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WHO KILLED THE BILL RIGHTS?

OR

ARE WE JUST LIVING IN A MATRIX

THAT HAS BLINDED US TO REALITY?

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WHO KILLED THE BILL OF RIGHTS? [*OR ARE WE JUST LIVING IN A MATRIX THAT HAS BLINDED US TO REALITY?]*

INTRODUCTION

100 years ago, an adult American citizen could buy any kind of firearm made, including automatic machine guns; any type of narcotic made such as cocaine and morphine--without a doctor's prescription; and there was no federal income tax. Have you ever asked yourself are you safer today or were you safer 100 years ago?

Increasingly, the cry of security has become paramount. This may be due to what President Eisenhower termed the "military industrial complex", the war on drugs and the war on terror, or just any government's ***libido dominandi**** as St. Augustine called the lust of a government (or individual) to expand to rule and dominate others. * Augustine, The City of God (trans. Marcus Dods. 1950) Book XI.24, page 369.

Has our Bill of Rights become but a shadow of what it was in 1787?

Perhaps, in our zeal to fight evil, whether it is anarchists, fascists, communists, or terrorists we have become just as evil.

Over 100 years ago Frederich Nietzsche said of this quandary:

"He who fights with monsters should look to it that he himself does not become a monster. And when you gaze long into an abyss, the abyss also gazes into you."

Frederich Nietzsche, Beyond Good and Evil, Aphorism 146 (1886).

Supreme Court Justice Flex Frankfurter wrote in 1946:

"It is not only under Nazi rule that police excesses are inimical to freedom. It is easy

to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end". *Davis v. United States*, 328 U.S. 582, 597 (1946).

Our nation has become a study in contrasts. We seem to have an almost unregulated internet and electronic media, where every kind of strange lifestyle or sex practice is found, all without censorship. We seem to have unlimited freedom to do what we want when we want. But do we? We now live in a country that, in order to travel by air, our spouses and children are forced to searches with scanners that take their nude photos or are searched in a way which would be called a sexual assault if anyone else did it.

We have technology capable of listening to everyone's phone calls, reading everyone's emails, matching DNA, and recognizing everyone's face.

Almost two centuries ago, the German philosopher, Wolfgang von Goethe wrote, "None are more hopelessly enslaved than those who falsely believe they are free." Goethe, Goethe's Opinions of the World, Mankind, Literature, Science and Art, (trans. Otto von Wenckstern, London, 1853).To make it all easier, the National Security Agency (hereinafter "NSA") is completing a 2 billion dollar facility in the heart of Utah. The NSA was largely unheard of until 1975, but after September 11, 2001 received huge budget increases every year. William Binney resigned from the NSA in 2001 after he stated publicly that the agency intended to violate the constitution by monitoring all Americans. According to the April, 2012 edition of Wired magazine, Binney, the former NSA official, held his thumb and forefinger close together saying: "We are that far from a turnkey totalitarian state." James

Bamford, “The NSA Is Building the Country’s Biggest Spy Center (Watch What You Say)” Wired Magazine, April, 2012: 78-85, 122-124 quoting William Binney.

The United States Constitution is not just for academics or for those practicing civil rights litigation. Every member of the Alabama Bar Association took the following oath:

“I do solemnly swear (or affirm) that I will demean myself as an attorney, according to the best of my learning and ability, and with all good fidelity, as well to the court as to the client; that I will use no falsehood or delay any person’s cause for lucre or malice, and that I will support the Constitution of the State of Alabama and of the United States, so long as I continue a citizen(or legal resident) thereof, so help me God”.

This paper is generally going to omit specific discussion of the “Patriot Act” as cases relating to it are still in the courts. Needless to say, this Act has probably been the greatest affront to our Constitution since the Alien and Sedition Act of 1798.

THE BILL OF RIGHTS

As the Witch of the North, Glinda said: It's always best to start at the beginning -- and all you do is follow the Yellow Brick Road and in this case the Yellow Brick Road takes us through the Bill of Rights---potholes and all. The Wizard of Oz, original screen play (1939), page 33. http://www.imsdb.com/scripts/Wizard-of-Oz,-The.html.

There was a fierce debate as to why have a Bill of Rights at all? As summed up by Alexander Hamilton:“For why declare that things shall not be done which there is no

power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?"

Alexander Hamilton, The Federalist 8

THE FIRST AMENDMENT

The First Amendment, especially free speech, has come under attack from several different sources. Speech codes have been imposed in many public colleges and universities which attempt to stop students and faculty from using speech that might offend another person. See generally: "Speech Code Litigation Project", Foundation For Individual Rights In Education. http://thefire.org/code/speechcodelitigation; DeJohn v. Temple University, 537 F.3d 301, Court of Appeals, 3rd Circuit (2008).

In 1917, former Princeton political science professor, lawyer and president of Princeton University, President Woodrow Wilson, persuaded Congress to pass the Espionage Act of 1917. While the most objectionable portions were removed by Congress shortly after World War I, it is still alive and well at 18 U.S.C. 37.

This Act, has been used aggressively by the current administration to prosecute citizens. David Carr, "Blurred Line Between Espionage and Truth." New York Times. 26 Feb 2012: n. page. Web. 26 Apr. 2012. http://www.nytimes.com/2012/02/27/business/media/white-house-uses- esponiage-act-to-pursue-leak-cases-media-equation.html

In affirming the conviction of Socialist Party official Charles Schenck under this Act, legendary Supreme Court Justice Oliver Wendell Holmes wrote these immortal words: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

What was the crime of Socialist Party Secretary Charles Schenck that caused him to be convicted and sentenced to 6 months in a federal prison?—Distributing 15,000 leaflets to young men of draft age critical of the war effort and, especially, the new Conscription Act.

A century earlier, Daniel Webster, then a U.S. Representative, made the same arguments as Schenck when he argued against conscription during the War of 1812:

"Is this, sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our Constitution? No sir, indeed it is not.

Where is it written in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war which the folly or the wickedness of government may engage in"? Speech of Daniel Webster delivered in the United States House of Representatives (December 9, 1814).

Why was such a piece of legislation proposed by former Ivy League President Woodrow Wilson, let alone passed by Congress? President Wilson's message to Congress reveals the motivation:

"There are citizens of the United States ... who have poured the poison of disloyalty into the very arteries of our national life; who have sought to bring the authority and good name of our Government into contempt ... to destroy our industries ... and to debase our politics to the uses of foreign intrigue.... [W]e are without adequate federal laws.... I am urging you to do nothing less than save the honor and self-respect of the nation. Such creatures of passion, disloyalty, and anarchy must be crushed out". State of the Union Address of President Woodrow Wilson (December 7, 1915).

Eugene Debs, one of the best known Socialist Party members of that day, was also convicted under the Espionage Act, merely for making a speech denouncing the United States' involvement in World War I. He was convicted in federal court and sentenced to 10 years in the penitentiary. While in the penitentiary, he once again ran for president and received 3.4 percent of the popular vote, which were all write-in ballots. http://www.infoplease.com/ipa/A0781450.html

History has never painted a flattering picture of President Warren G. Harding. Yet, during his first year in office President Harding granted clemency to the 66 year old Debs and others convicted for violations of this Act, stating of Debs, "I want the old man to spend Christmas with his wife." Lucius Wilmerding, "The President and the Law." Political Science Quarterly 67 September 1952: Pages 321-338 at page 327.

How has the second prong of the freedom of the press done since 1900? Technologies, such as cell phone cameras, have enabled citizen-journalist to take photos and video of acts that were usually never seen by the public. Police departments, in general, have taken a dim view of being recorded while making arrests or performing their jobs in public. Thus, in spite, of many federal court decisions to the contrary, it is not only legal to video tape police performing actions in public but actionable

under 42 U.S.C. 1983 to be arrested by the police for doing so. *Glik v. Cunniffee*, 655 F.3d 78 (1st Cir. 2011); *Smith v City of Cumming*, et al., 212 F. 3d 1332 (11th Cir. 2000).

Simon Glik, a recent law school graduate, was walking down a public street in Boston at the Boston Common. Glik observed what he believed to be excessive force being used on an arrestee by Boston Police officers.

Glik took out his cell phone and filmed the event. When the police noticed what Glik was doing, he was arrested on a laundry list of charges, including violating the Massachusetts wiretap law. These charges were all either dropped or dismissed. After Glik's complaint to the Boston Police Department went nowhere, he filed an action under Section 42 U.S.C. 1983 (the "Civil Rights Act"). In Glik's case, the United States Court of Appeals for the 1st Circuit held that:

1) There was no distinction, in this case, between a citizen journalist and a professional journalist.

2) Qualified immunity did not provide a defense to this action to the defendants (Boston Police officers, their supervisors, and the City of Boston).

3) Generally, everything done in public by the police can be recorded.

The case was settled in March of this year with the City of Boston paying Glik $170,000. Boston Globe, March 22, 2012 on-line at: http://www.boston.com/news/local/massachusetts/articles/2012/03/27/boston_settled_police_videotaping_lawsuit.

It is ironic to note that Glik, a native of Russia, had only lived in the United States

since 1993, had just graduated law school and was working as a law clerk in probate court in Boston when this happened. http://gliklaw.com/gliklaw/About_Me.html

During the BP Oil crisis in the Gulf of Mexico, the authorities were actively attempting to keep reporters from photographing the scene. In one case, Ted Jackson, a reporter with the New Orleans Time-Picayune, hired an aircraft to fly over the disaster area; however the pilot was restricted to not going below 3,000 feet. When the pilot radioed the FAA requesting that he be allowed to descend, the FAA ask him who was on the aircraft and when the pilot said a reporter, the request was denied. Andrea Papagianis, "No Fly Zone." Reporters' Committee For Freedom Of The Press, Winter 2012: page 13, available on-line at: http://www.rcfp/orders/doc/PPTP.pdf.

Two U.S. Circuit Courts of Appeal, the 1st and the 11th, have held that there is a right to photograph/videotape police activity. The 9th Circuit provides some protection if police activity is considered a "matter of public interest." Courts in the 3rd, 4th and 5th Circuits have said that the right to videotape the police has not conclusively been established. Courts in the remaining circuits have not ruled directly on the issue. Bill Kenworthy, "Photography & The First Amendment" First Amendment Center at Vanderbilt University, January 1, 2012 http://www.firstamendmentcenter.org/photography-the-first-amendment

The First Amendment not only protects the right to speech and of the press, but the right to assemble. Of this right, Alexis de Toqueville wrote:

The right of associating in this fashion almost merges with freedom of the press, but societies thus formed possess more authority than the press. When an opinion is represented by a society, it necessarily assumes a more exact and explicit form. Alex de Tocqueville, Democracy in America, (trans. Harvey Mansfield, Delba Winthrop 3rd ed. 2000).

Are juvenile curfews which now have spread to most cities with populations over 100, 000 really consistent with the First Amendment? Generally, the courts have said yes, if narrowly tailored. *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993). I would argue that such curfews, aside from appearing totalitarian, offer a pretext for the police to stop certain youth. One Dallas police officer said of the Dallas curfew:

"There's no way I'm going to stop every kid I see… I come down on them when I suspect they're into something else, like breaking into a car or vandalizing. When I stop them for those offenses, the curfew gives me an extra tool of enforcement. If they're not guilty of the offense I suspected them of, an underage (16 or under) person can still be hit with the curfew".

Kevin Bell, "Curfew Crackdown" Times-Picayune Jun 1st 1994 at A 1.

Of the rights guaranteed by the First Amendment, there has probably been more controversy concerning religion. "Congress shall make no law respecting an establishment of religion; nor prohibiting the free exercise thereof . . . . "

For almost 150 years, it was clearly understood that the First Amendment's religion clause applied only to the Federal government not to the States. In 1940, the Supreme Court held that it was incorporated through the Fourteenth Amendment's

due process clause. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Cantwell set the stage for litigation which is still playing out today.

In a dramatic case, the Supreme Court held in 1962 that "prayers" were banned from public schools as a violation of the First Amendment. *Engel v. Vitale*, 370 U.S., 421 (1962).

In an action against the New Hyde Park-Garden City Park School (New York) District, the Supreme Court held that a non-denominational, voluntary prayer at the start of each school day amounted to the establishment of a religion by the State of New York. The prayer, approved by the Board of Regents of the State of New York was: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 422.

Engel and the cases that set the stage for it: *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1946) and *McCollum v. Board of Education*, 333 U.S.201(1948), were all authored by Alabama's own Justice Hugo Black and succeeded in erecting a "wall of separation" between the church and the state. Letter from Thomas Jefferson to the Danbury Baptist Associates in the State of Connecticut (January 1, 1802). http://www.loc.gov/loc/lcib/9806/danpost.html.

These cases set the stage for litigation which continues to this day. In a case out of our own U.S. District Court for the Southern District of Alabama, Judge Brevard W. Hand held in *Jaffree, et al., v. Board of School Commissioners of Mobile County Alabama*, 554 F. Supp. 1104 (S.D. Ala 1983), that a one minute non-denominational blessing was constitutional. In fact, in a remarkable opinion tracing the evolution of the "incorporation doctrine" and the "establishment clause" Judge Hand held that the "establishment clause" of the First Amendment did not apply to the states.

Judge Hand was reversed by the 11th Circuit Court of Appeals (see: *Jaffree v. Wal-*

lace, 705 F. 2d 1524 (C.A. Ala. 1983), and the reversal was upheld by the U.S. Supreme Court. *Wallace, et al., v. Jaffree*, et al. 472 U.S. 38 (1985).

THE SECOND AMENDMENT

Litigation regarding the Second Amendment has clarified its meaning and applied it to the states. In the 2008 case, *District of Columbia v. Heller*, 553 U.S. 570 (2008), the Second Amendment was declared an individual right to keep and bear arms, unconnected with service in a "militia." However, this holding only applied to the federal government. Two years later, the case long anticipated by pro-firearms groups and anti-firearms groups held that the Second Amendment was incorporated by virtue of the Fourteenth Amendment and thus applied to the States. *McDonald, v. City of Chicago, Illinois*, 130 S. Ct. 3020 (2010).

Before Heller, no Second Amendment case had been heard by the U.S. Supreme Court since *U.S. v. Miller* in 1939 which involved a gangster's possession of a sawed off shotgun. *U.S. v. Miller*, 307 U.S. 174 (1939).

According to the lead attorney for Heller, Alan Gura, gun rights proponents interviewed a large number of potential litigants. The aim was to set up a properly constructed Second Amendment case with a litigant who was a law abiding "good citizen" rather than a "crack head" charged with a violation of the gun law. Interview with Alan Gura, Esq. Guntalk, March 9, 2008. http://media.libsyn.com/media/guntalk/080309guntalkB.mp3

Dick Heller, a retired Federal law enforcement officer and resident of Washington, D.C. and five other District of Columbia citizens, filed suit in the United States District Court for the District of Columbia after they were denied a permit to register their handguns under the District's strict gun law. D.C. Code Ann. §§ 7-

2502.02(a)(4), 22-4504, 7-2507.02.

In Heller, Justice Scalia, writing for the majority, held that the right to keep and bear arms belongs to individuals; more precisely, Scalia asserts in the Court's opinion that the "people" to whom the Second Amendment right is accorded are the same "people" who enjoy First and Fourth Amendment protection. *Heller* at 580.

The final legal battle, *McDonald v. The City of Chicago*, was the next Second Amendment case to be heard by the Supreme Court just over almost two years after Heller.

In the McDonald case, the ultimate question was before the Court--Did the Second Amendment apply to the citizens of all of the states?

On June 28, 2010, in a 5-4 decision, Justice Alito, writing for the majority of the Supreme Court, held that the Second Amendment was incorporated under the Fourteenth Amendment, protecting those rights from local and state governments. *McDonald v. City of Chicago*, 130 S. Ct. 3020, (2010).

In spite of these two cases, both the District of Columbia and Chicago have enacted a mass of regulations that make it expensive and time consuming to purchase a firearm. Cases against these cities are currently in court. *Heller, et al. v. District of Columbia, et al.,* 670 F.3d 1244 (2011); Brian Doherty, "Post-McDonald Challenges to Gun Laws—From the Second Amendment Foundation and, Believe It or Not, the ACLU" July 16, 2010 online at http://reason.com/blog/2010/07/16/post-mcdonald-challenges-to-gu

THE THIRD AMENDMENT

The Third Amendment is probably an easy one to discuss: ***"No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law".***

This was taken, almost directly from the English Bill of Rights of 1689, which enumerates one of Parliament's complaints against James II:

By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and quartering soldiers contrary to law. . . http://avalon.law.yale.edu/17th_century/england.asp.

There are few cases dealing with the Third Amendment. In *Custer County Action Ass'n v. Garvey*, 256 F. 3d 1024, 1043 (Court of Appeals, 10th Circuit 2001), a homeowners' association asserted that military flights over their homes violated the Third Amendment. While this was an incredibly creative argument, it was rejected by the courts.

There appears to be only one United States Court of Appleals case decided almost purely on the issue of the Third Amendment, *Engblom v. Carey*, 677 F. 2d 957 (2d Cir.1982). The 2nd Circuit Court of Appeals not only applied the Third Amendment to the States for the first time, but held that a temporary possessory interest in real property, such as a hotel room, could be subject to a violation if state National Guard troops evicted the rightful possessors.

The facts of the case are not what you would expect. Corrections officers in New York went on strike. Governor Carey called out portions of the New York National Guard to take over management of the state corrections facilities. The National Guard "evicted" the corrections officers from the barracks, a benefit the officers received as part of their compensation. This case not only applied the Third

Amendment to the states, but clarified that state National Guard troops were "soldiers" within the meaning of the Third Amendment.

While this tragic action was never reviewed by any court, United States troops forcibly evacuated natives of the Aleutian Islands in 1942 after a Japanese attack on the island chain. After the native Aleut Indians were "relocated" to the mainland, United States troops took over many of their private homes as barracks. While this happened under a declaration of war, nothing in the Declaration or other law authorized this action. Personal Justice Denied: Report of the Commission on Wartime Relocation, Part 2, Chapter II pages 10-12 (1983). http://www.archives.gov/research/japanese-americans/justice-denied/part-2-recommendations.pdf

Presidential advisor Rahm Emanuel has often been quoted as saying: "Never let a crisis go to waste." What this statement also highlights is that some of the worst abuses of the law and constitution take place during crises and emergencies.

A large troop deployment of both National Guard and regular U.S. Army troops deployed to metro New Orleans after Hurricane Katrina. There are some convincing arguments made that there were gross violations of the Third Amendment by these troops during this time. See: 17 Cornell J. L. & Pub. Pol'y 747 (2008); Third Amendment Protections in Domestic Disasters; Rogers, James P.

THE FOURTH AMENDMENT

Did anyone expect that the descendants of the patriots that risked their lives and fortunes defying the British "Writs of Assistance" to line up at our nation's busiest airports only to either be groped by a TSA agent or have a nude scan of their body

taken? The Founders could not have conceived such a violation of their personal space. The Fourth Amendments was included as a reaction to gross abuses of British troops of the American population.

The British "Writs of Assistance" , much like provisions in the current "Patriot Act" authorized British troops to write their own search warrants without the approval of a judge or a requirement of specificity of the place to be searched.

Any visitor to an airport will see the descendants of Jefferson, Madison, and Washington lining up meekly at the airport to be intrusively searched before boarding an airplane. Why? It all started with the hijackings to Havana and simple screening using magnetometers or metal detectors.

There has often been referred to this so-called "slippery slope" of legal precedent. The authorization of the use of the magnetometer in 1972, was only a minimum invasion of personal property that has now resulted in body scanners that can take nude images of travelers and invasive pat-downs. The U.S. Court of Appeals for the 4th Circuit held in 1972 since a magnetometer was not intrusive, like being frisked, the minimum invasion of personal privacy was justified *United States v. Epperson*, 454 F.2d 769 (4th Cir. 1972).

The 4th Circuit held in Epperson, quoting *Terry v. Ohio*, 392 U.S. 1 (1968):

"We think the search for the sole purpose of discovering weapons and preventing air piracy, and not for the purpose of discovering weapons and pre-criminal events, fully justified the minimal invasion of personal privacy by magnetometer".

"The use of the device, unlike frisking, cannot possibly be "an annoying, frightening, and perhaps humiliating experience," *Terry*, supra at 25, because the person scrutinized is not even aware of the examination. 454 F.2d 769 (1972). The U.S. Supreme Court has never determined the constitutionality of airport screenings of all passengers. See: *United States v. Aukai*, 497 F.3d 955, 959 n.2 (9th Cir. 2007) (en banc). Don't be surprised if they ultimately hold these procedures to be constitutional under the rationale of *Michigan State Dep't of Police v. Sitz*, 496 U.S. at 444 (1990). The Court in Sitz held that highway sobriety checkpoint programs are consistent with the Fourth Amendment and used as a justification the "magnitude of the drunken driving problem or the States' interest in eradicating it." The Court then found that "the weight bearing on the other scale--the measure of the intrusion on motorists stopped briefly at sobriety checkpoints--is slight." Id. at 455

Recently, the United States government seriously argued that it had the right, without obtaining a warrant from a judge, to place a GPS device on a suspect's automobile. *United States v. Jones*, 565 US ___, 132 S.Ct. 945 (2012). This type of ever advancing technology would mean that potentially every driver could have his whereabouts tracked in real time in case some crime was to time place. The advent of smaller, lighter flying drones make the possibility even more exciting for those who want everyone monitored 24/7.

Fortunately, the U.S. Supreme Court saw the danger of this type of intrusion in *United States v. Jones*, 565 US ___, 132 S.Ct. 945 (2012), and prohibited law enforcement from placing GPS tracking devices on a person's car without a warrant.

Justice Scalia delivered the opinion of the Court. The Court affirmed the judgment of

the lower court, and held that the installation of a GPS tracking device on Jones' vehicle, without a warrant, constituted an unlawful search under the Fourth Amendment. The Court rejected the government's argument that there is no reasonable expectation of privacy in a person's movement on public thoroughfares and emphasized that the Fourth Amendment provided some protection for trespass onto personal property.

The Court held in a 9-0 ruling that the placement of the GPS device, with an invalid out of date warrant was a “search” within the meaning of the Fourth Amendment and that a warrant was required.

The “War on Drugs” has unleashed a torrent of violence not seen in this nation since the War Between the States. Nighttime search warrants and “No Knock” search warrants were unheard of 50 years ago, but are now standard procedures in most large cities. Unfortunately, many innocent bystanders are killed or injured during these SWAT type raids. The Rise of Paramilitary Police Raids in America, Balko, Randy; CATO INSTITUTE; 1000 Massachusetts, N.W. Washington, D.C. 20001 www.cato.org

THE FIFTH AMENDMENT

The origin of our Fifth Amendment most probably comes from the 14th Century when the English Parliament enacted the Liberty of Subject, 1354 CHAPTER 3 28 Edw 3, (1354), which stated:

*ITEM, That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law. (original in “Old English”).*On-

line at: http://www.legislation.gov.uk/aep/Edw3/28/3

There are several burning issues that arise from the Fifth Amendment which states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

First, in a correction from the first edition of this paper which state that the excessive bail provision of the 8th Amendment now the only portion of the Bill of Rights not incorporated to the States, the Grand Jury requirement has been reviewed and rejected. *Hurtado v. California*, 110 U.S. 516 (1884).

On the real property side, *Kelo v. City of New London*, 545 U.S. 469 (2005), established that public entities could take private property for the use, not necessarily of the public, but to lease to private developers in order to improve the area. I was somewhat surprised at the adverse reaction, at least here in Alabama, as the Retirement Systems of Alabama and some of the municipalities have been doing this sort of thing for many years. If you have ever stayed in the Adams- Mark Riverview Plaza in Mobile it is the product of this sort of government overreaching. But what about the portion of the Fifth Amendment which provides: "nor be deprived of life, liberty, or property, without due process of law…"?

The legality of President Obama's predator drone attack killing of Islamic militant, Anwar al-Awlaki last October was defended by Attorney General Holder. To General Holder's statement, United States Senator Chuck Grassley said: "If the attorney general is going to justify targeted killings based upon 'robust'

congressional oversight, he needs to follow through and make these documents available to Congress, not just give us the 'Cliff's Notes' in a speech to law students…" The Hill, March 15, 2012 on-line at: http://thehill.com/blogs/defcon-hill/policy-and-strategy/216263-gop-senator-dismisses-holders-cliffs-notes-explanation-for-killing-citizens-abroad.

In February 2008, then-Senator Barack Obama sharply criticized the military prosecution of 6 detainees at Guantanamo Bay who had been charged with involvement in the 9/11 terror attacks: The trials, he said, were "too important to be held in a flawed military commission system that has failed to convict anyone of a terrorist act since the 9/11 attacks and that has been embroiled in legal challenges." http://www.nydailynews.com/opinion/president-obama-sees-merits-military-commissions-article-1.1036535#ixzz1pbx5ocKN.

There was an interesting prediction of overreaching of executive power in 1951. In that year, President Truman ordered his Secretary of Commerce to seize privately owned steel mills in order to prevent their closure by a strike during the Korean War. The steel companies sought and obtained a preliminary injunction barring the seizure of their private property.

The case was heard before U.S. District Court Judge David A. Pine. The government's case was argued by Assistant U.S. Attorney Holmes Baldridge who argued that the president had unlimited, inherent powers in times of an emergency.

The Court: ***Now, you contend that exercising powers where there is no statute makes a case stand on a different plane-a preferred plane?***

Mr. Baldridge: ***Correct. Our position is that there is no power in the Courts to restrain the President and, as I say, Secretary Sawyer is the alter ego of the President and not subject to injunctive order of the Court.***

The Court: ***If the President directs Mr. Sawyer to take you into custody, right now, and have you executed in the morning you say there is no power by which the Court may intervene even by habeas corpus?***

Mr. Baldridge: ***If there are statutes protecting me I would have a remedy.***

The Court: ***What statute would protect you?***

Mr. Baldridge: ***I do not recall any at the moment.***

Transcript of Proceedings, Motion for Preliminary Injunction, *Youngstown Sheet & Tube v. Sawyer*, Civ. Action No. 1550-52, note 45, at 291.

The United States Supreme Court upheld Judge Pine's decision, rejecting the idea of inherit presidential power. Instead, the Court held that the seizure was a clear violation of the Fifth amendment. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Both Judge David A. Pine and the United State Supreme Court were willing to challenge the President in the area of so-called "war powers". Courts since that time have been very reluctant to do so since. Congress passed and the President signed the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (Dec. 31, 2011) hereinafter referred to as "the NDAA" Sections 1021 and 1022 of the NDAA was passed with few dissents, but arguably is violative of the U.S. Constitution in that it: Sections 1021 and 1022 seems to authorize, 1) detainment of persons captured within the United States of America

without charge or trial; 2) military tribunals for persons captured within the United States of America, and 3) the transfer of persons captured within the United States of America to foreign jurisdictions. As such, these sections violate the U.S, Constitution in Article I Section 9, Clause 2 by: 1) Abrogating the right to seek a Writ of Habeas Corpus; 2)The First Amendment's right to petition the Government for a redress of grievances; 3) The Fourth Amendment's right to be free from unreasonable searches and seizures; 4) The Fifth Amendment's right to be free from charge for an infamous or capital crime until presentment or indictment by a Grand Jury; 5) The Fifth Amendment's right to be free from deprivation of life, liberty, or property, without Due Process of law; 6) The Sixth Amendment's right in criminal prosecutions to enjoy a speedy trial by an impartial jury in the State and District where the crime shall have been committed; 7) The Sixth Amendment's right to be informed of the nature and cause of the accusation; 8)The Sixth Amendment's right to confront witnesses; 9) The Sixth Amendment's right to Assistance of Counsel; 10) The Eighth Amendment's right to be free from excessive bail and fines, and cruel and unusual punishment; 11) The Fourteenth Amendment's right to be free from deprivation of life, liberty, or property, without Due Process of law.

A number of plaintiffs, mostly reporters, filed suit a lawsuit in the United States District Court for the Southern District of New York in the case styled: *Christopher Hedges, et al., v. Barak Obama, Individually and as representative of The United States Of America,* 12 Civ. 331 (KBF).

On September 12, 2012, Judge Katherine B. Forrest issued a permanent injunction in which she found, in the 121 page Order, that portions of the NDAA were violative of a number of Constitutional Rights, certain common law rights, Natural Rights, as well as basic fairness. The Order has been stayed on appeal, but is available to read on line: http://www.courthousenews.com/2012/09/12/Hedges%20v.%20Obama%20Perm.%20Inj.pdf

For example, Judge Forrest, found:

"At the August hearing, the Government argued that this Court's role with respect to § 1021(b)(2) should be limited to consideration of a detainee's petition for release pursuant to a writ of habeas corpus. That argument is premised upon an extraordinary proposition: that American citizens detained pursuant to § 1021 are not entitled to the presumption of innocence and requirement that guilt be proven beyond a reasonable doubt. In other words, relegating a court simply to a habeas review means that the detainee has been divested of fundamental due process rights. This becomes clear with reference to the fact that the Government's burden of proof with respect to habeas petitions is "preponderance of the evidence," not "beyond a reasonable doubt" as required for criminal convictions.

As discussed above, in comparing § 1021(b)(2) to the AUMF, it is incorrect to suggest that § 1021(b)(2) is a simple reaffirmation of the AUMF. It does more: it has a broader scope and directly refers to the law of war as an interpretive background. Section 1021(b)(2), which describes a category of "covered person" who can be detained, does not exclude American citizens, and is not limited to individuals on the field of battle or who bear arms. It is unlike the

military force authorization statutes the Government cites in its pre-trial memorandum.

To the extent that § 1021(b)(2) purports to confer authority to detain American citizens for activities occurring purely on American soil, it necessarily becomes akin to a criminal statute, and therefore susceptible to a vagueness analysis. Constitutional guarantees require that criminal statutes carry an array of due process protections. If it did not, then § 1021 must be interpreted as follows: Congress has declared that the U.S. is involved in a war on terror that reaches into territorial boundaries of the United States, the President is authorized to use all necessary force against anyone he deems involved in activities supporting enemy combatants, and therefore criminal laws and due process are suspended for any acts falling within the broad purview of what might constitute "substantially" or "directly supporting" terrorist organizations. If this is what Congress in fact intended by § 1021(b)(2), no doubt it goes too far. Although § 1021(b)(2) does not, strictly speaking, suspend the writ of habeas corpus, it eliminates all other constitutionally-required due process (indeed, leaving only the writ).

This Court rejects the Government's suggestion that American citizens can be placed in military detention indefinitely, for acts they could not predict might subject them to detention, and have as their sole remedy a habeas petition adjudicated by a single decision-maker (a judge versus a jury), by a "preponderance of the evidence" standard. That scenario dispenses with a number of guaranteed rights.

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our

calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. 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. Quoting Hamdi v. Rumsfield, 542 U.S. 531 (2004) at 532.

InUnited States v. Robel, 389 U.S. 258 (1967), the Supreme Court stated a similar principle: "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile." Id at 264.

THE SIXTH AMENDMENT

The right to a speedy public trial in criminal cases is one of our most cherished of rights. But what is "speedy" trial?

As to speedy criminal trials, the Supreme Court set out the standards that must be met in the 1972 case of *Barker v. Wingo*, 407 U.S. 514 (1972). The Wingo court held that a defendant's constitutional right to a speedy trial cannot be established by any inflexible rule, but can be determined only on a balancing basis in which the conduct of the prosecution and that of the defendant are weighed. The court must weigh such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In this case, the lack of any serious prejudice to petitioner and the fact, as disclosed by the record, that he did not want a speedy trial outweigh opposing considerations, and compel the conclusion that petitioner was not deprived of his due process right to a speedy

trial.

Today, it is estimated that 94% of felony convictions in state and federal court are a result of guilty pleas.

One of the most interesting cases that combines a defendant's Sixth Amendment rights, due process rights and the First Amendment is the case of Sam Sheppard, made famous by the television series "The Fugitive. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The Supreme Court held that Sheppard was denied basic due process by the extreme pre-trial and trial publicity.

While not stated in the Sixth Amendment or in the Constitution, the "Presumption of Innocence" is a bedrock of our criminal justice system. This is one of the reasons that the NDAA is such a deviation from American legal jurisprudence.

Take a day or two and try to find the origin of the "Presumption of Innocence" and you will wind up very frustrated. No doubt it is as solid a legal right as any one of the Bill of Rights are. In fact, the term is not mentioned in the Bill of Rights, but is usually believed to flow from the 5th, 6th, and 14th Amendments. *Coffin v. United States*, 156 U.S. 432 (1895).

In Roman Law the legal principle was referred to as: ei incumbit probatio qui dicit, non qui negat (the burden of proof rests one who asserts it, not one who denies it).

Again, as Americans, we tend to believe that we have invented anything of importance. Before "The Terror", which took place after the French Revolution, the Revolution was one of enlightenment, inspired by the same thinkers suck as John Locke, whose writings inspired the American Revolution. The "Declaration of the Right of Man" approved by the National Assembly of France, August 26, 1789,

clearly states the law on presumption of innocence. Article 9 states: As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.
http://avalon.law.yale.edu/18th_century/rightsof.asp

That entire document is an amazing tribute to “Natural Law” and self governance and demonstrates that there was indeed a revolution of thought taking place at the end of the 18th Century.

THE SEVENTH AMENDMENT

The right to a civil trial, guaranteed by both the United States and Alabama Constitutions is threatened by a severe funding shortage. When funding to the Alabama Judicial System drops below a certain level, the right to a civil trial by jury is violated. *Folsom, et al., v. Wynn et al.*, 631 So. 2d 890 (1993).

THE EIGHTH AMENDMENT

There is some debate as to whether the portion of the Eighth Amendment, prohibiting “excessive bail” is now, along with the Fifth Amendment’s requirement of a grand jury indictment are the only portions of the Bill of Rights not applied to the States. In *Schilb v. Kuebel*, 404 U.S. 357 (1971), Justice Blackmun wrote that the Court “assumed” that it had been applied to the States, although he cited no specific case.

Interestingly, the Eighth Amendment is almost an exact copy of the English Bill of Right of 1689 which states:

And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects; And excessive fines have been imposed;

http://avalon.law.yale.edu/17th_century/england.asp

THE NINTH AMENDMENT

While several cases which were argued before the U.S. Supreme Court based their arguments on the Ninth and Tenth Amendments (See: *Printz v. United States*, 521 U.S. 898 (1997), *New York v. United States*, 505 U.S. 144 (1992), *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), Symposium on Interpreting the Ninth Amendment, 64 CHI.-KENT L. REV. 37 (1988), *National League of Cities v Usery*, 426 U.S. 833 (1976), *Garcia v San Antonio Metro Transit Authority*, 469 U.S. 528 (1985), the Supreme Court has never attached the meaning to these amendments that many "originalist" do.

What should have been the ultimate safeguard against the encroachment of Federal power into the States areas have become little more than the subject of law review articles.

The Ninth Amendment states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

In his 1983 Virginia Law Review article, ***The History and Meaning of the Ninth Amendment,*** 69 VA. L. REV. 223 (1983), Russell Caplan, developed what is referred to as the "States Rights Law Model". He stated this Model as: [T]he ninth amendment is not a cornucopia of undefined federal rights, but rather . . . is limited to a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the law of the states. These state rights represented entitlements derived from both natural law theory and the hereditary rights of Englishmen, but ninth amendment protection did not transform these unenumerated rights into constitutional, that is, federal, rights. . . . [The amendment] simply provides that the individual rights contained in state law are to continue in force under the Constitution until modified or eliminated by state enactment, by federal preemption, or by a judicial determination of unconstitutionality.

Russell L. Caplan, ***The History and Meaning of the Ninth Amendment,*** 69 VA. L. REV. 223 (1983) at 227–28.

THE TENTH AMENDMENT

The Tenth Amendment states:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Unfortunately, these two amendments have all but been ignored by the federal courts. The Ninth Amendment appears on its face to protect un-enumerated

individual rights of the same sort as those that were enumerated in the Bill of Rights. Courts and scholars have long deprived it of any relevance to constitutional adjudication.

Justice Scalia wrote in *Printz v. United States*:

The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people. *Printz v. United States*, 521 U.S. 898 (1997) at 920.

However, the recent case of *Bond v. United States*, 131 S. Ct. 2355 (2011), seems to have given the Tenth Amendment a second life. The Supreme Court held that an individual convicted in federal court had standing to assert that the statute by which he/she was convicted of violated the Tenth Amendment. The vote was 9-0.

CONCLUSION

As lawyers, we all have a duty to, "…Support the Constitution of the State of Alabama and the Constitution of the United States…" Simon Glik, the lawyer in Boston did so when he filmed police beating a man. But how many of us would just keep walking? How many of us take the time to teach our young people about the Constitution? If we don't, then we all deserve what we get.

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