AN ARBITRARY NATION – Part 1

By Michael Ventura
April 19, 2013

The Constitution of the United States – read it lately?

Perhaps not.

We'll start with the amendments, but first: my purpose. This series of columns is called "An Arbitrary Nation" because it will demonstrate that our constitution is no longer a functioning document of law. Instead, we are governed today by an arbitrary legal hodgepodge that is arbitrarily applied with scant regard for constitutionality or any coherent code of principles. This state of affairs bears no resemblance to what we mean by the rule of law in a nation of laws.

Taken alone, any particular item of what follows might be thought an anomaly; take them together, and what you see is disintegration – a political entity strained and breaking at almost every point, too crippled to fix itself.

What to do about it? I have no idea. But I know this: It is idiotic to speak and think about American politics as though our system is what it was 20 years ago. Worse than idiotic – delusional.

Sound extreme? Well, here we go:

The First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Item1: I was about to write the phrase "literate citizens," but it's worth mentioning at the outset that there are fewer and fewer of such people in this country, and that, though I keep my vocabulary on the street, there are many, many thousands of fellow citizens unable to read this or any serious article – a well-documented fact which, all by itself, wounds the body politic terribly.

Back to Item 1: Literate citizens who followed the 2012 elections know that the Supreme Court blew up the floodgates and let loose millions in "dark money" and "super PAC" contributions, giving anyone with the cash the power to influence any election anywhere in the country.

It should go without saying that your vote loses its weight and your voice loses its strength when local elections are no longer truly local. Yes, we've let this gradually happen nationwide and we take it for granted. But is it democracy when factions far from home wield heavy power in your district?

What the Supreme Court did was to equate free speech with the money to buy a venue for free speech. It's official now: Speech equals money. So the court did not technically abridge freedom of speech. Instead, it turned up the volume on monied speech to a deafening roar. It didn't abridge, but it did corrupt. The Court used a law to diminish a law and drain the First Amendment's potency.

Item 2. *The New York Times,* August 2, 2012: "In response to recent disclosures about the so-called kill list of terrorist suspects designated for drone strikes and other intelligence matters, the Senate Intelligence Committee has approved misguided legislation that would severely chill news coverage of national security issues." This legislation was "drafted in secret without public hearings."

So it came to pass that, without fanfare or protest, the Intelligence Authorization Act for Fiscal Year 2013 got signed into law by President Obama during the last week of last year, rife with all the features that the *Times* feared.

The bill "designates [that] only the Director or Deputy Director of intelligence community elements and their designated public affairs staff may provide background or off-the-record information regarding intelligence activities to the media. Requests that DNI [Director of National Intelligence] publish specific requirements for personnel with access to classified information, to include non-disclosure agreements, prepublication review, and disciplinary actions. Requires the Attorney General to report back to the committee on the effectiveness of and improvements for investigating and prosecuting unauthorized disclosures" ("Intelligence Authorization Legislation: Status and Challenges," Congressional Research Service, posted March 25).

As the *Times* pointed out when the bill was drafted, "there is no exception carved out for whistle-blowers or other news media contacts that advance the public's awareness of government operations, including incidents of waste, fraud and abuse of the intelligence sphere."

Technically the law isn't about the press. It's about government employees. But it drastically restricts press access and widens the ever-growing gap between this government and its citizens.

Congress and the president used a law to diminish a law and drain the First Amendment.

Item 3. Tarek Mehanna – an American citizen, American born, who has a bad case of ugly beliefs. Until Mehanna was arrested, tried, and sentenced in Boston last year, ugly beliefs (in fact, all beliefs) were protected by the First Amendment.

"Mr. Mehanna's conviction was based largely on things he said, wrote and translated. Yet that speech was not prosecuted according to the … standard of 'imminent lawless action' but according to the much more troubling standard of having the intent to support a foreign terrorist organization. … Mr. Mehanna's crimes were speech crimes, even thought crimes. … [The prosecutor actually said] that 'it's not illegal to watch something on television. It is illegal, however, to watch something in order to cultivate your desire, your ideology.' In other words, viewing perfectly legal material can become a crime with nothing other than a change of heart" (*The New York Times,* April 21, 2012).

Mehanna drew a 17-year sentence. He's been in jail a year. The American Civil Liberties Union is appealing. We'll see. But note: An American citizen has been in jail for a year because he studied and expressed his beliefs.

The Second Amendment: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Full disclosure: I don't and won't own a gun.

That said, the Second Amendment comes second because we wouldn't have a country if the American colonists hadn't been an armed citizenry. It's not about our right to shoot rabbits or burglars. It's about our right to fight oppressive rulers.

It's also about what "militia" meant in 1787. *The Oxford English Dictionary* cites the old U.S. definition from 1890's *The Century Dictionary*: "The whole body of men declared by law amenable to military service, without enlistment, whether armed and drilled or not." "Militia" meant men of age for military service, rather than a federal- or state-controlled outfit.

Notice that the amendment does begin with “well-regulated.” Not just regulated, but regulated well. The Framers of the Constitution never heard of cowboys because cowboys didn’t exist in 1787 – but the Framers, peace-loving revolutionaries to a man, didn’t want cowboy militias screwing up their one-of-a-kind experiment in small-r republican democracy.

Gun control is constitutional; so is packing heavy ordinance.

Ah, those Framers. What a sense of humor.

If anything in this column has upset you, here’s some good news:

Nobody has screwed with the Third Amendment and I’m certain nobody’s gonna: “No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”

Feel better now?

To be continued.

AN ARBITRARY NATION – Part 2

By Michael Ventura
May 3, 2013

In this series, I examine the Constitution of the United States to demonstrate that it is no longer a functioning document of law. While I'm making my case, entertain this question: If the Constitution is no longer the law of the land, what is?

On to the Fourth Amendment: "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Item 1: Technology knows no checks and balances.

"Police departments in Florida, Maryland, Texas, and Colorado are testing drones for surveillance and search-and-rescue missions. … [The drones range] in size from a small airplane to a hummingbird … [that is] capable of … landing on a window ledge, where it can record sound and video. … Drones can read license plates, spot body heat at night, or identify faces. The American Civil Liberties Union warns that drones [may usher] in an era in which Americans could be monitored every time they step outside. … [I]n separate cases in 1986 and 1989, the Supreme Court ruled that police don't need a warrant to observe a private property from public airspace" (*The Week,* June 15, 2012, p.11).

There is also a "growing market of off-the-shelf computer surveillance technologies" that "grab images of computer screens, record Skype chats, turn on cameras and microphones, and log keystrokes … Mobile versions of the spyware [are] customized for all major mobile phones" (*The New York Times,* Aug. 30, 2012).

Item 2: There is no Fourth Amendment for Muslims, people who associate with Muslims, and professors who teach Muslims.

New York City police "eavesdropped inside businesses and filed daily reports on the ethnicity of the owner and clientele and what they overheard. The program was not based on allegations of criminal activity. … Police also infiltrated student organizations. … Officers included names of students and professors in police files, even when there were no allegations of criminal wrongdoing. … At mosques, police recorded license plates and took photos and videos of worshippers as they arrived for services.

"… [The NYPD] intelligence [division's] … primary oversight body, the New York City Council, is not told about these secret programs and does not review or audit them. … The Obama administration … has tacitly endorsed the programs but does not review them. … Nor does Congress, which authorizes the money" (The Associated Press, March 12, 2012).

The NYPD's violations of the Fourth Amendment are supposed to make non-Muslims feel safe. They shouldn't. A law arbitrarily enforced (or not enforced) according to the whims of the authorities is no longer a law.

Are you immune from becoming the object of such investigative whims?

The answer is no, as in Item 3: "President Obama's Justice Department" has issued new rules for the FBI that apply "not just [to] terrorism suspects but [to] pretty much anyone. … [A]gents will be allowed to search databases [etc.] … [without warrants]. No factual

basis for suspecting … wrongdoing will be necessary" (*The New York Times*, June 19, 2011).

Even heroes are not exempt, as in the scandal that drove David Petraeus from the CIA: "What is most striking is how sweeping, probing and invasive the FBI's investigation [was], all without any evidence of any actual crime – or the need for any search warrant" (*The Guardian*, Nov. 13, 2012).

Item 4: "Every day, collection systems at the National Security Agency intercept and store 1.7 billion e-mails, phone calls, and other types of communications" (*The Washington Post*, July 19, 2010).

"[T]his global surveillance system … collects so much digital detritus – e-mails, calls, text messages, cellphone location data [etc.] – that the N.S.A. is building a 1-million-square-foot facility in the Utah desert to store and process it. … Intelligence officials told [Senator Ron Wyden, D-Ore.] that they couldn't determine how many people inside the United States had their communications collected because checking the N.S.A.'s databases to find out would itself violate the privacy of those people. In other words, the protection of privacy rights is being invoked to cover up possible continuing violations of those same rights" (*The New York Times*, Aug. 22, 2012).

"Congress gave final approval … to a bill extending the government's power to intercept electronic communications. … President Obama strongly supports [this bill]. … [C]ritics … said that they suspected that intelligence agencies were picking up communications of many Americans, but that they could not be sure because the agencies would not provide [to Congress] even rough estimates of how many people inside the United States had had communications collected under the authority of … the Foreign Intelligence Surveillance Act" (*The New York Times*, Dec. 28, 2012).

Both parties are culpable. Thirty Democrats joined 42 Republicans to pass that bill, which was signed by a Democratic president.

Item 5: "The Supreme Court ... turned back a challenge to a federal law that broadened the government's power to eavesdrop on international phone calls and e-mails. …Writing for the majority, Justice Samuel A. Alito Jr. said that the journalists, lawyers, and human rights advocates who challenged the constitutionality of the law could not show they had been harmed by it and so lacked standing to sue. … It is of no moment, Justice Alito wrote, that only the government knows for sure whether plaintiffs' communications have been intercepted. It is the plaintiffs' burden, he wrote, to prove they have standing[.] … The Obama administration defended the law in court, and a Justice Department spokesman said the government was 'obviously pleased with the decision'" (*The New York Times*, Feb. 26).

A *Times* editorial, the same day: "The 2008 amendments to the [surveillance] law give the government sweeping power to intercept communications of Americans without individualized suspicions, warrants based on probable cause or any administrative findings of a terrorism connection. The law does not require the government to identify its surveillance subjects. … [The Supreme Court's] refusal [to let this case go forward] essentially prohibits constitutional review of the 2008 law and whether Congress and the executive branch have undercut fundamental liberties."

Item 6: Last month, U.S. District Judge Susan Illston "ruled that the FBI's practice of so-called national security letters to banks, phone companies and other businesses is unconstitutional, saying the secretive demands for customer data violate the First

Amendment" (*The New York Times*, March 15). Notice that Judge Illston does not question the FBI's right to pry into our sensitive data without warrants or probable cause; her ruling is based on the First Amendment because the FBI "almost always bars recipients of the letters from disclosing to anyone – including customers – that they have even received the demands. … [This] gag order creates 'too large a danger that speech is being unnecessarily restricted.'"

Then Judge Illston put her ruling on hold so the so-called Justice Department can appeal. The Obama administration dearly wants its FBI to have warrantless surveillance powers.

Shocked? Depressed? This might make you feel better: The Supreme Court just ruled that the blood in your veins is protected. Authorities need a warrant to extract it (*The New York Times*, April 18).

However, when it comes to almost anything else, the Fourth Amendment is applied or not, arbitrarily, when the authorities feel like it, making it just words on paper and nothing more. It no longer functions as law.

AN ARBITRARY NATION – Part 3

By Michael Ventura
May 17, 2013

A law arbitrarily enforced (or not enforced) according to the whims of the authorities is no longer a law.

That is the premise as we examine the Constitution.

On to the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It says, "No person." There isn't a distinction between citizen and non-citizen. Except for those "in actual [military] service in time of War or public danger," the authorities are not permitted to exclude anyone from due process of law.

Since September 11, 2001, Congress and two administrations have decreed that the Fifth Amendment doesn't apply to foreigners accused of terrorism.

Most Americans are fine with that -- Bush and Obama supporters alike. If any are queasy, they've been queasy quietly. Let's let government make exceptions, here and there, where the Fifth Amendment is concerned. Let's look the other way – even in May 2002, when an American was arrested on American soil without warrant, detained without trial, and tortured.

Jose Padilla was "denied contact with his lawyer, his family or anyone else outside the military brig for almost two years and kept in detention for four. His jailers made death threats, shackled him for hours, forced him into painful stress positions … denied him care for serious illness and more. … [He sued, but, in May 2012,} the United States Court of Appeals … decided that Mr. Padilla's lawsuit [could not] go forward. … The unanimous opinion contends it was not 'beyond debate' that Mr. Padilla, a declared enemy combatant, was entitled to the same protections as any accused criminal or convicted prisoner. … [T]he Supreme Court [ruled in May 2011] that 'existing precedent' must put any question about such a right 'beyond debate'" (*The New York Times,* May 3, 2012).

The Fifth Amendment already put that right beyond debate. But not anymore. "Existing precedent" cancels it out, says the Supreme Court.

On Sept. 30, 2011, another American citizen, Anwar al-Awlaki, was executed in Yemen, via drone, by order of the president. The White House says that's legal, but won't say why, nor why the memorandum justifying the president's power to kill Americans was "written more than a year before Mr. Awlaki was killed" (*The New York Times,* Oct. 8, 2011).

The administration has successfully created such a murky atmosphere that eight Democratic and three Republican senators signed a letter requesting the appropriate documents to judge "whether the president's power to deliberately kill American citizens is subject to appropriate limitations and safeguards" (*The New York Times,* Feb. 5).

Excuse me? What "president's power to deliberately kill American citizens" are we talking about? There is no such power in the Constitution. Is the president's power to kill now assumed by Congress as long as there are "appropriate limitations and safeguards"? (Let's pause and breathe deeply.)

Three months after President Obama ordered al-Awlaki's execution, he signed the National Defense Authorization Act, specifically designating that Americans, on American soil, may be arrested without warrant and detained indefinitely without trial (as had already occurred with Jose Padilla).

A year later, the House and Senate reauthorized the National Defense Authorization Act, deciding "to drop a provision that would have explicitly barred the military from holding American citizens … in indefinite detention without trial" (*The New York Times*, Dec. 18, 2012).

We started with, "No person can be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Now we're at: The president can arrest, detain, and execute at will.

Meanwhile, some Americans sued to see the secret memo that justifies a president executing U.S. citizens. But "a federal judge in Manhattan refused … to require the Justice Department to disclose [the] memorandum[.] … The ruling, by Judge Colleen McMahon, was marked by … frustration with her own role in keeping the legal rationale for it secret.

"'I can find no way around the thicket of laws and precedents that effectively allow the executive branch of our government to proclaim as perfectly legal certain actions that seem on their face incompatible with our Constitution and laws while keeping the reasons for their conclusion a secret,' she wrote. 'The Alice-in-Wonderland nature of this pronouncement is not lost on me,' Judge McMahon wrote, adding that she was operating in a legal environment that amounted to 'a veritable Catch-22'" (*The New York Times*, January 2).

That legal thicket is the interlocking mischiefs of the Patriot Act, The Military Commissions Act, the National Defense Authorization Act, etc., for which Democrats and Republicans are equally responsible.

In January, NBC News got hold of a "white paper" summarizing the execution memorandum that, until then, the White House denied even existed. It states: "The condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."

Steve Coll in *The New Yorker*, May 6: "Does the President require that intelligence used to convict a terror suspect in absentia be based on multiple sources, or is one sufficient? Must intercepts, photographs or credible firsthand testimony be obtained, or can people be executed on the basis of hearsay from paid informants? … At what point does a preacher's hate speech warrant his being killed?"

Sen. Paul Rand (R-Ky) famously staged a 13-hour filibuster to ask the White House whether it would order drone attacks against Americans on American soil. Attorney General Eric Holder didn't say no, though many reports claimed he did. Holder said the president wouldn't dispatch drones after Americans "not engaged in combat on American soil"; but what if, as with al-Awlaki, "engaged" means preaching and allegedly planning? Holder's answer, in other words, was more yes-and-no than no.

Now Congress talks of a “court for targeted killings,” “an analogue to the Foreign Intelligence Surveillance Court that Congress set up in 1978” (*The New York Times,* Feb. 13). The White House is seriously considering it.

Here’s where the flim-flam flies.

Former Acting Solicitor General Neal K. Katyal: “Simply [creating] a drone court … is not a guaranteed check. The FISA Court’s record is instructive: between 1979 and 2011 it rejected only 11 out of 32,000 requests” (*The New York Times,* Feb. 20). That’s no typo: 11 out of 32,000.

The FISA Court allows a delusion of legality to cover massive violations of the Fourth Amendment. A drone court would allow us to pretend that violations of the Fifth Amendment aren’t really, really violations.

FISA Court, drone court: Secret people in secret places mechanically stamping secret approvals for secret orders for secret reasons. To pretend this bears any relation to the rule of law is silly, dumb, tragic, disgusting, chickenshit – take your pick.

The Fifth Amendment no longer exists as a functioning law of the land.

AN ARBITRARY NATION – Part 4

By Michael Ventura
June 14, 2013

Let us confront the fact – or, if you like, the possibility – that we live in a rogue nation.

A definition is needed: For our purposes, "rogue nation" means a nation that purposefully, continually, and systematically defies the international laws and treaties that govern civilized behavior – treaties that said rogue nation had previously promised to abide by and enforce.

To demonstrate that the United States has gone rogue, we'll detour from examining our Constitution to look at two foundational documents of international law, instigated by and signed by the U. S.: the International Bill of Human Rights and the Geneva Conventions.

In 1945, President Truman appointed Eleanor Roosevelt as one of the first U.S. delegates to the United Nations. As chairperson of the United Nations Commission on Human Rights, the former First Lady was a key player in drafting the International Bill of Human Rights, which the U.N. voted into international law unanimously on December 10, 1948. (There were eight abstentions: the Soviet Bloc, apartheid South Africa, and Saudi Arabia.)

Article 1: "All human beings are born free and equal in dignity and rights." No exceptions.

Article 2 [italics added]: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, *without distinction of any kind*, such as race, colour, sex, language, religion, *political or other opinion*, national or social origin, property, birth *or other status.* Furthermore, no distinction shall be made on the basis of political, *jurisdictional or international status* of the country or territory to which a person belongs, whether it be independent, trust, *non-self-governing or under any other limitation of sovereignty.*"

"Without distinction of any kind" -- distinctions, for instance, like "enemy combatant." "Or other opinion," like jihadists. "Regardless of jurisdictional or international status … whether it be… non-self-governing," so stateless persons and places are included. "Or under any other limitation of sovereignty" -- such as failed states.

Article 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." No one. Ever.

Article 6: "Everyone has the right to recognition everywhere as a person before the law." Everyone means everyone and everywhere means everywhere, including Guantanamo Bay, Cuba.

Article 9: "No one shall be subjected to arbitrary arrest, detention or exile." Again, no one means no one. "Shall be" means ever.

Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal … [regarding] any criminal charge against him." Any means any, including terrorism.

Let's turn now to the Geneva Conventions, a body of international law that covers countries at war. Here is what the Geneva Conventions consider "grave breaches" (as listed in Wikipedia):

1) "Willful killing, torture or inhumane treatment."

2) "Willfully causing great suffering or serious injury to body or health."

4) “Willfully depriving someone of the right to a fair trial *if accused of a war crime*” [my italics.] Nazis who killed millions were given fair trials. That’s the standard.

“Also considered grave breaches are … unlawful deportation, transfer, or confinement.”

Finally, “those provisions are considered customary international law, allowing war crimes prosecution by the United Nations and its International Court of Justice over *groups* that have signed *and have not signed* the Geneva Conventions” [my italics]. Even “groups” are entitled to fair treatment, like the groups that attack and are attacked by the United States.

In his foreign policy speech of May 23, President Obama said, “America’s actions are legal. … Under domestic law and international law the United States is at war.”

His statement is intended to create the impression that we’re in compliance with international law, though it is glaringly obvious that we are not. With almost admirable audacity, after implying that we’re in compliance Obama admitted that “we are force-feeding detainees … on a hunger strike,” as though that’s just fine.

“The U.N. High Commissioner for Human Rights has called force-feeding a violation of international law, and the World Medical Association, of which the U.S. is a member, declared in 1991 that the practice is ‘never ethically acceptable’ unless a prisoner consents or is unable to make a rational choice” (*Time,* June 10).

“The lawyers representing the detainees would like to file a motion in federal court to stop the force-feeding, but there is a Catch-22. They can’t go to court without the consent of their clients – and thanks to another set of harsh, new [Obama administration] protocols, including … genital and anal searches … most clients are now refusing to talk to their lawyers. … The United Nations Office of the Commissioner for Human Rights released a statement in early May calling the continued detention in Guantanamo a ‘flagrant violation of international human rights law’ and categorizing the force-feeding at the prison as ‘cruel, inhuman and degrading’” (*The New York Times,* May 31).

To be in violation of so many aspects of international law, on such a scale and for so many years, is to be rogue.

Congress and the White House have passed new laws to institute and codify our outlaw behavior, but internationally this makes us no less rogue.

Democrats and Republicans are equally culpable. Check vote-counts for the Patriot Act, the Military Commissions Act, the National Defense Authorization Act, etc., or count votes for Senate bills to forbid releasing Gitmo detainees. George W. Bush and Barack Obama share equal responsibility for backing and signing such bills. Our violation of international law is a thoroughly bipartisan affair.

I feel like the kid in the back row of the classroom raising his hand to ask if statutes passed by Congress and signed by the president are actually legal when they blatantly violate treaties and agreements signed and ratified by the United States. But that kind of back row kid can raise his hand all day and the question will not be answered.

You perhaps noticed that during the 2012 presidential election international law and the Constitution were nonissues. Liberals were as happy as conservatives about that. A vigorous public and journalistic defense of the Constitution and of international law would have damaged the electability of either party’s candidate.

So it’s not only the government that’s gone rogue. With the consent of the governed, both explicit and tacit, the country has gone rogue.

The ability and willingness to commit violence anywhere in the world; the ability and willingness to ignore our commitments to international agreements; the ability and willingness to say with a smile that we are not doing what everyone else knows we are doing; and, above all, the ability to get away with it – these (and a large, restless economy) make the United States the world's most powerful, or most muscular, nation.

The Framers felt this truth to be self-evident:

Law that fails to bind the strongest as well as the weakest is not law.

With 12 consecutive years of rogue behavior, the United States has, in essence, ended international law. All that's left is a pile of old documents that America has proved impotent.

AN ARBITRARY NATION – Part 5

July 12, 2013

This is what the rule of law looks like:

"Italy's former military intelligence chief was sentenced to 10 years in prison … for complicity in the C.I.A.'s abduction of an Egyptian Muslim cleric. … [H]is former deputy director was sentenced to nine years. … Three Italian secret service officials were also sentenced to six years each" (*The New York Times,* Feb. 12).

In addition, 22 CIA operatives, including the agency's former Milan, Italy, station chief, were tried in absentia, found guilty, and sentenced (same article). A U.S. Air Force colonel was also found guilty, but later pardoned (*The New York Times,* April 6).

These cases were "the first in the world to scrutinize – and legally condemn – the American practice of rendition" (*The New York Times,* Sept. 19, 2012).

In addition, "[t]he European Court of Human Rights ruled that a German car salesman [Khaled El-Masri] was a victim of torture and abuse, in a long-awaited victory for a man who had failed for years to get courts in the U. S. and Europe to recognize him as a victim. … [S]everal other legal cases are pending from Britain to Hong Kong involving people who say they were illegally detained in the CIA program" (The Associated Press, Dec. 13, 2012).

This is what the rule of law does not look like:

"Officer Tied to Tapes' Destruction Moves Up C.I.A. Ladder" (*The New York Times,* March 13). Her name has been withheld because she is is still undercover, but reportedly this officer was a CIA station chief in London and in New York "and was once in charge of a so-called black site." (Black sites are secret CIA prisons where the U.S. tortures people.) She also "played a role in developing the C.I.A.'s detention and interrogation program," and she and her direct superior were responsible for the "destruction of dozens of C.I.A interrogation tapes" because they feared the tapes "might become public and expose the officers shown in them to jeopardy." The CIA obviously likes her work, since she lately has been acting director of the National Clandestine Service, the branch of the agency "responsible for all C.I.A. espionage operations and covert action programs. The head of the clandestine service is one of the most coveted jobs at the C.I.A." This officer was one of "a small group being considered to take over the job permanently" (same article). She is described as having "broad support within the agency" (*The Washington Post,* March 26).

Eight Italian intelligence officials, including their agency's director and deputy director, are in prison for doing the bidding of CIA operatives who prosper and rise to the top ranks for the same crimes.

In the end, the unnamed undercover officer did not get the coveted job. It was judged bad public relations to reward someone "who was at the center of the agency's detention and interrogation program" (*The New York Times,* May 7). But there is no evidence that the agency holds her in any less esteem. And she might well have gotten that plum post if a report by The Constitution Project hadn't been publicized while she was under consideration.

"A nonpartisan, independent review of interrogations and detention programs in the years after the Sept. 11, 2001, terrorist attacks concludes that 'it is indisputable that the United States engaged in the practice of torture' and that the nation's highest officials

bore ultimate responsibility for it. The sweeping, 600-page report says that while brutality has occurred in every American war there never before had been 'the kind of considered and detailed discussions that occurred after 9/11 directly involving the president and his top advisers on the wisdom, propriety and legality of inflicting pain and torment on some detainees in our custody'" (*The New York Times,* April 16). A *Times* editorial the same day noted that the report's "detailed 22-page appendix cites dozens of legal cases in which the United States prosecuted similar treatment or denounced it as torture when carried out by other countries."

But don't let a non-government report get you hopeful that our government will come clean. President Obama's administration has shut down the last of its tepid investigations into CIA abuses. "Not only have those responsible escaped criminal liability, but the administration has succeeded in denying the victims of harsh methods any day in court, using exaggerated claims of secrecy and executive power" (*The New York Times,* Sept. 5, 2012).

That's worth underlining. The Obama administration has neither sought justice nor permitted others to seek justice, shunting aside international law, United States laws, the Eighth Amendment's prohibition against "cruel and unusual treatment," the Sixth Amendment's guarantee of a "speedy and public trial," the Fifth Amendment's guarantee of due process, and the Fourth Amendment's requirement of warrants issued for probable cause.

When the highest office-holders in the land denigrate our laws for years on end, you may except corrosion throughout the body politick.

For instance, in American prisons and detention centers, cruel and unusual treatment has become the norm, while throughout the legal system, courts have become nightmarish.

"The notion of a fair day in court becomes only theoretical when immigrants lack attorneys, as most do, when their deportation cases are not reviewed by judges, as too often happens, and when they are locked up in prisons unable to see their families, even though they have been accused only of civil violations – and many have never been convicted of anything. … New federal data show that about 300 immigrants on any given day are held in isolation … many for 23 hours a day, sometimes in windowless cells barely bigger than bathroom stalls. And nearly half are isolated for 15 days or more. Why ICE [Immigration and Customs Enforcement] resorts to such extreme punishment is unclear" (*The New York Times,* April 2).

The United Nations considers "prolonged isolation" cruel and unusual treatment, but on any given day in the U.S. "there are at least 25,000 prisoners in solitary. … [M]any of those in solitary were put there for little more than irritating a guard" (*The New York Times,* March 15, 2012).

As for speedy trials: In New York City it takes "over 400 days, on average … to bring a case to a jury trial and verdict – with cases in Brooklyn taking nearly 600 days" (*The New York Times,* May 1). Some defendants wait as long as five years in jail before they're tried (*The New York Times,* April 21).

It's widely documented that our Bill of Rights guarantees are breaking down in state justice systems across the country, and that what was always somewhat true is now taken for granted as ironclad: There is one rule of law for the affluent, a different rule of law for people with a little money, and, if you've got no money, God help you.

I keep remembering my deep sense of surprise when I read that in Italy, a director of military intelligence was sentenced to 10 years in prison and his deputy was sentenced to nine for cooperating with our CIA. I felt such relief that that could happen somewhere – a relief followed by a rush of grief. For, after years of White House and Congressional degradation of the Constitution, who can believe anymore that people of such rank, in such services, can and will be brought to justice in the United States of America?

AN ARBITRARY NATION – Part 6: THE INVISIBLE AMENDMENTS

By Michael Ventura
July 26, 2013

If you've walked in after the show has begun, this "Arbitrary Nation" series slowly turns the pages of the Constitution to see if it remains the bulwark of American law. "Bulwark" means "defensive wall" (*Oxford English Dictionary*), but, in this series, fact after fact has revealed a crumbling edifice, breeched on all sides – and breached by all sides, with Democrats and Republicans equally culpable for the damage done since 2001.

And, now, ladies and gentlemen, boys and girls, and those who are both or neither, we come to the fun amendments, the Ninth and Tenth – fun, I say, because, more than anything else in the Constitution, they reveal not only the Framers' intents but their very hearts, and show us how far we've strayed from the liberty they envisioned.

Let's let the Framers speak for themselves for a change.

James Wilson is all but forgotten now, but he was a deeply influential figure at 1787's Constitutional Convention. (In 1789, President George Washington appointed him to the nation's first Supreme Court.) In a speech in Philadelphia, Oct. 6, 1787, Wilson defined the fundamental nature of the Constitution: "[E]verything which is not given is reserved."

Even without the Internet, Wilson's formulation flashed up and down the country, as proved by this letter from the anonymous "Federal Farmer," published in New York less than a week later, on Oct. 12: "It is said, that when the people make a constitution, and delegate powers, that all powers not delegated by them to whose who govern, is reserved in the people; and that the people, in the present case, have reserved in themselves … every right and power not expressly given the national government by the federal constitution."

Thomas B. Wait, the founder of Maine's first newspaper, wrote on Jan. 8, 1788: "[E]very right is reserved that is not *expressly* given up."

Samuel Holden Parsons, a Connecticut lawyer and soldier who rose to the rank of Major General in the Continental Army, wrote on Jan. 11, 1788: "[T]his Constitution is grounded on the idea that the People are the fountain of all power. … [E]very power not granted [to the government] rests where all power was before lodged."

Because of this conception, Parsons, like many others, argued against a bill of rights because it "would be dangerous, as it would at least imply that nothing more was left with the People than the Rights defined and secured in such Bill of Rights."

So agreed North Carolina's James Iredell, writing as "Marcus" in the *Norfolk and Portsmouth Journal*, Feb. 20, 1788: "[A] Bill of Rights would [be] dangerous, as implying that … if any had been omitted … they might have been considered at the mercy of the general Legislature." (In 1790, Pres. Washington appointed Iredell to the Supreme Court.)

James Wilson stated the matter at length on Nov. 28, 1787: "[W]ho will be bold enough to undertake to enumerate all the rights of the people? and when the attempt is made, it must be remembered that if the enumeration is not complete, everything not expressly mentioned will be presumed to be purposely omitted."

Virginia's George Lee Turberville, who rose to the rank of major during the Revolutionary War, agreed with Wilson in a letter to James Madison, Dec. 11, 1787:

"[T]hose [rights] not especially retained might by just implication have been considered as surrender'd."

Those who opposed a bill of rights did not oppose the rights, they opposed the bill, on the grounds that any rights omitted would be considered void. History proved them correct (more on that later).

Those who championed a bill of rights agreed with Thomas Jefferson's letter to James Madison, Dec. 20, 1787: "[A] bill of rights is what the people are entitled to against every government on earth … and what no just government should refuse or rest on inference."

John Smilie served as a private in the Revolutionary War. He would later be elected nine times to the U.S. House of Representatives. In a debate with James Wilson on Nov. 28, 1787, Smilie said, "[W]hen we further consider the extensive, the undefined powers vested in the administrators of this [proposed] system, when we consider the system itself as a great political compact between the governors and the governed, a plain, strong, and accurate criterion by which the people might at once determine where, and in what instance, their rights were violated, is a preliminary, without which this plan [the Constitution] ought not to be adopted."

Richard Henry Lee, a signer of the Declaration of Independence, wrote to the *Virginia Gazette*, Dec. 6, 1787, warning that a bill of rights was necessary to guard against "the silent, powerful, and ever active conspiracy of those who govern."

James Winthrop was a veteran of the Battle of Bunker Hill. Signing himself as "Agrippa" in a letter to the *Massachusetts Gazette*, Dec. 14, 1787, he wrote, "[A] declaration of rights is of inestimable value. It contains those principles which the government never can invade without an open violation of the compact between them and their citizens."

The Framers, and those whose generational task was to ratify or reject the Constitution, wrote thousands of words in debate. The Constitution was finally ratified largely on the promise that Congress' first order of business would be to pass a bill of rights. Included were the Ninth and Tenth Amendments, written to satisfy those who feared that, if rights were omitted, those rights would be nullified.

The Ninth: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved for the States respectively, or to the people."

No lack of clarity. No historical mystery. The intent is crystal clear.

The Constitution exists to define and limit government.

The Constitution was never meant to define and limit you.

Your right to privacy, your right to equality before the law no matter who or what you are, your right to govern your own body, your right to carry a concealed weapon – you don't have to prove you have those rights, and they are not to be denied or disparaged. The burden is on the government to prove you don't have such rights. So say the Ninth and Tenth.

A sweeping vision of liberty, born of political oppression, violent revolution, and articulate debate – yet the Ninth and Tenth are the invisible amendments, for they are universally ignored.

From the Supreme Court on down, judges and commentators constantly make statements like that of J. Harvie Wilkinson III, a judge on the United States Court of Appeals for the Fourth Circuit: "Liberals, when it suits them, embrace rights that have not been enumerated in the Constitution. … They have forsaken textual and historical foundations of that document in favor of judicially decreed rights of autonomy. It is one

thing to value those rights our cherished Bill of Rights sets forth. But to create rights from whole cloth is to turn one's back on law" (*The New York Times*, March 11, 2012).

Like many, His Honor imparts invisibility to the Ninth and Tenth Amendments, writing about the Bill of Rights as though they don't exist.

As for the Framers, both sides of their argument have proved correct: Un-enumerated rights have been denied, and, if we didn't have the Bill of Rights, by now we'd be hard put to claim any rights at all.

All quotes not otherwise identified are from ***The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification: Part One, September 1787-February 1788,*** *edited by Bernard Bailyn.*

AN ARBITRARY NATION – PART 7

By Michael Ventura
August 9, 2013

This "Arbitrary Nation" series on the U.S. Constitution has emphasized the first 10 amendments -- our Bill of Rights -- because they are the most vulnerable and violated. Amendments 11 through 27, ratified between 1795 and 1992, are beyond the scope of this series and beyond the energies of this writer. So, too, are the many Supreme Court decisions that have sometimes strengthened and sometimes enfeebled our rights. (Don't even get me started on *Wickard v Filburn,* 1942. Really. Don't.)

Proceeding, then, to the body of the Constitution: Its seven Articles number only about 4,000 words – or roughly three pages of the *Chronicle.* That small space houses the basic structure of Congress, the presidency, and the judiciary. Interestingly, more than half those 4,000 words are devoted solely to Article I, treating the forms and powers of Congress. The Framers gave Congress first importance, so, in this final installment of "An Arbitrary Nation," let's do the same.

The generation that wrote and ratified the Constitution had high hopes for Congress. New York's Noah Webster, originator of *Webster's Dictionary,* wrote that "[w]hile our Legislatures … remain elective, and the rulers have the same interest in our laws, as the subjects have, the rights of the people will be perfectly secure[.]" Samuel Stillman, of Massachusetts, wrote that those elected would be "ourselves, the men of our own choice, in whom we can confide; whose interest is inseparably connected with our own."

Of course, "ourselves" meant white males who owned property; these men expected fair treatment from the white, propertied men they elected.

Even then, such faith sounded naïve to tough-minded men who cherished no illusions about the fragility of their republican experiment. Virginia's James Madison predicted that unless voters of "virtue and intelligence [select] men of virtue and wisdom … no theoretical checks, no form of government, can render us secure."

I read Madison's words, and I read them again, and then I turn to the facts of Congress today, facts that journalists and political commentators know and ignore at the same time. (Psychologists call that condition "denial.") Facts like these:

"The average member of the House of Representatives has to raise $367 for every hour they're supposedly serving their constituents to pay for their re-election campaigns. The average senator needs to wrangle $819 an hour (*Mother Jones,* cited in *The Week,* June 29, 2012)." Depending on the Congress member, this takes 30% to 70% of their time (*Constitution USA with Peter Sagal,* PBS, May 28).

Obviously, Congress members so dependent on money must satisfy the sources of that money. And who do they satisfy most? "Donors representing 0.01 percent of the population contributed 28 percent of the $6 billion spent on the 2012 elections" (*Bloomberg.com,* cited in *The Week,* July 5-12).

Satisfied big donors give big benefits: "The average member of Congress receives a 1,452 percent salary hike when she or he leaves office and becomes a corporate lobbyist, with some making in excess of $1 million a year" (*The Nation,* cited in *The Week,* March 30, 2012).

Pious editorials demanding campaign finance reform and clean lobbying laws are written ad nauseam, exercises in helplessness directed at the same Congress that does this:

"Since 2007, 73 members of Congress have sponsored bills that benefited themselves or their families, *The Washington Post* reported this week. Former Democratic Rep. Dennis Cardoza [Calif.] helped get tax breaks for racehorse owners, and then bought seven horses himself; Rep. Mike Kelly (R-Pa.) co-sponsored a natural gas bill even as Exxon Mobile negotiated for his wife's shares in two gas companies. The practice is permitted under rules that Congress wrote for itself" (*The Week*, Oct. 19, 2012).

Newsweek, Nov. 21, 2011: "[M]embers of Congress are free to buy and sell stocks in companies whose fate can be profoundly influenced, or even determined, by Washington policy. … [S]ome of Congress's most prominent members are in a position to routinely engage in what amounts to a legal form of insider trading."

That article damns both parties.

On the Democratic side: Rep. Nancy Pelosi (D-Calif.), Sen. Max Baucus (D-Mon.), former Massachusetts senator and now Secretary of State John Kerry, and Rep. Jared Polis (D-Colo.). Baucus, Kerry, and Polis made hundreds of thousands of dollars investing in pharmaceutical and health care companies while negotiating and writing Obamacare legislation. (And you thought they were acting on your behalf and for your good. That's so sweet of you.)

That *Newsweek* report tells how Rep. "John Bohner (R-Oh.), then House minority leader, [invested] tens of thousands of dollars in health-insurance company stocks, which made sizeable gains when the proposed public option in the reform deal was killed." (And you thought he was championing individual choice. That's sweet, too.) The article also details the profitable shenanigans of Rep. Spencer Bachus (R-Ala.), Rep. Shelley Capito (R-W.V.), and former Speaker Dennis Hastert (R-Ill.).

It's all legal, if by "legal" you don't mean moral.

Lawmakers make laws that allow the lawmakers to make lots of money. Presumably, presidents sign some of these laws. Others are "rules" that the Senate and House keep largely to themselves. Meanwhile, journalists and commentators continue to discuss the motives of these politicians without a word about the personal monetary ramifications of their decisions.

As for reform: With both parties steeped in legalized corruption, no reform effort from within Congress has gained traction.

As for the House being stuck in place: Since both parties practice gerrymandering coast-to-coast, no one in power wants to do anything about that. (To vote in a gerrymandered district is to vote in a fixed election, an election massively weighted toward one side. Whatever that is, it is not a republic.)

Why would such a Congress care much about protecting and exercising its legitimate – some would say sacred – constitutional powers?

According to the Constitution, only Congress can make law, which the courts can then interpret. The president "shall take Care that the Laws be faithfully executed" (Article 2, Section 3). But congresspersons more loyal to their party than to the Constitution tolerate "signing statements" because presidents of both parties engage in that practice, though the staid American Bar Association has declared it "contrary to the rule of law and our constitutional system" (*The New York Times*, Jan. 3).

First, it's signing statements. Then, FISA courts that "for years [have] been developing what is effectively a secret and unchallenged body of law" (*The New York Times,* July 13). Then Pres. Obama decides it's legal for him to start drone wars and assassinate Americans at will, with no oversight, and this goes unchallenged, for all practical purposes, to the extent that "the Obama administration refused to send anyone to a Senate hearing on targeted killings" (*The New York Times,* May 9) – nor does Obama feel compelled to explain his legal rationale for these things. More secret law.

Congress and the people accept all this because corruption, when it becomes commonplace, drains the collective will. Where do you even begin to reform such a thoroughly compromised system?

Perhaps you begin by a refusal to speak about it as though it is what it is not. It is not a functioning republic.

Eighteenth Century quotes are from ***The Creation of the American Republic: 1776-1787,*** *by Gordon S. Wood, and* ***The Debate on the Constitution – Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle over Ratification, Part One: 1787-1788,*** *edited by Bernard Bailyn.*