Introduction

AN ACQUAINTANCE, KNOWING of my position as president of the American Civil Liberties Union, asked me to tell her what the ACLU was doing these days. "But don't tell me about that Guantánamo stuff," she said. "I'm so sick of hearing about that. Why should I care about those people when they're not even Americans?" I started to explain that the Patriot Act and other post-9/11 antiterrorism measures do affect Americans, including her, but she waved me off, insisting that all of that had nothing to do with her.

This woman is not alone is assuming that the War on Terror does not affect law-abiding Americans, or even that all "that Patriot Act stuff" ended when George W. Bush left the White House. But she is wrong. Her own rights and those of many other ordinary Americans—and even the democracy she takes for granted—are compromised by antiterrorism strategies unleashed after September 11, 2001. She could be one of the hundreds of thousands of innocent Americans the FBI has been spying on using the broad net of the Patriot Act and supplemental powers; her banker and her stockbroker, among many others, have collected financial and other personal data about her to lodge in government databanks, ready to trigger an investigation of her if the government happens to connect some dot of information to her dots (even if she's done nothing wrong); her computer geek neighbor might be one of the innumerable telecommunications workers and librarians whom the FBI has conscripted to gather information on hundreds of thousands of occasions, perhaps about her friends or acquaintances—and then ordered not to tell anyone anything about their experience on pain of criminal prosecution; her nephew could be the computer studies student prosecuted for providing "material support to terrorists" (a crime punishable by up to fifteen years, imprisonment) because he served as webmaster for a website posting links to other people's hateful comments; her son could be the college student detained and interrogated for packing his Arabic-English flash cards to study during a plane flight; she could find herself unable to complete an important business or personal trip because her name was incorrectly placed on a No Fly list,

or simply because she has a common name, like "T. Kennedy"; her favorite charity could be shut down for years or even permanently because a government bureaucrat once decided to investigate it even if the investigation went nowhere; her generous contribution toward humanitarian relief might be sitting in government escrow for years instead of reaching the intended recipients or being returned to her; her doctor's assistant could be the young Kashmiri-American who was stopped and searched in the New York City subways on twenty-one separate occasions even though the odds of the same person being selected for a "random" search that often are 1 in 165 million. She might not know the Americans whose lives were seriously derailed because government agents mistakenly identified them as terrorists—like the Oregon lawyer who was falsely suspected of involvement with terrorist incidents in Spain due to an incorrect identification of his fingerprint, or the former University of Idaho football player who was arrested on the pretext that he was needed as a "material witness" although he was never asked to testify—but post-9/11 policies have also fostered devastating mistakes like these.

All of these things have happened; all of these things can keep happening. Should we be willing to tolerate this level of surveillance, intrusion, and potential error because these efforts are helping to keep us safe? The beginning of the second post-9/11 decade is a good time to start a serious reevaluation of our approaches to fighting terrorism and to expose and question some underlying assumptions that may not be serving us well. The War on Terror decade has generated a powerful frame for evaluating government antiterrorism strategies, based on three assumptions: (1) terrorism is an exceptional threat; (2) we need to adapt by giving up rights in order to be safe; and (3) our strategies for combating terrorism have to remain secret so we just have to trust the president, who is best able to operate in secrecy, to decide what rights we need to give up. This fear-inflected frame is the very antithesis of constitutional democracy. The time has come to rattle this frame and return to first principles in reevaluating our course.

In this book, I will not be talking about "that Guantánamo stuff." Many other books, articles, and nationwide conversations have agonized about the legality, constitutionality, and morality of the detention and interrogation policies 9/11 tempted us to use against suspected terrorists. Many scholars and pundits have also criticized the Bush/Cheney Administration up, down, and sideways for its responses to 9/11. This book is about us and it is about now. A decade is a long enough time to allow us to step back and try to look at the whole picture of the costs and benefits of strategies that

were forged during the panicky days right after 9/11. The death of Osama bin Laden in some respects ended an emotional chapter, perhaps freeing us to view the costs and benefits of our antiterrorism strategies with a calmer eye. And more than halfway through Barack Obama's term is a good time to disentangle the criticisms of George W. Bush's policies, many of which are still with us, from the more personal criticisms of his presidency itself.

It is not surprising that in the weeks immediately following 9/11, the president and Congress reacted by creating dragnets of all kinds aimed at investigating and preventing any possible recurrences. They did not know whether there were terrorist sleeper cells embedded around the country, how the hijackers had financed their activities, or how Al Qaeda could be neutralized, but they wanted to find out as much as possible in all these areas and to be able to take any action that might be productive. A frightened country demanded protection as well as comfort. So the country's leaders improvised and adopted a wide variety of emergency measures that could imaginably discover or thwart terrorists. The prevailing idea at the time was that we should take aggressive preventive action even if we didn't have evidence that a particular action would actually enhance our safety, as long as there was some chance that it might do so. This attitude was epitomized by Vice President Dick Cheney's "1 percent doctrine": "If there's a 1% chance that Pakistani scientists are helping al-Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. It's not about our analysis . . . It's about our response."[1]

Congress's chief contribution was the USA PATRIOT Act, a rather labored acronym for an act actually entitled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001."[2] This Act was passed a mere six weeks after 9/11, without any meaningful deliberations or hearings. In retrospect, the assertion that Congress already knew exactly what tools were required to obstruct terrorism sounds like fear-induced swagger. The contents of the Act matched its overconfident title. In hundreds of provisions amending previous laws, the Patriot Act empowered administration officials to spy on anyone, including Americans, with less basis for suspicion and less judicial review; it stretched and repurposed criminal laws by allowing prosecution for "material support" of terrorism even if the person prosecuted did not have any intention of supporting terrorists; it exposed business records, including medical, educational, and library records, to easy capture by government agents in several different ways; and it expanded the reach of the Foreign Intelligence Surveillance Act, initially designed to keep track of Soviet spies, to more easily cover spying on

Americans. Many of these provisions threatened privacy; the freedoms of speech, association, and religion; due process; and equality, but supporters declared that although this was unfortunate, it was necessary—we have to give up some of our rights in order to be safe. Only one senator, Russell Feingold, voted against the Patriot Act and introduced measures to hone its provisions, questioning the widespread assumption that security and liberty were contestants in a zero-sum game.[3] President Bush provided dragnets of his own, like a declaration of emergency under which he abruptly seized the assets of a number of American charities, and the creation of a highly secret "President's Surveillance Program" under which the National Security Agency conducted surveillance of countless numbers of Americans, in defiance of the law in existence at the time. Bush and Cheney were as willing to dispense with the Constitution's checks and balances as its rights for the sake of combating terrorism, and so the administration repeatedly tried to minimize the role of Congress and the courts—and the American people themselves—in formulating or reviewing antiterrorism strategies.

It is understandable if some of those immediate reactions were overreactions. There are many reasons to be skeptical of the decisions made in the fog of 9/11. First, the course of many of our antiterrorism strategies was set before anyone had a chance to study the events of 9/11, so antidotes were being prepared before the disease had been diagnosed. Second, decisions made in the grip of fear are not likely to be balanced. Third, strategies that may have seemed plausible as emergency measures in the fall of 2001 could prove, over time, to be inefficient, too costly (in terms of rights or resources), or even counterproductive. Finally, short-term emergency sacrifices of rights can be regarded as a break in our usual patterns. Continuing into a second decade and beyond, these emergency measures stop being temporary exceptions and become part of who we are: the New Normal. For these reasons, the 9/11 Commission, which actually did study the causes and consequences of 9/11, recommended that the executive branch be required to bear the burden of showing why extraordinary powers conferred after 9/11 should be retained.[4]

But our approach to counterterrorism strategies has not changed appreciably during the past decade, despite the fact that a new president occupied the White House. President Barack Obama inherited the weapons and infrastructure of Bush's War on Terror, along with government employees who had been engaged in the campaigns, and much of the litigation brought to challenge the constitutionality of actions like those listed above. Obama's rhetoric has certainly been different. He has expressed skepticism about the misleading "war" metaphor and promised his allegiance to constitutional

values. In his inaugural address he declared, "We reject as false the choice between our safety and our ideals."[5] And he has disavowed some Bush-era tactics. His first executive orders promised to close Guantánamo, to impose limits on harsh interrogation techniques, and to put democracy back on track by increasing the transparency of government.

Nevertheless, the Obama Administration has explicitly endorsed or just continued to employ most of the Bush/Cheney post-9/11 strategies when it comes to the rights of ordinary Americans to be free from unfair prosecutions and excessive government spying. Obama's Solicitor General and Supreme Court choice Elena Kagan, for example, told the Supreme Court that a Patriot Act–enhanced provision criminalizing the provision of "material support" to terrorists could properly be applied to prosecute people who try to persuade terrorist groups *not* to commit acts of terrorism, or even to lawyers filing briefs on behalf of groups the government believes have ties with terrorism.[6] Obama might never actually prosecute humanitarians or lawyers, but he does want to retain the dragnet power to do so. Candidate Obama denounced the use of National Security Letters to gather information about innocent Americans without any court order, but the Obama Administration has asked Congress to expand the reach of this power.[7] Senator Obama voted in favor of the institutionalization of an expanded version of Bush's National Security Agency warrantless spying program, and in favor of granting immunity to the telecommunications providers who cooperated with that program even while it was plainly illegal. Consistently with those positions, the Obama Administration has defended the constitutionality of that controversial program. Although President Obama has expressed a greater willingness to share power with Congress, he sometimes echoes at least some of Bush's antipathy to meaningful congressional oversight. Obama threatened, for example, to veto a version of the 2010 intelligence authorization bill in which congressional Democrats provided for increased oversight of intelligence agencies.[8] And Obama's Justice Department has continued the Bush effort to sideline the courts by any means imaginable. His lawyers, for the most part, stick to the Bush lawyers' script. They employ the same extreme procedural arguments, including the state secrets privilege and claims of immunity, to tell the courts that they should not even think about finding executive actions like sprawling surveillance programs unconstitutional, or finding Bush-era government officials accountable for illegal actions.

The Obama Administration seems, at least at times, to agree with the Just Trust Us philosophy that unilateral executive power is acceptable—as

long as the people wielding that power act in good faith. President Obama and his appointees no longer object as strongly to unilateral executive power as candidate Obama did, because they believe that they truly are trustworthy. Attorney General Eric Holder, for example, issued a much heralded revised policy on use of the state secrets privilege.[9] In the extreme form employed by the Bush Administration, this claim of privilege asserted that the executive branch rather than the courts should get to decide which cases the courts must dismiss if the executive branch says that the very act of litigating a claim would compromise national security. Bush lawyers had argued, for instance, that the president's surveillance program was too secret even to be reviewed by the courts, as was the "extraordinary rendition" program that led to people being kidnapped and sent to other countries where they were locked in black holes and tortured. Holder earnestly announced that his state secrets policy would be different—*he* would only claim the privilege where it really is necessary. But he still reserved the option of not showing the courts the documents on which his assessment is based.[10] Just trust *us*. We're different.

The Holder state secrets policy itself is not substantively different from his predecessors' policy and, given that the whole point of these privilege claims is to prevent issues from being openly discussed, we are unlikely ever to be able to evaluate whether Holder's application of that policy will indeed be different. The Holder Justice Department clearly understands the dangers of unilateral executive power exercised in secret—the policy announces that the state secrets privilege will not be used to cover up mistakes—but expects us to be reassured by a solemn insistence that, unlike their predecessors, *these* lawyers will not succumb to those dangers. Plato, in *The Republic*, uses the myth of Gyges, who discovers a ring that renders him invisible, to discuss the temptation of those who believe their actions are invisible to disregard the limits of the law.[11] It is unrealistic to believe that people who have undertaken a noble mission—to safeguard the American people—will police their means of pursuing that mission effectively if they also believe that they will not be accountable for their actions. That is why the Constitution establishes an elaborate system of checks and balances to provide accountability. But wielding the state secrets privilege, invisible government actors claim the power to decide for themselves when and if they will give up their cloak of invisibility. Thus, in a case involving eavesdropping without a warrant, Obama Administration lawyers who were urging the court to dismiss the case on the basis of the state secrets privilege acknowledged that secrecy can indeed provide

a cover for government misconduct. So the lawyers addressed this problem by promising the court that the government (under Bush as well as Obama) really had not committed any misconduct. And they continued to conceal documents that might have shed light on whether or not that assertion was accurate.[12]

It is certainly true that, in some respects, the Obama Administration has used its weaponry more sparingly and with more circumspection. Bush-era officials, for example, denied Swiss Islamic scholar Tariq Ramadan a visa to enter the United States, preventing him from accepting a teaching position at Notre Dame. Their justification changed so abruptly (Did he preach or endorse terrorism? Had he contributed to an Islamic charity with alleged ties to terrorism?) and matched the actual facts so poorly (Ramadan styles himself as an anti-jihad Islamic reformer) that it began to seem obvious that this was an ideological exclusion—a McCarthy-like attempt to keep prickly ideas out of the country. Obama lawyers initially defended this exclusion in court, but the issue was mooted when Secretary of State Hillary Clinton issued Ramadan his visa. While other scholars shared Ramadan's fate under the Bush Administration, the Obama Administration does not seem to be trying to fence out ideas. During the Bush era, antiwar activists frequently complained that they were being subjected to special surveillance, harassment, or other retaliation because they expressed their dissenting views in ways that are supposed to be protected by the First Amendment.[13] Comparable complaints about misuse of antiterrorism powers against dissenters or political opponents have not been leveled against the Obama Administration.[14]

It is still too early to assess to what extent the Obama Administration will manage to avoid the mistakes and abuses of Bush Administration officials in implementing antiterrorism laws—like the prosecution of a University of Idaho graduate student for posting links on a website, or the FBI's persecution of Oregon lawyer Brandon Mayfield, who was suspected of involvement in the Madrid train bombing even after it should have been apparent that he was completely innocent. But tools as powerful as those in the post-9/11 arsenal are dangerous no matter who wields them. Dragnets, especially when used in secret, will sweep in people who are not the intended targets—people who are innocent but who suffer collateral damage. When broad discretionary powers are delegated to thousands of government agents, it is inevitable that there will be serious lapses of judgment somewhere along the chain. George W. Bush did not tell the FBI to arrest Brandon Mayfield. And not every Transportation Security

Administration (TSA) or FBI agent will exercise discretion in the same way Barack Obama or Eric Holder would.

Furthermore, many of the Patriot Act–enhanced statutes do harm even when they are not called into play. Dragnet laws that make it possible to prosecute other webmasters, or to prosecute humanitarians who come too close to members of a designated "terrorist" group while they are distributing aid, abridge our First Amendment rights by their very existence. They cause people to think twice about whether to engage in speech or association that might draw unwanted government attention or suspicion. Laws that threaten nonprofit charities and foundations with the possibility of being blacklisted and having their assets unceremoniously seized, on the basis of secret hearsay evidence, discourage people from exercising their First Amendment right to choose their associations and to fulfill their religious obligations by contributing to charities of their choice. Overbroad surveillance laws deter people from speaking freely on international calls, even if they are talking to their attorney or an investigative journalist, making it difficult for lawyers and reporters to do their jobs. Laws that require schools, hospitals, and libraries to turn over sensitive records to the government undermine relationships of trust and cause people to think twice before sharing information that might be needed to help them.

The immediate emergency after 9/11 was to apprehend and neutralize members of Al Qaeda. But the War on Al Qaeda quickly morphed into a generalized War on Terror. Many Patriot Act and other tools that may have seemed acceptable approaches to dismantling Al Qaeda and its direct threat to Americans on American soil are not actually limited to that goal. The emergency-inspired antiterrorism laws I will describe apply in full force to dozens of other government-designated "terrorist" groups, ranging from Hamas to Turkish Kurds to pro-democracy activists in Iran. And some of the post-9/11 expanded powers have already been prey to mission creep. Patriot Act–authorized "sneak and peek" warrants, dispensing with notice that one's premises have been searched, were used 763 times in fiscal year 2008, but only 3 of those cases involved terrorism investigations.[15] When a Patriot Act anti-money-laundering provision was used to investigate the owner of a Las Vegas strip club for bribery, Nevada Senator Harry Reid remarked: "The law was intended for activities related to terrorism and not to naked women."[16] Once we become accustomed to lowering our baselines—of what counts as an acceptable level of surveillance, or a tolerable criminal law, for example—it is all too easy for us to endorse the use of increasingly familiar tools against anyone, not just a suspected terrorist,

but a tax evader or a racketeer. And the Constitution is downsized another notch to accommodate another law enforcement strategy.

Legal historian Geoffrey Stone reminds us that Americans have, in the past, overreacted during times of war or crisis—our shameful treatment of West Coast Japanese-Americans during World War II, our war on an ideology during the McCarthy era—but observes that after the emergency ends, we generally regret what we have done and are able to regain our balance.[17] But when does the emergency of terrorism end? Unlike a conventional war, the "War on Terror" has no natural end point. As Barack Obama has recognized, terrorism is a tactic. We cannot end this metaphorical war by signing a peace treaty with Al Qaeda and dozens of other groups we list as terrorists. Are we willing to countenance a second decade of emergency reactions that are more costly to our rights and to our democracy than most Americans realize? The time has come to decide whether these weapons are truly consistent with our Constitution's foundational principles, rather than just trusting that the current president will use them more wisely than his predecessor. As Justice Robert Jackson so memorably said in the *Korematsu* case, dissenting from the Supreme Court ruling allowing over 100,000 loyal Japanese-Americans to be removed from their homes because the government said it was impossible to distinguish a few disloyal individuals, once we opportunistically revise a constitutional principle, "[t]he principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."[18]

Those who trust Barack Obama more than they trusted George W. Bush should bear in mind that there will be other presidents after Obama. The level of trust in a particular administration can indeed affect the extent to which people will fear being arrested or investigated for exercising their rights. But future presidents will inherit the Bush-era arsenal of weapons unless we persuade Obama and Congress to disarm or retrofit some of the undesirable ones now, and those presidents may be less sensitive to constitutional values than a former Constitutional Law professor.

Whatever one's personal views of Barack Obama, it seems surprising that at a time when, according to public opinion polls,[19] three-quarters of the American people distrust the federal government, we are willing to trust that same government to strike the right balance between our cherished constitutional rights—indeed, our democracy itself—and national security. Why is this so? One reason is certainly that most Americans do

underestimate the costs of our antiterrorism programs—in privacy, liberty, fairness, and equality as well as in resources. This is partly because so many of those costs are invisible behind the wall of secrecy; because the laws involved are dauntingly complex and hard to comprehend; and because it is difficult to put together a complete picture just based on periodic news stories about particular incidents or debates. I am writing this book to offer a more complete and coherent account of those costs.

A second reason there has not been more resistance is undoubtedly that many Americans believe that these laws and policies will not cause them much inconvenience if they are not Muslims or Arabs. As the following chapters will show, many of our post-9/11 strategies do have a significant impact or potential impact on a large number of people regardless of their religion or ethnic origin. But it is true that the most substantial costs of our antiterrorism campaign have fallen on Muslims and Arabs, whether they are American citizens or not. Muslim-Americans are more susceptible to being prosecuted even if they are innocent, to being prevented from returning to their homes in the United States because they are incomprehensibly included on a No Fly list, to having their banks inexplicably decide to close their accounts, or to having their legitimate charities put out of business.

Muslim-Americans are Americans, even if their names or religious practices seem unfamiliar to many, and they have the same constitutional rights as all other Americans. But as shown by the recent controversy over the New York City mosque planned for a site near the World Trade Center, Muslims are readily stereotyped as terrorists or potential terrorists because the 9/11 hijackers were Muslims. Rationally, everyone should know that the vast majority of the millions of Muslims in the United States are law-abiding people who have nothing to do with terrorism. Rationally, everyone should understand that targeting all Muslims, or any Muslim who happens to be within sight, is a remarkably ineffective and probably counterproductive way to fight terrorism. But emotionally, many Americans are suspicious of Muslims generally and so are willing to countenance treating any or all Muslims as suspect.[20] This stereotyping is unjustifiable and un-American. Earlier waves of immigrants, whether Irish, Italian, or Jewish, also met hostility and discrimination. During the post–World War I Palmer Raids, thousands of Russian and Eastern European immigrants were arrested, prosecuted, deported, and sometimes abused because Attorney General Mitchell Palmer thought that because some anarchists were immigrants, it was logical to assume that any immigrant (people whom he described as looking "sly and crafty") might be an anarchist.[21] We should

be able to learn from our history that when we assume guilt by association, when we target groups of people because of their religion or ethnicity, no good is accomplished and we are later ashamed. The Equal Protection Clause of the Fourteenth Amendment, added to the Constitution after the Civil War to prevent the freed slaves from being abused because of their race, embodies our commitment to treating every person as an individual rather than solely as a member of a racial, ethnic, or religious group. The American tradition of tolerance goes back to the original framers of the Constitution in the eighteenth century. Benjamin Franklin, for example, writing in his autobiography about the nonsectarian nature of a church in Philadelphia, said that "even if the Mufti of Constantinople were to send a missionary to preach Mohammedanism to us, he would find a pulpit at his service."[22]

An additional reason we have been just trusting the president is that the last ten years have inculcated in many Americans a sense that we cannot know enough to make the policy decisions about how much surveillance is too much or whether particular security programs work. While it is certainly true that the rigors of secrecy make it difficult for us to assess what benefits we may be getting from broad material support laws, wholesale surveillance, or massive data banking, for example, there is no good reason why the American people cannot be included in the decision-making process to a greater degree than we have been so far. We, the people, have been excluded by excessive claims of secrecy and infantilized by the Just Trust Us approach. The other side of the Just Trust the Government coin is distrust of the American people. In the chapters to follow, I will document how antiterrorism laws are built on lack of faith in the American people, with our leaders positing that we can't be trusted to evaluate hateful ideas for ourselves, that we can't be trusted to talk to a terrorist, that we can't be trusted to form our own opinions about the wisdom of antiterrorism measures. This is not American democracy.

Some might contend that we accept this diminished, antidemocratic role because Americans have become generally disengaged and passive and do not expect to be able to control the government. If this is true, it is a dangerous pattern and one that we, like many of the people I will describe in the book, should resist vigorously. In addition to fighting apathy, we also battle powerful psychological forces when we confront the question of what to do about terrorism and rights. Fear of terrorism makes it difficult for us to be rational and easy for us to hope that the government actually does know better than we ever could how to protect us. And so

we may not really want to learn that the government's promises to keep us safe are inflated or that particular tools vaunted for their ability to obliterate terrorism don't amount to much more than dearly bought magic beans.

Because we prefer, or maybe even need to believe that we can buy security by squandering our liberty, contrary information may bounce right off of us. Linguist George Lakoff tells us that a frame on an issue, once embedded, can trump facts.[23] The War on Terror frame has us start with the assumption that we are unsafe unless we give up some of our rights and, conversely, that giving up some of our rights is likely to make us safer. Beginning with that premise, people have been willing to trust the New York City Police Department, for example, when it declares that random searches of backpacks in the subway will deter terrorists. We want it to be true, and so perhaps we, like the court finding the program to be constitutional, don't want to ask too many hard questions. Will this program really prevent terrorism if any terrorist can simply walk away and enter the subway at a different stop? Shouldn't we be concerned if it seems that the program, despite contrary assurances, involves racial profiling of people with brown skin who look Muslim or Arab? I have heard people say that they don't actually think the New York City subway search program is an effective way to prevent terrorism, but it still makes them feel safer. After a decade of watching antiterrorism measures being instituted and listening to assurances that they are effective—usually with little or no evidence offered to back up those assertions, on the excuse that both our successes and failures must be kept secret—are we willing to ask hard questions about whether those programs are really effective, cost-effective, or counterproductive? Or are we so anxious that we will accept placebos, even if they have serious side effects? Are we willing to play our intended role in a constitutional democracy, or do we prefer to let the president decide what's best for us?

Democratic distrust is not ad hominem. It extends equally to George W. Bush, Barack Obama, and every one of their successors. The Constitution is a very distrustful document. Under its hydraulic system of checks and balances, presidents are rarely allowed to make important decisions—like appointing a Supreme Court Justice, entering a treaty, or declaring war—without participation by Congress. The courts then provide an essential check if the president and Congress are not respectful enough of our rights. But during most of the War on Terror decade, Congress has remained passive, letting the president make too many key decisions unilaterally and allowing the executive agencies to police themselves. As the

examples I will give clearly show, this is a mistake, just as the Constitution predicted. Discretionary powers exercised in secret, without sufficient oversight, are easily subject to abuse and, as I will document, have in fact been extensively abused.

And the courts have allowed themselves to be muzzled, an even graver mistake. In fact, the courts have actively collaborated in keeping themselves from speaking out on behalf of our rights. Although the Supreme Court decided a series of historic cases questioning the president's and then Congress's detention policies ("that Guantánamo stuff"), the Court simply declined to hear case after case where Americans complained that our own rights are being compromised by excessive secrecy and overzealous antiterrorism strategies—the issues I will be discussing in this book. The lower federal courts have hidden behind a dizzying array of procedural excuses for refusing to consider constitutional claims about issues affecting us. A number of courts have declared that no one has standing—that is, the right to bring a lawsuit—to challenge eavesdropping programs unless they can prove that the government has been listening to their own telephone calls or intercepting their own e-mails. This is a true Catch-22, when the whole point of secret surveillance is that the target is unaware of being the target. Accepting this definition of standing amounts to benching the courts. Executive branch demands for secrecy have compromised litigation in many cases and wholly precluded it in others, as courts have accepted radical standing, governmental immunity, and state secrets privilege arguments. Courts have allowed the government to conceal key documents from the lawyers on the other side and sometimes from the court itself, and even conspired to keep the very existence of entire cases a secret. The Supreme Court refused to decide any case about the domestic impact of antiterrorism strategies until 2010. And then, in the case of *Holder v. Humanitarian Law Project*,[24] the Court essentially just deferred to the government's assertions that the dragnet law in question (a broad material support law) was useful enough to warrant elbowing the First Amendment out of the way.

This book will show how ordinary Americans have been affected by the War on Terror by having our own rights and privacy compromised, by being deterred from exercising our collective right to free speech and association, and by having our democracy skewed. Aspects of a number of these stories may be familiar to some from news accounts over the years. But it is critical to put together the pieces of this puzzle to see the full picture and to observe the themes that emerge: the pitfalls of excessive

secrecy, the consequences of abdication by Congress and the courts, and the enduring wisdom of the Constitution's prescribed methods for protecting our rights. It should also be noted that these stories are only the tip of an iceberg of consequences. I will discuss, for example, six people—four librarians and two Internet service providers—who challenged a particular form of surveillance called the National Security Letter. Hundreds of thousands of National Security Letter requests have been served since 9/11 but, because of draconian gag orders built right into the statute, the public only knows the stories of these six intrepid individuals. The people involved in the hundreds of thousands of other instances apparently caved in to the government's demands to turn over sensitive records about their clients or patrons without any court order and never to mention the experience to anyone, and so we don't know what they might have to say. Secrecy prevents us from fully assessing costs—as well as benefits—and also means that we often cannot see the features of the people adversely affected by our policies, even when we know they exist. The stories that can be told and woven together at this point are not a complete history, but they are troubling enough to cause concern and to help us visualize what else might be behind the curtain.

I also want to stress that many of the people whose stories I will tell are not just victims. In a decade when all three branches of government failed to safeguard our constitutional values, ordinary Americans—librarians like George Christian of Library Connection of Connecticut, Internet service providers like Brewster Kahle of the Internet Archive and another patriotic litigant who spent over six years identifiable only as John Doe, as well as military leaders, social workers, journalists, administration officials who made the difficult decision to share their concerns about runaway programs with reporters, even local governments—rose up to do the job the Constitution expects "the people" to do—to be the government and to defend our constitutional birthright.

My interest is not in flogging the Bush Administration for its errors or indulging in *schadenfreude*. My focus is primarily on powers and potential problems that are still in play as I write. Unlike Andrew Bacevich[25] and some others who have written damning critiques of the Bush Administration's War on Terror, I do not seek to portray 9/11 as a convenient excuse for people who wanted to aggrandize executive power for their own selfish reasons. There are many other reasons why presidents and government officials of good faith who do believe in constitutional values are willing to seek overinflated executive powers when it comes to national security. It is

these natural pressures I am interested in exploring, rather than engaging in ad hominem attacks.

Several caveats: First, I do not claim to be an expert on how to defeat terrorism. After more than three decades of studying, teaching, and writing about the Constitution and more than two decades working closely with the ACLU, I think I can claim some expertise on the subject of civil liberties. My perspective is from the civil liberties side of the scale, but that doesn't mean I do not understand that these issues can look different from the point of view of the president and Congress, as we hold them responsible for our protection and blame them if they fail. If my views tilt toward the civil liberties side of the balance, I hope to counteract the constant pressure on our elected officials to tilt to the other side and look to short-term pragmatism (including the results of the next election) rather than to our long-term values. It is not my purpose—or within my competence—to judge which antiterrorism techniques are or are not effective, but I will point out places where experts seem to question our current assumptions about what is effective, because these are the very places where the judgment of the American people should be invited. I am not prescribing any specific antiterrorism program, but I am inviting all Americans to play a more significant role in the process of deciding whether we need to correct our course. My criticism is primarily skepticism, and my goal is primarily the central goal of the Constitution: to make sure that important policy decisions are made by the right decision-makers.

Second, although I am proud to serve as president of the ACLU and I rely heavily on the admirable work of ACLU lawyers and staff members both in information gathering and analysis, this book is intended to reflect my own views, which are not necessarily those of the ACLU in all respects. But with the ACLU, I believe that the constitutional concerns I raise go beyond partisan politics. There are many areas where libertarians and civil libertarians share concerns about excessive secrecy, excessive surveillance, and unconstrained government power. Conservatives like Bruce Fein[26] agree with people to their left on the political spectrum, like Anthony Lewis,[27] that during the War on Terror decade we have lost our balance and jeopardized our constitutional heritage. The heroes I will describe, those who stood up for constitutional rights and American tradition, include Democrats like Russell Feingold, the sole opponent of the Patriot Act in the Senate, and also libertarians like Ron Paul, who has fought intrusive security measures like bodyscanners at the airport,[28] and whose supporters formed a group to oppose the reelection of any members of

Congress, no matter what their party, who voted to confer immunity on the telecommunications companies that had collaborated with the Bush Administration's illegal surveillance program.[29] Steven Bierfeldt, Development Director of the Campaign for Liberty, an outgrowth of Ron Paul's presidential campaign, became an ACLU client when he was detained at the St. Louis Airport because he was traveling with a quantity of cash connected with his work.[30] Like the ACLU, the Cato Institute has consistently critiqued government overreaching in antiterrorism efforts as unconstitutional and ineffective. In a foresightful 2002 Cato article called "Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism,"[31] Timothy Lynch argued that lawmakers have developed a destructive pattern of restricting additional civil liberties after every terrorist incident without ever stopping to examine whether earlier hastily adopted restrictions have proved to be effective. "We can either retain our freedom," the article said, "or we can throw it away in an attempt to make ourselves safe." A 2010 book edited by Cato staff, entitled *Terrorizing Ourselves: Why U.S. Counterterrorism Policy Is Failing and How to Fix It*,[32] updates and elaborates on the concerns raised in that article, arguing that politicians are manipulating fear for political purposes and that we are defeating ourselves by succumbing to fantasies about the nature of and cures for terrorism.

One book cannot examine all facets of the issues I raise. Because I am focusing on the rights of Americans, I will not examine the particular impact of antiterrorism measures on non-Americans, an important topic eloquently discussed by David Cole.[33] And because admirable books, including Geoffrey Stone's, examine our history of respect for civil liberties in times of emergency or war, I will not try to repeat that work by spending any significant amount of space on historical context.

What I do aim to do is to correct the lack of balance in our perceptions of the War on Terror by showing how innocent Americans have been prosecuted, incarcerated, blacklisted, watchlisted, conscripted as antiterrorism agents, spied on, and gagged. Part I, "Dragnets and Watchlists," will describe post-9/11 measures, starting with material support laws, that have a substantial effect on First Amendment rights of free speech, free association, and free exercise of religion, as well as on due process and equality. In addition to criminalizing and deterring protected speech, these laws deprive those charged of due process, minimize the role of juries, threaten humanitarians with prosecution for providing aid in troubled parts of the world or even, paradoxically enough, for trying to talk terrorist groups

into abandoning their violent tactics. Among those already affected by prosecution under these elastic material support laws, as I will describe, are the Idaho webmaster already mentioned, and an Iranian woman who was granted asylum in the United States after she had been brutally punished for supporting a pro-democracy group in Iran and then found herself prosecuted by the United States for supporting the same group. Next, I will discuss the presidential emergency program allowing the government to seize a charity's assets, with no notice or hearing, which turned into a campaign against Muslim charities, an attack on the freedom of religion, and a serious threat to other nonprofits—all based on a declaration of an emergency now going into its second decade. The first section will conclude with a discussion of security systems, including watchlists used at the airport and by "financial institutions," and then an examination of how businesses have been enlisted as antiterrorism enforcers and data collectors for government databanks.

Part II, "Surveillance and Secrecy," will describe the damage post-9/11 surveillance measures have done to privacy and to essential principles of the Fourth Amendment, our constitutional protection against unreasonable searches and seizures. This section will tell the story of Brandon Mayfield, the American citizen living in Oregon who was ensnared by the Foreign Intelligence Surveillance Act, and the stories of businesses, librarians, and Internet service providers who tried to protect their customers' and patrons' records and found that during the War on Terror decade they had to fight just to get to talk to Congress or a court about whether their constitutional rights were being violated. Finally, I will explore the dramatic story of how President Bush tried to keep either Congress or the courts from reviewing the wisdom and constitutionality of a massive eavesdropping program involving the National Security Agency, and how Congress and President Obama have followed suit.

Part III, "American Democracy," will discuss what we can learn from the failure of all three branches of the federal government to protect constitutional rights during the War on Terror decade. Any president—Bush, Obama, Lincoln, or Roosevelt—will be tempted to err on the side of choosing dragnets and secrecy. Congress has learned something about the importance of oversight in the past decade but is still unlikely to act as a needed check on presidential power. The courts, with a few notable exceptions, have failed to play their expected role of pushing back against governmental programs that compromise rights and democracy. This section will also discuss the impact of secrecy on the courts, and on

our First Amendment right of access to judicial proceedings. In conclusion, I will ask what we can learn from our own history and from other countries in recharting our course—by examining not just what mistakes we have made, but how in the past we or our counterparts have succeeded or failed in changing course after straying because of perceived emergencies. My conclusion comments on the Constitution's multiple strategies for self-preservation, including a wide range of both familiar and lesser known rights, checks and balances, and even the structures of federalism. And the foremost and ultimate protection of our democracy is what the Preamble's opening describes as the real government of the United States: ordinary Americans.

I.

DRAGNETS AND WATCHLISTS