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Conscience Over Career: The Prosecution of the American Taliban
by Jesselyn Radack

The following is a transcript of a speech given at The Future of Freedom Foundation's June 2008 conference, "Restoring the Republic: Foreign Policy & Civil Liberties" held in Reston, Virginia.

Jacob Hornberger: Jesselyn Radack graduated magna cum laude from Brown University, and received her J.D. from Yale Law School. She joined the Department of Justice, where she practiced constitutional tort litigation, and later worked in the Professional Responsibility Advisory Office, which is the Ethics Department. She has served on the Washington D.C. Bar Association Legal Ethics Committee, and has represented whistleblowers alleging reconstruction fraud in Iraq. Among the cases she worked on while at the Justice Department was that of John Walker Lindh, the so-called American Taliban. Now, one of the things that law students are taught in law school, one of the most important things, is that when it comes to ethical principles, it doesn't matter whether you're on the prosecution side or you're on the defense side: those ethical principles must be applied consistently across the board. While in the crisis of 9/11 and the invasion of Afghanistan and the invasion of Iraq, as most everyone here knows, the U.S. government threw a lot of the rules of law and as well as morality and ethics out the window. Jesselyn was one of those lawyers in the Justice Department that took her ethical responsibility seriously, and she insisted on the application of ethical principles in this case of the American Taliban, which, as every law student is taught, is that no matter how unpopular the case is, no matter how despicable people consider your client, you apply those ethical principles. She learned that unfortunately the Justice Department didn't quite agree in those emergency crisis times. She paid a tremendous price in terms of her conscience over her career, and that is the title of her talk today. Please welcome Jesselyn Radack.

<applause>

Jesselyn Radack: Can everybody hear me? I wanted to say thank you to Bumper. My son, Jacob, would envy you your nickname. His is Snicker-Doodle. This was a very last-minute invitation but I am very glad to be talking to you, and I'd like to thank the Future of Freedom Foundation for the important work that they are doing, and for inviting me to speak. I had no way of knowing that my story was a snapshot of President Bush's most controversial policies in their embryonic stages, policies we are just now seeing play out in full today. I am the

whistleblower in the case of American Taliban John Walker Lindh. This very loaded sentence contains the ingredients of the perfect storm that this administration has brewed in the war on terrorism, the Patriot Act, torture policy, occupation of Iraq, assault on journalists, and punishment for truth-tellers.

I was a legal advisor at the Justice Department on matters of ethics. On December 7th, 2001, I fielded a call from a Criminal Division attorney named John Depew [ph?]. He wanted to know about the ethical propriety of interrogating American Taliban John Walker Lindh without a lawyer being present. Depew told me unambiguously that Lindh's father had retained counsel for his son. I advised him that Lindh should not be questioned without his lawyer. That was on a Friday. He called me back on a Monday and said "Oops, the FBI did it anyway. What should we do now?" "Not to worry," I said. "That is part of my job, to help you get out of this kind of dilemma." I said "You need to seal off the interview, and use it only for intelligence gathering and national security purposes, but not for criminal prosecution." Again, my advice was ignored. Three weeks later on January 15th, 2002, then Attorney General John Ashcroft announced that a criminal complaint was being filed against John Walker Lindh. "The subject here is entitled to choose his own lawyer," Ashcroft said, "and to our knowledge has not chosen a lawyer at this time." I knew that wasn't true. His parents had in fact retained counsel and tried desperately to communicate that to their son through the Red Cross, the Justice Department, the Defense Department, and the State Department. Three weeks later, Ashcroft announced Lindh's indictment, saying that "his rights have been carefully, scrupulously honored." Again, I knew that was not true.

About the same time, I was given a backdated, unsigned, untimely, and unprecedented performance evaluation from hell despite having received a performance award and a raise during the preceding year. I was told that the vitriolic review would be put in my permanent personnel file, unless I found another job. I was shocked, but I still did not put two and two together until a few weeks later. On March 7th I inadvertently learned that the judge presiding over the Lindh case had ordered that all Justice Department correspondence related to Lindh's interrogation be submitted to the court. Such orders are routinely distributed to everyone with even a remote connection to the case in question, but I heard about it only because the Lindh prosecutor contacted me directly. There was more. The prosecutor said he had only two of my e-mails. I knew I had written more than a dozen. When I went to check the hard-copy file, the e-mails containing my assessment that the FBI had committed an ethical violation in Lindh's interrogation were missing. With the help of technical support, I recovered the missing e-mails from my computer archives. Have we heard that story before, that the e-mails are missing?

<applause>

Jesselyn Radack: I documented them and included them in a memo to my boss, took home a copy for safekeeping in case they disappeared again, and resigned. Months later, as the Justice Department continued to claim it never believed that at the time of his interrogation Lindh had a lawyer; I disclosed the e-mails to *Newsweek* in accordance with the Whistleblower Protection Act. As a result, I was forced out of my job then in the private sector at the government's behest, placed under criminal investigation without any charges ever being brought, refereed [referred?] to the state bars in which I'm licensed as an attorney, and put on the No Fly List.

Two weeks ago, the Department of Justice Office of the Inspector General (OIG) issued a positive report on the FBI's involvement in detainee interrogations in Afghanistan, Guantanamo Bay, and Iraq. This, of course, piqued my interest. I applaud the Office of the Inspector General's recognition of a handful of career justice attorneys and FBI officials who challenged abusive interrogation techniques, and warned correctly that torture would likely taint any legal proceedings against suspected terrorists. The report finds, "We believe the FBI should be credited for its conduct and professionalism in detainee interrogations."

But to reach this conclusion the OIG omits from the 458-page report one of the earliest and most obvious cases of torture in FBI misconduct, that of John Walker Lindh. The report does cover 2001, the period during which he was detained. He is an American citizen. He was found shot in the leg and barely alive. U.S. soldiers threatened him with death, blindfolded him, duct-taped him naked to a board, scrawled expletives on him, and posed with him for pictures before holding him in an unlit, metal shipping container for two days. Yet curiously, the OIG reports in its executive summary, "We found no instances in which an FBI agent participated in clear detainee abuse of the kind that some military interrogators used at Abu Ghraib prison."

Unbeknownst to me until a few weeks ago, the White House had decided not to turn over any documents to Lindh's defense counsel. The Defense Department, apoplectic that its new policy on the torture of captives in the War on Terrorism was going to be exposed, leaned on the Justice Department to offer Lindh a deal. On the eve of the suppression hearing that was going to expose his mistreatment, Lindh pleaded guilty to two relatively minor charges that landed him in jail for 20 years. As part of the plea bargain, he had to sign a statement swearing that he had not been intentionally mistreated by his U.S. captors and waiving any future claim of torture.

In 2002, my lawyer made it abundantly clear to the Office of the Inspector General that I took several steps to thwart efforts to conceal material regarding Lindh's interrogation from the court. In January 2003, Inspector General Glenn Fine (who will be testifying about this very issue before the Senate Judiciary Committee on Wednesday, if any of you want to see something.), told my lawyer he looked into my list [ph?] of lower allegations and was not going to pursue them. My reaction is that the Inspector General didn't look too deeply, because he didn't even bother to talk to me, the complainant. To add insult to injury, OIG turned my case over for criminal prosecution, which eventually closed without charges ever being brought. I don't know what they would have charged me with: stealing paper clips from the government? Leaking is not a crime. And they can't hide behind the attorney-client privilege to commit illegal acts.

But the Justice Department was not through. There's been a long litany, seven years' worth of retaliation, including little things like the government assisting my private law firm in contesting my award of unemployment compensation benefits: your government at work. Needless to say, the current OIG report does not mention that FBI agent Christopher Ryman, [ph?] who admits that when informing Lindh of his right to counsel, he adlibbed, "Of course there are no lawyers here in Afghanistan." When OIG catalogues a gruesome list of techniques used on detainees in Afghanistan, including abusive handling, harsh restraints, deprivation of clothing, blindfolding, humiliation, and isolation, it does not reference Lindh. In fact, the report makes no mention of John Walker Lindh whatsoever. While I applaud the handful of people identified in the report who repeatedly challenged harsh interrogation techniques, I question the motive of the OIG report in propping them up, as revisionist evidence that the Justice Department's and FBI's role in torture was somehow not so bad. It

must be remembered that the same Justice Department's Office of Legal Counsel, which writes legal opinions considered binding on federal agencies and departments, authored the infamous torture memo that gave Justice's imprimatur to such conduct in the first place. No Office of Inspector General report has been issued on that.

My story is a microcosm of what happens when you trade freedom for fear, when you confuse dissent with disloyalty, and replace democracy with despotism. John Walker Lindh started out as a traitor incarnate, treasonous, the worst of the bad. But he turned out to be a misguided kid from California. I started out as an Ethics Advisor at the Department of Justice, but was somehow transmogrified into a "traitor," a "turncoat," a "terrorist sympathizer," according to unnamed officials quoted in the *New York Times*. This reversal is emblematic of how far the War on Terrorism has inverted the constitutional structure, in which our inner lives are private and the work of the government is public. Instead it has created a country in which our personal lives are transparent, and the workings of the government are secret.

<applause>

Jesselyn Radack: This obsessive secrecy hinders security. Our best protection against terrorism is an informed public with the safety valve of free expression. But we have done everything to prevent that. The erosion of civil rights and liberties is a toxic trend, and I hope my story will help deprive it of oxygen. In responding to terrorism, we must not trample on the very freedoms for which we are fighting, and public servants should not have to choose between their conscience and their career. Thank you.

<applause>

Jesselyn Radack: I'd be glad to take questions because I know the story has many different tentacles and can go many different ways, and different audiences want to hear different aspects, so line them up.

Q: Don't worry, it's friendly fire; they're not critical questions. I'm just curious about two legal things. And first of all, thank you for what you've done. That's wonderful.

Jesselyn Radack: You're very welcome.

Q: First one: when they made him sign that statement, and they know it's false, isn't that suborning perjury?

Jesselyn Radack: Yes, I think it is. I think his attorneys, who have petitioned for commutation of his sentence, are considering that and considering introducing a lot of new evidence which has come out only in the last couple of weeks. The nature of information that does come out has been very drip-drip-drip. Every couple of months we learn something new about what happened, and for the reporters who I'm grateful to, Jane Mayer and Eric Lichtblau, a number of the bloggers right and left who have been covering this case, I think definitely this is new information, and I think the plea bargain itself was problematic and in many ways heavy-handed.

Q: Thank you. Another quick follow-up— Leaking by a government official is not illegal for sure?

Jesselyn Radack: Yes, for sure. You're authorized to leak under the Whistleblower Protection Act of 1989. You cannot be retaliated against for giving information that evidence is fraud, waste, and abuse. Part of the problem, however, with the Whistleblower Protection Act is that it has no teeth, so when they retaliate against you in spades, it doesn't create a private cause of action for you to go and sue the government. So it sounds really good on paper, but it's kind of a paper tiger. And in terms of actually protecting people, we're trying to strengthen it right now. There are proposals on both sides of the aisle in Congress to try to strengthen whistleblower protections, because we need them more than ever right now.

Q: I, along with Dr. Henderson, salute your bravery. Congratulations.

Jesselyn Radack: Thank you.

Q: My question isn't about the topic but more about whistleblowers in general. I'm wondering if you have any information or if you know anything about the case about the Iraqi judge who was appointed by Viceroy Paul Bremer in Iraq who apparently did his job too well, and his staff was killed, and he had to leave the country. I don't know if you're familiar with that?

Jesselyn Radack: Yeah, I have heard about that, and I don't know the details of that, but I know in general there have been a number of casualties of people who were just doing their job, or doing it too well.

Q: My simple follow-up: has Sibel Edmonds been in contact with the organization?

Jesselyn Radack: Pardon?

Q: Sibel Edmonds?

Jesselyn Radack: Yes. Sibel and I are friends, and we helped form the National Security Whistleblower Coalition back in 2004. She's another person who's just been raked over the coals. Everyone's retaliation is different. She's under a gag order right now. Still under a gag order for stuff that's been public and on the Internet, and she certainly has suffered her share of retaliation also, again without much recourse. But happily right now, Sibel is adopting, in the process of adopting a baby from Vietnam. Hopefully, that was sort of my silver lining from this whole thing was the birth of my daughter. I was pregnant during all of this.

<applause>

Q: Thank you for your story. Hopefully some good can come out of it. My question is about kind of the broader story. As I recall, there were photos that came out in the media showing John Walker Lindh completely beat up,

and yet that very public part of the story seems to have gone down the memory hole as well. I recall fairly recently writing a letter to the editor, and just asking about it. This guy was tortured. American citizen. What's going on here? So I'm wondering if you can comment on sort of the media.

Jesselyn Radack: Right. There was definitely a hysteria surrounding the John Walker Lindh case, and the picture you're referring to was a famous trophy photo of him in which he's naked and gagged and blindfolded, and has "Shithead" written across the blindfold and he's bound and strapped to a board. And that photo circulated around the world. You can still find it on the Internet. It was right after 9/11, and no one flinched. I mean, there were a few people who may have been taken aback by it, but when we saw the same thing from Abu Ghraib in 2004, there was a very, very different reaction. And I know within the Justice Department, when Lindh was first captured, it was the sentiment of let's hang him high. How can we try him for treason because it carries the death penalty? How can we get him tried in the Fourth Circuit, which is very conservative compared to the Ninth Circuit, which tends to be more liberal, and would have been more logical because he was from California. But they tried him in the Fourth, which was a mile from the Pentagon, and on the anniversary of 9/11. And there was a huge hysteria because he was the first person captured, really, in the War on Terrorism. And that made it even worse that he was an American, and yeah, they tortured him, and not many people blinked.

Q: I'm Roslyn Gleasy-McClinnon [ph?]. I was a journalist in New Jersey writing for a northern New Jersey newspaper, and I went through something, a retaliation, where I know what it feels like, to make it short, and I commend you for your courage for standing up. It was so relatively mild, what I went through compared to this. My question is, if this John Walker Lindh, he's serving 20 years now? What was his choice? It was death?

Jesselyn Radack: Initially the government had been seeking three counts that carried the death penalty against him. So when we look back at it now, in hindsight people are like, gosh, why did his attorney ever agree to that? Twenty years, that's a draconian sentence because he pled guilty to two very minor, very minor technical charges.

Q: But 20 years!

Jesselyn Radack: Twenty years. And it seems draconian now, but when you look back at this guy, who was facing three counts that carried the death penalty, and was about to be tried one mile from the Pentagon on the anniversary of 9/11, there was still very much this hysteria about it, and he very much was scapegoated

Q: Witch burning.

Jesselyn Radack: Yeah. as being...even though the judge himself ruled that he had nothing to do with the death of CIA agent Johnny Michael Spann at the time the administration was very happy to kind of fan the flames of that rumor.

Q: What are the prospects of parole or of getting out?

Jesselyn Radack: Nothing in this administration; maybe in the next. But I also think, again, there's new evidence that just came out a couple of weeks ago that I think could bolster his petition for commutation, but again, people ask me, "What are your prospects?" I'm still under investigation by the D.C. Bar and it's been nearly five years, and people say "What about now?" I, I'm not confident that anything will happen until 2009."

Q: Yeah. I downloaded this case, by the way. I believe I got this on FFF.org, or I'm not sure where I got it, and I brought it, so it's just a coincidence, so I'm glad to meet you.

Jesselyn Radack: Thank you. It's nice to meet you too.

Q: I think you may have already answered this. I just wanted to ask what the status of his case was right now.

Jesselyn Radack: Yeah, the status right now, I think he—I e-mailed his father the other day, and I think he was still in solitary confinement. He's in prison; he's done about four years of the 20-year sentence. He's no longer a teenager, he's a young man, but he's in jail for 20 years, and as part of the plea bargain he agreed not to challenge his sentence. So he can't appeal the sentence. He can petition for commutation, which is what he's done, and maybe it's a good thing that they haven't ruled on that, and that petition is kind of flapping in the wind right now. It's not fun to be kind of flapping in the wind, but I think a lot of us are just sort of treading water, knowing that nothing is going to happen in the near term with this. I think with the new administration he could potentially get the sentence reduced to time served. It's worth noting that there were two other people who were caught alongside Lindh, doing the exact same thing. Yaser Hamdi, also an American citizen, we litigated his case all the way up to the Supreme Court. The administration lost, and he was sent scot free, back to Saudi Arabia, which is a hotbed of terrorism. The other guy was David Hicks, an Australian, also caught. He's a kangaroo skinner by profession, also caught in this uprising at Mazar-i Sharif on the Taliban side. He was held at Guantanamo Bay for five years, but then they released him and he was sentenced by the Australian courts to nine months in jail, not including the five years in the Black Hole, otherwise known as Guantanamo Bay. So you have three men with completely different outcomes, and if part of the penological purpose is proportionality, I mean, that's what we're taught in law school, proportionality, to have three guys who did the exact same thing—one being set free, one serving 20 years, and the other serving nine months—it's just not fair, I think, by anyone's definition.

Q: I'm Bart Frazier from the Future of Freedom Foundation here. I was wondering if you could please tell us if you have handled any other ethics cases pertaining to the War on Terrorism, and also if you could please give us a synopsis of how ethics cases are handled in the Justice Department.

Jesselyn Radack: Right now, as far as I know, my former office is not doing—as I told Jane Mayer in the article she did for the *New Yorker*, I think ethics went out the window when the War on Terrorism started. So ethics, which involves following the Constitution, I don't believe in only following—Article II seems to be the only part of the Constitution our President has read, and the Bill of Rights seems to have flown out the window along with

the ethics. I don't think much is going on in the Ethics Unit at all. I guess, I think they're probably stacking Styrofoam cups and collecting a paycheck. In terms of my work on other terrorism cases, yes, I basically made it a lifelong crusade. It's interesting; me and the attorney with whom I originally corresponded, I met him, strangely, for the first time, at an anti-torture conference, and I'm, like, "Good job, Justice Department; you made two people who were career government attorneys, totally anti-government, and totally."

<applause>

Jesselyn Radack: Yeah, I was the biggest flag-waving, government wears a white hat, we do the right thing, fresh-faced kid out of law school, into the honors program, and how amazing it was to walk in to court and have the imprimatur of the United States behind me, but I would be ashamed to do that now. I don't preclude government service some day, if it can be done in a certain way, but not like this. In terms of my own personal work, I ended up working with the ABA Task Force on Treatment of Enemy Combatants. I ended up serving in the D.C. Bar Legal Ethics Committee, even though, oddly, I'm still under investigation by the D.C. Bar. It's just emblematic of this Kafkaesque world that we're living in right now. I have been giving ethics advice in other terrorism-related cases, most recently, one of the few surviving cases on national surveillance: warrantless wiretapping. It's all involving an Islamic charity called Al-Haramain, and they know that they were spied on, and how do they know this? They actually have proof of it. Why? Because the government screwed up and turned over a transcript of their telephone calls to them. So they're one of the few plaintiffs who can actually prove they were spied on. But then the government basically shut down their case by claiming state secrets privilege. And the ethics issue came in because they tried to appeal that decision, and to appeal it, they had to write the appellate brief in a special government room in a government computer. They were not allowed to keep a draft of what they wrote, though they had to turn it over to the government. The government prosecutor was involved in supervising this special little government room brief-writing session, and at the end, they shredded the banana peel of one of the attorneys representing Al-Haramain, and they decided to destroy the hard drive with the leg of the table in another demonstration of professionalism. So I wrote an article on the legal ethics implications of having the Litigation Security Group baby sit the brief writing of a party opponent in a terrorism case; so yes, I'm still very involved in it. I work for a government watchdog group, the Government Accountability Project, right now, representing whistleblowers, and I've dedicated my life to that.

Q: If I could add a short anecdote that might be of some interest. After 9/11 at the Independent Institute, we were trying to figure out what we could do to get public attention to what we could see as a real threat to American society in the world. So we decided to put on an event featuring Gore Vidal and had a number of people in the panel with Gore, including Bob Higgs, who is here. And we had a huge turnout in San Francisco, sold out, and even had scalpers. And afterward, I got two e-mail notes attacking us for doing this, only two. One was from Brink Lindsey of the Cato Institute, and the second one was from Henry Holzer's wife, Erika Holzer, cosigned actually by both of them. Henry Holzer was the attorney for Ayn Rand, and was setting up a Web site to go after Lindh as being this epitome of treason, demanding the death penalty, and the incident to me just dramatized the absurdity and the insanity that was steeping into American society. And I wasn't sure if you'd ever had a run-in with the Holzers, because they were leading this charge, and of course since Holzer was this attorney who allegedly was for due process in the rule of law. I thought it was particularly interesting, and of course confirmed my suspicions about many of the people in the Rand movement in the first place. But in any

event, I wasn't sure if you'd had a run-in with these people, because the vitriol that I got was the most extreme I've gotten since 9/11, and I'll never forget that.

Jesselyn Radack: I haven't run into them or dealt with them. I can say that this experience has created strange bedfellows, but I ended up—one of my attorneys is going to be a speaker, I think tomorrow, Bruce Fine, who had been a Reagan Republican and worked at the Justice Department under Reagan. And I ended up teaming up with a lot of people of a different political stripe. And I also have gotten a lot of—even, I mean, I wrote an editorial the other day and I still get hate mail; “Why don't you spend more time writing about the terrorists who try to kill us?” “Why don't you spend more time writing about the people who have been killed by the terrorists?” And I say, “You know, I actually have written about that stuff,” and cite my numerous, boring law review articles. But I'm talking about JUSTICE, writ large. It's not about some bleeding heart sympathy for John Walker Lindh or not. For me it was never about John Walker Lindh personally. I don't know him, don't know what he was doing over there, but it was about the rule of law in following the rules, and not taking shortcuts, and doing stuff by the book. After all, I worked for the Justice Department, and we were simultaneously prosecuting Arthur Anderson for destruction of evidence and obstruction of justice.

Q: Thank you very much, Jesselyn. My name is Sally Hayes [ph?] from Gainesville, Florida. I have a question. Because you found out so early that he had not been allowed to have a lawyer, or they bypassed it and also that you had evidence of that, did you appear at his trial?

Jesselyn Radack: Did I go to his case?

Q: No, did you appear as one of the witnesses?

Jesselyn Radack: No, actually his case never went to trial, because on the eve of the suppression hearing that was going to bring out into the open who did what to him and how, it was going to reveal a lot of the torture. That was when the White House ordered discovery to be shut down, and that this kid be given a deal and for this not to go to trial. I think they could have potentially called me as a hostile witness or an adverse witness. I would have been willing to just tell the truth about my personal experience. Because his case didn't go to trial, a lot of the stuff ends up getting told in the media: what happened behind the scenes, what happened to the e-mails, who issued the order to shut down the discovery process, which, as those of you who are lawyers know, is an integral part of our adversarial system of justice.

Q: One follow-up question to that; is that evidence strong enough that the judge immediately, when he heard that would have dismissed the case, that due process hadn't taken place?

Jesselyn Radack: This was before Judge Ellis in the Fourth Circuit, who was not enamored of Lindh, and who's a very conservative, very conservative law-and-order, pro-government judge. If all the truth had been out that we know now, yes, I think it would have been dismissed by even a junior green defense attorney. But you have to remember there was like this hysteria after 9/11, understandably so. A lot of us have lost people in 9/11. I was downtown when it happened. It was horrible. It was just kind of a vengeance that permeated the Justice

Department and I think a lot of other portions of the government, a lot of other agencies. And I think that seeped over and has seeped over into Congress. I know we have a Congress right now that has all of the power and none of the will. We have a judiciary that rubber-stamps everything, and then we have an executive that has his unitary executive theory that they control everything, and they have. I don't think many judges were willing to take a different view at that point, and he happened to have a very conservative, pro-government judge.

Q: I just want to get a clarification and understand your situation at the time. Is it correct that you were not a prosecutor? You were in a separate office within the Justice Department, is that correct?

Jesselyn Radack: That's correct. I was in an independent office within the Department of Justice., I was not on the prosecution team. We gave ethics advice prospectively to attorneys who were involved in cases to try to keep them out of trouble, and tried to keep them from getting in trouble later on. You don't want them to be sanctioned or disciplined by the judge or get in ethics trouble later. And even if they do mess up, we would still help them try to figure out how to correct that by sealing off an interview or creating a taint team to look at information that we got the wrong way and that kind of thing. So no, I was an ethics attorney, the legal advisor who happened to be called on that morning, Friday.

Q: When you took the job, is it because you felt that federal prosecution of federal crimes was a particularly important thing? And if so, has your view of that changed from this experience?

Jesselyn Radack: Yeah, when I originally went to work for the Justice Department, like I said, I was very much the government wears a white hat, and does the right thing, and is on the right side, and naïve about that. When I switched to the Ethics Office, that was really because I had done constitutional tort litigation for four years, and at that point I had two small babies, and litigating was incompatible, flying all over the country and crazy deadlines and litigation. And I liked the ethics stuff. It was very interesting to me, and they were opening this new Ethics Office, and I thought that would be a good match. I felt like for the first couple of years it was a good match. I didn't feel a huge change between the Reno Justice Department and the Ashcroft Justice Department. I mean, granted Reno was very open, very kind of Glasnost, let's hold hands, sing "Kumbaya." She was a lot more open. And Ashcroft liked very top-down corporate structure. But for me the real sea change of the department was after 9/11, when everything, I think, went out the window. And you heard the language all the time: "We're in a new kind of era." "It's a new kind of war." "We need new techniques." We need new this and new that. Yeah, maybe we have to do some things differently, but we have a way of doing that, of going to Congress and fixing the law, not by doing it in secret. Not by enacting the Patriot Act, which no one read, which was essentially a Christmas tree, a wish list of a small minority of people, who wanted the kind of government that we have right now today.

Q: Jesselyn, would you talk a little bit about the gag order that was placed on Lindh as part of the plea bargain, which seemed to be kind of an unusual thing.

Jesselyn Radack: Yeah, it would seem to be an unusual thing, but the gag orders that have accompanied not only Lindh's case-- first of all what does his say? It basically says he's prohibited from talking about this, not only, I mean often there may be something saying that a defendant is prohibited from profiting by what they've

done by writing a book or selling the movie rights or something like that, but no. He's prohibited from talking about it *ever* with anyone, with his eventual wife if he were to get married. And it doesn't matter that me and you and God knows who can talk about it over the Internet. He specifically is not allowed to talk about it ever. And the use of gag orders in these plea bargains has just seen an astronomical increase, just like the use of the state secrets privilege, which was invoked maybe 25 times during the 20th century, and has been invoked more than 38 times in the last eight years. So right now the gag orders, a lot of people are gagged from talking about certain things. There are certain things I cannot talk to you about, and I can't say anything more than that. Sibel Edmonds is gagged. There are a lot of people who were gagged even when there's been no conviction, because something that is in our brain happens to touch on something that someone deems to be national security. So it puts people in a very odd position, and like, huh, how come the whole world gets to say the "T" word, but I don't get to? It's a strange universe, but the gag order that was placed on Lindh has been used in a lot of other terrorism plea bargains.

Q: I have two quick questions: one, do you think there will be some First Amendment free speech challenges to these gag orders going to be coming up? And the second one is, were you in the office, the Ethics Office, when Reno was in the Clinton administration when the Waco incident and all took place?

Jesselyn Radack: No, I was not. I was doing constitutional tort litigation when the Waco thing had happened right when I joined, and we had Waco and Ruby Ridge and a number of debacles. They didn't have the Ethics Office at that point. The Ethics Office was actually, people confuse it all the time with the Office of Professional Responsibility. They're the back end of the ethics. They will discipline you after the fact, once you've screwed up. This new office was created in 1999 with a very similar name called the Professional Responsibility Advisory Office, and it was created basically because of the McDade Amendment, which Joe McDade had sponsored because of his experience with government overreaching. And the McDade Amendment said that prosecutors had to abide by not only their own state bar ethics rules, but the ethics rules of any state in which they litigate. So for a number of prosecutors who barely knew their own ethics rules, suddenly they had to know the ethics rules of whatever state they happened to be in. So we were there to help them figure that out and try to help keep them out of trouble.

So that office didn't even get created until 1999, and I think its utility quickly-- I mean I think it's just a dead-letter office right now. It still exists, but-- First Amendment challenges, here's what's happening with that. There have been a number of First Amendment challenges to both the gag orders. Sibel had a First Amendment challenge, Sibel Edmonds, who had been an FBI translator. She had a First Amendment challenge. It went all the way up to the Supreme Court. The government blocked it all at every stage by asserting the state secrets privilege, "We can't litigate this, because it's going to reveal a state secret." The other challenges that involve First Amendment or Fourth Amendment also, like the warrant list wiretapping. Again, those have been blocked completely by the government asserting the state secrets privilege. There isn't really a state secrets privilege in the United States. This is just something that's been kind of out there, and brought up here and there, but it hasn't actually-- I mean, there isn't really such a privilege. It's been brought up here and there in some very high profile super secret cases, but the government is just asserting it left and right. So when you do hear the First Amendment challenges, and the Fourth Amendment challenges to what's going on, they say state secrets privilege and usually slap a gag order on you too. And then if you try to challenge the gag order again, we can't allow a challenge. It will violate the state secrets privilege. She wants to talk about something that touches on

national security. Granted, everyone in the world is talking about what Sibel exposed, but she herself, she can talk about it up to a certain point and we all have a team of lawyers that we consult with about okay, what can I say about this? What can I write about this? But when I first started freelance writing, and it was kind of dovetailing with people beginning to blog and stuff like that, I literally had to check everything I wrote, run it by my attorneys to make sure that I wasn't saying anything out of school.

Q: <inaudible> was blindfolded and gagged?

Jesselyn Radack: Blindfolded, gagged, and in fact you know, that drape that John Ashcroft put over the Lady Spirit of Justice, it wasn't just a puritanical act. It was a metaphorical one, because she's blindfolded, gagged, and clothed.

<applause>

Q: Hi Jesselyn. Two quick questions. One, you used the word "intentional" when you said that John Lindh was prohibited from saying that "The FBI had used intentional..." da-da-da-da-da. So my first question is, could he say that they "accidentally"? I mean, is that a semantics thing? And the second question is, what are the consequences if you or someone else at your level of whistleblowing or not whistleblowing, actually, but if you disobeyed a gag order, what are the consequences that have been laid out to you? Thanks.

Jesselyn Radack: That you could be put in jail. I applaud journalists who are willing to test that. I have three young kids right now. I can't. There's so-- I've already spent hundreds of thousands of dollars trying to combat this, and I'm willing to talk about it up to a certain point. Again, right now, have they struck the fear of God in me? Yes, because of all the petty things they're willing to do. I take it very seriously when they say, "Don't talk about certain things." In terms of that language, where Lindh had to swear that he had not been "intentionally mistreated," I think that is a tacit admission by the government that he was mistreated. And by putting in...

<applause>

Jesselyn Radack: ... "notintentionally," they were basically bulletproofing themselves from—they also made him state outright that he would never bring a future claim based on torture, but they were insulating themselves, and bulletproofing themselves from a lawsuit later on for Eighth Amendment, cruel and unusual violations.

Q: I got up to ask you a few minutes about the state secrets privilege and while I was walking over to the mike you answered the question. But I'm still not satisfied that I understand what's going on here, because it seems to me that by invoking the state secrets privilege the government is pulling out a club that it can use to knock down anything whatsoever, and this club has no existence within either our legal history, our legal traditions, our Constitution, our constitutional jurisprudence, or anywhere else. So what I'm wondering and I'm really quite puzzled, why any judge would allow a federal lawyer to walk into the courtroom and invoke the state secrets privilege. Why doesn't he say "Get the hell out of this court and come back when you know the law"?

<applause>

Jesselyn Radack: Some judges have. There have been a handful of judges who have done that. Louis Fisher, who works for the Congressional Research Service, is the state secrets expert. He has an article in the *Harvard Journal of Legislation* going over exactly what it is, how it can be asserted, where it came from, which was this really screwed up case called Reynolds, [Check with author] circa 1950. Again, state secrets was asserted about something that was not really a secret at all. Some judges have said “No” to the government when they said, “Oh, this person can’t testify because he’s an enemy combatant and he will reveal important information.” Well, there are procedures set up to handle that in court. We have CIPA, the Classified Intelligence Protection Act. We have things set up to hear that, so when they’re like, “No, we need to create military tribunals where we’re going to have the same people be the judge, jury, executioner, and defense attorney, and we can’t have these people in real court,” we can. Some judges have begun to say no or to challenge the government. And other judges who have been very happy to embrace the state secrets privilege have been recently elevated to the Supreme Court.

Q: I appreciate your answer, but I’m just compelled to say that this is utterly Stalinistic, and that if the Americans tolerate this kind of behavior from their courts, these courts have lost all credibility whatsoever.

<applause>

Jesselyn Radack: This is the last question. I’m getting the “Fifteen minutes, five minutes, one minute.”

Q: I appreciate Robert Higgs’ question. I hope this might be of interest to you, as I’ve been involved in these things for a long time. There’s been a lot of talk over the years, you know, with the collaboration of the British, who have the Official Secrets Act, that we have to get something comparable here in the restructuring, the reality of national security. And there’s been a lot going on about that for a long time. I think you with your abilities and research ought to look into that. I can tell you more offline. The second thing about the Official Secrets Act that the British have, and you know they’re much more tight on it, connected with this too, and as I’ve told a couple of our other colleagues here, one of the things I learned only in 1995, having been involved in some pretty sensitive things, is that not only do the intelligence community or the secrets protect sources and methods, but liaisons, Remember that word: liaisons. And I assure you that certain other countries that we collaborate with have control over what’s releasable. We do not have control, including even things that are older than 50 years. I could give details to some of you offline.

I think this is a very important matter. You hear about protection of sources and methods, but also liaison, foreign liaison, and you can understand some of them say, well, if I’m going to give you things, and then you’re like Swiss cheese, you know, you’re not going to do it. So it’s a complicated matter. The question I ask for you Ma’am, just briefly: I don’t want to get you into more trouble, but maybe you can at least give the history, and if this does give you trouble, please don’t say anything. But I think of the precedents in the Office of Special Investigation, OSI. Some of my friends who were very much involved a long time ago at a senior level, that I’ve known since I was a little boy, said to me, “Some day I might be able to tell you about this.” I mean it’s that serious. Now I knew that they used evidence of foreign intelligence communities in order to prosecute, but I’m

just wondering if the permanent bureaucracy in Justice, that there's still lingering things or restructurings, even if the OSI is no longer formally there. Someone told me that it might not be actually there on the chart, but would you care to comment on the history of this, OSI?

Jesselyn Radack: I wish I knew more about the history of the OSI, and again, I talked to people like Lewis Fisher to try to find out more about the history of the state secrets privilege, and I'm not...

Q: It's Office state secrets privilege or high-level classification and that kind of thing. But when you're classifying ordinary citizens, when you're putting them on terrorist watch lists? I'm a mother of three. I'm a hundred pounds soaking wet. I'm not a terrorist. I mean it's a big waste of the taxpayer dollar to be doing that. And a lot of people are gagged indefinitely. We don't even have the 70-year rule, so maybe when I'm 99 or 100 I can talk about certain things unless someone new comes in and unties the knot of the gag. But, my time has expired. I'd be glad to talk to people later. I'll be floating around, so buttonhole me and we'll talk.

Q: For those of you who have not made a recent visit to the books table, we have some copies of Jesselyn's book *The Canary in the Coalmine: Blowing the Whistle in the Case of American Taliban John Walker Lindh*.

of Special Investigation. I don't know. I don't think I said that.

Jesselyn Radack: No, that's fine, Office of Special Investigation. The problem is I don't doubt that there is reason to keep certain stuff under cover and keep certain stuff secret, but every single document these days is being classified. Things are being over-classified. State secrets privilege is being applied to everything, and meanwhile the things that should be secret like CIA agent identities who are undercover, are being exposed.

<applause>

Jesselyn Radack: So I don't doubt that there is stuff that validly should be classified or that might validly be subject to some sort of