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Who's on the Line? Pictured here, the National Security Agency, Threat Operations Center.



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THE

Unchecked Power

EXPLOSION

by LISA GRAVES and EMILY LERNER

Whole books will be written — and have been — about recent governmental abuses of power, abuses that have tarnished our nation's reputation and put wind in the sails of our country's enemies. Since September 11, 2001, a litany of bad decisions and over-reaching has built to a crescendo, leading more and more Americans of all stripes to realize that the dangerous precedents being set today could have repercussions far into the future.

Civil liberties have been a cornerstone of American democracy since the signing of the Constitution and Bill of Rights. Yet compromises to these liberties are now being justified as “necessary” measures to protect “our way of life.” But what is our way of life without these freedoms? As Benjamin Franklin once said, “Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.”

Franklin's words were prescient, given the long list of practices that have suddenly emerged in (or re-entered) our national vocabulary, if not our nightmares: unchecked power, rendition, indefinite imprisonment, and torture.

“Unitary” Power

Every school child learns about the “checks and balances” that were part of the genius of the Constitution, which distributes the federal government's power among the executive, legislative, and judicial branches to protect the liberty of the people.

Yet President George W. Bush has issued more presidential signing statements than all prior presidents combined. Where past presidents have used these to note praise or disappointment with a bill that Congress has passed and they have signed, Bush has used his signing statements as an assertion of his “right” to ignore bills after signing them into law, claiming that they impinge on his “unitary” power as president. The Constitution, however, permits the president only two options, to sign a bill into law or veto it. There is no line-item veto in the Constitution — let alone an implied power.

Consider the dangers posed by a president who considers himself unbound by the rule of law. In the parlance of the Founding Fathers, such an assertion is nothing short of monarchical power. Or, in the words of the American Bar Association, this practice is “contrary to the rule of law and our constitutional system of separation of powers.” During his first term alone, President Bush used signing statements to assert he was not bound by some 505 provisions of bills that became law.

Cruel and Unusual Punishment

Let's start with "torture," the cruel and unusual punishment banned by US and international law. During the current war in Iraq, interrogation methods used have included "waterboarding" — the process of drowning a person (suffocating with water), but not to death, ostensibly. Despite the fact that the United States prosecuted Japanese soldiers for this inhumane practice, Vice President Dick Cheney has defended it and Attorney General Michael Mukasey has argued that it would be illegal only if it "shocked the conscience." When Congress passed a law outlawing the torture of detainees, Bush quickly issued yet another signing statement, asserting the "right" to ignore this torture ban in some situations. It was this kind of acceptance of cruelty and degradation that led to the horrible Abu Ghraib photos, now seared into the world's conscience.

Unwarranted Search & Seizure

On the secret surveillance front, the president aggressively pushed through Congress the so-called "Protect America Act" to legalize warrant-less access to Americans' international communications (phone calls, email, and other communications) in the name of foreign intelligence. This fall, the administration tried to extend this power and immunize anyone who helped with past illegal spying. For 30 years, the law has unequivocally allowed damages against companies (up to \$1,000 per day) for violating Americans' right to a warrant before their communications are seized in the US.

Investigative journalists have also reported unlawful access to millions of Americans' communication records — in violation of statutes such as the Foreign Intelligence Surveillance Act. In addition, there have been documented misuses of the Patriot Act's controversial expansion of secret National Security Letter demands for Americans' private financial and communications documents, thereby sweeping the records of countless innocent people into governmental databases. The administration's "terrorism watch list" now includes more than 800,000 names; the FBI's "Investigative Data Warehouse" has more than 500 million records; and a new terrorism "data-mart" comprises over a billion records. Such numbers dwarf any realistic estimate of terrorist suspects. Yet tracking individuals this way wasn't enough for some in the administration, which recently tried (unsuccessfully) to take its surveillance even further — into space, in fact — to monitor the American people via military "spy satellites" with high-resolution, real-time surveillance.

The Politics of Imprisonment

We now speak often of "detention," or indefinite imprisonment, linked to the image of hooded men in orange jumpsuits and handcuffs at Guantanamo Bay, "Gitmo" for short. The bottom line is that the administration imprisoned numerous people without following the Geneva Convention rules and while opposing access to independent court reviews. While some have been released after years of being imprisoned without charges, others may end up unwittingly as political pawns. In October, the Pentagon's chief prosecutor in Gitmo, Morris Davis, resigned because of what he described as political pressure. He says he was asked to force the trials of certain detainees in time to make headlines for the 2008 presidential election.

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without due process or real human rights protections. The practice is often referred to as "torture by proxy." Whether seized on the battlefield in Afghanistan or elsewhere, these "detainees" are not treated as "prisoners of war" under the Geneva Conventions, despite the wise counsel of then-Secretary of State Colin Powell, which was overruled by then-White House counsel Alberto Gonzales and, ultimately, the president.

Along with detention, Americans have suddenly learned more about a once-obscure Latin phrase, *habeas corpus*. Known as the "great writ," this right to be free from arbitrary imprisonment or jailing without charge dates back almost 800 years to the Magna Carta. Part of the "due process" provided by the Fifth Amendment to the Constitution, *habeas corpus* is the basic right to have a court decide if a person is imprisoned legally or illegally. Due process also incorporates the right to counsel. Both have been limited significantly for many detainees in the "war on terror." Less well known is the administration's abuse of "material witness warrants" to imprison people in the US without charges. This power was misused

extensively in the roundup of hundreds and hundreds of people in 2001, none of whom was ever charged with conspiring in the 9-11 attacks.

It seems the administration has few qualms about condemning those who stand up for the Fourth Amendment, equating them with the enemy. Yet rhetoric that equates dissent with anti-Americanism weakens our democracy at a time when forthright debates about protecting both our security and our liberty are essential.

Many people are speaking up against such abuses. Now, more than ever, the administration and Congress need to know that the people want accountability. Accountability is essential because such defiance, if tolerated, weakens the very foundation of the rule of law, the hallmark of our democracy. It weakens our nation's influence in the world and erodes our legacy of liberty.

We must ask ourselves, what will happen if we do not speak out to protect our democracy? >

When there's "rendition," a practice initiated during the Reagan administration to get around extradition treaties, which involves seizing — some say kidnapping — suspects anywhere in the world and transferring them elsewhere. During the Clinton administration, rendition typically meant transferring suspects to judicial proceedings here or abroad, known as "rendition to justice." In the Bush administration, it has meant evading judicial oversight by transferring "detainees" beyond US borders for interrogation

