The Grand Inquisitors

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In the days and weeks after the terrorist attacks of September 11, 2001, each time Attorney General John Ashcroft made a public appearance he would preface his remarks by announcing how many "suspected terrorists"—many of them foreign nationals picked up on minor immigration violations—the government had detained. By early November, just seven weeks after the attacks, the official number stood at 1,182. Ashcroft's message was clear. The Justice Department had matters under control, and was preventing another attack by keeping more than one thousand suspects off the streets.

In June 2003, the Justice Department's inspector general issued an extensive report on the federal government's treatment of immigrants locked up as "suspected terrorists" following September 11. The report found that in the first year of the investigation of September 11, more than seven hundred foreign nationals had been swept up, often on no charges at all, and placed in preventive detention under immigration law auspices. By order of Attorney General Ashcroft, their identities were kept secret. Also by order of the attorney general, more than six hundred of those detained were tried in secret immigration proceedings, closed to members of their families, the public, the press, and even members of Congress. The prisoners were initially held incommunicado, and thereafter limited to one phone call per week. At the Metropolitan Detention Center in Brooklyn, where eighty-four of the prisoners were kept, guards tried to deny them even that right by treating an affirmative response to the question "you doing all right?" as a waiver of their right to make their weekly phone call.

Immigration law permits detention of foreign nationals while they await the outcome of their deportation proceedings, but generally only if there is evidence that they are dangerous or pose a risk of flight. The government lacked such evidence about most of those rounded up on immigration charges after September 11, so it contrived various strategies for delaying the hearings that would reveal how little evidence it had. When detainees were able to get hearings, and immigration judges started ordering some
released, Ashcroft issued a regulation permitting his immigration prosecutors to keep detainees in prison despite the judge's release order, simply by filing a notice of appeal—without regard to whether the appeal had any merit. (Several federal courts have since declared that regulation unconstitutional.) When many of the immigrants agreed to leave the US, the Justice Department refused to let them go, keeping them locked up for months without any legitimate basis in immigration regulations while the FBI apparently tried to satisfy itself that they were not terrorists. Many detainees were brutally beaten. Today not one of these over seven hundred detainees stands convicted of a terrorist crime.\footnote{12}

The inspector general's report of 2003 was a strong indictment of "the Ashcroft raids." It found not only deliberate and systematic abuses of basic human rights, but also that the sweeps had done nothing to further our security. What was Ashcroft's response? As he told Congress at a hearing on the report, "We make no apologies."

That response perfectly captures John Ashcroft's approach to his job as President Bush's first attorney general. In his public statements he consistently resisted any attempts to engage in reflection, dialogue, debate, or even candid discussion of the difficult trade-offs between liberty and security that were presented in the aftermath of September 11. Instead, he rigidly adopted the most aggressive show of authority, whether or not this actually served our security needs, while ridiculing and challenging the loyalty of those who dared to express concerns about his practices. Above all, he never admitted a mistake.

In February 2005, Ashcroft was replaced by Alberto Gonzales, a man with a very different style. Soft-spoken and polite where Ashcroft was gruff, dismissive, and rude, Gonzales, who served as White House counsel before assuming the post of attorney general, has been willing to meet with critics, including representatives from the ACLU, the Center for Constitutional Rights, and the American-Arab Anti-Discrimination Committee. I attended one such meeting on behalf of the Center for Constitutional Rights in 2005. Gonzales admits that liberty and security issues pose difficult questions. Most recently, he has publicly apologized for the apparently partisan-driven firing of eight United States attorneys, admitting, in the passive voice favored by Washington politicians, that "mistakes were made"—even if he can't quite recall what the mistakes actually were.

A recent account of a dramatic showdown between Ashcroft and Gonzales in March 2004 suggests, however, that despite outward appearances, Gonzales was even more willing than Ashcroft to do the President's bidding, regardless of concerns about legality. In dramatic testimony before the Senate Judiciary Committee in May, Bush's former deputy attorney general, James Comey, a Republican and by all accounts a straight shooter, described an astounding effort by then White House Counsel Gonzales to get Ashcroft, while Ashcroft was under sedation in intensive care after an emergency gallbladder operation, to approve a National Security Agency warrantless wiretapping program that Ashcroft, Comey, FBI Director Robert Mueller, and Office of Legal Counsel head Jack Goldsmith had all previously concluded was illegal.

Ashcroft had signed off on the NSA wiretapping program repeatedly since its inception in late 2001. But in March 2004, the Justice Department reevaluated the program, and apparently concluded that it was no longer legal (no one has yet disclosed why the department's views changed or what its specific legal concerns were). Ashcroft and Comey discussed this conclusion the day Ashcroft went into the hospital and agreed that the program should not be recertified. But when Comey, as acting attorney general in Ashcroft's absence, informed the White House of that decision, the White House was not willing to take no for an answer. Instead, Gonzales and White House Chief of Staff Andrew Card made a late-night trip to Ashcroft's hospital bed to see if they could get him to override Comey's decision—even though Ashcroft was so sick that Mrs. Ashcroft had forbidden all visitors, and was apparently willing to relent only when she received a personal call from President Bush himself requesting the meeting.
Gonzales and Card did not tell Comey they were going to the hospital, but Mrs. Ashcroft did. Comey raced to the hospital, as did FBI Director Mueller. Comey, who got there first, described Ashcroft as disoriented and "pretty bad off." Nonetheless, when Gonzales and Card arrived a few minutes later, Ashcroft rebuked them, explaining why he thought the program was illegal, and noting that in any event, "that doesn't matter, because I'm not the attorney general." Pointing to Comey, he concluded, "there is the attorney general." Gonzales and Card left empty-handed.

When President Bush reauthorized the program anyway, Comey, Mueller, Goldsmith, Ashcroft's chief of staff, and as many as thirty Justice Department officials threatened to resign. They held off only because Ashcroft's chief of staff thought they should wait until Ashcroft was feeling better to see if he wanted to resign as well. Bush headed off the crisis by agreeing to modify the program to address the Justice Department's legal concerns. Even as modified, however, the program has been declared unconstitutional by a federal judge. [3]

The officials who threatened to resign were all Republican political appointees who had approved and carried out numerous aggressive counterterrorism initiatives before this. That these men were so concerned that they contemplated mass resignations was a sharp rebuke of Gonzales's actions. As Comey put it, Gonzales sought to "do an end run around the acting attorney general" and "take advantage of a very sick man who did not have the powers of the attorney general." Perhaps most disturbing of all was the President's decision, with Gonzales's counsel, to continue the program despite the determination of all the top people in his own Justice Department that it was illegal.

Some have suggested that Ashcroft's sedated stand warrants reevaluation of his role in the "war on terror."[4] While he never expressed any doubts in public, this incident suggests that on at least one occasion he stood up, under very trying circumstances, to blatant executive overreaching. But the calls for reevaluation are premature. Ashcroft repeatedly approved the illegal NSA wiretapping program, both before and after the March 2004 incident. And in view of the uniform views of his department that the program was illegal as it existed in March 2004, and Ashcroft's formal transfer of official authority to Comey while he was in the hospital, it would have been remarkable had he done anything but say no to Gonzales and Card. In the end, the event says more about Gonzales, who acted underhandedly and possibly unethically, than about Ashcroft, who did only what he was legally required to do.

Still, the hospital encounter does illustrate a telling difference between Gonzales and Ashcroft. Ashcroft was a true believer, lacking any doubt about his principles (whether they were right or wrong). While that trait allowed him to stand up to the President on this occasion, it more often meant that he was the administration's most outspoken advocate of sweeping executive power.

Gonzales, by contrast, was and is at bottom a consummate facilitator, willing to twist the law to serve his boss's ends—whether on torture, detention, wiretapping, or the politicizing of the Justice Department. As far as we know, he never said no. In the end, however, despite their different styles and characters, both men did much to develop and defend a sweeping view of executive power after September 11—what Joe Conason calls "authoritarianism" in It Can Happen Here, and what Frederick Schwarz and Aziz Huq call a "monarchical executive" in Unchecked and Unbalanced.

2.

Ashcroft oversaw the entire domestic response to the attacks of September 11, and in doing so consistently exploited laws—such as those governing immigration—for purposes they were never designed to serve. He orchestrated the raids described earlier. He directed the drafting and negotiation with Congress of the USA Patriot Act, which simultaneously expanded federal surveillance power while watering down judicial checks on that power. He launched the Special Registration program, a national campaign of ethnic profiling that required all male immigrants from Arab and Muslim countries—some
80,000 men—to report to immigration authorities and be fingerprinted, photographed, and interviewed—regardless of whether there was any other basis for suspicion. He authorized warrantless eavesdropping on communications between prisoners and their attorneys. He relaxed the rules for FBI spying, freeing agents to monitor religious services and public meetings without first establishing any basis for suspicion.

He also approved many prosecutions of alleged "terrorists" that ultimately fizzled once they got to a jury, including those of Sami al-Hussayen, a Saudi student acquitted of charges that he had aided terrorists by posting links to Muslim sermons on his Web site; Sami al-Arian, a Palestinian computer science professor in Florida who was acquitted of charges that he had conspired with Palestine Islamic Jihad to murder Americans; Mohammed Salah and Abdelhaleem Ashqar, acquitted in Chicago of charges that they had illegally raised funds for Hamas; and Abdel-Ilah Elmardoudi and Karim Koubriti, whose convictions for conspiring to provide material support to terrorism were thrown out because the prosecution failed to disclose to the defense evidence that its principal witness had lied on the stand.

In fact, the Justice Department's record in terrorism prosecutions is astonishingly poor. Its conviction rate for terrorism prosecutions since September 11 is only 29 percent, compared to a 92 percent conviction rate for felonies generally. None of the 80,000 men called in for Special Registration or the more than 5,000 foreign nationals the administration admitted to detaining in the first two years after September 11 stands convicted of a terrorist crime today. And the FBI has yet to uncover a single al-Qaeda cell in the United States.

In Never Again, Ashcroft's account of his years as attorney general, he offers little defense for these measures. But he inadvertently provides some insight into the character that led him to adopt them in the first place. Ashcroft is the son of a Pentecostal minister who until his death anointed his son with oil every time he assumed a public office, in the tradition of the Old Testament kings of Israel. (When Ashcroft became attorney general, his father had died, so Supreme Court Justice Clarence Thomas did the anointing.) He is a member of the Council for National Policy, a five-hundred-member association that Joe Conason calls "the central committee for the religious right," and whose avowed mission, Conason writes, is to turn America into a "Christian nation."

Ashcroft's voting record as a senator received 100 percent ratings from the Christian Coalition and the National Right to Life Committee. He is a professor at Pat Robertson's fundamentalist Regent University. Upon becoming attorney general, Ashcroft instituted a Bible study group session in his Justice Department office every morning. Like Bush, Ashcroft sees the world in fundamentalist terms, with sharp divisions between good and evil. He associated the President with good, and his opposition with evil—whether that opposition was al-Qaeda, Democrats, or civil libertarians. As Supreme Court Justice Oliver Wendell Holmes Jr. once wrote, "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." Holmes, of course, meant to criticize that approach as unconstitutional; Ashcroft seems to have adopted it whole.

Ashcroft seems to equate faith with the denial that there is any basis for ambiguity or doubt. Just as he made no apologies as attorney general, he expresses no regrets in his reflection (if one can really call it that) on his years at the helm of the Justice Department.

He defends the post–September 11 roundups, for example, by claiming that the government "was much more respectful of due process and citizens' rights" than when it interned Japanese-Americans during World War II. That's like defending segregation on the ground that it's better than slavery. In his retelling, Ashcroft sweeps away all inconvenient facts. He does not even mention the inspector general's report documenting systemic abuses, or the telling fact that not one of the foreign nationals he repeatedly described as "terror suspects" was convicted of a terrorist crime. Instead, he simply asserts that "each
action taken by the Department of Justice...is carefully drawn to target a narrow class of individuals —terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists."

His own account, however, refutes his claims about careful targeting. As he puts it, in the aftermath of September 11, "we didn't yet know who the terrorists were, or where we could find them," but "we had to buy time." When you don't know where the terrorists are—if they are indeed in the United States at all—but you lock up thousands of people anyway "to buy time," you are virtually certain to detain many who pose no threat whatever.

Ashcroft's unwillingness to admit mistakes is coupled with the tactic of demonizing and ridiculing his critics. In his first testimony before Congress after September 11, he claimed that those who evoked "phantoms of lost liberty" were "only giving aid to terrorists." In his book he accuses his critics of talking "incessantly about things that didn't exist, people whose rights were supposedly being infringed upon or were supposedly losing their liberties on a whim, or for no reasons at all." But he never addresses a single one of the hundreds of documented cases of just such infringements.

When librarians expressed concern that the Patriot Act authorized the FBI to demand library records on patrons without showing that the patrons were involved in any terrorist or criminal activity, Ashcroft ridiculed their concerns as "breathless reports and baseless hysteria." He publicly derided the librarians for entertaining paranoid visions of FBI agents "in raincoats, dark suits, and sporting sunglasses," interrogating readers about "how far you have gotten on the latest Tom Clancy novel." He insisted that people need fear Patriot Act surveillance only "if you are spending a lot of time surveilling nuclear power plants with your al Qaeda pals" or "if you have cave-side dinners with a certain terrorist thug named bin Laden."

In fact, the number of wiretap and search warrants granted annually under the Foreign Intelligence Surveillance Act doubled after passage of the Patriot Act. And from 2003 to 2005, the FBI issued more than 140,000 "national security letters," administrative subpoenas authorized by the Patriot Act that require no judicial approval, that demand the disclosure of phone, e-mail, financial, and other records, and that forbid people served with such letters from talking about them with anyone. These numbers suggest that the government's focus has been a lot less targeted than Ashcroft snidely suggested. In July 2005, one "national security letter" went to a librarians' consortium in Connecticut, and we know about that one only because the consortium violated the accompanying gag order by approaching an ACLU lawyer to ask about its constitutional rights. (A federal court subsequently held unconstitutional the gag order sent with national security letters.)

Ashcroft's fast and loose treatment of the facts whenever they are at odds with his black-and-white worldview is also demonstrated in his attitude toward the 9/11 Commission. One might think that the nation's top law enforcer would be interested in what a blue-ribbon bipartisan commission engaged in intensive study of our national security apparatus would have to say about the causes of the attacks and what the United States might do to prevent another attack. But he treated the commission as an adversary, not an ally. "From the early stages," he writes dismissively,

it became apparent that on occasion the [9/11 Commission] hearings were not so much about discovering the truth as they were about assessing blame and grandstanding. Before long, the public hearings disintegrated into show trials.

But if anyone is responsible for grandstanding and casting blame, it is Ashcroft himself. When he testified before the commission, he dramatically announced that he had declassified a 1995 memo discussing the "wall" between law enforcement and intelligence agents that was designed to avoid tainting criminal prosecutions with illegally obtained evidence. The memo, Ashcroft noted, was drafted by Jamie Gorelick, a member of the commission and former deputy attorney general in the Clinton administration. Ashcroft claimed that the "wall" was responsible for the FBI's failure to obtain a warrant
to search Zaccarias Moussaoui's computer when he was detained the month before September 11. In other words, September 11 was essentially the Clinton administration's fault.

In fact, the "wall" was not created by Gorelick or the Clinton administration, but dated back to the passage of the Foreign Intelligence Surveillance Act in 1978. Shortly before September 11, Ashcroft's own deputy, Larry Thompson, reaffirmed Gorelick's 1995 memo. And both the 9/11 Commission and the Senate Judiciary Committee found that the "wall" had nothing to do with the failure to search Moussaoui's computer.[6]

3.

While Ashcroft clearly had a prominent and vocal part in the expansion of executive power, Alberto Gonzales was equally important in approving, behind the scenes, many of the administration's most troubling practices. Gonzales advised President Bush to deny Geneva Convention protections to al-Qaeda detainees, dismissing the provisions as "quaint" and "obsolete," and warning that adhering to the Geneva Conventions might inhibit intelligence gathering. (The conventions flatly prohibit torture and inhumane treatment of all prisoners.) He commissioned the Justice Department’s Office of Legal Counsel to draft the now-infamous "torture" memorandum of August 2002, which was designed to free the CIA to use harshly coercive tactics in interrogations, reportedly including waterboarding, in which suspects are made to believe that they are drowning.

Gonzales advised the President that the international human rights treaty banning "cruel, inhuman, and degrading treatment" of all human beings simply did not apply to foreign nationals held outside US borders—an unfounded and immoral interpretation resoundingly repudiated by Congress when it became public. He helped draft President Bush's initial order establishing military tribunals, in which foreigners accused of terrorist crimes could be tried and executed by military officers on the basis of secret evidence that they could not see or rebut. And as described above, he advised President Bush to authorize the National Security Agency to conduct warrantless wiretapping on Americans, in contravention of a criminal law and the considered view of the Justice Department. The administration has been forced to retreat from every one of these Gonzales-recommended positions, but not before inflicting lasting damage on the United States' reputation throughout the world.

In view of this record, it is ironic that Gonzales has received his harshest criticism to date for his involvement in the scandal over the firing of US attorneys. The two officials who have resigned over the firings, Kyle Sampson and Monica Goodling, were both aides to Attorney General John Ashcroft first. And the politicizing did not begin with Gonzales; by many accounts it began as soon as Ashcroft assumed office, as political appointees took over the hiring process, which had traditionally been conducted by career attorneys, and began filling positions, particularly in places like the Civil Rights Division, with young lawyers with little relevant legal experience but substantial ties to the right-wing Federalist Society or the Republican National Lawyers Association. While Gonzales should be held accountable for undermining the independence of the Justice Department, in doing so he was for the most part continuing a pattern begun under Ashcroft.[7]

Because he is still in office, it is too early for Gonzales to offer an extensive public accounting of his role, and given his asserted memory lapses, he may never do so. During his recent Senate testimony, Gonzales answered questions about the US attorney dismissals with some variant of "I don't recall" sixty-four times. Gonzales was harshly criticized by virtually every member of the Senate Judiciary Committee—Republican and Democrat—but he simply sat there. Whether out of rank incompetence, loyalty to his boss, or both, he took the fall. (Why he has not yet resigned remains a mystery, since he is not helping the President's reputation by staying on as a deeply compromised official—unless, of course, by doing so he is hiding information that a more independent successor might reveal.)
Nancy Baker, Joe Conason, and Frederick Schwarz and Aziz Huq all provide valuable critical perspectives on both Ashcroft and Gonzales. In General Ashcroft, Baker's careful command of detail makes for a forceful indictment, precisely because she forgoes the kind of rhetorical overstatement and reductionist rhetoric that Ashcroft himself favors. Conason, like Baker, identifies Ashcroft as a principal player in the Bush administration's attack on checks and balances, but his field of vision is broader. He offers pithy insights into each central character in the post–September 11 drama, including Karl Rove, Dick Cheney, Gonzales, David Addington, and John Yoo. (Interestingly, in Conason's telling Bush himself seems less important than any of these figures.) But where Baker offers a relatively objective account, Conason's book sometimes reads like a partisan attack. It is almost as if he sees the world in Ashcroft's mirror—where Ashcroft sees black and white, Conason sees white and black. He writes, for example, that the administration used color-coded security alerts such as "orange" for political purposes and that Bush went to war in Iraq so Republicans could win the 2002 midterm elections. These claims are not supported by evidence, and undermine what is otherwise a well-written account of an administration bent on establishing authoritarian executive power.

Schwarz and Huq's Unchecked and Unbalanced provides a more structural critique of executive excess in the post–September 11 era. Presidential aggrandizement, they remind us, was not invented by George W. Bush. In 1975 and 1976, Congress's Church Committee, on which Schwarz served as legal counsel, revealed extensive abuses of executive power during the cold war, including widespread illegal spying on Americans. Schwarz and Huq suggest that the problem is not just that people like Bush, Cheney, Ashcroft, and Gonzales have been in power, but that institutional flaws make it all too easy for such officials to get away with unconstitutional initiatives in times of crisis. The Church Committee diagnosed four such flaws that encouraged the cold war abuses: ambiguous laws and instructions; implicit orders from high officials to violate the law; secrecy; and feeble congressional oversight. Schwarz and Huq demonstrate that despite many post-Watergate reforms, including the Foreign Intelligence Surveillance Act, the same institutional factors are central to understanding the Bush administration's recent torture, rendition, and warrantless wiretapping policies.

In short, where Conason stresses the actions of power-hungry politicians and enabling lawyers, Schwarz and Huq emphasize the importance of structural features in the organization of our federal government. Both diagnoses capture a significant part of the story. In some sense, we have had the worst of all possible combinations: Ashcroft and Gonzales, not to mention Bush and Cheney, came to power just when they could do the most damage. They arrived in office with strong ideological commitments to unchecked power, and they exercised authority at a time when the concept of restraint was most vulnerable. If Conason's focus on particular politicians and officials is right, we might expect the problems to subside with a new administration. But if, as I believe, Schwarz and Huq's structural criticism is equally if not more correct, the problems will continue, albeit perhaps less acutely, well after President Bush leaves office.

Missing from both analyses is sufficient consideration of the overwhelming political pressure to prevent another terrorist attack that an event like September 11 places on government officials, regardless of party affiliation. While President Bush and his cabinet are fully responsible for the abuses of their ill-defined "war on terror," no serious Democrat presidential candidate in 2004 had the courage to speak out against their illegal practices—the word "torture," for example, rarely if ever was spoken by John Kerry. Democrats felt it was political suicide to voice concern about human rights abuses when the public was demanding protection from another attack.

The central question, then, is how to respond to the pressure for security without assuming excessive power and condoning abuses. The leaders of the Bush administration not only yielded entirely, but often appeared to play up their contempt for human rights, suggesting that only Republicans could be trusted to...
protect Americans from terror. Ashcroft himself was perhaps the administration's fiercest proponent of what he called the "preventive paradigm," in which dramatic and highly coercive measures—preventive detention, abusive interrogation, and the like—are brought to bear on people not for wrongs they have committed but because of fears, inevitably speculative, of what they might do.

Ashcroft pursued this approach with zeal from the day after September 11, even though he had no idea how it could be sustained over the long term. In Bush at War, Bob Woodward recounts a National Security Council meeting on September 12, 2001, in which FBI Director Robert Mueller warned that the government must seek to avoid tainting evidence in order to be able to bring the terrorists' accomplices to justice. According to Woodward, Ashcroft interrupted, saying, "Let's stop the discussion right here.... The chief mission of US law enforcement...is to stop another attack and apprehend any accomplices to terrorists before they hit us again. If we can't bring them to trial, so be it."[9] In his book, Ashcroft admits that "at the time, I wasn't really sure what we would do with the terrorists when we caught them, especially if we couldn't bring them to trial in our country."

The administration listened to Ashcroft. But Mueller was right. If evidence is obtained illegally, through a warrantless wiretap conducted by the NSA, or through an interrogation featuring sleep deprivation, exposure to extreme heat and cold, sexual humiliation, and waterboarding, it cannot be used to hold defendants responsible for their crimes. That is the principal reason why no single trial for war crimes has been completed at Guantánamo. And if terrorists cannot be tried for their crimes, the government is left to assert the authority to hold them indefinitely without trial, and, at Guantánamo, without even a fair hearing. Ashcroft recognized this trap the day after September 11—and advocated walking right into it.

If we are to prevail against the tactics of terror, we need structural reforms to ensure clear rules, aggressive congressional oversight, and political leaders who are willing to stand up for principle in the face of overwhelming popular pressure. Following September 11, we had none of these. We need to restore them all if we are to make progress in reestablishing the system of checks and balances that Bush, Ashcroft, and Gonzales so aggressively sought to dismantle in the name of our protection.

—June 20, 2007

Notes


[2] As a cooperating attorney for the Center for Constitutional Rights, I represent pro bono a number of immigrants who were arrested in terrorism roundups following September 11 and who have sued John Ashcroft and others for their mistreatment. See Turkmen v. Ashcroft, 2006 US Dist. LEXIS 39170 (EDNY June 14, 2006).

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In a similar case alleging abuse of an Arab Muslim immigrant detained in Brooklyn as a "terror suspect" after September 11—but not charged with any crime related to terrorism—the US Court of Appeals for the Second Circuit recently rejected John Ashcroft's motion to dismiss the case. Refuting Ashcroft's argument that the emergency occasioned by September 11 justified his actions, the Court stated:
The rights that the plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.


