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CONTENTS

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John W. Reed, *Editor*

THE FUTURE OF THE SUPREME COURT†

Jeffrey Toobin*

The Supreme Court has been a wonderful subject for me. Everyone knows in a general way how important the Court is, but few people, even in the legal profession, know much about the justices. I saw that as an opportunity and wrote about it in my book. Interestingly, the justices themselves recognize that they are both known and unknown, and they sometimes even have a little fun with it. I'll give you an example.

For reasons that remain obscure–they don't look anything alike–David Souter and Stephen Breyer are frequently mistaken for each other. Not too long ago, Justice Souter was driving from Washington to his home in New Hampshire, and he stopped to get something to eat in a little restaurant in Massachusetts. A couple approached him, and the man said, "I know you–you're on the Supreme Court, right?" Souter acknowledged that he was, and the man continued, "You're Stephen Breyer, right?" Souter didn't want to embarrass the fellow in front of his wife, so he responded affirmatively, and they chatted for a little while. But then the man asked a question that Souter wasn't expecting. The man asked, "What's the best thing about being on the Supreme Court?" Souter thought for moment and then said, "I have to say it's the privilege of serving with David Souter."

I wanted to write about the Court for a second reason, in addition to trying to uncover the perhaps not so secret personal lives of its members: I think the Court is at an important turning point in its history. That is my focus today.

HISTORICAL PERSPECTIVE

To understand why the Court has reached this turning point, you need to go back to the mid-1960s. That period was the last time the Supreme Court was a unified ideological force. At that time, the late era of the Warren Court, there were seven liberals on the Court. It is hard to imagine now, but there were seven liberals, and the decisions and opinions reflected that. You had *New York Times v. Sullivan* in the area of libel, you had *Miranda* in criminal law, you had *Griswold*, which established the right to privacy–and you had case after case in which the Court tried to drag the South into the twentieth century, with respect to civil rights.

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† Address delivered at the Annual Convention of the International Society of Barristers, Four Seasons Resort Maui, Wailea, Hawaii, March 11, 2008.

* Staff writer, THE NEW YORKER; senior legal analyst, CNN; author, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007).

Then something extraordinary happened, a quirk in the history of the Court. Four justices left early in President Nixon's term. Chief Justice Warren, Hugo Black, John Harlan, and Abe Fortas all left in quick succession, and President Nixon got to make four appointments to the Court. As you recall, I'm sure, Nixon was the President for only five and a half years, and yet he got four appointments to the Court. At the time, a lot of people thought the Court was going to move dramatically to the right.

That didn't happen, and one of the reasons was that the Republican Party of Richard Nixon was very different from the Republican Party of George W. Bush. And the evolution in the Republican Party, from Richard Nixon to Ronald Reagan and then to George W. Bush has been a dramatic change, ideologically. If you look carefully at Nixon's appointees to the Court, you will see that they were hardly liberal, but they reflected a Republican Party that was much more moderate than it is today.

Nixon's four appointees to the court were Chief Justice Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. That group itself was a mix, and my view is that with the Nixon appointees, the Court became ideologically balanced between liberals and conservatives. This term was somewhat overused by journalists, but there was a "swing vote" on the Court, and that was Lewis Powell. From 1972 until he left in 1987, Powell had enormous power in the Court.

In many respects, the decisions of the Court in the 1970s were almost as liberal as the decisions of the Warren Court. You had the Nixon tapes case, the approval of school busing for desegration, and–probably the Court's most controversial decision in the last one hundred years–*Roe v. Wade* in 1973. *Roe* was a seven to two opinion with three of the four Nixon appointees in the majority and written by Harry Blackmun. The only two dissenters were William Rehnquist and Byron White, who was a Kennedy appointee. So I think it is clear that the "conservative movement" had yet to take hold on the Supreme Court.

That changed with the election of Ronald Reagan. Among other things, Ronald Reagan brought to Washington a core of committed conservatives, and one group of the conservatives were the lawyers. They decided that they weren't going to settle for criticizing individual decisions here and there for going too far; they decided that they were going to engage in a comprehensive ideological critique of liberal jurisprudence. They had a whole agenda, just as liberals had an agenda.

What was the conservative agenda that Attorney General Meese and others fostered? Some key elements were "expand executive power," "end racial preferences intended to assist African Americans," "speed up executions," "welcome religion into the public sphere," and, above all, "reverse

Roe v. Wade, and allow states to ban abortion again." This agenda was fostered, also, by a new organization founded shortly after Ronald Reagan was elected, an organization called the Federalist Society. This was (and is) an organization of conservative law students and lawyers, established to develop intellectual support for conservative change, particularly in the courts, and it has been a real catalyst. A lot of liberals, even today, talk about the Federalist Society as if it's something out of *The Da Vinci Code*, but there's nothing secret and mysterious about the organization. It's an open group that has meetings and public debates. Although it took a while for liberals to come up with their own organization, they ultimately did. It's called the American Constitution Society, and it's thriving.

In the group of smart, dedicated conservative lawyers who came to Washington with the Reagan Administration, two of the best and brightest were John Roberts and Samuel Alito. They took increasingly responsible positions throughout the Reagan years and became important parts of the conservative movement. For example, when Sam Alito was in the Solicitor General's Office, he wrote a memo to his boss, plotting strategy that could lead to the Court's eventual overruling of *Roe v. Wade*. Later that year, applying for a promotion in the Justice Department, he wrote, "I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that . . . the Constitution does not protect a right to an abortion." In my view, there is no room for dispute about Samuel Alito's position on *Roe v. Wade*.

Still, the Republican Party of Ronald Reagan was not the party of George W. Bush, and Ronald Reagan's appointments to the Court reflected a party that was more conservative than Nixon's but not as conservative as today's. During the campaign of 1980, Ronald Reagan made a promise that Jimmy Carter didn't make; Reagan said, "I am going to name a woman to the Supreme Court." When Potter Stewart unexpectedly resigned shortly after Reagan became President, Reagan told his deputies, "Bring me only women candidates." They found Sandra Day O'Connor–who, frankly, was not that easy to find. She wasn't even on the highest court in Arizona; she was on the intermediate appeals court. But she was nominated and confirmed, not because she was a movement conservative, which she clearly wasn't. Reagan's next appointee was much more conservative. In 1986, when Chief Justice Burger resigned, Reagan elevated William Rehnquist to Chief Justice and named Antonin Scalia to fill the Associate Justice position.

A year later, Lewis Powell's resignation carried the potential to be a major turning point in the history of the Court because his was the swing vote. Reagan, conservative that he was, named Robert Bork for that seat. And in response, the country–for the only time in my lifetime–engaged in a nation-

al conversation about what the Constitution meant. There was a Democratic Senate at the time, and Robert Bork was on record in many different areas, saying, for example, that there's no such thing as a right to privacy, and that the Civil Rights Act was a monstrous thing. The country, through its senators, decided Bork was just too conservative. Bork was defeated, and the more moderate Anthony Kennedy was appointed in his place.

Sometimes people talk about Anthony Kennedy being a surprise moderate, but he was not a surprise. His views were known in 1987. He was and is a conservative, but he is not as conservative as Robert Bork and Antonin Scalia, and he never was. One significant effect of Kennedy's appointment was that it shifted the center of the Court to Justice O'Connor. As a result, from 1988 to 2005, Justice O'Connor exercised enormous power at the Court and became an extremely consequential person in the history of the country.

The period of the 1990s gets a lot of attention in my book, and I'm going to tell you a couple of things you might not know about the Supreme Court in the 1990s. For one thing, the justices got along very well. This, I have to tell you, was somewhat disappointing to me as a journalist. One of the great inspirations I had in writing my book was *The Brethren* by Bob Woodward and Scott Armstrong, a terrific book. Published in 1979, it dealt with the period 1969 to 1975, and the theme of that book was how all the associate justices despised Warren Burger. I expected to have similar backbiting to write about, but it just didn't happen. Rehnquist learned from Burger's negative example and made sure that everyone got along well. He also was very fair to everyone.

In fact, the harmonious relations of the Rehnquist years are actually an exception in the history of the Court. Justice James McReynolds, who served on the Court from 1914 to 1941, was such a raging anti-Semite that he used to get up and leave the conference when Cardozo or Brandeis spoke. During the 1950s, William Douglas was a fiery liberal and a contentious personality, as you know. He used to spend his summers in rural Washington state, and he once drove his car off a cliff. The first thing everyone asked back at the Supreme Court was where Felix Frankfurter was at the time, because they thought Frankfurter would have pushed Douglas over the cliff. That kind of disharmony seems to have been the rule at the Court.

One reason why the Rehnquist Court got along so well is that Rehnquist engineered a tremendous reduction in their workload. In the 1980s the Court was deciding something like 150 cases a year. By the time Rehnquist left office, that number had declined to 70 or 80 cases a year, and the justices liked that. (That is a rule of universal application, I think; people like less work.) Interestingly, in the early 1980s, when the workload was heavy, there was actually a proposal to create kind of a super-appeals court,

between the existing courts of appeals and the Supreme Court. Warren Burger supported this, and the proposal went to the White House for consideration. It was assigned to a young lawyer on the White House Counsel staff named John Roberts, and John Roberts wrote this in 1983: "While some of the tales of woe emanating from the Court are enough to bring tears to the eyes, it is true that only Supreme Court Justices and school children are expected to and do take the entire summer off." (I haven't heard him say anything like that recently.)

THE CURRENT COURT

Today, the justices seem to be getting along well, just as they did under Chief Justice Rehnquist. And I think you can see that when you go to oral arguments at the Court, as I'm sure many of you have done. The unusual aspect of oral arguments these days is that eight justices are very engaged–they ask lots of questions, they ask hard questions, and they're very well prepared–and one justice doesn't talk at all. That's Clarence Thomas. Last term he reached a milestone: There were 104 oral arguments, and Clarence Thomas did not ask a single question in any of them. An enterprising reporter from the McClatchy newspapers got the transcripts of all the oral arguments, and he added up how many words each justice spoke. Stephen Breyer was first, with over 35,000 words, and Thomas was last with zero. But Thomas is not silent during argument. He sits between Breyer and Kennedy, and he chats with Breyer, and passes notes, and they laugh. Thomas is not isolated on the Court, and he is not hostile to the other justices; he just chooses not to address the attorneys during oral argument.

Reflecting on the Rehnquist Court, I think it is useful to divide his tenure into two time periods: 1986-2000 and 2000-2005. The dividing point in the history of the Rehnquist Court, and in many respects a dividing point in American history, is *Bush v. Gore*. *Bush v. Gore* was a major event. I don't intend to speak too much about it today, but there are three chapters about it in *The Nine*, and I admit to being somewhat obsessed with the case. My last book prior to *The Nine* was called *Too Close to Call*, about the recount in Florida, and there I wrote about *Bush v. Gore* from the perspective of the lawyers. I had tried to interview Al Gore about the case, working every connection I could, and Gore refused to talk to me. By coincidence, when I was writing *The Nine*, I ran into Al Gore. He had read *Too Close to Call*, and we chatted about that, and I told him that I was writing a book about the Supreme Court, so I was writing about *Bush v. Gore* again. I said, "You know, Mr. Vice President, I think I'm the biggest *Bush v. Gore* junkie in the world." And he said, "You may be second."

Bush v. Gore had an enormous impact on the Court. And it particularly had an impact on Justice O'Connor. During the first fourteen years under Chief Justice Rehnquist, the Court was pretty conservative–not entirely, but pretty conservative. But from 2000 to 2005, the Court was actually much more liberal, and the reason for that was that Justice O'Connor was appalled by the new administration. She had thought that George W. Bush would be like his father. But O'Connor was wrong about what had happened to her Republican Party, and she became increasingly alienated. Look at the decisions that came out from 2000 to 2005: The Court struck down the death penalty for the mentally retarded and for juvenile offenders; the Court said gay sodomy could not be criminally prosecuted, overruling a case decided in 1986; the Court saved affirmative action at the University of Michigan Law School; and in case after case, the Justices rejected the administration's positions regarding the detainees at Guantanamo Bay. In all of those cases, O'Connor was with the majority.

So what changed O'Connor? What soured her on the administration? It started with John Ashcroft, because John Ashcroft was not her kind of Republican. She was a Goldwater Republican, a libertarian Republican, and John Ashcroft was part of a movement that she did not join. She didn't like the way the War on Terror was being conducted, and she didn't like the war in Iraq. And above all, the crowning insult for Justice O'Connor was the Terri Schiavo case. That was an event that I think will only loom larger as we look back over the first decade of the twenty-first century, and it certainly had a big impact on Justice O'Connor, for a couple of reasons.

First, as I'm sure you know, the Schiavo case was really an attempt by Republicans in Congress to push the federal judiciary around. That offended Justice O'Connor because she cares a great deal about judicial independence. But there was also a personal dimension, because Justice O'Connor was dealing with her husband's decline into the grip of Alzheimer's disease. Starting in about 2003, John O'Connor had gone to the office with Justice O'Connor every day, just so she could keep an eye on him. But then sometime during 2004, when the Schiavo case was gaining attention, John O'Connor started to wander away, which is something, as you may know, that happens with Alzheimer's patients. So Justice O'Connor was coming to grips with the idea of how you make medical decisions for a loved one who can no longer make them for himself. Any idea that those decisions should be made by, say, Tom DeLay was unappealing to her, to say the least.

The next year, Justice O'Connor realized that she could not continue to serve on the Court; she couldn't serve as a justice anymore and be the kind of spouse she wanted to be. So she went to her old friend of fifty years, Chief Justice Rehnquist, and said, "I have to resign." (An interesting question to

pose is this: How many male justices in the history of the Court would have made that decision? I hear a murmur of "zero," and I think that's probably about right.) At the end of the Court's term in June of 2005, Justice O'Connor announced her intention to resign when a successor was confirmed.

President Bush immediately named John Roberts to replace Justice O'Connor. Hearings were scheduled to start right after Labor Day, and the summer was devoted to preparations. Over Labor Day weekend, William Rehnquist died, and President Bush named Roberts to replace Rehnquist. O'Connor had to wait. After Roberts was confirmed, President Reagan nominated Harriet Miers to replace O'Connor. That unfortunate situation took about a month to resolve itself. Then Samuel Alito was named, hearings were held, and he was confirmed. In short, many months elapsed between the announcement of Justice O'Connor's resignation and her actual departure from the Court. During that period John O'Connor slipped completely into the grip of Alzheimer's disease. He didn't recognize his wife anymore. So Justice O'Connor simultaneously lost her beloved seat on the Court and her beloved husband. It is a terribly sad story.

At the same time, the Court got two new justices in quick succession, and the Court is now a very different place. The change in the Court reflects the changes in the Republican Party. John Roberts and Samuel Alito are not like Richard Nixon's appointees or even Ronald Reagan's appointees. They are *very* conservative. I think liberals have a certain arrogance, in some respects, that caused them to misjudge John Roberts. Because Roberts presented himself well during his testimony, I think liberals thought, "He's so intelligent and he's so charismatic that he must be kind of moderate like us." Wrong. He is those things *and* extremely conservative.

I think all you really need to know about the current Court is something Stephen Breyer said at the end of the last term, on June 28, 2007, when the court announced its decisions in the Louisville and Seattle school desegregation cases. The Court very clearly signaled that it was on its way to reversing Justice O'Connor's University of Michigan Law School decision, and getting ready to outlaw affirmative action altogether. Stephen Breyer, who generally is a very chipper person and not a hysteric, said, "It is not often in law that so few have so quickly changed so much." And I think that's an accurate assessment.

The question now is what is going to happen to the Court in the near future. To that I say there is only one variable that matters–the outcome of this year's election. If Barack Obama or Hillary Clinton wins, we're going to have one kind of Supreme Court. If John McCain wins, we're going to have a different kind of Supreme Court. I'm sure that most of you know there are four very conservative justices at the moment: Roberts, Alito, Thomas, and

Scalia. There are four who are moderate to liberal: Souter, Stevens, Ginsburg, and Breyer. And Justice Kennedy is in the middle, usually but not always siding with the conservatives. But three of the four in the moderate-to-liberal group are getting ready to leave. John Paul Stevens is eighty-seven years old (though I hasten to add that his older brother William Stevens is still practicing law in Florida at the age of ninety), Justice Ginsburg is seventy-four, and Justice Souter is sixty-nine and doesn't particularly like the job. So these three are getting ready to leave, and I think that clearly outlines what is at stake in this election. With that, I welcome your questions.

QUESTIONS AND ANSWERS

Q: I don't really know what the terms "liberal" and "conservative" mean in relation to the Court, but when the Court got involved in the national election, do you regard that as conservative or liberal, or do you see that as movement toward an activism that is separate from the ideological bent?

A: I think your question raises a good point. I think one of the ways conservatives have stolen a march on liberals is that they've captured the nomenclature, so that liberals are always accused of being judicial activists and conservatives are supposedly engaged in judicial restraint. But I think any fair-minded accounting of what liberals and conservatives have done in the last twenty years shows that conservatives have often been activists. Conservatives are supposed to believe in letting states handle state matters and in a narrow reading of the equal protection clause, but in *Bush v. Gore*, you had the so-called conservatives stepping into a state election controversy and deciding that the equal protection clause would be interpreted broadly–not for blacks or women, but for one plaintiff named George W. Bush.

The Seattle and Louisville school cases provide another example. The elected school boards of both of those communities decided that their communities cared about diversity. They were going to make sure that siblings went to the same schools and that children went to neighborhood schools when possible, but they also wanted to make sure that their schools didn't become all black or all white. That was a value they cared about and a decision was reached in a democratic way. The Court's conservatives said, "We know better. We are going to step in and tell you that's an impermissible approach."

I have to say that I have become cynical about these "liberal" and "conservative" terms. At this point, I basically think that conservatives advance the interests of the Republican Party and liberals tend to advance the interests associated with the Democratic Party. And "activism" is kind of a smoke screen that doesn't really mean that much.

Q: When I read your book, I was fascinated by the stories you told about Justice Souter. I wonder if you could recount two of them—first, the *Casey* case, from Pennsylvania, where he organized a troika to move from one side of the decision to the other; and then his reaction to the *Bush v. Gore* opinion.

A: One of the questions I'm sometimes asked is who my favorite justice is. Honestly, I like them all, in many respects, but Justice Souter is special. It is an extraordinary thing that this man is on the Supreme Court; he is such a figure out of another era. He doesn't have a cell phone; he doesn't have an answering machine in his home; he doesn't use a computer. He doesn't even like electric light; he moves his chair around in his chambers to catch the light through the window over the course of the day. When he arrived at the Court, he had never heard of Diet Coke or of the singing group "The Supremes." Yet he was the author of the Supreme Court's opinion in the Grokster case about file sharing on the Internet, which was a very successful bipartisan opinion. This tells me that Justice Souter understands the twenty-first century; he just chooses not to live in it.

Not unexpectedly, Souter has a different approach to precedent than his colleagues. I think it's safe to say that Breyer and Ginsburg are somewhat in the tradition of William Brennan and Thurgood Marshall–they are kind of "traditional liberals" (particularly Ginsburg). Souter comes from the tradition of John Marshall Harlan II, Learned Hand, and Henry Friendly. The stability of the law is very important to him. The *Casey* case came up in only his second year on the Court, and he was horrified that the Court–in a very political way, he thought–would throw *Roe v. Wade* over the side. So he mobilized Justice Kennedy and Justice O'Connor to work in secret on their opinion, which wound up saving *Roe*. Similarly, he was deeply offended and hurt by *Bush v. Gore*. A lot of the criticism that many people made–that the Court seemed very partisan, very political–hurt him deeply, and he actually considered resigning over it.

Q: You touch in the book on Justice Thomas and his testimony in his confirmation hearings and question whether he was telling the truth. His own recent book discloses his tremendous anger. Would you comment on that?

A: It was sort of a fun experience to be on the book tour at the same time as Justice Thomas. His book is an extraordinary document. His anger at a lot of things seems, frankly, bizarre. He nurses tremendous anger toward Yale Law School, for example, because he was admitted under an affirmative action program, and he felt that that was wrong and unfair, and there was a stigma associated with it. The irony about that, I always felt, was that with Thomas, affirmative action worked exactly as it is supposed to work. He came from a background that usually does not send people to Yale Law

School, and perhaps he didn't have the LSAT scores of some of his classmates. But he did go to Yale Law School, did well there, was hired by the Missouri Attorney General, was given positions of increasing responsibility–jobs that he did well–and then was appointed to the Supreme Court. I think he's the model of how affirmative action should work. Yet, he is a great believer in abolishing all affirmative action. And I think his anger is just peculiar. Until recently, he kept a roll-call vote of all the senators in his confirmation hearings, the fifty-two for him and the forty-eight against him, just because he was so angry at the forty-eight. And his judicial philosophy is something else. A lot of people lump him and Justice Scalia together and say that Thomas is just following Scalia. That's wrong. Justice Thomas is well to the right of Scalia. Thomas wrote an opinion in a case called *Lopez* in 1994, which made it clear that he believes much of the New Deal is unconstitutional. And the justices know how extreme his philosophy is. I was at a synagogue not too long ago where Justice Scalia was asked a very good question: "What's the difference between your judicial philosophy and Justice Thomas's?" Justice Scalia talked for a while and then said, "Look, I'm an originalist, and I'm a textualist, but I'm not a nut." And I think that's a useful distinction between their judicial philosophies.

Q: How would the world of the Court be different today if *Roe* had never happened?

A: Abortion would be illegal in about eighteen states. I think that's how different it would be. One of the arguments against *Roe* is that it truncated a political process that was already in place; it preempted a consensus that the country was developing, and allowing abortion rights to develop through a political process would have been much more politically durable than this continuing fight we are having in the Supreme Court. I don't really buy that. I think *Roe* reflected (and still does reflect) where the Constitution was going.

A lot of people have a misunderstanding of what the overruling of *Roe* would do. A lot of people think that if *Roe v. Wade* is overturned, abortion is going to be illegal in the whole country overnight. As you know, that's not the case. In many states–virtually all of the traditional blue states–there would be no change at all. Throughout the "Deep South," abortion would be illegal within a week. And in a good number of states such as Missouri, and Georgia, and probably Florida, there would be huge political fights over it. Eighteen is a number I pulled out of the air, but I think that's about what would happen. And, frankly, I think that's what will happen if McCain is elected.

Q: The book said that if Harriet Miers had hung in there, she would have been confirmed. This may be a question you can't answer because Harriet doesn't have any judicial opinions, but how would the Court be different if we had Justice Miers instead of Justice Alito?

A: That's a great question. And I think the whole Miers story illustrates how much the Republican Party has changed since the 1970s and1980s. Miers was not rejected or withdrawn because Democrats were going to vote against her. Democrats were probably going to vote for her. She was rejected because the "movement" (whatever you call it–the religious right, the base of the Republican Party–however you want to describe it) viewed her as not one hundred percent reliable. One of the great mantras of the conservative movement for the past fifteen years has been "no more Souters"–no more Republican appointees to the Court who don't turn out as the movement wants. One of the reasons that Alberto Gonzales was not nominated was a saying that went around: "Alberto Gonzales is Spanish for David Souter."

One of the fun things about writing a book is that you get to put events into historical context that you didn't realize at the time they were happening. Harriet Miers was nominated to the Supreme Court right after Hurricane Katrina, and President Bush's support collapsed everywhere because of Katrina. That's when his approval ratings went down to the levels where they've been, essentially, ever since. Bush made the Miers appointment thinking that he would have his way with the Republican Senate the way he had always had his way with the Republican Senate, but suddenly the senators were thinking, "You know, we don't fear you any more. You don't have the political juice to force us to do stuff we don't want to any more." It was the "movement" Republicans who said, "no deal," so Miers had to withdraw.

Now, to answer your question directly, I don't think the Court would be very different at all, because I think she really is as conservative as Alito. I think she would have been the sure thing that the conservatives wanted. But because there was no paper trail, they weren't willing to take the risk. They wanted to go with someone like Alito who had a long record, where there was no doubt about how he would stand.

Q: What prediction would you make for the Exxon Valdez case?

A: I have to say, first, that I got such a kick out of the fact that Walter Dellinger, who was a great liberal Solicitor General and made his bones in the civil rights cases, is now representing Exxon in the Exxon Valdez case. Time does change things. I think a safe expectation with this Court is that it will rule against the trial bar at every opportunity. There is room for debate

about how they feel about civil rights, but they hate lawsuits. And they hate personal injury cases. You saw it in the securities case, earlier this term. I think they are going to take any opportunity to side with corporate defendants against individual plaintiffs, so I think they are going to rule for Exxon in that case.[1]

Q: How do you think they will come out on the D.C. gun case?

A: The D.C. gun case is really fascinating, because the Supreme Court has not interpreted the Second Amendment since 1939. Only Thomas has a record on this; he wrote a dissent from a denial of certiorari where he said he believed that the Second Amendment protects an individual's right to bear arms. My own sense is that they are going to strike the law down and they will find that it's an individual right, but they will write it in such a way that there is room for some kind of control of firearms. I do think the justices are going to want to have a system in place where there is no constitutional right to buy a surface-to-air missile. That sounds like a joke, but it is not easy to draw a line that says a person can buy a handgun but can't buy a surface-to-air missile. I think they are going to try to do that, but I also think they are going to strike down the D.C. law.

[1] Mr. Toobin's predictions in this case, *Exxon Shipping Co. v. Baker,* 554 U.S. ___ (June 25, 2008), and in the D.C. gun case, *District of Columbia v. Heller,* 554 U.S. ___ (June 26, 2008), *infra,* were correct. *Ed.*

SECURITY OR LIBERTY: MUST WE CHOOSE?†

Jamie Gorelick*

My subject this morning is the relatively light topic of the tension between protecting individual liberty and ensuring our national security in a time of war and conflict. When I agreed to give these remarks and Marti asked me for a title, I had been stewing for a long time over the critical issues that are being debated in Washington–the Patriot Act, electronic surveillance, interrogations, detentions, airport screening, profiling–and I realized that if I gave Marti this title, I would actually have to collect my thoughts; it would be kind of an action-forcing mechanism. I thought I would have them all coherent by the time I got here, but what I really have for you are some initial thoughts; I want to get the reactions of this very thoughtful group, because I know of your interest in the public policy debates of our time.

Personal Background

First, I want to say a couple of words about myself, because my own experience obviously colors my thoughts. I'm a Democrat. I grew up in civil rights and civil liberties communities. My law firm represents individuals and organizations all around the various issues involving national security. This limits in part what I can say today; but it's public record that we represent the detainees who are before the Supreme Court in the *Boumediene* case, which is challenging the tribunals that review their continued detention,[1] and we also represent one of the telecoms sued over the national security wiretap program. More personally, I was General Counsel at the Defense Department, which includes the National Security Agency; all of the collection of information the NSA does is under the legal authority of the General Counsel of the Defense Department. And at Justice, I had to sign warrants under the Foreign Intelligence Surveillance Act, and I

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[1] WilmerHale achieved a significant but costly victory when the U.S. Supreme Court ruled June 12 that Guantanamo Bay detainees have habeas rights.

Since 2004 a team of up to 30 lawyers from WilmerHale has represented six Algerian terrorist suspects whose case resulted in the Supreme Court decision, the *Boston Globe* reports. The tab for the effort: 35,448 hours of pro bono legal help worth an estimated $17 million.

Debra Cassens Weiss, *The Cost of WilmerHale's Gitmo Victory,* ABA Journal Law News Now, June 5, 2008, *at* http://abajournal.com/news/the_cost_of_wilmer_hales_gitmo_victory_17m_worth_of_pro_bono_hours. *Ed.*

authorized warrantless searches of homes, which many people call "black bag jobs." These are actions which tend to focus your attention. They focus your attention both on the need to do things like that, and also on the care with which that kind of executive authority really ought to be exercised.

In addition, my colleagues at Justice and I had to advise President Clinton on the exercise of *his* authority. As you may recall, he sent cruise missiles in to kill Osama bin Ladin and tried to shoot down the helicopter in which he was flying at one point. President Clinton believed in robust executive authority, and those were the views that we tried to support.

That was my background when I joined the 9-11 Commission, and we had a chance to look across the board and see the vast powers that we had given our government, both before 9-11 and after, to deal with national security. I proposed to the Commission that we recommend establishing a Civil Liberties Board in the executive branch, to look at whether the use of executive power was being properly constrained.

I share this background with you only because I want you to know that I have seen these issues up close, and I know they are not easy.

THREE OBSERVATIONS

I want to start with three observations. One is that these dilemmas, the choices between national security on the one hand and liberty on the other, are not new. The second is that our founders actually built the tension of balancing liberty and security into the Constitution, so that the two could live in harmony. The third is that all three branches of government need to work together and do their parts if we are going to have the right balance. Let me spend a minute on each of these points.

Historical Examples

First, the dilemmas posed by balancing national security and liberty are not new. Some of the forms may be new–for example, adversaries that are decentralized collections of terrorist groups inspired by a common ideology. Some of their methods of attack–flying planes into buildings–may be unfamiliar. The technologies that our government uses–gathering information, sharing data, surveillance–may be unprecedented in their ability to invade our privacy. But the fundamental dilemma is one that we have dealt with before. In fact, it goes back to the earliest stages of our republic, and I will give you a few examples.

In 1798, there were fears of France, stoked by the ascendant Federalist Party. And James Madison wrote to Thomas Jefferson, "Perhaps it is a universal truth that the loss of liberty at home is to be charged to the provisions

against danger, real or pretended, from abroad."[2] And indeed, two months later, the Federalist majority in Congress enacted the Sedition Act, which made it a crime to publish false, scandalous, or malicious writing against the government. They then used that power against opposition journalists, and revulsion against the Federalists propelled Thomas Jefferson's Republicans into power in 1800.

Next, we can look back to what President Lincoln did during the Civil War. Lincoln, perhaps our deepest legal thinker and perhaps the best executive we've ever had, suspended the writ of habeas corpus. He permitted the detention of thousands of civilians by military and civilian authorities. He raised armies, he blockaded the South. He did all of this by himself on his own order–and these were powers entrusted to Congress. To be sure, after the emergency, when Congress returned to Washington, he went to Congress and he went to the American public to make his case, and both the public and Congress endorsed what he had done. But he had taken extraordinary steps, and that is part of our history.

Our president during World War I was Woodrow Wilson, who viewed himself as a great champion of individual freedom, but he pushed for the enactment of the Sedition and Espionage Acts, under which hundreds of dissidents were either prosecuted or deported for little more than expressing their opposition to the U.S. war effort or their support for the Bolshevik Revolution. And these laws are still on the books today.

Being in Hawaii, we can remember that during World War II we interned our fellow citizens of Japanese ancestry. Here in Hawaii, there was military law. The Supreme Court of the United States endorsed the internment, and it waited until the end of the war to reject martial law.

I think it's important to remember these parts of our history. Also, the American experience isn't unique. Since World War II, European countries have faced terrorist movements, and they have enacted special laws and created special tribunals. Britain has struggled with the IRA, Spain has struggled with ETA, and Israel has struggled with Hamas and Hezbollah. So, this is not new or unusual.

Liberty and Security in the Constitution

My second observation is that achieving security while preserving liberty has been at the center of our national debate from the beginning. You need look no further than our Bill of Rights. The Fourth Amendment is probably the clearest illustration of the understanding that we need to bal-

[2] Letter from James Madison to Thomas Jefferson (May 13, 1798), *in* 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 141 (1865).

ance. It says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .." Even though the fundamental impetus for our revolution and our Constitution was rejection of the abuse of executive power, the framers still recognized the need to provide for searches upon reasonable cause. And reasonableness became the touchstone of a search's constitutional validity.

A second good example would be in the due process clause of the Fifth Amendment. The due process clause demands that no person be deprived of life, liberty, or property without due process of law. That has long been understood to embody a balancing test. We look at the weight of the private interests at stake. We look at the risk of an erroneous deprivation of rights with the processes that are available. We look at the burden of additional process. So, the dilemma is not new, and we've got balancing built into our constitutional DNA.

Participation by All Three Branches

My third observation is this: The balancing works only when each of the governmental branches does what it is supposed to do. Just and sustainable solutions to this national security/civil liberties balance require three things. One, we must recognize that both horns of this dilemma are compelling, and represent genuine and powerful concerns. Two, there has to be a degree of mutual trust in the discussion among the branches of government. And three, there has to be a willingness to get down to the nitty-gritty and away from unhelpful rhetoric. Let me say a word about each of these.

More than fifty years ago, Robert Jackson, who was then on the Supreme Court but who had been Attorney General of the United States and whose thinking about these issues probably has been more influential than that of any other lawyer or jurist in our history, observed, "The issue between authority and liberty is not between a right and a wrong–that never presents a dilemma. The dilemma is because the conflict is between two rights, each in its own way important."[3] And I think that is as apt today as it was when he said it fifty years ago.

Not every claim by the government about the magnitude or imminence of threats can be taken at face value; but when a genuine threat does exist, as it does today, it has to be weighed carefully against civil liberties. At the same time, we have to distinguish real threats to our civil liberties from not-so-real threats, so that we can protect what is important, just as we need to distinguish real threats to our security from what is not so important.

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[3] Justice Robert H. Jackson, Address delivered at Buffalo Law School (May 9, 1951).

The second thing we need to have is a degree of trust among the three branches of government. There are–and I'm sure you've noticed this–politicians who are eager to heighten the public fears in an effort to gain partisan advantage. On the other hand, they are reading the intelligence reports daily, they are acutely aware of the threats to our country, and they can't share the threats publicly. So they face a challenge. The President insists on characterizing the threat as great, but he keeps the basis for the assessment to himself. He says, "Trust us." Eventually, that's going to be met with distrust and with a weariness in the American public, so you have to find a way to build consensus for the assessment of the threat or be viewed as a fearmonger, even if the threat is legitimate. And therein lies the quandary.

It's my view that the lack of political consensus and the lack of real dialogue since 9-11 have marred our public debate on these issues and have led to bad results both at home and abroad. We on the 9-11 Commission began our report by talking about the need for unity, and noting how we had lost an opportunity for unity in the immediate aftermath of 9-11. And we've gotten ourselves into a pretty bad dynamic. The Administration, for ideological reasons, has preferred to assert its inherent authority to go it alone and has characterized the threat as one that only it can deal with, characterizing the other party as weak-kneed. That in turn has led those in the opposition to assert that the President's policies are unprecedented and a complete break with the past, and therefore radically dangerous. At the same time, for most of the last seven years, Congress has been in the hands of the same party as the President, so there has been very little meaningful oversight or dialogue from that branch. Then you get to the judiciary, what I call the last grown-ups. They have said that we can't have unchecked power here, so if Congress is not going to act and the Executive is doing things that are dangerous for our country, the courts will step in. And I think this has resulted, paradoxically, in an executive branch that is actually weaker than it was when this Administration began.

How do we get out of this situation? What is the answer to this? I think the answer lies in getting down to the nitty-gritty. And I'll give you some examples of what I mean by that. My experience on the 9-11 Commission ratified the experience that I had in government, and that I'm sure a lot of you have in the practice of law every day, which is that even the knottiest problems can be solved, or at least the differences narrowed, if you can get away from rhetoric and focus on the merits, and if you can recognize the key strengths of each party–in this case, the key strengths in each branch of government–in solving a problem.

So let me get down to the nitty-gritty. Let's talk first about the Patriot Act. Most Americans believe that the Patriot Act fundamentally changed the bal-

ance between security and civil liberties in this county. And why is that? Because in proposing the Patriot Act, the President and the Attorney General told us that profound changes were needed and that we needed a complete break with the past, which had been unsuccessful in dealing with threats against the country. The other side responded, "Oh my God, there's been a profound change in the balance between security and liberty, and we don't like that," never having focused on the significant powers that had indeed been given to the government in the anti-terrorism legislation of the 1990s. The fact is that both of the polar positions are wrong.

An interesting study by a law professor named Orin Kerr, who teaches at George Washington University, concludes that most of the Patriot Act consists of minor adjustments to a set of pre-existing laws.[4] That would be a shock to most people for whom the debate about the Patriot Act has become talismanic. Kerr says the differences among pre-Patriot Act law, the law under the Patriot Act, and proposals to change the Patriot Act are relatively small. Indeed, people like me urged the passage of the Patriot Act. Most of the provisions were ones that I and others in my administration had proposed, and the ones that were new could be put under sunset provisions and reviewed afer a couple of years, which is indeed what happened. Professor Kerr has noted that critics of the Patriot Act have come to acknowledge that most of the Act is consensus legislation that does not raise civil liberties concerns. He quoted the ACLU as saying, "[M]ost of the voluminous [act] is actually unobjectionable from the civil liberties point of view and . . . the law makes important changes that give law enforcement agents the tools they need to protect against terrorist attacks. A few provisions . . . must be revised."[5] And they were.

Let's look next at national security surveillance. When the *New York Times* revealed that the Administration had a secret program to collect and analyze electronic communications, including communications inside the United States, there was an uproar. There were charges of unregulated domestic spying and flouting of the Foreign Intelligence Surveillance Act (FISA). Suits were filed against the telecom companies, thought to have facilitated the program. The Administration had briefed barely anybody. It *had* briefed a few people on Capitol Hill, but it had told those people that they couldn't talk to anybody, including their staffs. (Congressmen are lost without their staffs!) So there was uproar on Capitol Hill.

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[4] Orin S. Kerr, *Internet Surveillance Law After The USA Patriot Act: The Big Brother That Isn't,* 97 NW. U.L. REV. 607 (2003).

[5] *Proposed Amendments to the Patriot Act*: *Hearings Before the Senate Select Comm. on Intelligence* (Feb. 19, 2005) (testimony of Prof. Orin S. Kerr), *citing Bipartisan Legislation Would Fix Worst Parts of Patriot Act While Maintaining Key Law Enforcement Powers*, *available at* http://www.aclu.org/SafeandFree.cfm?ID=17935&c=206.

Now let's fast forward two years. The program is proceeding under FISA. Congress and the Administration have agreed on some small changes in the legislation, which permit the program to go forward comfortably under FISA, and the only disagreement that remains is what's going to happen to the telecom companies that have been sued for their alleged participation.

Why did this happen? Well, again, at the outset, the Administration said, "We have authority to do this on our own. We don't need Congress." And, again, a docile–and, frankly, fearful–Congress permitted this to occur. Also, it was quite evident that if the Administration had gone to Congress, Congress would have given its approval (which is what happened after the fact).

When you look at these situations, you have to wonder if there is less here than meets the eye. I was reminded of a similar situation that I faced when I was Deputy Attorney General. FISA allows you to wiretap a spy, an alleged spy, if you get a warrant from a special FISA court. We did wiretap Aldrich Ames, the famous spy, but the statute didn't apply to physical searches (what I referred to earlier as black bag jobs). So we went into his home on the say-so of the Attorney General alone. After we apprehended Ames, his lawyer threatened to challenge the searches and the legal predicate for them. We *thought* we had the authority, but no court had ever said that we did; and, as I understand it, the government took a deal with Ames that it otherwise might not have accepted, because it was worried about that challenge. Attorney General Reno decided that she never wanted the Department to be in that situation again, so she sent us out to get physical searches brought under FISA. I got that task, and I went to Congress to say that we wanted to include the authority to conduct searches on the basis of FISA warrants. The ACLU went crazy, arguing that we should never be able to do a physical search on such a basis, and Congress should not give us a mechanism to do so. My response, in essence, was this: "Wouldn't you rather have these searches being done under a process, where we have to go to a court and show that we have cause under the statute, with a judicial officer reviewing it, than let us continue doing it on our own?" Ultimately, Congress agreed with us. We now have the imprimatur of Congress for conducting these searches. We have a set of judicial controls, and we have preserved an important tool for our national security.

FISA itself represents a similar example. In the mid-1970s, there were abuses of power, particularly with respect to unauthorized wiretaps, by the FBI and the CIA–by the intelligence community, writ large. On the left, the ACLU and others said there should be no basis for wiretapping other than the kind of wiretap that you can get in a criminal case. Those on the right said they didn't need any legislation; they could do what they pleased if they were protecting the country. In the end, neither polar position was taken. A

regime was set up that requires the executive branch to go to a special court and make certain showings to obtain a warrant. We have a statute that, by and large, has worked for many years.

Let me give you one other example. What do we do with these "enemy combatants"? It has been six years since we picked up thousands of people on the battlefields in Afghanistan and Iraq, and we still have no workable system for determining whether somebody is a bad actor. We have no process. Here again, the executive branch decided to go on its own. It established commissions that purportedly would make these decisions. A U.S. citizen named Hamdi, who had been picked up in Afghanistan and detained as an enemy combatant for fighting alongside the Taliban, filed a habeas corpus petition, contending that the process he was afforded to show that he was not an enemy combatant was constitutionally inadequate. He said he wanted a full- blown trial. The Executive said, "No, this is a war, and we get to say whom we pick up and how long we keep them." Ultimately, the Supreme Court balanced the two interests and rejected both polar positions. The Court found that Hamdi's liberty interest was indeed a weighty one. It said that, in our society, liberty is the norm and detention without trial is the very limited exception. But it also noted that we were in circumstances of war and that there had been accusations of treasonous behavior; and it concluded that Hamdi was not entitled to a full trial. It said, however, that Hamdi *was* entitled to a genuine opportunity to challenge the government's determination that he was an enemy combatant before a neutral decision-maker.[6] Ultimately, after several interventions by the Court, the Administration did go to Congress, and Congress essentially gave the Administration what it wanted–but now, because the courts, and particularly the Supreme Court, have been invited into this debate, the fate of the tribunals may rest in the hands of our judiciary.

In the middle of this, you had academics on the left and right. Neal Katyal, a noted Georgetown professor, represents some of the Guantanamo Bay detainees. Jack Goldsmith, at Harvard, was the head of the Office of Legal Counsel in the Bush Administration. These people come at these issues from very different perspectives, but they actually got together and came up with a proposal for how to have these tribunals.

I give you these examples because I think that, in fact, there *is* less here, in these debates, than meets the eye. They *are* critical debates, and there *are* difficult choices to be made, but one can understand the debates and make the choices if a few conditions are met. First, we must reject the political rhetoric surrounding the debates, which has made us vastly less safe, because we tend to castigate the other guy as either weak-kneed or fascistic. This is

[6] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

not a helpful debate; we need to understand that both interests–security and liberty–are important and should be honored. We also have to take the time to understand the merits. We have to make sure that decision-making in our executive branch has integrity. And we have to fight for the rule of law.

We don't have to choose between security and liberty; in my mind, that is a false choice, because security is the predicate for liberty, not an alternative to liberty. The Constitution is intended to provide a common defense of both. So I'm going to leave you with a statement that the Supreme Court made in the *Hamdi* case, which I think is helpful to us:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear . . .. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[7]

[7] *Id.* at 532 (plurality opinion).

THE EVOLVING STATE OF PUBLIC DISCOURSE ON THE LEGAL RESPONSE TO TERRORISM†

Patrick J. Fitzgerald*

This morning I'd like to talk for a while about my thoughts on the public discussion of national security issues and terrorism. This part really amounts to a little bit of a vent, for lack of a better word, and it stems from having been a participant in many debates about how we deal with terrorism and being frustrated about how those debates have gone, with respect to what the public has been told or not told, how the advocates on both sides have addressed the issues, and frankly, how they have failed to address substance on many occasions. I will limit my "vent," however, and save some substantial time to take questions, because I would rather address what's on your mind than prattle on about what's on my mind.

Reflections on the Debate over National Security

I should state a few caveats. First, what I say is not the official Department of Justice view. I don't know if there *is* a Department of Justice view on how we've gone about debating national security, but if there is, this is not represented to be it. Second, although I'd like to focus less on the substance of the issues and more on how we go about debating them, I don't want you to be under any illusion regarding substance; I *am* a prosecutor, so I see things from a prosecutor's point of view first. I actually hope that you can vehemently disagree with me on the substance of many of the issues but perhaps appreciate what the problems are and the need to address them differently. My final caveat is that I don't purport to be an expert in national security law. I think if you work as a prosecutor and prosecute terrorism cases, you learn how those cases work and how the terrorism laws are structured, but those are limited aspects of national security law. As a prosecutor, you just don't come into contact with many of the sophisticated and important programs involving national security. Keep in mind that I don't purport to know all the answers about national security.

With the caveats out of the way, let's take a step back and think about how we would expect a country such as the United States to respond to the attacks on September 11. You realize that there has to be an initial strong reaction,

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and you think you should be concerned that the initial reaction might be too strong. The two famous examples we always hear about are President Lincoln's suspension of the writ of habeas corpus during the Civil War and President Franklin Roosevelt's internment of Japanese Americans during World War II. (At one point, when Lincoln realized that he had to defy a Supreme Court order, he said, "[A]re all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated?"[1] I always thought that was a great way for Lincoln to put it; if he had been from my home city, Brooklyn, New York, he would have said, "I did what I had to do.") Given those two examples, you have to think that when we're facing a national crisis that threatens our security, there is a risk that we will go too far. On the other hand, you can't assume that we actually *will* go too far.

With the passage of time, you would think that we would become more and more rational. People who first reacted by thinking that the threat of terrorism was greater than it was and who lacked appreciation for civil liberties might take a step back and say we don't need to go as far as they originally urged, while people who initially were not fully convinced of the extent of the threat or who underestimated some of the obstacles we would face in prosecuting terrorism or improving national security might decide to let the government go a little bit further. You certainly would hope that over the years we would end up in a rational debate, and perhaps reach a rational consensus, on how we ought to balance national security and civil liberties. Yet I don't think many people would say today, six and a half years after the attacks, that we've developed that rational consensus or that the debate has been fair and civil at all times–and that's really what I want to discuss.

I want to begin with the Patriot Act because that provides a great example of how our national discussion went off track. I have to confess that I'm actually a fan of the Patriot Act, but whatever you think about the Act, it was far less important than both the people who supported it and those who opposed it made it out to be. It really was a simple law that got overhyped by both sides.

Let me explain why I support the Patriot Act. I can give you two examples of changes made by the Act that came out of cases we worked on in New York. We opened a case in 1996 about a relatively little-known financier named Osama bin Laden, and we were told what the rules were at the time (prior to the Patriot Act) with respect to what information we could access and what we could see. Remarkably, as federal prosecutors in New York City, we were allowed to talk to the New York City Police Department and the CIA (we were given badges and could walk around the CIA building at will and read just about anything we wanted), and we could go to for-

[1] President Abraham Lincoln, Message to Congress (July 4, 1861).

eign countries and talk to both the police and foreign spies. We could and did talk to al Qaeda; we found al Qaeda members overseas who were disaffected and were willing to talk to us and serve as witnesses. But we weren't allowed to talk to the FBI agents across the street who were doing an intelligence investigation of Osama bin Laden, because people were concerned that we might use FBI contacts to have other people gather intelligence through the misuse of civil liberties and then share it with us. So we could lawfully talk to al Qaeda members or Osama bin Laden himself, without the FBI agents across the street who were in charge of the investigation. That was pretty dysfunctional.

The second example relates to something that happened in grand jury proceedings. I can talk about it because the witness later was indicted for perjury so it all became public. We had an al Qaeda member before the grand jury, and he described where an associate of his in Kenya had hidden files in 1997. We wanted to find this person, but our witness was giving just a vague description of where this person could be located in Kenya–so we had him draw a map. Then we wondered what the heck we were going to do with the map, because it was grand jury material, and it wasn't clear that we could share it with anyone else in the government without violating the law. So, when we finished with the grand jury, I pulled the witness over to an FBI agent and said, "That was a very interesting story you told us about that al Qaeda member who hid files in Nairobi, Kenya, and I'm wondering if you wouldn't mind telling that story to this FBI agent, and if you wouldn't mind drawing that same map." The FBI agent talked to the witness; he drew the map, and that gave us something that was outside the grand jury that we could share with other investigators. And again, I thought that was a pretty dysfunctional way of doing things: The only way to share threat information you learned during grand jury proceedings was to ask an al Qaeda member to go outside and repeat his story.

After the 9-11 attacks, a number of people in Washington called those of us who had worked on terrorism-related cases and asked, "What's wrong with the system? What doesn't work?" A number of us reported the problems we had faced because of the inability to share information with the FBI–and the Patriot Act largely fixed that. The Act said that it's all right to talk to the FBI agent across the street who is conducting intelligence investigations. Because of the difficulties I had had, I thought that was great.

The process through which the Act was adopted perhaps was not the best. The debate in Congress was short; it was a pretty hurried debate in late October of 2001. Somebody came up with the idea of calling it the Patriot Act, which meant that many people in America immediately loved the Act, because of the name; but many other people in America hated the name

because they did not want their patriotism defined in that way. And, lo and behold, this law that I thought was a very good development became very controversial. (Part of the adverse reaction might have had to do with the personality of Attorney General John Ashcroft. He evoked strong reactions from people, and he was closely associated with the Act.)

For the next couple of years I spent a substantial amount of time going into communities to debate the Patriot Act. The ACLU or other people who were against the Act would criticize and condemn it, and I would be the person trying to defend it, trying to say that it wasn't so bad. And I think if you took a poll after all the debates I participated in, you would find that opinions ran ninety-nine to one against the Patriot Act. You would have found about the same ratio *before* the debate, too, so I didn't lose any ground, but I didn't gain any ground either. And there were no undecided voters or late-breaking trends with respect to the Patriot Act. People were in distinct camps from the time they walked into the room. Most people couldn't stand the Act but attended because they wanted to find out why they were right; a few people liked the Act but also wanted to hear why it was good; and I believe that some people supported the Act not because they really liked the Act but because they hated the people who hated it. It troubled me that we were dealing with national security policy but the debates came down to personalities. People made up their minds about the Act without knowing anything about its substance.

One event brought home to me how dysfunctional the public discussion of the Patriot Act was: a "debate" before the Chicago City Council. The first hint I got that I might have a little trouble that day occurred upon my arrival when one of the fifty aldermen on the City Council walked over and whispered under his breath, "You've got a lot of guts to show up." The next hint was the arrival of a huge bus from California, full of people who were strongly in favor of immigrants' rights. At the time, there hadn't been a single person arrested under any immigration provision of the Patriot Act, but people who supported immigrants' rights were angry about the Act. Then, when I walked in at the back of the venue, I saw a rather talented artistic depiction of a woman's breasts next to a picture of John Ashcroft, with a caption that said, " Who's the real boob?" That set the tone for the "debate."

When it was my turn to speak, I followed a rabbi who listed all sorts of horrible abominations that have occurred throughout history and concluded with, "And now we have the Patriot Act." Then he handed me the microphone. I decided to be very open and straightforward, so I said, "I think a lot of people are upset about things that certainly can be argued and debated, including immigration policy and Guantanamo Bay, but we cannot focus on those if we're here to consider the Patriot Act. If you repealed the Patriot Act

tomorrow, not a single prisoner would leave Guantanamo Bay and not a single immigration case would change. Those issues have to be addressed separately, in their own right." The response I got was loud booing and hissing. The audience attitude seemed to be this: "He's from the government, his lips are moving, so he cannot be believed." I have realized that both sides of the debate enjoyed the debate because it appealed to their ideological bases.

I was hoping that, as time passed, the tenor of the debates would change, but it didn't. I don't think any of the Patriot Act debates were learning experiences for me or for anyone who attended. This is a serious issue of our day, but no one seems to be dealing with it in the thoughtful way it deserves.

Where do I think we are today? One example is the issue of immunity for telecommunications providers who may have assisted the government. In discussions of that issue, you'll see the same level of rancor; we split into two entrenched camps. One camp says we're at war and the old rules have to go out the window. The people in this camp often imply that anyone who disagrees just doesn't get it–doesn't appreciate the threat to our country and puts our nation's security at risk. On the other side, you have people who think that those who would do anything differently in the face of a terrorism threat than they would do in an ordinary criminal case are shredding our Constitution and have no appreciation for civil liberties. It's almost as if we think all the people in the United States fall into two groups: those who have nothing but contempt for civil liberties and only want security, and those who would take civil liberties to the nth degree and sacrifice our country's safety. I've got to believe that most people are in neither camp, but the debates and reports don't show that.

I started to wonder about the reasons for the focus on the extremes, and I have come up with two principal reasons. One is that the issues are hard. The lawyers in this room probably have a better idea than most people of how hard it sometimes is to get a handle on how criminal law works, because it is very different from civil law. Even the people who practice criminal law find terrorism cases difficult at first because they aren't familiar with some of the statutes, both the substantive crimes that are charged and some of the procedures that are involved, like how we deal with classified information. A terrorism case is a whole different animal. On top of that, even people who are familiar with *those* laws don't understand what laws govern national security agencies based in Washington, D.C., or the rules they have about what their computers can do, what their wiretaps can do, what they can do with sharing information. They don't understand our immigration policy, which is pretty complicated. You also have to factor in international law, the laws of war, military law, and the Military Commissions Act. Figuring out how all of that comes together could take

an experienced lawyer a good semester of law school. A lay person would find it nearly impossible.

Because the issues are hard, many citizens look to proxies–someone else who can tell them what makes sense and what is crazy. The proxies are newspapers with biased editorial boards, similarly biased websites, and news shows on television. Most people have favorite newspapers, websites, and news shows, so some will go to sources that reinforce the view that we need to do everything on a war footing and cannot question anything done in the war effort, while others will go to different sources that say all the things we are doing in the name of national security really threaten the fundamental principles of our country. There is very little meeting of the minds in between in any of these sources, and it becomes convenient just to keep reading and reinforcing that one side is right and the other side is wrong rather than put effort into having a thoughtful discussion. That has been the most frustrating aspect of this for me. When the issues involve deciding how to keep ourselves safe and how to protect our civil liberties, we ought to expect better.

I will mention one bright note that might result in some improvement in the dialogue. I heard recently that a group called Human Rights Watch has commissioned two former prosecutors who are now in private practice to write a report on national security law, which is supposed to come out soon. The plan is to canvass both people who advocate stronger national security measures and those who are most concerned about civil liberties and try to get some basic facts, and then write a description of what the positions are and what the facts are. Regardless of what conclusions they reach, the process itself seems grounded in a positive effort to get past the rancorous name-calling that we usually see in the national security area. I will be curious to see not only what the report says but how much attention people pay to it, because that could make an important difference.

Sometimes I think the reason for the extremism comes down to what I consider the hardest question, which is what we would do with what I would call the unarrestable terrorist. Here I'd like to pose a hypothetical question and then show you how we always fail to answer it. I want to emphasize that the hypothetical is not designed to resemble any particular case; some of you might think I'm describing José Padilla, but I'm not trying to describe him.

The reality is that we get a lot of information from our allies and other foreign countries that work with us. (Some of these other countries are openly our friends, and some are secretly our friends, and some are sometimes our friends and sometimes not–and we spend a lot of time trying to figure that out.) Often, when we get information from another country, our source tells us that the information must be strictly held because dire

consequences will follow if the information becomes public–that is, if it's used in court. The dire consequences might be that other people will think the country providing the information is a friend of America, which could cause the country to be attacked. Or the information might reveal a human source, who might be killed. Or it might reveal a bug somewhere, which would then become useless.

My hypothetical is this: What if we are told by a reliable source in a foreign country that a U.S. citizen overseas is capable of launching a devastating terrorist attack and is returning to the United States on a specific flight? We know the person's identity and flight but we're told that we can't use the information in court. What can we do? In the traditional criminal approach, we can do nothing; you can't arrest someone based on something you can't take into court. And if the person is a citizen, we can't keep him out of the country. You might think we could keep the person under surveillance, but there are many problems with that. First, surveillance is incredibly hard and incredibly expensive. Just imagine watching someone twenty-four hours a day, seven days a week, without losing him. More significantly, what would surveillance accomplish? I don't think people realize that surveillance seldom prevents crimes. John Gotti was the boss of the Gambino crime family for more than a decade. The FBI watched him constantly, tapped his phones, and bugged his club. The Gambino crime family didn't shut down. Drugs were sold, people were murdered, and other crimes were committed. Think about 9-11. If we had had the participants under surveillance, we likely would have followed them to the airport and then would have called people in the arrival city to say, "We just watched them get on the plane. Pick them up on the other end," an event that would not have happened.

The best way for me to clarify why we cannot prevent crimes by surveillance is to direct your attention to our prisons. Anyone who has visited a state jail or federal prison knows how tight security is. When someone is convicted and sent to prison, he is literally stripped down and searched; there are thorough body searches so nothing can go into the jail. All of the openings in the jail are barred; there are cameras all over the place; and people watch the inmates. They are kept under surveillance in a physical setting from which it's almost impossible to escape. Anyone who visits is searched and wanded. And yet, in spite of all of these measures, jails are full of contraband. There are cell phones, there are drugs, and there are knives and other weapons–sometimes even guns. Think about that. If, in a building smaller than this hotel, surrounded with barbed wire, covered by cameras, staffed by armed guards, and inhabited by inmates who were strip-searched when they came in, you still find weapons and criminal

conduct, how by surveillance could you prevent crime in a country with a three-thousand-mile land border to the north, a shorter but significant land border to the south, and water borders that greatly exceed the land borders? The simple answer is, you can't.

In my hypothetical, then, when that person who intends to do harm gets off the plane, you won't be able to sleep at night if you're in charge of the case and surveillance is your only option. On the other hand, if the nation decided that the risk was too great and we should arrest a U.S. citizen without any charges and hold him so he couldn't blow anything up, that also ought to keep you awake at night. We have always followed a system that allows us to arrest someone only if we go to court, show the charges against him, and allow him to confront the witnesses, so we can determine whether the person who made the allegations is telling the truth or is someone with an axe to grind.

I think we don't want to admit that we face such a problem, a problem that has no solution that will let us sleep comfortably. We shouldn't be comfortable about letting people wander around our cities with the ability and the intent to do massive harm, and we shouldn't feel comfortable about throwing out our long-established legal system and incarcerating people without charges. The only answer we've gotten from people is to minimize the risk on both sides. Those who say that we can't change the system or we can't bend it in any way sometimes say that it's simple, we can always find *something* to charge them with or we can keep them under surveillance. But that really is not an answer. And those who say that we're on a war footing so we can throw out the old system and lock up people without giving them the regular criminal process are masking or overlooking the fact that we make mistakes and there's a great price to pay for changing our system. But the main thing we've done, instead of facing up to the reality that we're in a dilemma and need to find some consensus about how to address it, is spend our time attacking the bona fides of people who have put forth the position we dislike–either by saying they don't appreciate the threat and are not taking national security seriously or by saying that they don't appreciate the Constitution and don't respect civil liberties. It might make us feel good to denigrate those who question or disagree with us, but it doesn't solve the problem.

My hope going forward still is that at some point we will have a much more rational conversation. People in the bar, in particular, could step up and begin a more informed discussion, one that doesn't engage in rancor or assume that everyone fails to appreciate either the Constitution or the need for safety. Only in that way can we try to come to some consensus about how to deal with the most intractable problems.

QUESTIONS AND ANSWERS

Q: If people who are concerned about civil liberties had trust in the administration, if they could trust that the powers of the government would be used wisely and with some discretion and apolitically, do you think the debate would be different?

A: If you take a step back, I think you'll see that there is a lack of trust on both sides of the debate. Think for a minute about the hypothetical I posed. One possible rational response would be to devise a new proceeding; for example, we could require a prosecutor to come forward with some evidence in a secret proceeding and give the accused some representation–a lawyer. This would recognize that we have a valid reason to hold someone but also respect the promise to another country not to disclose the information or source in a public proceeding. Perhaps we could come up with another kind of hybrid proceeding. The problem we have with this idea is that people don't trust any governmental secrecy, and there's good reason for that. In a secret proceeding, there is likely to be less opposition and a less vigorous defense, which isn't good. You know how it is when you are going to court; you expect vigorous representation on the other side, so you test your own case. "Okay, how do we rebut this? How do we prove it's actually this guy? How do we prove it's not a mistake? How do we prove that conversation means what we think it means?" And sometimes, as you are going through this preparation for court, you realize you shouldn't go to court at all because you've convinced yourself that you don't have a case. We would lose at least some of that rigor in a secret proceeding, so we should be reluctant to do anything in secret; that's a balancing act that we have to do carefully. And there has to be trust.

People who are outside the government might want more openness in a more public proceeding, or they might want oversight by Congress. The difficulty with oversight is the risk of leaks. One of the issues that really paralyzes Washington is leaks. People have good reason for wanting to observe at least some part of the proceeding or for requiring congressional oversight, but the executive branch needs to have great confidence that the person who's briefed will not end up leaking. And the simple fact is that there are so many leaks in Washington every day, it's frightening. The 9-11 Commission noted how much harm is caused by leaking. The Rob Silverman Commission noted how much harm is created by leaking. So we have to address the problem of leaks.

So, on the one side of the debate people can say, "We need to be able to trust the executive branch more, so the executive should at least share more information with the legislative branch, so there can be proper oversight."

On the other side, the executive branch could say, "Well, if we could trust the legislative branch not to leak information, we would share more." This argument spirals on itself.

Q: When Jamie Gorelick talked the other day, she recounted incidents in our history where there was tension between liberty and security, starting with 1798 and working up through the Civil War, the Palmer Raids, and the internment. She didn't mention the McCarthy era, which I would add. It seems clear in retrospect that in every instance we overreact, and we always err on the side of security. In Salt Lake City, we had a nice debate about the Patriot Act. A respected local U.S. Attorney represented the government, and the ACLU took the other side, but neither position was excessive. They agreed that except for a couple of provisions, the Patriot Act wasn't overdone and it wasn't that significant a change. But clearly the consensus of everybody there was that we don't trust this government; we don't trust the people who are going to be administering the Act at the top. And there is concern that the next time we face something similar to 9-11, the reaction will be even worse, because of what happened with this administration.

A: It is clear that in our history we have overreacted a lot, but I hope we don't accept as a given that we will always overreact on the side of security; if you start from that premise and assume that every time we have a crisis we will overreact, you almost create a perverse incentive to go too far: "You're going to be blamed for overreacting just because there is crisis, so you might as well go farther than you should have." When there is a crisis, you want people in government to take a step back, take a deep breath, and remind themselves to try to do the right thing, to try to do only as much as they need to do, honestly, fairly, and in the right balance. They might get it wrong, one way or the other, but the expectation should be that they will try to do what is best.

One thing that is different now from prior crises in history is the media age in which we live. In earlier crises, we had the same tendencies to overreact, but I think debates were a little bit more informed. Now, because of the twenty-four hour news stations and the Internet and text messaging, people feel free or even compelled to develop opinions and talking points on the basis of a few little facts within an hour after an issue has become an issue, and then the same points are repeated over and over again. We have to be more careful not to rush to have positions that get repeated over and over again. People need to pause and think and learn what the facts are before committing to positions.

Q: Did it compromise your trust in the government when several of your colleagues were discharged under questionable circumstances?

A: I won't say much about this. One thing I've learned more and more every year I've been a prosecutor is that you never know what the facts really are unless you are working on the case yourself. And if you read newspaper reports about cases that you are working on, they sometimes are dead on but sometimes are completely wrong. So when I read about my colleagues being fired, I had to keep in mind that I couldn't be sure of the accuracy of the stories. I have lots of speculation in my mind about what happened, but I'd like to wait and see. My understanding is that the Inspector General opened an investigation, and I will get that report the moment it's printed, and I will read it very carefully. Until then, I reserve any judgment.

What's important to me is that I can't resolve what happened in Washington. All I can do is continue to run my office the best I can. The resolve from the people in the field was to view the ninety-three individual U.S. Attorney's offices as ships that are part of the Navy. There might be something going on back at headquarters that isn't pleasant, and people might have the perception that politics are involved in how the Navy operates, but the individual ships can't fix that. The ninety-three ships have to do their best jobs, and that is how we have focused our time in the U.S. Attorneys' offices. I can tell you we've never had a political decision in my office, as far as I know. And I can tell you that the people I work with come from both parties or are independent. I couldn't even guess the political affiliation of ninety-five percent of the people in my office. We just keep doing our jobs.

TO CHANGE OR NOT TO CHANGE†

John W. Reed*

You surely know what led me to choose this title about change. Most notably injected into the current race for presidential nomination by Barack Obama, the theme of change has been made a campaign centerpiece for virtually all the presidential hopefuls across the full breadth of the political spectrum. The word "change" is spoken again and again in every debate and in every stump speech, and it is printed on placards and painted on the banners that appear behind the candidates as they speak to voters. Every candidate promises to be an agent of change. However much discussion there may be of taxes, Iraq, the economy, immigration, national security, or health insurance, the overriding theme is change. So one has to be deaf and blind not to think about change in this election year. I don't know why the candidates are spending big dollars for campaign consultants. You and I could give the advice for free. All we need to do is tell them to promise change–change *to* what doesn't matter, just as long as we promise change.

Thinking about change, of course, is not new. Just for fun, I Googled the word "change" and, in seven-hundredths of a second, I was referred to 1,770,000,000 sites. Rather unhelpfully, only ten of the 1,770,000,000 sites were displayed on the first page; but, not surprisingly, the second of the ten was a link to a clever You Tube video collage of phrases from campaign speeches by Obama, Clinton, Edwards, Huckabee, McCain, Romney, Giuliani, and Thompson, each claiming to stand for change. The video then captures them in fast sequence saying only the word "change," "change," "change," . . . and finally, in lightning-fast succession, only the initial sound of the word: "ch, ch, ch, ch . . .." The video's caption: "They all seem to be singing from the same page."

Change from what to what is seldom clear. The word change doesn't indicate a direction or an intention. Change is a process, not a value. Change may be good, it may be bad. Even when it is good, it may create problems. I'm sure I've told some of you about my favorite fortune cookie saying: "A change for the better will be made against you." I don't know how many of you know a hymn, sometimes sung at Protestant funerals, entitled "Abide With Me." Some years ago I saw on the op/ed page of a newspaper a picture of the Supreme Court Justices–their formal portrait for the year–and the

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caption was a line from that old hymn: "Change and decay in all around I see." So change is not necessarily a good thing.

We could go on for hours chronicling the myriad ways in which the law and the practice of law have changed. And the work of trial lawyers has changed in our short lifetime. Each one of us knows that change will continue in our lives as trial lawyers, just as it will in the larger world. Some of these changes may be beyond our capacity to influence or control, but not all. To stimulate your thinking about some of these, I want you to suspend disbelief and imagine, now, that I am a candidate for president of the legal profession, or at least our part of the profession. Every candidate is sloganeering with some form of promise of change (just as in the national presidential campaign), and I am challenged to say what that means to me. What are some of the things I would change if elected, and, of equal importance, what things would I not change–indeed, would fight to strengthen?

As I offer my list, I hope you will engage in a similar fantastic exercise. What would you change if you were running for this make-believe office?

THINGS I WOULD CHANGE

First, I will press to make legal services more affordable for the public we are sworn to serve. For the profession's clientele generally, I support the incipient move toward reducing the importance of the concept of the billable hour and replacing it with so-called value billing, where the charge reflects the value created for the client. Designed originally to make lawyers' fees more rational and transparent, the billable hour has itself become an engine of cost, conferring a premium income on a lawyer who, heedless of the law of diminishing returns, goes the extra mile after extra mile after extra mile. The billable hour certainly provides no incentive for efficiency, and it is quite possibly a major cause of lawyer burnout and broken marriages.

And for our litigation clients, who are less often charged by the billable hour, I will press for a procedural regime that relies more on pleadings than on discovery, thus reducing the enormous pretrial costs that often turn courtroom wins into Pyrrhic victories. The adoption of the Federal Rules of Civil Procedure seventy years ago–indeed just one year before I went to law school–made it possible for litigants to have considerable knowledge about their adversaries' cases, making settlements more likely and, if no settlement is reached, making trial by ambush less likely. Unfortunately, discovery has overwhelmed the process and almost closed the arena to all disputants but big business and the personally rich. I would immediately appoint a broadly representative commission, well staffed and funded, to

propose a system of civil procedure that moves us from the extremes of what the Federal Rules call notice pleading to a modified version of the fact pleading that prevailed before the Federal Rules.

I submit that moving away from the billable hour and ending the gigantism of modern discovery will reduce the costs of legal services without diminishing quality, and make those services more broadly available to the public we are to serve. And so, as a candidate, I stand for that change.

Second, I will seek to reverse the decline in the status of judges by increasing their compensation, especially on the federal bench, and by improving the selection process, especially in the states. In the last half century or so, there has been an evolution in the role of the judiciary. We have asked the judicial branch not only to decide controversies but also to manage prisons, supervise school systems, monitor corporate conduct, define death, and the like; it is no wonder then that the public wants a hand in selecting judges who do those things. But the ways in which those selections are made damage the independence of the judiciary and diminish the public's confidence in the impartiality and fairness of judges.

In my home state of Michigan, for example, our supreme court justices are elected on a so-called nonpartisan ballot; but, weirdly, the nominally nonpartisan nominees are chosen by the political parties at their conventions. And obscene amounts of money are spent in the judicial campaigns, making it clear that various economic and social interests are seeking judges who tilt toward their desired positions. Wherever possible, then, I will press for a change toward some form of the so-called Missouri Plan for electing judges–gubernatorial appointment of judges from a list presented by a judicial selection commission composed of citizens chosen to be broadly representative of the community's interests, followed by periodic retention elections of the appointed judges thereafter. It is by no means a perfect system, but it's clearly superior to the pseudo-democratic process in general use.

Third in the litany of changes that I propose is a major rethinking of our ideas about the penal system. Just two weeks ago, the respected Pew Center on the States reported that more than one in every 100 American adults is in jail or prison, and that figure doesn't include the hundreds of thousands of people on probation or parole. These incarceration rates are the highest in the world. If they increased public safety significantly, they might be tolerated; but in fact the United States crime rates are also among the highest in the world.

Especially troubling are the racial disparities: Almost half of the 2.3 million adults behind bars are African Americans, who constitute only thirteen percent of our population. And here is a more shocking fact: One in nine black males between the ages of twenty and thirty-four is incarcerated.

Our penal policies, in my view, pose issues not only of morality but also of the wisdom of the allocation of the community's resources. A number of states–my Michigan among them–spend more on corrections than on higher education. You will notice that I used the common governmental term: corrections. Our prisons usually are run by a "department of corrections." But are we correcting anything? Why in fact do we incarcerate wrongdoers?

First, we are trying to prevent future harm in the community. In that view, we are imprisoning people not for what they have done but rather for what we think they might do if they remain at liberty. Our predictions of what a criminal will do the next time are notoriously inaccurate, but at least the desire to protect the community is understandable.

Second, we are satisfying the nearly universal emotional need for punishment–for retribution, to hurt the wrongdoer because he has caused harm to another. It is tit for tat.

Third, we maintain that imprisonment should have a beneficial, rehabilitative effect. Think of the words we use: corrections, reform school, reformatory. Even the word penitentiary connotes penitence. The inmate is penitential and can then be corrected, reformed, or rehabilitated. But this eighteenth and nineteenth century philosophy and hope has largely disappeared. And why should it not disappear? Here's a statement by the Permanent Secretary of Britain's Home Office during a study of the prison system:

> I regard as unfavorable to reformation the status of a prisoner throughout his whole career: the crushing of self-respect, the starving of all moral instinct he may possess, the absence of opportunity to do or receive a kindness, the continual association with none but criminals, . . . and the denial of all liberty. I believe the true mode of reforming a man or restoring him to society is in exactly the opposite direction to all these.[1]

As I argue for change, I do not propose change in the concept of prisons. However desirable that might be, it clearly is not feasible in our lifetimes. Rather I will commit my administration to changing the substantive law of crime, especially the laws that are a part of our failed war on drugs, and in tandem I will continue the attack on mandatory minimum sentences and on Draconian measures like the three-strikes laws–not three strikes and you're out but three strikes and you're in, for life, even if the third crime is a relatively minor, nonviolent crime.

You may think that change in the penal system is a task for sociologists and criminologists, but they're not getting it done, at least not by themselves.

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[1] *Quoted in* IAN DUNBAR & ANTHONY LANGDON, TOUGH JUSTICE: SENTENCING AND PENAL POLICIES IN THE 1990s, at 13 (1998).

It's the lawyers and judges who operate the legal machinery that puts these people in prison, and we must provide the missing leadership to end the scandal and shame of locking up such a high proportion of our people.

The fourth change I promise in my platform will reveal me as a crotchety person, but bear with me. I promise to use my office as a bully pulpit from which to complain about the dismal quality of the use of the English language by both lawyers and judges. I accept the fact that none of us, at this stage in our careers, can significantly improve our own style and elegance of expression, much less that of the profession at large. This is not yet the century of soaring prose. But I have in mind something much simpler and more fundamental–not style and elegance, but clarity and accuracy. Seeking clarity, I would support the move toward understandable English, without using words like "aforesaid" and "hereinafter" and so on–hardly a new idea, but worth reinforcing. More importantly, it calls for more attention to the definition of words so that they convey meaning more accurately and less ambiguously.

For example, meaning is usually expressed in words, either orally or in writing; both modes of expression are verbal. Yet many–perhaps a majority–use the adjective verbal to mean oral. This misuse is probably most common on the sports pages where they report that a particular high school student has made a "verbal" commitment to go to U.S.C. Of course it was verbal–he used words. But we are not told whether it was oral or written. The ambiguity is harmless on the sports page, but it could have dispositive significance in a legal setting.

Or think of the terms imply and infer. Imply denotes that the speaker's words are intended by him to carry a meaning beyond what is said explicitly. Imply is a function of the speaker. Infer means that the listener finds a meaning beyond the literal message. Infer is something the listener does. I confess that in modern dictionaries, imply is sometimes listed as one of the meanings of infer, though ordinarily listed, fortunately, as "loose usage." In that loose usage, people say, "He inferred that he would return the next day," when, of course, he did nothing of the kind–he implied it. I can infer that he would return, but he can't do the inferring. A crochet? Of course, but carefully used language does tend to reveal a careful thinker.

By the way, I saw a cute illustration of the use of inference. The question was asked, "How can a stranger tell if two people are married?" A little eight-year-old boy said, "You might have to guess, based on whether they seem to be yelling at the same kid."

The other day I heard another common misuse of words, as a friend, not feeling well, said to me, "I'm nauseous." Because I know her to be a pleasant person, I know she didn't mean what she said. "Nauseous" means sick-

ening or disgusting. What she meant was that she was "nauseated," meaning that she felt sick–literally, seasick, which is where the nautical part of nausea comes from. (I feel sure, however, that all of us have encountered instances in which the person saying "I am nauseous" was speaking more truly than he knew.)

There are, of course, scores upon scores of other misuses of words–disinterested for uninterested, reticent for reluctant, enormity for large size, notorious for famous, artful for artistic, and on and on. Lawyers, of all people, ought to use language with precision and insight.

This little rant of mine about language is only a speck on the page of my platform of change. Perhaps, like William Safire, I should write a column about usages that irk me. But I offer these few comments to show you that, as a candidate, I care about the careful use of language by lawyers–and also, like some more famous candidates for high office, to show my real self, which has this "picky" aspect.

THINGS NOT TO CHANGE

We could go on playing this game of pseudo-candidacy, listing changes I would include in a platform. These have been only the tip of the iceberg of the changes I would work for. Change *will* occur, and the only question is whether you and I will be its agents or its victims. But now let me make a pledge that may be politically incorrect, or at least politically unwise in this change-themed electoral season: I bravely assert that there are aspects of our profession that must *not* change, things that arguably are eternal verities, and that in those areas I will actively oppose change–areas the preservation of which you and I must work for as diligently and strongly as we might work for change in other areas, such as those I have mentioned.

First, we must continue to fight for the preservation of the jury, which is a charter purpose of the Barristers. There is so much to say about the importance of the jury in our system of justice, and the attacks on it, that I need to make it the subject of an entire campaign speech on another occasion. I note, however, that when we speak of the disappearing jury, it is not disappearing everywhere. In fact, Japan, believe it or not, is preparing to adopt a jury trial system in its criminal courts in 2009, the most significant change in its criminal justice system since the post-war American occupation. And here at home, there is gradually emerging a body of research that validates the jury's performance as a fact-finder–preferable indeed to one-person arbiters, namely judges. So all may not be lost. (Speaking of research, it has been discovered that research causes cancer in rats.)

Second, we must continue to fight to maintain our system of separation of powers, resisting incursions by the executive and legislative branches into the judicial branch. An independent judiciary is crucial to the rule of law and to the maintenance of our freedoms.

It is my impression that lawyers individually and the bar corporately are so busy with their everyday concerns–transactional work, depositions and mediations, mergers, client development, and the like–that they give only occasional and weak attention to large issues like separation of powers, threats to the jury, and threats to the judiciary's independence. We need to speak out. Martin Luther King, Jr., said, "Our lives begin to end the day we become silent about things that matter." We need to speak more of such muscular concepts as habeas corpus, justice, equity, the adversary system, due process–even Magna Carta, although one should be careful to know what Magna Carta is before speaking of it. You may recall the schoolboy's essay. He wrote: "Magna Carta was when, to protest high taxes, Lady Godiva rode naked on a horse through the streets of Coventry. She rode sidesaddle, which is the origin of the phrase 'Hooray for our side.' When she got off, Sir Walter Raleigh gave her his cloak, saying, 'Honi soit qui mal y pense,' which being translated means, 'Your need is greater than mine.' She responded, 'Mon dieu et mon droit,' which means, 'My God, you're right.'" So, be careful about using Magna Carta.

I suspect that one reason why we speak so little of these bulwarks of our freedoms is that they have become too familiar, and we have lost the capacity to be energized, indeed to be surprised and excited as we were when we first were introduced to them. We have "overheard" them–that is, *over* heard them; we have heard them so often that they have lost much of their ability to seize our imaginations and give us the energy to fight for the right. We need to reawaken ourselves to the grandeur and high promise of these mechanisms that secure liberties, and realize anew that laws and lawyers are the infrastructure of freedom.

Yet, when it comes to our obligations to shore up the adversary system, to preserve the jury, to insure the independence of the judiciary, we see the tasks as daunting, and beyond our abilities and meager energies. The forces of society and history often appear irresistible, and the temptation is to give in to what seems to be inevitable, however unappealing it may be. I concede that some quests are impossible and Quixotic, but not as many as we may think. Most problems are solved, most barriers are surmounted, most opportunities are realized not by monumental acts of flashing insight and daring, but by an accumulation of little acts. We achieve our greatest purposes by attending faithfully to the smallest things. There are times, of course, when this doesn't feel true. We practice law and we live our lives in the shadow

of gigantic social and economic and political systems and the endless grinding on of history that takes no notice of us. Isn't it then absurd and pathetically self-important and delusional to think that the little efforts of our little lives make any meaningful difference at all?

The poet Bonaro Overstreet suggested an answer to that question. Originally she titled her poem "To One Who Doubts the Worth of Doing Anything Because You Can't Do Everything," but she ended up calling it "The Stubborn Ounces."

> You say the little efforts that I make
> will do no good: they never will prevail
> to tip the hovering scale
> where justice hangs in balance.
> I don't think
> I ever thought they would.
> But I am prejudiced beyond debate
> in favor of my right to choose which side
> shall feel the stubborn ounces of my weight.[2]

The truth is that the small things we do can make massive differences in the end. Some years ago on a sidewalk in Johannesburg, South Africa, a man did a very small thing. Trevor Huddleston, a white Anglican priest, walked by a black woman and her little boy, and he tipped his hat. That's all. But that simple little courtesy was almost never offered to black South Africans by whites, and the little boy noticed. He and his family started going to Huddleston's church, where they learned more about the love of God for all people equally. The boy was Desmond Tutu, who followed Trevor Huddleston into the priesthood and joined his own witness to the witness of many others, resulting at last in the ending of apartheid and the democratic birth of a new nation. Desmond Tutu has said that one seed of that great transformation was the tiniest witness of a tipped hat. We must not, you and I, withhold the stubborn ounces of our weight.

Inherent in all of this is the practice of being true to our best selves. A requirement for being a Fellow of the Barristers is, in the words of the Society's Articles, that you "shall possess excellent character and integrity of the highest order." Integrity, like the word "integer," connotes the concept of wholeness. What we see in you is what we get–consistently high principle through and through, in big things and small. I spoke earlier of things that we ought to change. But the quality that your election as a Fellow cer-

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[2] BONARO OVERSTREET, HANDS LAID UPON THE WIND 15 (1955).

tifies–that you have excellent character and integrity of the highest order–that quality must not change. You do not change with the winds of expediency or fortune. You are true to your best self in high times and low, good times and bad. That's the very definition of integrity.

The consequence of being a traitor to your true self is suggested by this cautionary tale told by the Danish philosopher Søren Kierkegaarde: A peasant walks to town and comes across a satchel of money. Elated, he goes and buys himself an exquisitely beautiful pair of boots. He also buys a big bottle of wine. As he walks in his gorgeous new boots along the road through the forest toward home, he sings and he drinks, and he sings and he drinks, and he drinks some more, until he's roaring drunk and passes out, sprawled across the road. In the morning he is awakened by someone shouting. Hung over, he opens his eyes, sees a horse and a big wagon, and the driver of the wagon is yelling: "Get off the road so my wagon doesn't break your legs!" The peasant raises his head, sees the beautiful boots, then happily waves the driver on. "It's all right," he says, "those are not my legs."

That tale is all too apt a parable for our lives in these times. Living and working in a world that boils and bubbles with change, where the old verities are easily cast aside and where self-interest seems to be the primary value, we are in danger of clothing ourselves in ambitions and attributes that are not true to the person underneath–that are not true to the core of what we really are–until, like the peasant in the Kierkegaarde tale, we scarcely recognize ourselves; and the true, the good self underneath gets run over by life and mangled beyond recognition. As members of the Barristers family, you have well-worn boots of rationality, generosity, compassion, and courage. The world may well offer you exquisitely beautiful new boots of fame and fortune and self-interest. Whatever else you do, don't change your boots.