

Say It Ain't So Uncle Sam
By David Johnson

I was 9 years old during the first Gulf War with Iraq in 1991. My dad was a high school social studies and government teacher, and he loved politics and current events, so the news was on almost constantly during the conflict. I remember quite well the videos shown on TV of U.S. pilots who had been shot down and captured by Iraq. It was obvious that they had been severely beaten and mistreated. That seemed to affirm what a bad guy Saddam Hussein really was, and it somewhat validated why we needed to go to war to stop him. 1991 was a great time to be an American. It may have been the very height of our power and influence as a nation. The Soviet Union had just collapsed and there was no longer a Cold War. Our military had just trounced the Iraqi military, which before the conflict began, was ranked as the 4th best in the world. It was clear that there was a wide gap between our military and anyone else's. For the first time, we were without question the most powerful country in the world. Best of all, it also felt like we were respected all across the world. Everyone admired our Constitution, our democracy, our economy, our personal freedoms, and our way of life. They all wanted to be like us, even in terms of styles and trends. I was certainly 'Proud to Be An American' just like the song said. We all were.

In 2003, during the second war with Iraq, and its subsequent occupation, I was 21. During the lead up to the war, I did not know quite how to feel about it. It seemed wrong to attack a country that had not actually done anything to us. Even back then I was not so sure about the logic of a preemptive strike. After all, it would not be wise (or just) to walk up and punch someone in the face just because you thought that maybe one day he might attack you. In most cases a preemptive strike ends up causing the very thing that it was supposedly meant to prevent, which is serious and unnecessary conflict. One would never really know for sure whether the other side would have ever actually attacked. I did not believe that Saddam Hussein was very much of a threat to us by that point. He liked to irritate us, and be a thorn in our side, but he had been humiliated during the first Gulf War, and I didn't think he would want to risk that again. I did not see him sponsoring terrorism either, because I just did not think he would dare. My feelings were mixed, though, because I also knew that he was a very cruel and oppressive leader to his own people, and that his sons were even worse. I thought the Iraqis (and the rest of the world) would probably be better off if we got rid of them.

When news of the Abu Ghraib prison scandal broke, I was devastated. I could not understand how such a thing could have happened. I remember that during the *60 Minutes* report they interviewed one of the Iraqi citizens and he said something to the effect of: 'Everyone knew Saddam Hussein tortured people, but this was America. We never thought the Americans would do that.'¹ It felt like we had let the world down, especially the Iraqis.

¹ I tried very hard to look up the original *60 Minutes II* report, but I could not find it anywhere on the internet, which is odd. I found documentaries and other sources about Abu Ghraib, but not that particular one. I could not find a transcript of it either. Thus, I cannot quote the Iraqi citizen exactly, nor do I know his name. I just have to go off of what I remember from when I watched the program a long time ago. One thing that I did learn through all of this searching, though, is that the photos that were made public were tame in comparison to others that were too graphic to be shown on TV. Anyone who doubts that this was torture should get the full story on everything that they did. It was awful.

No one would talk about Abu Ghraib very much before the 2004 election. That was a little surprising to me, given that John Kerry criticized just about everything else that President Bush did. But he would not go near that issue. Maybe he was afraid that if he did, he would appear weak on terrorism, which was the defining issue of that election. Or maybe he thought that if he talked about the ugly truth, voters would blame the messenger. Perhaps there were other reasons. Politicians claimed that they did not want to talk about it because they did not want to harm the prosecution of the case against the guards. I think that was an excuse. It needed to be discussed, and I think it could have been without harming the case. Because Kerry ignored it almost entirely, the other Democrats did as well. But I could sense that there was more going on than what was being said in public. Much of my suspicion was due to how the Bush Administration handled the situation. I fully expected President Bush to be as outraged and embarrassed as I was. I assumed that he would take strong steps to ensure that such a thing never, ever happened again. But the Bush Administration seemed far more concerned with containing the public relations disaster than with stopping the abuse. The only thing that they really did about the scandal was to no longer allow the soldiers to bring cameras or cell phones into the prisons. Their message to the military seemed to be, 'Go ahead and do whatever you want behind closed doors, just make sure that nobody gets any pictures'. If they would have been serious about stopping the abuse, they would have encouraged the soldiers to bring cameras and to document everything that was happening.

I was starting to think that what happened at Abu Ghraib was not just an isolated incident with a few bad apples acting on their own, as it had been claimed. I have never believed that anyone in high military command, or in Washington, actually told those prison guards to do those things at Abu Ghraib; they would not have taken the risk to order it directly. But it is easy to hint and insinuate what is wanted without actually saying it. Here is what we do know. The abuse took place where they questioned prisoners. The CIA had a presence in the prison, along with some private military contractors. Donald Rumsfeld visited Iraq shortly before the abuse occurred, and he was frustrated by the lack of intelligence that they were getting on the insurgency. It cannot be proven with certainty, but I believe that Washington and the CIA let it be known that they wanted more intelligence on the insurgency, and they did not really care how it was acquired.

My fears that Abu Ghraib was part of something larger were later confirmed as more information slowly began to leak out to the public. Not long after the 2004 election victory, and as so much information came out that it became almost impossible for them to deny it any longer, some Bush Administration officials began to openly defend torture as a way of gaining intelligence.² President Bush and many members of his Administration did not want to call what they were doing 'torture' though. 'Enhanced interrogation' was, and continues to be, the euphemism of choice. In most cases, the government claimed officially that the United States did not torture. But one must remember that the Bush Administration redefined torture as 'intentional organ failure'. Under that definition, you could gouge a man's eyes out, cut off his leg, castrate him,

² It should be noted that extraordinary rendition, in which they would simply transport terrorist suspects to other countries and then with a wink look the other way while those countries tortured them, had been going on at least since the Clinton Administration, and maybe longer. We have definitely come to where we are today in stages. It seems as though each Administration pushes things a step further than the last one did.

sexually assault him, or almost anything else that you wanted to do to him, and it would not be torture. It is only torture if it causes organ failure, or in other words death. Not only that, but it also has to be on purpose. If the interrogator had only meant to cut off his leg, and in the process had unintentionally caused him to bleed to death, that would not be torture either. Since an 'interrogator' could always simply deny that causing organ failure was his intent, essentially anything is permitted. This is obviously an absurd definition of torture. Its only purpose was to provide a convenient legal loophole so that they did not have to acknowledge officially that the United States was doing it. But 'What's in a name? That which we call a rose by any other name would smell as sweet . . .' and 'enhanced interrogations' are torture, whether you call it that or not. You would certainly think it was torture if it was happening to you.

While growing up, I thought of the United States as Superman. Not only were we extremely powerful, but we could always be counted on to act honorably, even if our enemies did not. Sure, villains might hurt innocent bystanders, or target the hero's loved ones, or torture someone, but that kind of behavior was expected from them; you knew that bad guys would do bad things. But Superman never would have resorted to such tactics. He would have found a way to save the world without doing anything bad himself. The tactics and methods that you use define who you are. Superman was always the good guy because he always acted like the good guy. Finding out that the United States tortured people has shaken me to the core because it shows that my childhood hero is not what I had thought it was. The disappointment and sadness that has come with that realization has not gone away, even after several years. I had always thought that if there was one country in the whole history of the world that could be counted on to never torture, no matter what, it would be the United States. I believed that because, like most Americans, up until all of this happened, I believed all the hype. I thought we really were a force for good in the world. I thought that we really did promote peace and justice and freedom and fairness and human rights and democracy and baseball games and apple pie and the American dream and everything else that we claimed to stand for. I did not know that most of that was just propaganda and public relations spin. Looking back, I guess it was pretty naive to have ever believed it to begin with, but I was a kid, and I certainly was not the only one. It felt to me like most Americans thought that way, and many still do today.

Those who support torture nearly always argue for it using some sort of utilitarian-based reasoning. Utilitarian theory says that the morally correct thing to do is what would bring about the greatest total net gain in pleasure for all who are affected by the act. The thinking seems to be that obtaining information that could be used to stop an attack would prevent the suffering of so many that it would justify inflicting pain on one individual. It does seem that eventually one would reach at least a theoretical point at which there would be so many lives at risk that it would be the right thing to do according to the theory. But it is certainly no great coup for those supporting torture to say that utilitarianism would justify it. Utilitarianism would also say it is moral to torture a three year old child if a cruel mob got a greater amount of pleasure from it than the amount of pain that the child endured. We have to remember as well that some would get pleasure from seeing the terrorist act carried out successfully, and utilitarianism would treat their pleasure and pain equally with the potential victims. So, if people in the terrorist's home country (if they were from a different country) and all across the world hated the U.S. so much that they got a greater amount of pleasure from seeing the terrorist act carried out than the amount of displeasure that it created for us, then utilitarianism says that it would actually be immoral to

stop the attack. I cannot take utilitarianism seriously as a viable stand-alone moral theory when such results are possible, as extreme and unlikely as they may be. If one must use utilitarian reasoning, rule utilitarianism is better than act utilitarianism. We have to look at the broader long-term ramifications of such a policy rather than merely weighing the pleasure or pain relative to one instance.

Moreover, most of the people with this position are only considering the idealized Hollywood torture scenario, which is something like this: you are a government official who has just captured a well-known terrorist while he was attempting to set off a nuclear device in a major city. The bomb has been set and is ticking down to the last few minutes before detonation, but you do not know exactly where it is located. Only this captured terrorist knows where it is, and he is not going to tell you willingly. So, you must decide whether to torture him in order to make him tell you where the bomb is so that it can be disarmed. This is a very popular plot line for movies and TV shows, in part because Hollywood loves to heighten the drama to the highest possible degree. The bomb can never be disarmed with even fifteen seconds left on the countdown clock, it always has to go down to the very last second. It is all pretty cliched at this point, and very unrealistic. What are the odds that the timing would work out that perfectly? The Hollywood scenario might make for an interesting theoretical ethical question, but if we are going to understand the real policy issue we need to think more about the real circumstances.

One major difference is that in the Hollywood scenario, the audience knows exactly who the bad guy is, and usually he is a real lunatic of pure evil with no redeeming qualities whatsoever. All of this background information makes it so that the audience cannot empathize with him at all. In real life, though, you often would not know for sure when someone was captured whether they were a terrorist. Many of the people held at Guantanamo Bay after our short war with Afghanistan were 'recruited' by the Taliban, who told them that if they did not fight for them, they and their entire family would be killed. Most of these individuals were not terrorists, and they were not necessarily enemies of the USA (at least until we held them as prisoners for years without a trial and tortured them). We didn't know who was a terrorist, and who wasn't, so we just treated them all the same. At other times, you may have captured a known terrorist, but you would not know whether there was an attack planned at all, let alone whether one was imminent. Usually, if there was an attack planned it would be months or even years away from the time of his capture, and it is quite likely that the plans would be radically altered or abandoned entirely once his capture was known. That makes it pretty unlikely that you would obtain information that would directly stop an attack.

The uncertainty that exists in real-life situations raises questions about the effectiveness of torture. In fact, most of the arguments against using torture are based upon the claim that it is an ineffective interrogation method. I do believe that there are some legitimate concerns about how accurate the information would be, because the suspect would probably say whatever the interrogator wanted him to in order to make the pain stop. But in some sense, whether torture is an effective way to obtain information is beside the point. There are many things that may be advantageous, or at least thought to be so, which are morally unacceptable. Wiping out an entire village of unarmed civilians, allowing your soldiers to rape and pillage the countryside, and hiring mercenaries may each in some instances help to win a war. All of them have been done many times throughout the world's history. But they are morally abominable, whether tactically

advantageous or not, and those who do them have no honor. Since when did success in obtaining a desired policy objective somehow bestow moral permissibility on an act? Who exactly are we trying to be these days, anyway, Machiavelli?

Now, to be clear, I am not suggesting that torturing a known enemy who is trying to harm you is morally equivalent to wiping out an entire village of unarmed noncombatants. The latter is clearly worse. My point is simply that whether torture is effective in accomplishing its desired objectives is separate and distinct from the question of whether it is moral. Torture might be effective in some instances. That is probably one of the reasons bad guys like to use it. But there are some things that a good person simply will not allow themselves to do, despite the potential advantages. Morality sometimes requires acting contrary to self-interest, at least in the short-term. But of course that is not always the case, and it is not that way here. People act as though we put ourselves at such an enormous disadvantage in the so-called 'war on terror' if we do not torture, but one of the reasons that the first war with Iraq in 1991 was won so easily is because Saddam Hussein's soldiers kept surrendering to us with little to no resistance. Back then they believed that we would treat prisoners of war according to the Geneva Convention agreement and that they had nothing to fear from us. So why would they risk their lives against a superior opponent for a cause that they cared nothing about, and a man they only followed out of fear? We had such a distinct advantage in terms of weaponry that I am sure we would have won the war eventually anyway, but it would not have been nearly so easy. In that case, our reputation for justice worked in our favor. It would not always be so, but there is no guarantee that a brutal and unfair policy like the one that we have now will necessarily lead to better results overall.

I think that torture and rape are fairly equivalent in terms of moral standing. Though instances of unjust killing are morally worse than either one of these, there are also instances in which killing is warranted, such as in self-defense, or to save the life of an innocent person. Sometimes good people have to kill because the bad guy simply will not have it any other way.³ But I do not see a just person, fighting in a just war, ever raping or torturing anyone. If they did, then it seems to me

³ Another argument I have heard is that if you consider killing, particularly the death penalty, to be a permissible form of punishment then you should also be willing to allow torture, as it is less severe than death. Well the first point on this is that torture is not being used as a punishment for those who have been found guilty of a crime in a fair trial. If anything, it would probably be more just if it were being used in that way. Instead, it is being used on suspects, who may or may not be guilty of a crime. The second point is that if torture is permissible because it is less severe than killing, then we would need to say the same of rape. The loss of one's life is considered the greatest loss that one can suffer, so most people, if they had to choose between being murdered and being raped, would choose to be raped, though obviously either option would be awful. According to the prior reasoning, anyone sentenced to execution could also then have any lesser punishment inflicted upon him in the meantime. So if someone wanted to rape him, then it would be morally permissible to do it because it would be a lesser punishment than death? Of course that reasoning is absurd. Now maybe a more charitable interpretation of the claim would be that if you think execution is a reasonable and just punishment, say for murder, then any lesser punishment would also be just for an equivalent crime. So in that case, it would not be just to rape the murderer if murder was the only crime he committed, but it would be just to rape the rapist, torture the torturer, rob the robber, and so on. Even this is not necessarily true though. Maybe a strictly retributivist view of punishment would result in this, but if there are other considerations taken into account, I do not think that one who supports the death penalty is necessarily committed to this. Considering the death penalty to be permissible in some instances does not entail that chopping off limbs, or castration, or being pulled apart by horses, or sexual assault are morally permissible punishments.

that the person could no longer be considered a just person (or at least not fully so). It really is just that simple. The goal of a just war is to bring about peace, not to further escalate the conflict. When we do these kinds of things, the line between good guys and bad guys becomes blurred, and at some point, indistinguishable.

No country should torture, but the United States in particular must not do it because torture is prohibited by the Constitution. There are several ways in which this is so, but I will start with the primary one, which is the eighth amendment. It says:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

During the Bush Administration, those supporting torture would have argued (if anyone would have even raised the question, though so far as I know, no one did) that the government was not violating the eighth amendment because those accused of terrorism were not U.S. citizens. Since the Constitution does not explicitly say that the same rights and protections should be extended to those who do not have U.S. citizenship, they could be treated differently. The thinking, I guess, is that we would not want to recognize any rights that we are not absolutely required to recognize, because we wanted to really get tough with those terrorists. But the Administration did not want to call them prisoners of war either, because the Geneva Convention agreement prohibits the torture and abuse of prisoners of war. So, they once again played the legal semantics game they were so fond of, and made up a whole new category, designating them 'enemy combatants'. This allowed the government to make the argument that there was no official or legally binding agreement regulating their treatment. This is some relatively cunning legal maneuvering by the Administration's lawyers (or as I like to call it, legal contortionism) but in no way does putting them into a new made-up category alter the fundamental moral issue of how those individuals ought to be treated in our custody. It is not legitimate to simply redefine or re-categorize something for your own purposes when you do not like the commitments that the original entailed. I also do not believe that this is a correct interpretation of the Constitution. The ninth amendment says:

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

In other words, even though they have identified some specific rights that cannot be infringed upon, it should not be interpreted as a comprehensive list. Other rights may exist that were not mentioned, and failure to list them should not be interpreted to mean that those rights can be taken away.

This is in harmony with the tenth amendment:

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.

Any power or right that is not specifically granted to the federal government by the Constitution is retained by the states, or the people, except what the Constitution specifically says are powers

that are prohibited from being held by the states, or the people. From these two amendments it is clear that the default position is not that any right not specifically enumerated can be taken away, but instead that the federal government can only do what it is specifically authorized by the Constitution to do, and nothing else. So, if the Constitution does not address the question of whether the Bill of Rights applies to non-citizens, that does not automatically mean that it does not apply to them. In fact, if powers not specifically delegated to the federal government are retained by the people, then it seems to me that the government would not be authorized to violate the rights of non-U.S. citizens unless that was a power specifically granted to it by the Constitution.

But my objection is much more fundamental than merely this. When I say that torture violates the Constitution, what I really mean is that it violates the spirit of the Constitution and the principles that our nation is based upon. To fully understand those principles, one must remember the historical circumstances that led to the creation of the Constitution. We must also understand John Locke's philosophy. The United States is called 'The Great Lockean Experiment' for a reason. Thomas Jefferson in particular was a great admirer of Locke, believing him to be one of the three greatest men to ever live (the other two were Bacon and Newton) and many of the core concepts of the Constitution and the Declaration of Independence show his influence on Jefferson.⁴

Locke's revolutionary idea (literally in some cases) was that government derives its authority from the people it governs, and it is ultimately accountable to them. That does not seem all that remarkable to most of us today, because that is what we have been taught all our lives, but it was radical in the 1600s when he first wrote it. Locke believed that each individual has God-given natural rights that must be respected. This is not limited only to the behavior of one individual towards another; the government cannot violate a person's rights either. If the sovereign repeatedly violates the natural rights of its citizens without cause, then Locke believed that was one of the conditions that justified having a revolution.

One can easily understand how appealing Locke's philosophy would have been to those who were taking part in the American and French Revolutions because he provided the necessary religious and philosophical justification for revolution. Those were times of arbitrary and unfair laws from unjust monarchs who claimed to rule by divine right, and a wealthy nobility that thought of themselves as superior to the lower classes. It used to be that a king could lock

⁴ As an example, Jefferson said in the Declaration of Independence: *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.--That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, -- That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security . . .*

someone up almost indefinitely simply because they had angered him. In the middle ages, a lord of the manor could put you in his own prison, force you to confess to something through torture, and then take away your land based upon that confession. During the Reformation Era, simply being a Protestant or Catholic in a nation dominated by the other could make you a target for harassment, arbitrary arrest, and torture. The founders did not want the Inquisitions to happen here. They did not want the public executions that included torture, such as being pulled apart by horses, burned at the stake, having one's intestines pulled out while still alive, or even crucifixion, as the ancient Romans did.

We must remember that the Constitution was not written until 1789. Before that, the nation was governed by the Articles of Confederation. But this was found to be inadequate because the central government had little authority. There was great debate as to whether they should create a stronger central government. Those in favor were known as Federalists. The Anti-Federalists worried that if they allowed the creation of a strong federal government it could end up becoming an autocracy similar to what they had left behind in Europe. To alleviate these concerns, the Federalists agreed to make the Bill of Rights (first 10 amendments) part of the new Constitution. It was a concession that had to be made to get the Anti-Federalists to go along with the plan. The purpose was to ensure that the rights of individuals and of the states would be protected. The founders realized that they needed Leviathan, but they bridled it to make sure that they could keep it under control.

Having said all this, then, do we think that the founding fathers, particularly those who were Anti-Federalists initially, would have thought that 'enemy combatants' have rights? The answer should be obvious. The founders of our nation would have been very uncomfortable with the idea of people being held without a trial and without the State producing any real proof that they are guilty of anything. I think it would have reminded them far too much of the actions of the English kings that they had rebelled against. Locke would say that people of every nation have God-given rights to life, liberty, and property, so it would not matter whether it was an American citizen or not. Our government today is acting more like Hobbes' Leviathan than Locke's. Is that what we want to become, 'The Great Hobbesian Experiment'? Unfortunately, that seems to be where things are going.

Consider, for example, the 'unitary theory of executive power' embraced by the Bush Administration. Here is John Yoo, one of its chief proponents, who was a justice department lawyer during George W. Bush's first term in office. Yoo was asked during a debate to defend a position that he took in his infamous 'torture memo' of 2002, but declassified and made public only years later. Here is a brief exchange from the debate:

Cassel: If the President deems that he's got to torture somebody, including by crushing the testicles of the person's child, there is no law that can stop him?

Yoo: No treaty.

Cassel: Also no law by Congress. That is what you wrote in the August 2002 memo.

Yoo: I think it depends on why the President thinks he needs to do that.

Yoo's asinine interpretation of the Constitution is that the President's role as Commander In Chief permits him (or her) to do whatever he thinks is necessary to protect national security. That

is probably why his response to the question was ‘it depends on why the President thinks he needs to do that’. He was justifiably cut off by boos from the crowd before he got the chance to explain his answer, but he probably would have said something like if the President felt that crushing the testicles of the person’s child was necessary to protect national security, then as the Commander In Chief, there is no treaty (by this he probably meant the Geneva Conventions), no law by Congress, no ruling by the Supreme Court, nor anything else that anybody could do to stop him from doing it.

Yoo is wrong. The Constitution itself puts limits on what the President can do. Yoo’s interpretation is absurd because it would mean that the Constitution grants the President the right to violate the Bill of Rights if he thinks that doing so is in the interests of protecting national security. But the whole reason for including a Bill of Rights in the founding document is so that they cannot ever be violated. Richard Nixon may have thought that ‘If the President does it, it is not illegal’ but from a Lockean perspective, the President (or anyone else for that matter) is only authorized to take away a person’s natural rights if they have violated the rights of another.⁵ There is no possible way that the founding fathers would have considered the President’s authority as Commander In Chief to supersede the Bill of Rights. The only reason that the President is the Commander In Chief at all is so that a civilian is in charge of the military. It was simply another check built into the system to prevent a popular military commander from becoming too powerful and then taking over the government in a coup de tat. But the President’s power as Commander In Chief is certainly not unlimited; the Constitution does not even grant him the right to declare war;⁶ that is a power reserved for Congress, which also has the power to impeach the Commander In Chief, and they should do it if he is not following the Constitution.

⁵ Jefferson called the right to life, liberty, and the pursuit of happiness (among others) ‘unalienable’, but this is mistaken if interpreted literally. If they were really inalienable then they could never be separated from the individual for any reason. You could not sell or barter them away, even if you wanted to, and no one could ever take them from you. That sounds great initially, but it would mean that the government could not imprison anyone, no matter what they had done, because the right to liberty is inalienable. This would make punishment impossible, and the government would not have any authority. I am sure Jefferson said this because he wanted to avoid the idea that it is up to the sovereign authority to decide whether someone has lost his or her rights. If they are inalienable then they would always have to be honored and those in government could not just define them away, or take them arbitrarily when it suited them. But Locke’s idea on this point is better, which is that a person forfeits his rights if, and only if, he has violated the natural rights of another. In so doing, he has put himself into a state of war with that person, and with the rest of society. If that is the case, then society has the right to punish, and/or get rid of him, because he is a threat. Under Locke’s view you would not be deprived of your rights unjustly (assuming that the government is functioning correctly) because it would have to be proven that you had committed crimes that violated the natural rights of another. I imagine that Jefferson probably had something like that in mind himself, it was just a mistake to use the term ‘unalienable’.

⁶ The President is not a king, and the founders did not want such an important decision left up to only one person. The Commander in Chief’s role is more to execute the war, if it has been declared, than to make the initial decision whether we should be going to war. Unfortunately, this has been regularly ignored by many Presidents seeking military action. They use the now familiar legal tactic of simply calling war by some other name. It was a ‘police action’ in the case of Vietnam, and the early days of the Korean War. The Obama administration called the bombing of Libya in 2012 a ‘kinetic military action’. Once again, this is just playing with words. But if Congress and the public allow Presidents get away with it, then they will probably continue to do so.

The unitary theory goes against the whole idea of limited government because it would remove all checks and balances from the executive branch and would effectively make the President a dictator. A President could justify almost anything simply by saying that it was a matter of national security. I understand that Congress should show some respect for the President, and not be overly meddling or obstructionist in opposing everything that the President does, but there has to be some oversight and overlapping of responsibilities or there cannot really be checks and balances. There are times when Congress needs to block and fight what the President is trying to do, and that was foreseen by the founders. I have doubts that even Yoo himself really believes this is a legitimate interpretation of the Constitution. Lawyers are rhetoric mercenaries; they will argue whatever position that they are hired to argue. Their whole job is to twist and manipulate the written law into some interpretation that advances the interests of whoever is paying them. Dick Cheney and the Bush Administration had an agenda to expand the power of the executive branch, and Yoo's theory provided the legal justification for it.

I thought for some time that the problem was confined to the Bush Administration and the Neocons. Their jingoism and determination to strengthen the power of the Presidency had me very concerned that there was a legitimate threat to the Constitution. I had high hopes for Obama when he first came into office in 2008. He was saying all of the right things as a candidate (but then, I guess politicians usually do). I really liked the fact that he had opposed the second war with Iraq from the very beginning, he promised to close the prison at Guantanamo Bay, Cuba, and he said that he would stop using torture, and protect civil liberties. He even talked about limits on the power of the Presidency. It was exactly what I thought this country needed. But looking at his record since coming into office tells a much different story. Obama never even attempted to prosecute those who had used tortured in the previous administration, the prison at Guantanamo Bay is still open, the CIA still has other secret prisons all around the world, and as far as I can tell, very little has changed from when Bush was in office. It is Obama that has drastically increased the number of unmanned drone strikes in which he simply assassinates suspected terrorists (along with anyone else unfortunate enough to be in the vicinity) without a trial, and without providing any proof that the person is guilty of anything.⁷ He has his own 'kill list' and no one even knows who is on it until one of them turns up dead. Now, after using the drones extensively abroad, they are bringing them to the United States. It was Obama that greatly

⁷ For example, Obama ordered a drone strike on Anwar al Alaki in 2011. Alaki was a U.S. citizen, born in New Mexico, though he was living in Yemen at the time of the strike. Right after 9/11, he was not considered a threat at all. In fact, he was invited to attend a luncheon at the Pentagon. He later fell out of favor with Washington when he was critical of the war with Iraq, and spoke out against some U.S. policies. However, it is far from clear that he was a terrorist. He certainly never attempted any attacks himself. The government claimed that he was a talent recruiter and motivator for Al Qaeda, and that he allegedly helped to plan some terrorist attacks. But where is the evidence that proves that? Probably much of that so-called 'intelligence' came through torturing other captives, and they may have just said what the torturer wanted them to say. Other evidence (if there actually was any) probably came through illegal NSA spying. I really have no idea whether Alaki was innocent or guilty, I am just saying that they should have to put him on trial, in front of a jury, and prove their case before killing him. Respecting due process, and the Constitutional rights of an American citizen living abroad, is not too much to ask for from the President. They also killed Alaki's 16 year old son two weeks later, in another drone strike, who was also an American citizen. Then Obama used his influence with Yemen's government to have the reporter who wrote about the strike thrown in prison.

expanded the war in Afghanistan, and bombed Libya, and he wanted to bomb Syria too, if he could have talked the nation into it (and if Secretary of State John Kerry had not accidentally stuck his foot in his mouth). The NSA spying scandal happened on Obama's watch, and he really has not done anything about it at all. It is the Obama Administration that has been more aggressive than any previous one in prosecuting whistleblowers.⁸

The last straw for me was when Obama signed the NDAA bill, on New Year's Eve 2011 (apparently hoping few would notice if he signed it on that day). The NDAA is just a military appropriations bill that is passed every year. But the one for 2012 contained something that had never been in any of the prior ones. Buried in the middle of the bill, there was a section that said an American citizen that is accused of terrorist activities could be detained in military custody as a prisoner of war until 'hostilities are over'. Since the government will probably never declare the 'war on terror' to be officially over, this legislation effectively means they can hold you indefinitely based upon nothing more than their own accusation against you. This is a step beyond even what the Bush Administration did. If Obama was serious about protecting civil liberties, he would have vetoed that bill immediately. In reality though, according to Senator Carl Levin, Obama wanted that section of the bill to include American citizens, though he made a public show of pretending like he opposed it. Actions speak louder than words, and this shows that Obama is a charlatan just like all the other politicians. He is a skilled orator, but it is like an actor playing a role. He does not really mean most of what he says in his speeches.

This section of the NDAA bill is blatantly unconstitutional.⁹ The sixth amendment says:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

A portion of the fifth amendment says that a person cannot be deprived of 'life, liberty, or property, without due process of law'. In the fourteenth amendment it states that all persons born or naturalized in the United States are citizens of their state, and of the nation, and it prohibits states from denying their citizens due process and equal protection of the law. Originally the fourteenth amendment was meant to protect freed slaves. But it clearly says that the government does not have the right to pick and choose which U.S. citizens get to have due process, and which do not.

⁸ They prosecute whistleblowers under the espionage act, as though it were treason. The whistleblower reveals corruption or illegal behavior that is going on in our own government to the voting public so that something can be done to stop it. That seems quite patriotic to me. But the Obama Administration prosecutes them as though they had sold military secrets to a foreign government for personal gain. Apparently Obama thinks it is better to keep all the corruption and illegal practices hidden, which is alarming. How can it ever get fixed if no one dares to say anything? Or does he really want it to be fixed?

⁹ It also does not make any sense. How could a nation consider its own citizens to be prisoners of war? By definition, if the accused is a U.S. citizen, and the alleged crime is committed on U.S. soil, then it is a domestic crime.

President Obama is not the only one to blame for this awful legislation. Congress passed it to begin with, and they are as much at fault. Here is Senator Lindsay Graham, from South Carolina, while the NDAA bill was being debated in the Senate:

I'm just saying to any American citizen, if you want to help al-Qaida, you do so at your own peril. You can get killed in the process. You can get detained indefinitely. And when you're being questioned and you say to the interrogator, I want my lawyer, the interrogator will say, you don't have a right to a lawyer because you're a military threat.

-NPR Dec. 2, 2011

There has not been legal reasoning of this quality since the Salem witch trials. Perhaps they should just try drowning the accused, and if they float, you know it is a terrorist. Not only is it not 'innocent until proven guilty', you don't even get a trial to try to prove your innocence. And when your interrogator is 'questioning' (i.e. torturing) you, if you ask for a lawyer, Senator Graham says that you don't have a right to one, because after all, you have been accused of something, and obviously you lose all of your Constitutional rights if an accusation has been made against you. Then, if you tell them what they want to hear to make the torture stop, they could potentially use that as evidence against you to further justify the detention. They have absolutely no accountability whatsoever to the public for what they do. They would never even have to reveal what they did with you, or to you. One day, you could just disappear, and no one would even know what happened. And I am really supposed to believe that this will not be abused?

Terrorism legislation, which has come in many different forms over the last several years, has been the vehicle of choice to weaken the Constitution and erode civil liberties.¹⁰ I do not know whether these laws and policies were designed for that very purpose by a group of malevolent individuals who have the goal of subverting the Constitution, or whether it is only well-intentioned, but clueless people, who are so paranoid about terrorism that they fail to see the greater danger. But I will say this, if this legislation has not been designed for such a purpose, no legislation could be created which would be more effective in bringing about that end than what is currently being done.

Perhaps, though, you think that terrorism is a new challenge that was not fully understood or addressed by the founding fathers, and that we need to make modifications to the Constitution to adjust. People who want to change something often say that it is a 'living document' meant to be modified to fit the times. They are correct. There has always been a procedure built into the Constitution that allows us to make changes to it, and we have used it on numerous occasions. Additional amendments can always be added, and can even be used to change or repeal earlier

¹⁰ One of these is the so-called 'Patriot Act' (the name being a misnomer of the highest order) which was passed soon after September 11, 2001. This legislation is almost as bad as the NDAA bill. It allows warrant-less wiretaps on phones, seizing phone records, and even tracking e-mails and web searches. It allows them to spy on you without even needing to get a warrant from a judge for approval. Obviously it violates the fourth amendment, which prohibits search without probable cause. It seemed really bad at the time it was passed, and it is still in effect, but recently we have found out even more about the NSA's spying program, and things are even worse than previously thought.

ones; for example, the 21st amendment repeals the 18th amendment (regarding prohibition). If some of the amendments need to be repealed or modified to handle cases of terrorism, then it should be discussed and debated openly as a nation. But of course no one has tried to do that because they know it would fail. What would you change? Would we modify the eighth amendment to say, 'No cruel and unusual punishment, unless you are accused of terrorism. Then we can do whatever we want to you'? Not very many people would support an amendment like that, and it is quite difficult to get a new amendment approved anyway. 3/4 of state legislatures have to agree to it before it is ratified. But the process is supposed to be difficult. You should not be changing the Constitution very often. Because they know that they cannot get a new amendment ratified, lawmakers instead try to slip it in through the back door, like putting indefinite detention of U.S. citizens into the middle of a military appropriations bill for example. Such methods just further convince me that those who are trying to do this should not be trusted. The Constitution is undermined because none of its amendments have been changed, they are just being ignored. That makes it seem as though compliance with the Constitution is voluntary, and merely at the discretion of political leaders. It is not.

We basically have two separate legal systems in the United States now. If you are accused of what is considered a domestic crime, you have your Miranda rights, and all of the standard legal protections under the Constitution. But if you are accused of terrorism, then the government does not honor any of those rights. There has already been some 'mission creep' with more and more domestic crimes being reclassified as terrorism. For example, arson has been treated as an act of terrorism because it was done as a political protest, even though the activist group knew that no one was in the building when they set fire to it. We already have a law against arson. I am not defending what they did, but there is no reason to treat it as terrorism. Making the political statement was not a crime, intentionally setting fire to the building was the crime. Even if they would have killed someone they could have been charged with manslaughter or murder. Other things that have been classified as terrorism: possessing the materials to create a molotov cocktail (not throwing one, just having the materials in your home), posting a song lyric or movie quote on Facebook or Twitter that others find threatening, or even turning loose a bunch of cows from a slaughterhouse, or filming at one without consent. It seems as though right now people who are accused of terrorism in these kinds of cases still have access to lawyers, and receive a trial, but according to the NDAA, the government is not required to provide any of that. The next step in all of this is if and when they start saying that people in these cases do not have a right to a lawyer, and can be detained indefinitely.

How long will it be until those who are pushing for torture seek to use it on suspects of violent domestic crimes, especially once they have redefined those crimes as terrorist acts? One could easily imagine politicians who were looking to score some cheap political points advocating for a high profile murder case, a mass shooting, or a hate crime to be treated as a terrorist act. Doing so would allow the government to circumvent the Constitutional rights of the accused. Not everyone would be opposed to this, though. Some think it would be perfectly appropriate for the police to torture a murderer, a child molester, or a rapist, especially if you could get some information that could help stop a future crime. I have to admit that there really is no legitimate reason to treat violent domestic crimes differently than terrorism. The number of potential victims may be higher for terrorism, in some instances, but if you think that torturing terrorists is good policy, then it seems like it would work equally well for questioning a serial killer. If

torture is permissible at all, then it would seem to be so to save the life of even one innocent potential victim. But we have to remember why the Constitution prohibited it in the first place. There is massive potential for abuse. Government authorities can be wrong (and even corrupt), and they do sometimes go after innocent people. If they could torture, then they would be able to get the suspect to confess to practically anything just to make it stop. That would allow them to manufacture 'evidence' against you, whether you are actually guilty or not. That happened during the Middle Ages. Once someone had been found guilty and condemned to death (sometimes already having been tortured to obtain the original 'evidence' for the conviction) they tortured them in an effort to get the condemned to reveal the names of others who had also participated in the crime. This would have easily allowed the torturers to target their political rivals and personal enemies for false accusation, and then those people would have been arrested and tortured, and the cycle would have continued. It is horrifying to imagine how many innocent people must have been implicated for crimes that they did not commit in this way. The purpose of the Bill of Rights is not to protect the guilty from punishment, it is to protect the innocent from false accusations and unjust punishment. It is also meant to be a check on government power, and it prevents those in positions of authority from exercising it unjustly.

Our Constitutional legal system has some weaknesses, of course, as almost any system does, and there are some particular cases of injustice. There always are. But the principles it is founded upon are sound, and overall, it is still probably the fairest and best system that the world has to offer. We do not need another legal system to handle cases of terrorism. If an attack occurs or is even attempted on our soil, then it is a crime, just like murder, kidnapping, rape, or robbery, and it should be treated as such from a legal perspective. If a U.S. citizen went over and murdered people in China, claiming that it was for some political cause, China would correctly categorize them as a criminal, not an enemy soldier. Even if the person claimed to be fighting a war on behalf of the United States, the U.S. would not claim them as its soldier. They would be subject to the law of the land in China where the crime had taken place. This is done even between U.S. states. If someone from California commits a crime in Texas, then he is prosecuted in Texas (and God help him), and if convicted, he is imprisoned in Texas. Terrorism should be prosecuted as a crime where it took place. Part of the 6th amendment says: '*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .*' This is really not a difficult concept.

Yet some politicians claim that you cannot prosecute terrorism this way, because it would make that location, such as New York City, a potential terrorist target during the trial. So we are going to cower in fear now, and let terrorists dictate where and how a trial occurs? That makes us seem pretty weak. Moreover, do we really think that military tribunals and locking people up forever without trials at Guantanamo Bay, and torturing them, will not invite future terrorism if a public trial in New York did? These excuses are ridiculous. The government just does not want to have to prove its case to an impartial jury of average citizens in a trial. They do not want to reveal the evidence that they have, or the methods they used to obtain it. This is probably because much of the evidence, if there is any, was obtained illegally. Now I am sure that those defending these policies would tell you that having a public trial would reveal too much classified information and blow their cover, thus inhibiting their ability to catch other terrorists, and prevent future attacks. But these trials would often take place years after capture, and I am not saying that they would have to reveal the identities of undercover agents or the techniques that they used to

capture the accused person. What they should have to reveal publicly is the accusation, the evidence supporting the accusation, and how that evidence was obtained. Far too much information is classified. Anything that is embarrassing or uncomfortable can simply be marked 'top secret' and swept under the rug, never to see the light of day. They should have to account for what they are doing, just as a county prosecutor does.

Many people out there are very apathetic about what is taking place in our country right now. They just assume that they have nothing to worry about as long as they are not doing anything wrong. But those in power may think it is wrong even if you do not. Isn't it obvious that protests and acts of civil disobedience could one day be classified as terrorism? This new legal system that they have created could very easily be used against political dissidents. One day I might be labeled a 'domestic terrorist' who is endangering national security simply by writing this essay. It is very unlikely that any leader would announce openly that you are losing your Constitutional rights. That would cause too much opposition. So instead it happens as more of a gradual erosion of your rights, and a reinterpretation of the Constitution rather than an outright dismissal of it.

History provides an example. The constitution of the Weimar Republic had many of the same things that ours has, like habeas corpus, freedom of speech, freedom of assembly, etc. In fact, their constitution was modeled after our own. There was a fire in the German Reichstag building (which was equivalent to our Congress) and the Nazis blamed it on the Communists. It is still unknown whether the fire was actually started by the Nazis themselves, or whether they simply exploited the situation for their own advantage. Considering who we are talking about, it would not be at all surprising if the Nazis orchestrated the whole thing as part of a premeditated plot. At any rate, Hitler used it to declare a state of emergency and issued the 'Reichstag Fire Decree' which 'indefinitely suspended' civil liberties and parts of the Weimar Constitution. Few questioned him at the time. There must have been a lot of confusion and fear, and it probably seemed necessary under the circumstances. People tend to rally around their leaders during a crisis, and a state of emergency is not the time to question those who are only doing what they must to protect you - or so they thought. The decree enabled the Nazis to hunt down and oppress the Communists, arresting and killing many of them when they had committed no actual crime. This freedom to crush his main political opposition in the name of protecting the country was, in my opinion, one of the key reasons that Hitler was able to obtain full and complete political control. It created an environment in which no one dared to oppose the Nazis, at least not openly. But throughout it all, Hitler never did tear up the Weimar Constitution and publicly declare that he would no longer follow it. He was far too cunning to make it that obvious. Instead, he used a distorted interpretation of a small part of it for justification, and then ignored, suspended, and reinterpreted anything that he did not like, all the while claiming that it was necessary to protect the country from terrorism. You could not afford to have things like habeas corpus and civil liberties with all those rotten Communists and Jews out there endangering national security. Is any of this sounding a little too familiar to anyone else?

In using this example I do not mean to imply that what is taking place in the U.S. is exactly equivalent to the Nazi takeover of Germany. There is not justification to say that. But what happened in Germany is a model for what we must watch out for. My sincere hope is that no one in the United States ever crosses that Rubicon, but some have certainly been dipping a toe in to test the water. We need to make sure that it does not look overly inviting to them. It is not really

about whether you think such a thing is likely or unlikely, it is about guaranteeing that it cannot happen. It should not even be possible. As American citizens, we have got to quash this now, while we still can. These politicians and bureaucrats need to be disabused of the notion that it is up to them to decide when and if they will follow the Constitution. I will not vote for, or support anyone who is not actively pursuing the repeal of the 'Patriot Act' and the NDAA bill. It is non-negotiable. A politician's position on the other issues makes little difference if they are a traitor to the Constitution. If other voters were that serious about it, things would change.

What happened after the Boston Marathon bombing is a perfect example of how we are losing our Constitutional rights as a society. They did not officially declare martial law in the city of Boston, but that is basically what it was for a few hours.¹¹ The military was not involved, but it sure looked like it, with tanks in the streets, and hundreds of cops in full body armor going door to door screaming obscenities at people if they did not have their hands raised up high enough. Then they ordered them out of their homes at gunpoint so that they could break the fourth amendment and search their houses without a warrant or any legitimate probable cause. Yet everybody just goes along with it because they were supposed to be searching for a terrorist.

If we create an oppressive police state to protect us from terrorism, who will then protect us from the oppressive police state? Such governments require at least 3 major elements in order to flourish: secrecy, spying, and intimidation. They need secrecy because what they are doing is often unjust, and if the entire population knew everything that was going on there would be an uprising and likely overthrow of those in power. They need spying because the citizens must feel as though the government is watching everything that they do, so they dare not do anything subversive or risky. In short, they want to know everything that the citizens are doing, and for the citizens to believe the propaganda, and know almost nothing about what they are really doing. The key to it all, though, is that they need intimidation. They have to be able to threaten and hurt anyone who poses a potential threat of opposition. Historically, torture has been used far more for intimidation than for gaining information. It is itself a form of terrorism. It causes the general population to have great fear of the government, which in turn makes them easier to control. Because of the secrecy, they can pick out any potential opposition leaders, one by one, and once they get them separated from everyone else, they can either kill them or inflict enough pain to get them to cooperate. The worst case scenario is that they could potentially detain someone on false, trumped up charges, torture them into a confession of guilt, and then use that confession to hold that person indefinitely, or kill them. Torture is an extreme abuse of state power, and is symptomatic of an authoritarian, aggressive, and unjust government.

¹¹ People fret a lot over martial law, but even if martial law was declared, it should still be the case that they would follow the Constitution; it is, after all, not just an ordinary law, it is the highest law in the land, and no natural disaster, no terrorist attack, no outbreak of disease, nor any other state of emergency takes precedence over it. Some reasonable accommodations and restrictions might need to be made while in the midst of a disaster, but the principles of the Constitution should always be respected, even during a time of crisis. Of course, the real worry is that declaring martial law will be used to cover up what is really a coup de tat, or similar such action. But if we remember that the Constitution cannot ever be lawfully suspended, we would recognize any such attempts for what they are - an illegal attempt to seize power and control - and react accordingly.

The good news is that the antidote is already in place, we just have to use it. The way to prevent a 'Big Brother' government is simply to follow the Constitution. In Orwell's novel, one of the main reasons that the government could be so oppressive is because they could arbitrarily arrest and detain people for things that were not real crimes. That government did not have to provide any justification for why they were holding someone, and that allowed them to arrest and detain people for political dissidence. It would have been much more difficult to do that if they had to honor habeas corpus, and those who were arrested had to be given a speedy and fair trial of their peers, and provided with a lawyer. It would have been difficult for them to be such a rigid police state if they were not allowed to spy on everything that their citizens were doing. And it would have been far more difficult to be oppressive if they could not intimidate and coerce through torture.

If we allow our government to torture, then we have lost the Republic that the founders created. We go back to the Middle Ages, to the Inquisitions, to the Salem Witch Trials, and the days when kings could lock someone up indefinitely without even having to prove that the person had done anything wrong. Instead of being in control of our government, it will control us. We cannot allow the President to have someone assassinated or imprisoned without a fair trial. The Constitution does not give him authority to do that. Blatant disregard of the Bill of Rights is a high crime against the highest law of the land, and worthy of impeachment. People like John Yoo, Dick Cheney, and Lindsay Graham (along with many others) are a bigger threat to the United States than any terrorist ever was. Terrorists may threaten the nation physically, by destroying property and killing people, but these guys are trying to subvert the Bill of Rights, which is an attack upon the soul of America. We must not violate the core principles that our nation stands for, no matter what the stakes are, or we lose much of what has made it a great country to begin with. We have already taken a step backward as a nation by allowing these practices to take root and progress as much as they have. We the people are the ultimate check and balance. Let's not wait for a crisis to address this, or it may be too late. We need to correct this problem now, while it still can be corrected.