

THE ARLIN M. AND NEYSA ADAMS LECTURE ON CONSTITUTIONAL LAW

THE FIRST AMENDMENT: ITS USES AND ABUSES

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Ladies and gentlemen, this occasion means a lot to me. I go a long way back with Arlin and Neysa Adams, to the Kennedy, or perhaps even the Eisenhower, administration. I have the highest respect for their contribution to the constitutional order of this country. So it is a privilege for me to be giving the second Arlin and Neysa Adams Lecture on the Constitution, following on my friend Judge Louis Pollak.¹

I am going to talk today about the First Amendment, and I shall begin with a personal note. Sometime in the early 1960s, when I was covering the Supreme Court for the *New York Times*, Justice Felix Frankfurter invited me to his chambers for a conversation. Justice Frankfurter grew up in the law at the time of the old Court's excesses in reading protection of property into the Constitution,² and he was wary of reading the Constitution too broadly even for libertarian purposes. For this he was criticized for being insufficiently "liberal." That morning, he was feeling testy on the subject. After discussing it a bit, he suddenly exclaimed, "Liberal? I'll show you liberal." He rose from his chair, walked across the room, pulled a volume of the United States Reports from the shelf, opened the book, and handed it to me.

It was open to a dissenting opinion in the case of *United States v. Schwimmer*,³ decided by the Supreme Court in 1929. Until that moment, I had never heard of the case. Rosika Schwimmer was an immigrant from Hungary. She loved the United States, and she wanted to become a citizen. But she was a pacifist, and she would not swear the oath that was then required for citizenship: swear that she would take up arms to defend the United States. She was denied the right to become a citizen; she sued, and she lost in the Supreme Court.⁴ Justice Holmes dissented,⁵ and it was his dissent that Justice Frankfurter had put before me.

Ms. Schwimmer's refusal to swear that she would take up arms was

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1. Louis H. Pollak, *To Administer Justice*, 80 TEMP. L. REV. 1 (2007).

2. See, e.g., *Lochner v. New York*, 198 U.S. 45, 60-62 (1905) (stating that unreasonable or arbitrary government interference with freedom to contract is unconstitutional).

3. 279 U.S. 644 (1929).

4. *Schwimmer*, 279 U.S. at 646-49, 653.

5. *Id.* at 653-55 (Holmes, J., dissenting).

irrelevant, Holmes said, “as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to.”⁶ He added that he did not agree with her pacifism and did not think “that a philosophic view of the world would regard war as absurd.”⁷ (Holmes had fought in the Civil War—more than sixty years earlier—and been gravely wounded three times. When he died a few years later, friends found his Union army uniform hanging in his closet.) But he ended his opinion with the following passage, which I shall read in full:

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant’s way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant’s belief and that I had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the teachings of the Sermon on the Mount.⁸

When I read those words for the first time, I felt the hair prickle on the back of my neck. I have read them many times since then, and the same feeling comes every time. The power of Holmes’s words is electric. And that is why I have chosen to begin this talk with them. Remember that Holmes’s opinion was a dissent. A majority of the Supreme Court decided in 1929 that a belief in pacifism could bar someone from American citizenship.⁹ Such a decision would be unthinkable today. For the words of Holmes and his frequent colleague in dissent, Justice Brandeis—they had only words—ultimately persuaded the country, and the Court, to give full meaning to the promise of the First Amendment.

“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”¹⁰ Those are the words, the fourteen words, of the Free Expression Clauses of the Amendment. A “sweeping command,” Holmes called them.¹¹ Indeed, it would be hard to draft a more powerful guarantee of freedom of thought. But the striking thing is that as late as 1929—138 years after the First Amendment was added to the Constitution—a majority on the Supreme Court had never invoked the Amendment to protect a speaker or writer.¹² Not once. It was only in 1931 that the Court first struck down, as a violation of the

6. *Id.* at 653-54.

7. *Id.* at 654.

8. *Id.* at 654-55.

9. *Schwimmer*, 279 U.S. at 653.

10. U.S. CONST. amend. I.

11. *Abrams v. United States*, 250 U.S. 616, 631 (1919) (Holmes, J., dissenting).

12. *See, e.g., Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (expounding widely followed interpretation that Free Expression Clauses only prevented prior restraints on speech and did not protect speakers from subsequent punishment for speech).

Constitution, an attempt to repress disfavored expression. It did so that year in two cases: one the criminal prosecution of a woman for carrying a red flag,¹³ the other an injunction that put a nasty newspaper out of business.¹⁴

In the years since 1931 the Supreme Court has interpreted the First Amendment to build an enormous structure of freedom. Radical and eccentric speech is now protected from the criminal prosecution that used to be directed at it.¹⁵ So are attacks on religion and hateful speeches, so long as they do not advocate immediate violence to audiences likely to carry out the urging.¹⁶ Libel actions have been sharply restricted.¹⁷ What is called symbolic speech is also safeguarded, notably burning the flag to make a political point.¹⁸ And so on. The list is long.

That history makes an essential point. It is judges who have given us what the public understands when we say the words “First Amendment” today. Ours is the most outspoken society on earth. The American public is now thoroughly accustomed to living with unvarnished speech. But my guess is that not much of the public realizes that the expansive freedoms it enjoys under the First Amendment were established not by the Framers of the Amendment in 1791 but by the judges, especially the Supreme Court Justices, who gave it broad meaning in the twentieth century.

Years ago the late Fred Friendly, a great television producer and then a teacher of the First Amendment at the Columbia School of Journalism, put on a series of television programs under the heading *The Constitution: That Delicate Balance*.¹⁹ Journalists, lawyers, and judges would play roles and argue in discussions that brought out difficulties of minding all the conflicting interests in constitutional decisions. Justice Potter Stewart of the Supreme Court agreed to come to one of the first meetings but only on the condition that he not be asked to say anything. The journalists there took to whining about some cases—not many—that the press had lost in the courts. Finally, Justice Stewart could not stand it any more.²⁰ “You complain about these terrible judges not protecting your rights,” he said. “Where do you think those rights came from? The stork

13. *Stromberg v. California*, 283 U.S. 359 (1931).

14. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

15. *See, e.g., Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (overturning conviction of defendant who walked through courthouse wearing jacket bearing phrase “Fuck the Draft” as unconstitutional restriction of speech).

16. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (overturning conviction under criminal syndicalism statute that punished “mere advocacy” without showing of “incitement to imminent lawless action”).

17. *See, e.g., N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (raising burden of proof required of public-official plaintiffs bringing libel suits in interest of protecting speech on matters of public concern).

18. *Texas v. Johnson*, 491 U.S. 397, 420 (1989).

19. *The Constitution: That Delicate Balance* (Columbia University Seminars on Media and Society 1984).

20. The author also recalled this series of programs in Anthony Lewis, *Why the Courts*, 22 *CARDOZO L. REV.* 133, 144-45 (2000).

didn't bring them! The judges did."²¹

Nowadays there is a fashion for denouncing what is called "judicial activism." It often comes from conservatives, or some who call themselves conservatives but are really radical reactionaries. Well, I have never found any definition of the phrase "judicial activism" that means anything. It is an epithet used when a court decides a case in a way that critics do not like.²² The criticism of judicial activism comes with particularly ill grace from people who applauded the decision in *Bush v. Gore (Bush II)*²³ in which the Supreme Court decided an election without any show of precedent or lasting principle²⁴—indeed, in my judgment, without jurisdiction.

The argument of those who criticize so-called judicial activism is that judges should be timid souls.²⁵ They should not "make law"! But it is impossible to interpret the spacious, open phrases of our Constitution without making law. A judge who must tell us what "due process of law" requires in a concrete case has no button he can push for the answer. Nor does he in defining "the freedom of speech."

The whole history of what judges have done in interpreting the First Amendment shows that only bold judicial decisions could have given us the freedom we enjoy.²⁶ Think about the beginning of that process of interpretation: in 1919, in the case of *Abrams v. United States*.²⁷ A group of radicals had thrown leaflets from the top of a building in New York criticizing President Woodrow Wilson for sending American troops to Russia after the Bolshevik Revolution. They were prosecuted under the Espionage Act, convicted, and sentenced to

21. *Id.* at 145.

22. See Arthur D. Hellman, *Judicial Activism: The Good, the Bad, and the Ugly*, 21 MISS C.L. REV. 253, 253 (2002) (defining judicial activism as "judicial review with an outcome adverse to the result reached through the political process").

23. 531 U.S. 98 (2000) (*per curiam*).

24. See Ann Althouse, *The Authoritative Lawmaking Power of the State Supreme Court and the United States Supreme Court: Conflicts of Judicial Orthodoxy in the Bush-Gore Litigation*, 61 MD. L. REV. 508, 542-43 (2002) (describing disagreement among Justices regarding Court's proper role and observing that dissenting Justices criticized majority's decision to grant stay as in conflict with view that "[s]tate courts are the authoritative expositors of state law"); Paula Alexander Becker & Richard J. Hunter, Jr., *A Review of the Supreme Court's 2000 Term: Is There a Consistent Theme?*, 38 HOUS. L. REV. 1463, 1465 (2002) (recognizing view that majority opinion in *Bush v. Gore* was "the height of judicial activism and partisan (or, perhaps more accurately, ideological) intrusion into the electoral process" (footnote omitted)).

25. Indeed, the dissenters on the Court throughout the *Bush I* and *Bush II* litigation thought that the Court broke with its own tradition of exercising judicial restraint. See *Bush v. Gore (Bush I)*, 531 U.S. 1046, 1047 (2000) (Stevens, J., dissenting) (arguing that majority, in granting stay, ignored "venerable rules of judicial restraint that have guided the Court throughout its history"); *Bush II*, 531 U.S. at 158 (Breyer, J., dissenting) ("I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary 'check upon our own exercise of power,' 'our own sense of self-restraint.' . . . What it does today, the Court should have left undone." (quoting *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting))).

26. Lewis, *supra* note 20, at 144.

27. 250 U.S. 616 (1919).

twenty years in prison.²⁸ Twenty years for criticizing a President's policy!

As I said earlier, there were no precedents at that time for protecting such speech, trivial though it was—and utterly unlikely to have any effect. And the Supreme Court did not protect it. A majority affirmed the convictions and savage sentences. But this time—the first time—there was a dissent in favor of free speech.²⁹ It was by Justice Holmes, joined by Justice Brandeis. Holmes wrote:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. . . . But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death³⁰

Forgive me for quoting that opinion at such length. I did because its extraordinary rhetoric signals what a bold tack Holmes and Brandeis were taking, trying to take the Court in an entirely new direction. Its boldness was demonstrated in an episode brought to light by Dean Acheson in his memoir, *Morning and Noon*.³¹ Acheson was Justice Brandeis's law clerk the year after the *Abrams* case was decided. From a friend who had clerked for Justice Holmes the year earlier, Acheson learned that before Holmes announced his dissent, three members of the Court had called on him, bringing with them Mrs. Holmes. They asked him to withhold his dissent for the good of the country. He declined politely to do so.³²

The boldness of Holmes's vision of freedom—and that of Brandeis, expressed with equal rhetorical power—eventually won the day. And I put it to you that only judicial boldness, then and since, could have created the structure of freedom of expression that we enjoy today. Again and again the Supreme Court has moved away from constricting precedent to forge that freedom.³³

28. *Abrams*, 250 U.S. at 616-17, 629; see also Lewis, *supra* note 20, at 144 (describing *Abrams* case).

29. *Id.* at 624 (Holmes, J., dissenting).

30. *Id.* at 630.

31. DEAN ACHESON, *MORNING AND NOON* (2d prtng. 1965).

32. *Id.* at 119.

33. See, e.g., *Cohen v. California*, 403 U.S. 15, 16, 26 (1971) (overturning conviction of defendant observed in courthouse wearing jacket that said "Fuck the Draft" and announcing that Court could not "indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process"); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (rejecting speech-restrictive Cold War precedent and adopting new, more permissive test that barred punishment of speech that merely advocated abstract ideas without corresponding "incitement

Let me mention three decisions that deliberately broke with the legal tradition of England, where ours began. The first was the press case decided in 1931, *Near v. Minnesota ex rel. Olson*.³⁴ In England then, and still today, it was and is common for courts to enjoin— forbid—the publication of material that may do one kind of harm or another. For example, a person who believes that a forthcoming book may contain passages damaging to his reputation may get a court to stop the publication. That is just about unimaginable in the United States. It is because, in the *Near* case in 1931, the Supreme Court said that prior restraints of that kind— stop orders before publication— were disfavored under the First Amendment.³⁵

Another familiar rule in England is that criticism of judges can be summarily punished as contempt of court. That idea was rejected by the Supreme Court in 1941, in the case of *Bridges v. California*.³⁶ Justice Hugo L. Black said it was “a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public occasions.”³⁷

Then, in 1964, the Supreme Court broke sharply from the English view of libel, which greatly favored offended plaintiffs over the press and other defendants who had published critical comments on them. Under the law of England and some American states, a newspaper had to prove the truth of a challenged statement—which is often hard to do. The Supreme Court shifted the burden to the plaintiff to prove the comment false.³⁸ And it held that public officials could not recover libel damages at all unless they proved that the comment they challenged had been deliberately or recklessly false.³⁹

There is so much more I could say about the expanding meaning of free expression under the First Amendment, if there were world enough and time. Let me, rather, make one general point about the changes that have taken place. Historically, those who favored repression of uncomfortable speech were usually conservatives: for example, those who sent the critics of Woodrow Wilson to prison for twenty years.⁴⁰ But more recently, political conservatives have rallied to the cause of free expression. They have understood that they, too, have an interest in having the courts protect their expression.

People of all political persuasions now invoke “the First Amendment” as a kind of mantra. But treating the guarantee of free expression as a universal solution to problems carries its own dangers. In life there are almost always

to imminent lawless action”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (recognizing that freedom of association is “inseparable aspect” of freedom of speech).

34. 283 U.S. 697 (1931).

35. *Near*, 283 U.S. at 713-14.

36. 314 U.S. 252 (1941).

37. *Bridges*, 314 U.S. at 270 (footnote omitted).

38. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring heightened standard of “actual malice” for libel action brought by public official and concluding that system that placed burden on speaker to prove criticism of official conduct true would “dampen[] the vigor and limit[] the variety of public debate”).

39. *Id.* at 279-80.

40. *Abrams v. United States*, 250 U.S. 616, 629 (1919).

diverse interests that ought to be considered, not just swept aside.

One controversial example is a claim of my profession—journalism—to the testimonial privilege. Most journalists argue, and believe, that the First Amendment entitles them to say no when they are subpoenaed to testify in court about confidential sources. They say, convincingly, that confidential sources are essential to the business of exposing wrongdoing in government—because information about the wrongs can only come from insiders who would be punished if their names were exposed. The author of the First Amendment, James Madison, wrote admiringly about the function of the press in exposing official abuses.⁴¹ But it is too simple to say that the amendment automatically and always protects journalistic silence. Or so I believe.

Think about the case of Wen Ho Lee, the nuclear scientist who was described in press reports as a spy for China.⁴² He was arrested, charged with fifty-nine felony counts, and held in solitary confinement for nine months. Then the government dropped all but one of the counts, and he agreed to plead guilty to mishandling information. The judge in the case apologized to Mr. Lee and said the case had “embarrassed our entire nation.”⁴³

Wen Ho Lee sued the government for violation of his privacy in the leaks about him to the press. He subpoenaed reporters and asked them to name the source or sources of the leaks. They refused to answer.⁴⁴ Would we want the courts to hold that the First Amendment protects that refusal and effectively deprives Mr. Lee of any chance to repair a ruined life? I would not.

What actually happened in the *Lee* case is that reporters and their news organizations were held in contempt for refusing to name their sources.⁴⁵ Five news companies then settled by paying Mr. Lee \$750,000,⁴⁶ and the government contributed \$895,000 toward his legal fees. That seems fair enough to me. I am less enthusiastic about the statement made by the news organizations. They said they agreed to settle “to protect our journalists” and their ability to use confidential sources.⁴⁷ In other words, we do not care about what we did to Wen Ho Lee; we only care about our needs. I doubt that an interpretation of the First Amendment embracing that position would really help the press.

41. See, e.g., 1 ANNALS OF CONG. 448-51 (1789) (Joseph Gales ed., 1834) (statement of James Madison) (“[T]he freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.”).

42. *United States v. Lee*, 79 F. Supp. 2d 1280 (D.N.M. 1999); see also, e.g., Walter Pincus, *Spy Suspect Fired at Los Alamos Lab*, WASH. POST, Mar. 9, 1999, at A1 (detailing Wen Ho Lee’s termination from Los Alamos National Laboratory).

43. Transcript of Proceedings at 58, *United States v. Lee*, No. 99-1417-JC (D.N.M. Sept. 13, 2000), available at http://www.fas.org/irp/ops/ci/whl_plea_transcript.html.

44. See *Lee v. Dep’t of Justice*, 413 F.3d 53, 55 (D.C. Cir. 2005) (“We hold that the District Court did not abuse its discretion in holding four of five journalists in contempt and therefore affirm as to four of the [journalists].”).

45. Neely Tucker, *Wen Ho Lee Reporters Held in Contempt*, WASH. POST, Aug. 19, 2004, at A2.

46. Adam Liptak, *News Media Pay in Scientist Suit*, N.Y. TIMES, June 3, 2006, at A1.

47. Joint Statement of The New York Times, the Los Angeles Times, the Associated Press, ABC and The Washington Post on the Settlement of the Wen Ho Lee Case (June 2, 2006), available at http://abcnews.go.com/images/WNT/wen_ho_lee_media_statement.pdf.

Without confidential sources, the *New York Times* could not have exposed President Bush's order to violate the law and wiretap American citizens without obtaining the required warrants.⁴⁸ But secret sources are not always truthful, and the press is not always above reproach in using them.

In South Africa, during the apartheid years, a magazine called *To the Point* published an attack on a black minister, Manas Buthelezi.⁴⁹ He called publicly for peaceful change in the racist system, the magazine said, but reliable sources said that in private, he advocated violence. Buthelezi sued for libel and demanded to know the names of the sources. The editor refused to give them. The court rejected a claim of privilege not to testify and awarded damages to Buthelezi.⁵⁰ After some time, it came out that the story actually had been written by the secret police and planted in the magazine.⁵¹

Legislation to give the press a limited right to confidentiality in federal courts is now moving through Congress.⁵² It is full of exceptions and complications—so full that a reporter might be wise to bring a lawyer with him before promising confidentiality to a source. Perhaps it will pass, and perhaps it will do some good. But the very complications seem to me to show that a sweeping claim of privilege under the First Amendment is unpersuasive.

Another idea in which I think the concept of free expression under the First Amendment has been abused is campaign finance. The United States is the only country in the world in which candidates for office spend tens and hundreds of millions of dollars on their campaigns. Efforts to regulate that spending have been met by the argument that campaign spending is a form of political speech.⁵³

I am not going to trace the ups and downs of that argument, except to say that it is gaining ground in the newly conservative Supreme Court. I shall content myself with saying that I agreed with the late Paul Freund, revered professor of constitutional law at Harvard Law School, when he said of the first decision that political spending was speech: "They say that money talks. I thought that was the problem, not the solution."⁵⁴

Finally, I think we must beware thinking of the First Amendment's guarantee of free exercise as the be-all and end-all of the Constitution. In the last half-dozen years we have seen extraordinary abuses of the Constitution, and they have not engaged the First Amendment. Madison believed that the Constitution's fundamental safeguard of freedom was the separation of powers: the separation of the federal government into three branches. If one abused its

48. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

49. Anthony Lewis, *Privilege and the Press*, N.Y. REVIEW, July 14, 2005, at 4, 8.

50. *Buthelezi v. Poorter & Others*, 1975 (4) SA 608 (W) at 608 (S. Afr.).

51. Lewis, *supra* note 49, at 8.

52. See Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007) (providing qualified privilege to journalists and granting federal entities power to compel disclosure in limited circumstances).

53. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976) (recognizing campaign contributions as form of political speech).

54. Anthony Lewis, *Light in the Murk*, N.Y. TIMES, Nov. 4, 1996, at A27.

powers, he reasoned, the others would resist.⁵⁵ But since the terrorist attacks of September 2001 the executive branch has used the resulting fear to abuse its authority on a gross scale. I mentioned earlier President Bush's order to wiretap Americans. A federal law—a criminal law—prohibits such wiretapping unless permission is first granted by a special court and a warrant obtained.⁵⁶ President Bush could easily have convinced Congress to grant him new authority after the terrorist attacks. But he deliberately chose not to ask. He secretly ordered the National Security Agency to violate the law and wiretap without warrants.

The reason for that deliberate lawlessness is that the President, and the ideological cohort behind him, want to exalt the power of the President, claiming the right to do anything the executive wants on its own if it asserts national security. They somehow have concluded that the result of the American Revolution was to create a presidency with the royal prerogative of George the Third.

Another example of this claim is even graver. I have believed all my life in the essential goodness of America. I clung to that belief despite Vietnam and other misadventures. I never thought, never imagined, that our country would torture prisoners. Not as an occasional, individual act of barbarity but as official policy. That is what we have done: torture.

The policy was let loose by an official interpretation of the law by the Justice Department's Office of Legal Counsel. This document was written by a then official—now law professor—named John Yoo. He defined torture as only something that inflicted pain of a severity equivalent to the failure of a bodily organ or near-death.⁵⁷ It went on to say that the President had unilateral power to order the use of torture, ignoring a criminal statute⁵⁸ and a treaty that prohibit torture.⁵⁹ And Congress, this legal opinion added, could not stop him. The Justice Department also argued that the President could designate any American citizen an enemy combatant and have him held forever in solitary confinement, without charge and without access to counsel, and argued that the courts could not intervene.

Americans tortured an Iraqi major general to death.⁶⁰ They have subjected numbers of suspects to waterboarding, a practice that simulates drowning.⁶¹

55. THE FEDERALIST NO. 48 (James Madison).

56. 18 U.S.C. §§ 2510-2522 (2000).

57. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Office of Legal Counsel 1 (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

58. See generally 18 U.S.C. §§ 2340-2340A (defining and prohibiting torture).

59. See generally Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (binding convention parties to humane treatment of prisoners of war).

60. See Josh White, *Documents Tell of Brutal Improvisation by GIs: Interrogated General's Sleeping Bag Death, CIA's Use of Secret Iraqi Squad Are Among Details*, WASH. POST, Aug. 3, 2005, at A1 (describing fatal torture of Iraqi Major General Abed Hamed Mowhoush).

61. See Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST, Oct. 5, 2006, at A17 (describing historical use of waterboarding interrogation technique and its reported use in

They tormented and abused prisoners at Abu Ghraib.⁶² And we do not know exactly what was done to men held in secret Central Intelligence Agency prisons and others seized abroad and sent to countries that practice torture, in a program with the innocent-sounding name of extraordinary rendition.

The end justifies the means: that is the argument. We must skew the constitutional balance and trust the President with unlimited power. But history cautions against that view. Justice Brandeis warned against the argument that the end justified the means.⁶³ To accept that doctrine, he said “would bring terrible retribution.”⁶⁴

I have ended on a somber note, and I make no apologies for that. We have every reason for satisfaction at what judges have done over the last century to protect our freedom of speech and press under the First Amendment. But there are other things that now urgently demand our constitutional attention.

Arlin and Neysa Adams, thank you for doing so much to make our country what its founders wanted it to be: a constitutional democracy.

interrogation of prisoners following 9/11 attacks); *see also* Dan Eggen, *Bush Announces Veto of Waterboarding Ban*, WASH. POST, Mar. 8, 2008, at A1 (reporting President Bush’s veto of congressional initiative to ban waterboarding as interrogation tactic).

62. *See, e.g.*, Seymour M. Hersh, *The General’s Report*, NEW YORKER, June 24, 2007, at 58, 58-69 (profiling Army Major General Antonio Taguba and his report following military inquiry on abuses at Abu Ghraib prison).

63. *See* *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.”).

64. *Id.*