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analysis

the FISCER, the government (but no one else) may appeal to the U.S. Supreme Court.

Not long after the PATRIOT Act changed the "purpose" requirement, the FISC issued an order requiring the government to continue to segregate the information to prevent misuse by law enforcement, holding that those measures were needed to protect citizens against a violation of the Fourth Amendment. The FISCER reversed that decision, holding that "the procedures and government showings required under FISA, if they do not meet the minimum Fourth Amendment warrant standards, certainly come close" and that the amended act "is constitutional because the surveillances it authorizes are reasonable."

But that was then, and this is now. Just as the tide of public opinion has turned against the Bush administration, so does the tide of judicial approval seem to be running against it. While Mayfield's motion was pending, another federal court, in New York, held that the PATRIOT Act's provision allowing investigators to obtain phone and other business records using "national security letters" is also unconstitutional.

Even the Supreme Court of Chief Justice John Roberts has recently shown heightened concern about the administration's conduct of the war on terror. Last April, the court denied review of the law stripping courts of jurisdiction over Guantánamo detainee challenges. But two months later, in an all-but-unprecedented move, the court reversed

itself and granted review — apparently because of an affidavit from a military lawyer stating that the detainees are receiving only a travesty of due process.

By repeatedly lying to the nation and to the courts, by extending government secrecy to new heights and by pushing its constitutional and statutory authority to the furthest imaginable limits, the Bush administration has forfeited the trust of the courts. Judges of all political stripes simply no longer believe government assurances. Trust us, the government said, Mayfield's the guy; he wasn't. Trust us, we won't abuse national security letters; they did. Trust us, we don't torture; they do.

Harvard professor Jack Goldsmith, a conservative and a Bush appointee, is the man who withdrew the infamous "torture memos" that apparently authorized cruel and inhuman interrogation by soldiers and spies. In his recent book, *The Terror Presidency*, Goldsmith writes that Bush, unlike other strong wartime presidents, has repeatedly refused to consult with Congress, defer to the courts or make any concession even to public opinion. "He has instead relied on the hard power of prerogative," Goldsmith writes. "And he has seen his hard power diminished in many ways because he has failed to take the softer aspects of power seriously."

This diminution suits Brandon Mayfield fine. Behind his desk are two framed posters, made at a local copy shop, of the Bill of Rights. Black-clad federal agents worked directly beneath them, he notes, as

they ransacked his computers and his clients' confidential files in a fool's quest for a Spanish bomber.

Mayfield is now working on his own account of the events of 2004, and he spends other free time reading the history of the Constitution and the Bill of Rights. The Constitution guarantees every American the right to choose a religious belief even if it's one the government does not approve of. And it's impossible not to believe that Mayfield's spiritual choice is what landed him in prison, branded a mass murderer, on the basis of phony assertions and faked "evidence."

Mayfield's prescription for what ails the country is as straightforward as most other things about him. It's the Constitution.

"We have a perfect balance between liberty and security, between criminal investigation and privacy. It's called probable cause," he said. "We ironed out these issues a long time ago. That's why we're such a wonderful country."

EW

Garrett Epps is the Orlando John and Marian H. Hollis Professor of Law at the UO and has published numerous books, scholarly articles and articles for general audiences in the field of constitutional law and civil rights. In 2007-2008, Epps is the Wayne Morse Center for Law and Politics Resident Scholar, and his most recent book, Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America, is a finalist for an Oregon Book Award. A novelist and former journalist, Professor Epps is a former staff writer for the Washington Post, and has also written for, inter alia, The New York Times, The New Republic, and The New York Review of Books.



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