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FEATURE ARTICLE

CONSTITUTIONAL CATASTROPHE: THE NATIONAL DEFENSE AUTHORIZATION ACT VS. THE BILL OF RIGHTS[1]

by SHAHID BUTTAR[2]

I will touch on a number of different issues today, including the National Defense Authorization Act (NDAA), as I discuss the new and expanding power of our government to detain even U.S. citizens indefinitely without trial.[3] There is an even greater power being asserted by our government in

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connection with national security, to kill U.S. citizens without trial — a power that was defended right down the street about a week ago by the Attorney General of the United States.[4] I will address that in my remarks, as well.

I want to couch what I am about to offer in the terms of legal realism. There are two primary audiences with which I intend to share that frame of reference. The first is to law students, who I imagine are still being indoctrinated with the false pretense that the law is made in the courts — which quite frankly could not be further from the truth — and so I will try to put the role of courts in context. The other audience consists of the public generally, but particularly reporters and elected office holders who, with respect to the NDAA and the military detention authority, have failed to grasp what it at stake, how the law that was recently passed and signed into law by the president on the last day of last year impacts very fundamental rights, and a legal realist perspective of that law.

Then I will try to wrap all that up, rather than leaving you entirely dejected and disillusioned, with some action opportunities and ways for you to raise your voices here in Chicago.

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A Realist's View of Courts

The first piece I want to touch on just by way of introduction is the role of courts. Obviously, in legal education case law is primary. That's what you study as a lens through which to understand how the common law develops, how the principles interrelate, and it's a useful teaching method. But the teaching method obscures the reality on the ground, which is to say that courts are largely a sideshow with respect to how the law evolves.

You could think of this through a couple of different lenses. First, consider the branches of government: we are all taught that in our system of divided and separated powers there is an executive branch, a legislative branch and a judicial branch.

Complicate that now with the federalist system, which is to say we have at least three layers of government: federal, state, and local. There are executive branches at the federal layer, the state layer, and the local layer, as well as legislatures at each of those three layers. And while courts don't generally have local equivalents, we at least have state and federal courts. We have, then, at least eight branches of government. If you add the press as a theoretical additional branch, we actually have nine branches – *nine* – of which the federal courts are only one.

You read federal case law in law school. This is a useful teaching method, but if you look at the branches of government and the sets of institutions that collectively comprise and decide how the law will apply, at least on the ground, federal courts are just one-ninth of the equation.

Another very simple way to capture this notion is the adage that possession is nine-tenths of the law. Think about the role of courts where potential litigants lack the resources to litigate. Stasis is the norm. It doesn't matter what the doctrinal commitments for some other case or controversy might be when litigants don't have the resources to litigate.

The analysis also holds when courts lack the doctrinal hooks to reach a set of issues. For instance, if a particular case does not satisfy constitutional standing or ripeness requirements, there are any number of issues that elude the jurisdiction of courts.[5] So whether it is because potential litigants lack the resources to

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actually litigate, or because judges lack doctrinal opportunities to engage the issues, judges play a profoundly passive role in the system.

If any of you aspire to be judges, and follow the canard that to get there you have to hide your political perspectives for your entire careers, I would just plead with you to wake up, because: a) there aren't that many spots on the federal bench — you're talking about under 700; b) there is no particular guarantee that stealth nominees will be the fashion *du jour* at that stage in your careers; c) there are any number of issues on which you can raise your voice between now and then; and d) judges are very disempowered. To become a judge takes decades of preparation, and when you are on the bench you might sit your entire career and hear just a handful of cases with any particular public relevance.

The disempowerment of courts is a theme I want to leave with you. This is a bit of a digression, but I don't want to make the claim that the courts are irrelevant. Courts are absolutely relevant; they are just marginalized, and the last way in which I present this is the judicial vacancy crisis. In the U.S. Senate, Republicans have mounted essentially a dragnet filibuster impeding any effort to confirm particularly circuit court nominees.[6] There is a long-running crisis with respect to vacancies on several of the judicial circuits, which further undermines the capacity of the judiciary to provide meaningful justice, either to discrete litigants on the ground or with respect to very important doctrinal questions that we'll explore over the next few minutes.

Public Mobilization and the Responsibility of Law Students

Maybe the last piece with respect to the marginalization of courts that I think is particularly interesting for this crowd, given you are in Chicago, are the opportunities for public mobilization. Chicago earlier this year, just a few months ago, maybe even weeks, became the first city in the country, as far as I know, to become a torture-free zone.[7] And that reflected public mobilization.

The Chicago City Council passed, I believe unanimously, a resolution affirming that torture is unacceptable in the United States, but further finding that extended solitary confinement constitutes torture.[8] Many states across the country practice extended solitary confinement as a relatively routine instru-

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ment of retribution. But it is torturous, and your city has taken the lead in announcing that principle despite the prevailing view.

Your city, if pressed by its residents, can take similar positions with respect to any number of issues. And the most compelling opportunities to raise your voice are not in the courts nor even necessarily in legislatures, but rather in the public sphere. This is an overarching theme I want to leave with you.

The last thing I will just say before I dig into some of the subject matter here is that, for those of you who are law students, you occupy a particularly privileged position in our society. Students, except for professors, are the only people who essentially get paid to learn. Granted, you might be racking up a lot of debt while you are being paid to learn, but the fact of the matter is you have the privilege of having the opportunity to study and dedicating — at least for that moment — your lives to that end.

Few people have that opportunity. And by virtue of that, you are becoming increasingly acquainted with the levers through which these decisions are made. So you have the privilege not only of focus, but also of training. And as busy as you might feel (this might be the most depressing thing I tell you today), it gets only worse. So you actually have a fair amount of flexibility in your lives; in retrospect you will see this.

This combination of attributes — the opportunity for focus, the acquaintance with the levers and the training you are getting in those schools, and the flexibility over how to allocate your time — also includes a freedom from institutional constraints. Let's say some of you go on to clerk in courts; you will essentially sacrifice your First Amendment rights for the privilege of occupying that position. You don't have those constraints at the moment. So I would just, again, invite you to wield that privilege assertively.

The Perspective of Legal Realism

So let's talk about what legal realism is. We'll apply it to a few different discrete doctrinal settings, starting with the First Amendment. We'll compare it to the Attorney General's recent defense of the ability to assassinate U.S. citizens at will without judicial oversight, and then we'll apply it to the National Defense

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Authorization Act. Finally, we'll link all of that to action opportunities that you might consider pursuing here in the weeks and months ahead.

Legal realism is essentially the perspective that the law is not necessarily reflected in the contorted justifications that judges reach in order to decide the cases before them, nor in the theories constructed by law professors to lend coherence to an incoherent body of case law. Legal realism recognizes that the law includes whatever potential litigants, or government agencies, are able to get away with. Which is to say, legal realism acknowledges that that the law includes, for instance, acts by an executive branch that no court ever oversees, like torture, or systematic and pervasive dragnet spying by the National Security Agency.

There are all kinds of issues that elude the courts, whether because of the standing barrier, the ripeness barrier or the lack of resources available to litigants. Those facts — the possession that is the nine-tenths of the law — that is what the law *is*, whatever judges might articulate in the limited number of cases they actually decide.

When you read case law, what you are really looking at are reflections on the law from its periphery. They don't determine what the law is. They are advisory with respect to a particular set of facts that find themselves before someone who is in a position to do something about it. So I just want to place in context the instruments of your legal education.

Legal Realism Applied: Two Cases and the First Amendment

Another way to look at this is to examine the contrast between similar cases that reach very different doctrinal conclusions. Let's look at the First Amendment as a particular crucible.

In the 2010 Supreme Court term, there were a pair of First Amendment decisions, one of which has gotten a great deal of attention and the other of which has gotten some, but not nearly as much. So just a show of hands: who here has heard of *Holder v. Humanitarian Law Project*?[9] I see a handful of hands. Who here has heard of the *Citizens United* case?[10] More of you. Good.

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So, before we get into the doctrine on how these cases compare and contrast with one another, you see a very stark discrepancy as to how many of you have heard of one of the cases versus the other. But the reason you have heard about *Citizens United* is because of public mobilization. The fact that one of those cases is an object of mainstream political public awareness even outside this room reflects the public mobilization that responded to this decision, from all corners, left and right, across the country, in the halls of government, on the street, at Occupy sites, in Tea Party rallies. You see in this mobilization from all corners the opportunity to promote an idea and reflect a consciousness in the polity, in the electorate, in the populace, in the public, beyond the rarified institutions in which we discuss these things.

Let's talk about how these cases differ. They're both First Amendment cases, decided, ironically, on the first and last days of Supreme Court term 2010. The *Citizens United* decision essentially gave corporations the First Amendment right under the free speech doctrine to buy elections. The *Humanitarian Law Project* case rescinded from U.S. persons, including charities or individuals, the right to promote nonviolence abroad. I'm going dig into the facts of the latter case, present the holding, then give you another way to look at it beyond the narrow facts before the Court.

In Turkey, there has been a long-running insurgency conducted by a Kurdish minority concentrated in the southern part of the country, straddling the northern border of Iraq. The Kurdish minority in those two countries has an irredentist aspiration to its own state, and that has led to, at times, violent insurgency against the Turkish state, in particular.

The Kurdish Workers' Party, or PKK (Partiya Karkeran Kurdistan), was the target of a series of workshops promoted by a U.S.-based charity called the Humanitarian Law Project aiming to bring peace to this conflict. Its method was to enable nonviolent conflict-resolution workshops.

Who might you think you would want to participate in workshops aiming to bring peace to a conflict? Any guesses? Do you want bank customers in Alabama to participate in those workshops? Do you want members of Congress to participate in those workshops? You want militants to participate in the workshops. That's the point: if you're trying to bring peace to a region and there is an active conflict, the people you want in your workshops are the people who would otherwise be out there committing violence.

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But because the PKK had previously been categorized by the State Department and the Treasury Department as a foreign terrorist organization, the charity would risk being charged with providing "material support" to a terrorist organization if it went ahead with its workshops, thanks to an amendment to the material-support provision included in the PATRIOT Act.[11] The Humanitarian Law Project challenged the material-support law.

You might think of the PATRIOT Act as a surveillance authority. It is more than merely that. The amendment to the material-support statute, and the resulting *Humanitarian Law Project* case, help reveal the extent to which the PATRIOT Act also included the government's power to criminalize what used to be First Amendment-protected activity.

The interesting parts about the case, to me, were particularly that the defendant, the Humanitarian Law Project, committed no violence. The government did not even allege that it committed any violence. Nor did the charity intend to support violence, a point the government conceded as well. All of which is to say, you can face conviction for material support for terrorism even if there has been no act of violence and you never intended to support any. I would then ask: what exactly does terrorism actually mean? Is it just whatever the government wants it to mean?

Terrorism rooted entirely in association, with no violent action or intent to support such action, drives a hole the size of a train through the First Amendment. What it does, particularly if you contrast it with the decision in the *Citizens United* case, is create a very dramatic tension in the First Amendment doctrine: corporations have a free speech right to buy elections, but you don't have a right to fund nonviolence abroad. And if the government comes after you to say that you are talking or coordinating with the wrong people, you don't have the right to claim you never intended to support violence or that such violence never happened.

This is the state of the First Amendment, and when you look at it through a legal realist lens, particularly as revealed through these two cases during the Supreme Court's 2010 term, it demonstrates how little the rule of law actually means in America today. We sing anthems at baseball games about living in the land of the free, but the shoe does not fit.

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I'll explain a few other things that are even worse, quite frankly, than the *Humanitarian Law Project* case in a second.

The Fragility of Constitutional Rights: A Note on AETA

Before I get to the Attorney General and the authority to kill U.S. citizens without judicial process, let's talk briefly about the Animal Enterprise Terrorism Act (AETA), which became law in 2006.[12] AETA amended and strengthened the Animal Enterprise Protection Act of 1992, which had introduced the federal crime of "animal enterprise terrorism" — that is, causing physical disruption to the functioning of an animal enterprise, such as a commercial lab using animals as test subjects.[13]

AETA and its predecessor basically fit the same line that I was drawing out in the *Humanitarian Law Project* (*HLP*) case. If *HLP* stands for the proposition that terrorism can include what used to be First Amendment-protected activity, then the prohibitions against animal enterprise terrorism did the same thing, even well before 9/11.

Let me give you a fact pattern that reveals how AETA can be (and has been) abused. If you stand on the sidewalk in front of a house that, let's say, happens to belong to an executive of a company that experiments on monkeys for pharmaceutical research, or a company that is involved in factory farming, and you do so because you have an interest in animal rights, or food safety, or bioethics, or any number of other issues that drive these particular movements — if you do nothing more than wave a placard outside the home of an executive of an "animal enterprise" — then you have committed an act of terrorism.

You might often hear that in the years after 9/11 our government sacrificed civil liberties for the sake of national security. Don't buy it. That started well before 9/11.

The extent to which the First Amendment has been essentially shredded in service of corporate power is better shown in the AETA legislation than in the HLP litigation. Who do you think lobbied to get AETA passed? These were businesses that had been targeted by protesters.

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So when you think about the right to speech or the right to association, two among the several rights that the First Amendment protects, doctrinally consider a legal realist perspective, which is to say the First Amendment doesn't protect much, depending on who you are or the settings in which the facts emerge. So let's go beyond them.

The Killing of U.S. Citizens Without Trial

Let's talk particularly about the Fifth Amendment and the Sixth Amendment and the right to assassinate U.S. citizens without trial. The Fifth Amendment guarantees due process. The Sixth Amendment guarantees the right to confront witnesses and evidence.

Yet, just last week, the chief prosecutor of our country spoke down the street from here and defended the president's authority to disregard both of those amendments at will to essentially order the death of a U.S. citizen without any process.[14] Now there's a secret process that the Attorney General claimed would suffice to guard against any potential liberty interest that we might perceive as threatened here, but I want to invite you to think about a couple things here, and again, to do so from a legal realist perspective.

I will grant that the Attorney General articulated a series of limiting principles that govern whether killing a U.S. citizen is legal, such as the seniority of a target within a known terror network and the imminence of an attack that might ensue from the target's activities.[15] But what value are limiting principles if there is no forum in which to articulate or contest them? And if there is no transparency to the decision — if this is a process that happens entirely behind closed doors — how can we have any faith that the application of those limiting principles reflects any degree of legitimacy?

The short answer is: we can't. The canard that we can simply construct a vision of due process that doesn't involve judicial process, that we can cut out Article III of the Constitution because it is inconvenient to the executive branch, is not only foolish and draconian, it is authoritarian. You cannot claim to lead the free world when you don't even belong in it.

And that is the unfortunate situation in which we've found ourselves today. We have an executive branch that, under administrations from each of our

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major political parties, claims the right, quite frankly, to do whatever it likes, regardless of what the Constitution says.

The Constitution *constitutes* the republic. It is the founding document. But what if courts are not in a position to defend it? What if there is never an opportunity to hear evidence? What evidence is there to hear if the executive branch is just running around vaporizing people with CIA drones?

Think about a legal realist perspective here. Does the Fifth Amendment mean anything? Go abroad, say something our government doesn't like, and then we'll see how much the Fifth Amendment means. We've already seen how little the First Amendment means. The Fifth and the Sixth suffered a dramatic setback just last week when the Attorney General claimed the authority to disregard them. And that is under a president that claims to be a constitutional scholar!

But that's a whole other story, which I will leave aside for a minute.

Before I move into the NDAA, let's note another voice, just so that you are not hearing this only from me. Jonathan Turley, a law professor at George Washington University Law School in Washington, D.C., where I live, wrote an op-ed in *The Washington Post* in January essentially assessing precisely this question: Can we claim to live in the land of the free?[16]

Turley looked at many of these same pieces. He didn't look closely at the justifications for the kill doctrine, because I don't know that it had actually emerged yet. Holder had not defended it yet, but it was in the news.

There is another lens with respect to the state secrets doctrine that relates to the marginalization of courts that we discussed before, and he talks about that. I would invite you to read it. It would be interesting follow up to our conversation today.

The NDAA and the Detention of U.S. Citizens

So let's talk about the NDAA, the National Defense Authorization Act.[17] A show of hands on how many of you have heard about NDAA? So somewhere between *HLP* and *Citizens United*.

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I would dare say that the reason you've heard about the NDAA is because of public mobilization. You didn't hear it on the news. Nobody covered it when it happened. You didn't hear it from Washington. They signed it into law in the figurative dead of night on New Year's Eve. Why would you sign a bill into law on New Year's Eve? When you want no one to see what is happening.

So if you haven't heard about it in the news, and you haven't heard about it from our government agencies, you heard about it through public mobilization — the same mechanism through which you heard about the PATRIOT Act, the same mechanism through which you heard about *Citizens United*. And the missing ingredient, public mobilization, is why many of you hadn't heard about the *Humanitarian Law Project*.

The NDAA includes a great many things. It is a long bill, hundreds of pages long. One passes every year. It is the act that authorizes the Pentagon to spend money separately appropriated in an appropriations bill; so the NDAA itself, the acronym, is meaningless. It is a bit of a red herring. It is the detention provisions of the NDAA, in particular, on which I invite you to focus: sections 1021 and 1022.[18]

Each of those sections has different contours. One of them is a permissive detention authority. The other is a mandatory detention authority. The mandatory detention authority has a caveat that essentially makes quite clear that it cannot apply to U.S. citizens.[19]

The permissive authority has a comparable caveat, but one that is weaker. The caveat for the permissive detention authority says that nothing in this law shall be read to change the laws or authorities relating to the due process rights of U.S. citizens.[20] Nothing shall change the existing laws or authorities. So let's look at some existing laws or authorities.

Is anyone familiar with the Authorization for Use of Military Force (AUMF)?[21] It was passed by Congress in the immediate wake of 9/11. It was an authorization to use military force against those who the president determined "planned, authorized, committed or aided" the 9/11 attacks, or who harbored such persons or groups. The Bush administration subsequently claimed the AUMF authorized the domestic military detention of a U.S. citizen, also not far from here, at O'Hare International Airport. I'm talking about José Padilla, for people who are familiar with that case.[22]

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This is a U.S. citizen of Latino decent, born in the United States, accused of plotting to detonate a radioactive device over a U.S. city. He was held in a naval brig for three years, during which he lost his mind.

Remember the torture ordinance that your city just passed declaring that solitary confinement is torture? Padilla is an example of what happens when you torture someone in that way for three years.

He emerges, with his mind no longer intact, on the eve of his hearing before the U.S. Supreme Court. The Bush administration mooted the case by shifting him from a military brig into a civilian prison. He was ultimately convicted in a normal Article III trial of an offense bearing no relationship to the allegations for which he was originally detained.[23]

Again, let's look at this from a legal realist perspective. Did the Supreme Court ever say that the AUMF allowed domestic military detention? No. Why? Because the executive branch contrived an opportunity to keep it out of court. But the AUMF is an existing authority, one to which the NDAA locks itself as a baseline. In the wake of the NDAA, the Bush administration's controversial use of the AUMF now extends beyond that one individual, José Padilla, to the hundreds of millions of Americans living here within the domestic United States. You can think of the NDAA's military detention provisions as essentially taking principles that work at Guantanamo Bay, importing them, and now subjecting all of us to them, rather than only the 800 people that were subjected to it at that facility.

This may sound preposterous — and quite frankly, it is. Even more prosperous is the fact that half of you never heard about it. And you're law students and lawyers. If you haven't heard about it, do you think the people on the street have heard about it? Do you think our members of Congress, quite frankly, have any idea what they voted for?

Applying Legal Realism to the NDAA

Several members of Congress in the weeks since the NDAA became law have claimed that it does not authorize domestic military detention of U.S. citizens. I don't know a kinder way to say this: They're clueless.

You can't necessarily blame them: the reason they're clueless is because if you read the particular provisions of the act without context, it doesn't seem so disturbing. "Nothing in this law shall affect the existing law or authorities." Well, we all have a right to trial. "Nothing to see here, move along. Go home."

Except that when you look at the legal realist perspective of the authorities that have been asserted, the ways in which the AUMF has been itself twisted to enable the torture of U.S. citizens domestically, a whole different picture emerges.

If you look at the *Humanitarian Law Project* case as an opportunity to treat as terrorism First Amendment-protected activity, association, and speech, a whole different picture emerges. It's here in Chicago, as well as Minnesota, Michigan, and Los Angeles, that two dozen peace and justice activists face a long-running investigation by the FBI.[24] Under the NDAA, people suspected of associational crimes, like those activists, won't face grand jury investigations. We'll just lock them up and throw away the key. That is a power that was not around when those individuals were first investigated.

This is a very chilling time in our nation's history, and it's not just the dramatic expansiveness under administrations and congressional leadership from both major parties, it also the abject ignorance pervading our society of what is happening under our noses. But in public mobilization we have the opportunity to fix that ignorance, and then to fix the law.

And I will just say this: I'm going to drop the "F word": fascism. Never is it apparent when you are within it. It is always easy to get along if you go along in a fascist system. It is when the boot is on your neck that it becomes very clear, and by that time there is no recourse.

You can see this in the evolution of the AETA first criminalizing environmental and animal rights activism, then to the post-9/11 crackdown on Muslims, which has now extended to peace and justice activists. We came for the communists; we came for the trade unionists. And when they come for you there will be no one left — unless we figure out as a civil society, between now and then, how to join together to restore meaning to the fundamental principals that have long made our country great.

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I'll give just one last piece here about the ways in which the NDAA, if abused, could threaten democracy and the destabilization that could result. I want to particularly take a quick moment to riff on the state secrets doctrine; this will connect to two different points in the discussion — both with respect to the ways in which courts have marginalized themselves and also the need for public education on issues that might otherwise evade attention.

The Use and Abuse of the State Secrets Doctrine

Are people familiar with the state secrets doctrine?[25] Show of hands. It emerged in a Korean War-era case[26] involving the families of three civilian observers who were killed when a B-29 Superfortress bomber they were aboard crashed in Waycross, Georgia, in 1948. The executive branch claimed before the U.S. Supreme Court that the disclosure of the circumstances surrounding this incident would compromise national security, and the Court accepted the executive's claim of the need to protect particular pieces of evidence. This was an evidentiary doctrine deferring to the executive.

Remember, mind you, that the founders of our country claimed explicitly in the Federalist Papers that the need for the independence of the judiciary was paramount.[27] Without an independent judiciary, your rights are meaningless. All of the rights embodied in the Bill of Rights rest on the opportunity to get before a court.

Despite that, the Court allowed the executive to keep particular pieces of evidence hidden. It just so happens that many years later, when the facts about the Waycross crash came did come out, the declassified accident report revealed there was no national security secret that would have been disclosed by releasing the facts of the case.[28]

Half a century after the *Reynolds* decision, the Bush administration used the state secrets doctrine to keep out of court allegations of corporate complicity in torture — specifically, corporate assistance with the CIA's extraordinary rendition flights.[29] These flights involved sending people to countries that were known to use torture as an instrument of "enhanced interrogation." Having other countries conduct torture for us kept our hands theoretically clean.

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Corporate involvement in such flights wouldn't seem necessarily to rise to the level of a state secret. We're talking about a private corporation. Nor is the state secret doctrine, in this case, limited to an evidentiary doctrine. It was cited as a wholesale immunity doctrine to confer immunity on both the government and private actors for conduct that violates our nation's most fundamental commitments — I dare say our species' most fundamental commitments.[30]

That is one example of the state secrets application. Another would be the NSA's warrantless wiretapping scheme, which has been struck down as unconstitutional by every federal court that has ever reached the merits of a challenge to the NSA's program.[31] Yet it persists. Why? Because all of those cases have been overturned on appeal, particularly because of the state secrets doctrine, or constitutional standing, which has been an independent reason to keep those cases out of court. And let's just follow that latter strand really quickly.

The Self-Marginalization of the Judiciary

If you need to demonstrate a particular case or controversy to a court, you have to demonstrate that you have been subjected to the NSA's spying. But if the spying program is secret, how do you establish that you were subjected to it? The fact of the secrecy impedes judicial review.

So this use, this allowance, of the state secrets doctrine impedes any meaningful judicial review of private complicity in torture, the NSA's warrantless wiretapping scheme, or quite likely in the future, the military detention of any discrete individual or set of people. And they might not be Japanese Americans, they might not be Jewish Americans, they might not be Muslim Americans, they might not be environmentalists, they might not be peace and justice activists, but they could be any of them or anyone else. That could also be a state secret.

The complicity of the judiciary in writing itself out of the equation here is what I'm trying to drive home to you. And remember, we started this discussion with the marginalization of courts. I wanted to stop short of saying they're irrelevant, but they are marginalized, and this is an arena in which the courts have marginalized themselves.

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The most recent case, as far as I know, in which the state secrets doctrine has been asserted by the government is a case involving the FBI's infiltration of a whole series of mosques in Southern California in which an ex-convict was paid $100,000 to bribe Muslims to participate in plots that the FBI proposed so that there would be then something to prosecute — which incidentally is the pattern in almost every FBI prosecution of a Muslim American involving people recruited in a mosque over the last 10 years.[32]

Let's bring this back to a legal realist perspective of the state secrets doctrine, in an interesting way in which it has been flipped on its head in the advocacy arena recently. The state secrets doctrine you might sum up as the idea that you can talk about some sensitive issues anywhere except a courtroom. You can write articles about the NSA's warrantless wiretapping scheme, you can talk in the street or have a protest about corporate complicity in torture, but you can't talk about those issues in courts because if you talked about it in court, that would risk national security.

In the discussion around how to respond to the NDAA — I won't name any names here — one of the big public interest litigation shops with a four-letter acronym articulated a particular concern that is the inverse of the state secrets privilege: you can't talk about your fear of the NDAA in public because then that very construction of an otherwise ambiguous law might later show up in court.

Some don't want to admit to the public that the NDAA could be used to allow domestic military detention, because we don't want a court buying that argument in the future. This again speaks to where law is constructed. If you think of the law as constructed in a courtroom, that concern makes sense. But the law is not constructed in courtrooms.

We've looked at that through several lenses now. We've looked at that through the barriers presented by standing, by ripeness, by the state secrets privilege; we've looked at this through the tension demonstrated in the First Amendment jurisprudence, in the summary disregard for the Fifth and Sixth Amendments demonstrated by the Attorney General just last week down the street. We have seen in various ways how the law is not constructed in courts, but rather on the ground, and if the law is constructed on the ground and in public, for us as advocates, or for that matter even as students of the law, I dare say it is incumbent upon us in this time of constitutional crisis, quite frankly,

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to be as loud as we can possibly get, because most people on the street don't have access to the privilege you enjoy to study these issues.

Wielding Our Responsibility

It is a responsibility that we wield, as members of a profession with unique access to this information, to reveal to the public what these laws actually mean. When I say "public," I include elected representatives because, again, they don't get it. It's not surprising, quite frankly, that members of Congress don't get this. And these are opportunities for us, every day, to raise our voices.

I'm going to go back to the resolution that the Chicago City Council recently passed that made this city a torture-free zone. There are any number of issues on which you, and your city or your state, are poised to raise your voice.

There have already been, in the less than three months that have passed since the NDAA became law, nearly a dozen oppositional resolutions emerging from county boards and city councils around the country, from jurisdictions as geographically and ideologically dissimilar as Albany County, N.Y. — surrounding the state capital, one of the largest states in the country, a blue state, a machine Democrat state — and El Paso County, Colorado, which was the first to pass an anti-NDAA resolution and encompasses Colorado Springs, which is hardly a progressive hotbed. Colorado Springs encompasses several military bases, including the Air Force Academy, and that community raised its voice, in no uncertain terms, decrying domestic military detention even before the NDAA became law.[33] When the Air Force Academy is telling you there is a problem with domestic military detention, we should all take notice.

And we should do a lot more than that. The most powerful act you can perform is not filing a case, it's not signing a petition, it's not even going to a protest. It's making introductions, it is extending networks, it is building grassroots communities that can speak truth to this power.

Our emperor, whoever this figurative body is, has no clothes — but we have to reveal that to our friends and neighbors, to our communities. It is incumbent upon us to reach out across communities to offer information and analysis about these kinds of issues that do unite all Americans.

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We all share an interest in the right to trial. It doesn't matter what the government might accuse you of. If you have no right to trial, then you don't have an opportunity to vindicate it, which is to say, the right to trial unites every conceivable political interest. It unites every community.

I think this is a crucial moment in our nation's history — I dare say a world historical moment. We have started to see cracks in the edifice of the authoritarian regimes of North Africa and the Middle East. How then can we, in the country that pioneered democracy, resign with such stunning passivity the rights that inspired the world to follow our lead?

I invite you to take the lead here in Chicago, where it matters, and where you have reach. You have a voice to speak truth to that power and shine a light on these abuses. Thanks again for being here this morning.

NOTES

1 This article is an edited version of the keynote address delivered March 16, 2012, at the Loyola University Chicago Public Interest Law Symposium. Andrew Bashi, a 2013 graduate of the Loyola Chicago Law School, transcribed the remarks.

2 Shahid Buttar is executive director of the Bill of Rights Defense Committee. The organization's website can be found at http://www.bordc.org/. He is a 2003 graduate of Stanford Law School.

3 The National Defense Authorization Act for Fiscal Year 2012 (Public Law No. 112-081) was signed into law by President Barack Obama on Dec. 31, 2011. The bill passed the House of Representatives 283-136 on Dec. 14. A day later, the Senate approved the legislation 86-13. See *Bill Summary & Status, H.R. 1540, Major Congressional Actions*, THOMAS (Library of Congress), at http://thomas.loc.gov/cgi-bin/bdquery/D?d112:4:./temp/~bdGohY:@@@R—/home/LegislativeData.php. The relevant portions of the law concerning detention of suspected terrorists can be found in Title X, Subtitle D — Counterterrorism, §§ 1021-22. For the full text of the law, see http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf.

4 Attorney General Eric Holder spoke at the Northwestern University School of Law on March 5, 2012. During his speech, he asserted the legality of killing a U.S. citizen "who is a senior operational leader of al Qaeda or associated forces, and who is actively engaged in planning to kill Americans . . . ." For the full text of his remarks, see http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

5 See, e.g., *Amnesty Int'l USA v. Clapper*, 638 F.3d 118, 138 (2d Cir. 2011), cert. granted, 132 S. Ct. 2431, 182 L. Ed. 2d 1061 (2012) (raising the question of whether the National Security Agency's warrantless wiretapping scheme, struck down as unconstitutional by every federal judge ever to have reviewed the program on its merits, can be challenged in court given the barriers to constitutional standing implicit in executive secrecy); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), cert. denied, 131 S. Ct. 2442, 179 L. Ed. 2d 1235 (2011) (reflecting judicial deference to assertions of the state secrets privilege as an immunity doctrine protecting

even private parties complicit in government-facilitated human rights abuses, such as torture outsourced through extraordinary rendition).

6 As of March 12, 2012, seventeen federal judicial nominees were being blocked by Senate Republicans. The average number of days between Senate Judiciary Committee approval and a Senate vote for circuit court nominees was 28 days during the George W. Bush presidency and 136 days during Obama's presidency. The average for district court nominees was 22 days under Bush and 93 days under Obama. See Ian Millhiser and Adam Peck, *Reid Will File To End Seventeen GOP Filibusters of President Obama's Judicial Nominees*, ThinkProgress Justice, March 12, 2012, available online at http://thinkprogress.org/justice/2012/03/12/442841/reid-will-file-to-end-seventeen-gop-filibusters-of-president-obamas-judicial-nominees/.

7 The Chicago City Council on Jan. 18, 2012, voted 49-0 to approve a resolution proclaiming Chicago a torture-free zone. For the full text of Resolution 2011-1239, see http://chicago.legistar.com/LegislationDetail.aspx?ID=993196&GUID=4573CE90-448D-4585-83D6-AC09816AE159&Options=ID|Text|Attachments|&Search=torture+free+zone.

8 *Id.* The relevant language in the resolution states, "Whereas, many Chicagoans are being held in prolonged solitary confinement in Illinois prisons in conditions which often lead to physical and psychological breakdown and are a form of torture . . . ."

9 *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010) (interpreting a provision from the PATRIOT Act expanding prosecution for "material support of terrorism" in the face of a First Amendment challenge, and holding that conviction does not require the government to establish the intent of the defendant to support violence).

10 *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010) (interpreting provisions of the Bipartisan Campaign Reform Act against a First Amendment challenge, and holding that restrictions on corporate participation in campaign finance are constitutionally untenable).

11 18 U.S.C. § 2339B. For background on the PATRIOT Act, see *PATRIOT Act*, Wikipedia, http://en.wikipedia.org/wiki/PATRIOT_Act. The full text can be found at http://epic.org/privacy/terrorism/hr3162.html. *See Charity & Security Network, Material Support and the Need for NGO Access to Civilians in Need*, July 7, 2010, *available at* http://www.charityandsecurity.org/analysis/material_support_law.

12 For the full text of the Animal Enterprise Terrorism Act of 2006 (Public Law 109-374), see http://www.gpo.gov/fdsys/pkg/PLAW-109publ374/content-detail.html. See also *Animal Enterprise Terrorism Act*, Wikipedia, available online at http://en.wikipedia.org/wiki/Animal_Enterprise_Terrorism_Act

13 For the full text of the Animal Enterprise Protection Act of 1992 (Public Law 102-346), see http://www.nal.usda.gov/awic/legislat/pl102346.htm.

14 Eric Holder, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, Department of Justice website, March 5, 2012, http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

15 *Id.*

16 Jonathan Turley, *10 reasons the U.S. is no longer the land of the free*, The Washington Post, Jan. 13, 2012, available online at http://www.washingtonpost.com/opinions/is-the-united-states-still-the-land-of-the-free/2012/01/04/gIQAvcD1wP_story.html.

17 See *supra H.R. 1540*, note 3. See also *National Defense Authorization Act for Fiscal Year 2012*, Wikipedia, http://en.wikipedia.org/wiki/National_Defense_Authorization_Act_for_Fiscal_Year_2012.

18 Section 1021 is titled, *Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use o Military Force*. Section 1022 is titled, *Military Custody for Foreign Al-Qaeda Terrorists*. The full text of the NDAA can be found at http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf.

19 National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012), § 1022(b)(1).

20 NDAA 2012, § 1021(e).

21 The AUMF passed Congress as a joint resolution on Sept. 14, 2001. President George W. Bush signed it on Sept. 18. The full text can be found at http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/html/PLAW-107publ40.htm.

22 José Padilla, born in Brooklyn on Oct. 18, 1970, was arrested in Chicago on May 8, 2002, on suspicion of plotting a "dirty bomb" attack. For background, see *José Padilla (prisoner)*, Wikipedia, at http://en.wikipedia.org/wiki/José_Padilla_(prisoner).

23 For a timeline of events in Padilla's case, see *id.*

24 For background concerning this investigation, see Committee to Stop FBI Repression, *Timeline of Events*, at http://www.stopfbi.net/about/timeline. See also *Press Coverage* at the same site, http://www.stopfbi.net/about/press-coverage.

25 The state secrets doctrine holds that when military secrets are at stake, a plaintiff's need for evidence must yield to national security interests. *See State secrets privilege*, Wikipedia, at http://en.wikipedia.org/wiki/State_secrets_privilege. See also Jess Bravin, *High Court to Consider State Secrets Doctrine*, Wall Street Journal, Jan. 18, 2011, available online at http://online.wsj.com/article/SB10001424052748704029704576088253308626870.html.

26 *United States v. Reynolds*, 345 U.S. 1 (1953).

27 See *Federalist No. 78.*

28 The accident report can be found at http://www.fas.org/sgp/othergov/reynoldspetapp.pdf, beginning at page 10a.

29 *Jeppesen Dataplan*, 614 F.3d 1070.

30 For background on extraordinary rendition by the Bush administration, see *Extraordinary rendition*, Wikipedia, at http://en.wikipedia.org/wiki/Extraordinary_rendition.

31 For an overview of the issues involved in the National Security Agency's warrantless wiretapping, see *NSA warrantless surveillance controversy*, Wikipedia, at http://en.wikipedia.org/wiki/Warrantless_wiretapping. *See also Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) vacated, 493 F.3d 644 (6th Cir. 2007); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007).

32 See Thomas Watkins, *ACLU Mosque Lawsuit: Muslims Sue FBI, Attorney General Invokes State Secret Rules*, Huffington Post, Aug. 2, 2011, available online at http://www.huffingtonpost.com/2011/08/02/aclu-mosque-lawsuit_n_916627.html. *See also Fazaga v. F.B.I.*, 8:11-CV-00301-CJC, 2012 WL 3541711 (C.D. Cal. Aug. 14, 2012).

33 For an overview of grassroots opposition to the NDAA, see Andrew Bashi, *Communities Challenge NDAA, and Its Supporters*, In These Times, Jan. 19, 2012, available online at http://inthesetimes.com/ittlist/entry/12588/community_efforts_against_ndaa_and_its_supporters_begin/. *See Resolution to Preserve Habeus Corpus and Civil Liberties, available at* http://bcc.elpasoco.com/Documents/Resolution%20to%20Preserve%20Habeas%20Corpus%20and%20Civil%20Liberties%2011-428.pdf.