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Give Me Liberty: Individual Rights In A Time Of War

Anthony Lewis

GIVE ME LIBERTY: INDIVIDUAL RIGHTS IN A TIME OF WAR*

Anthony Lewis**

Ladies and gentlemen, it is a signal honor for me to be here with you this evening. I have great respect for New York Law School – a respect that was planted in me many years ago by one of its most wonderful graduates: Justice John Marshall Harlan.[1] In the years that I covered the Supreme Court, Justice Harlan was my model of the judge. He struggled, successfully, to escape from the habits of thought that had built up over a lifetime in order to be a judge. He had a character so courteous, so kind, that he could rightly be called noble.

Let me give you an example or two. I know I am delaying the main theme of my talk this evening, but it seems right to me to say a few words about Justice Harlan. On the Court he often disagreed with Justice Hugo L. Black.[2] Where Black sought and found certainties in the

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* Mr. Lewis delivered these remarks at the Twelfth Annual Media Center Lecture at New York Law School on February 10, 2004.

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[1] Justice John Marshall Harlan was born in Chicago, Illinois, on May 20, 1899. Justice Harlan received his law degree from New York Law School in 1925. President Eisenhower nominated him to the Supreme Court of the United States where he served as an Associate Justice from 1955 to 1971. He died on December 29, 1971, at the age of seventy-two. *See generally* Justice John Marshall Harlan, *at* http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/justices/query=*/doc/{t184}? (last visited Apr. 18, 2004).

[2] Justice Hugo LaFayette Black was born in Harlan, Alabama in 1886. Justice Black received his law degree from the University of Alabama Law School in 1906. He served in the United States Senate from 1927 to 1937. His appointment to the Supreme Court by President Franklin Delano Roosevelt drew criticism after the Senate confirmed him because of his earlier membership in the Ku Klux Klan. Black was, however, a staunch defender of civil liberties and he became the leader on the Supreme Court of those consistently opposing congressional and state restrictions on freedom of speech. He served as an Associate Justice from 1937 to 1971. He died on September 25, 1971 at the age of eighty-five. *See generally* Justice Hugo LaFayette Black, *at*

Constitution, Harlan thought he had to apply a rule of reason. Black had been a populist radical Alabama politician, Harlan a Wall Street lawyer. But in their last years they became very close to each other. Justice Black was convinced that they were cousins through a southern connection.

After the Supreme Court decided the *Pentagon Papers* case[3] in June, 1971 – with the two of them on opposite sides – both were stricken with what proved to be a mortal illness. Both were taken to the Bethesda Naval Hospital. One day, Justice Harlan called Justice Black's son, Hugo Jr., to his room. He asked Hugo when his father was going to retire. He would have to retire too, Harlan said, but he wanted to wait until Black had done so. He told Hugo, "I do not want to do anything to detract from the attention your father's retirement will get. I don't have to tell you. He is one of the all-time greats of our Court. Nobody's judgment ever exceeded his – his is just the best." Hugo protested. But Justice Harlan said, "Holding up until your father's retirement is recognized and commented on is the right thing to do."

Then I want to mention the case of *Cohen v. California*.[4] Cohen was convicted of disturbing the peace for walking through the Los Angeles County Courthouse during the Vietnam War wearing a jacket that bore the words, "Fuck the Draft." Justice Harlan wrote the opinion of the Court reversing the conviction. It was an "unseemly expletive," he said. But it is "often true that one man's vulgarity is another's lyric." He added that governments might "seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." Thus a courtly gentleman was able to empathize with vulgar protest.

Now I want to mention two more recent graduates of this law school: Donna Newman and Andrew Patel. They connect me to the subject of the evening, "Individual Rights in a Time of War." For they are counsel to Jose Padilla,[5] one of two American citizens who have been

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http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/justices/query=*/doc/{t162}? (last visited Apr. 28, 2004).

[3] New York Times Co. v. United States, 403 U.S. 713 (1971).

[4] Cohen v. California, 403 U.S. 15 (1971).

[5] On June 9, 2002, Jose Padilla (a.k.a. Abdullah Al Muhajir) was transferred from the control of the U.S. Department of Justice to military control. Since that time, Mr. Padilla has been held in a navy brig in South Carolina. He has been accused of plotting to set off a "dirty bomb," of conspiring with members of Al-Qaeda and planning to scout for Al-Qaeda. Padilla has not been charged with a crime. *See generally* Jose Padilla (a.k.a. Abdullah Al Muhajir) *at* http://www.chargepadilla.org (last visited Apr. 18, 2004).

held in solitary confinement for more than 20 months now, without trial, because President Bush has declared them to be "enemy combatants."

Not many lawyers face roles as difficult as do Donna Newman and Andrew Patel in the *Padilla* case. They have not been able to communicate with their client, because the government forbids Padilla to talk with a lawyer. Indeed, the Justice Department has gone beyond that to try, in effect, to prevent Newman and Patel from acting on his behalf. The Department argued, among other things, that Newman had no standing to bring a habeas corpus action for Padilla. It has thrown up every imaginable obstacle to judicial review of the foundation question in his case: whether he is in fact a terrorist, an "enemy combatant."

But Donna Newman and Andrew Patel have persisted. They have acted in the highest tradition of the law, the tradition that makes me a passionate admirer of law and lawyers. Happily, the two of them are here with us this evening. I hope everyone here will share my sense that we owe them a great deal. And by we, I mean the people of this country.

I shall return in due course to the *Padilla* case. But I want to get there through a broader consideration of what the Bush Administration has done to civil liberties in the name of fighting terrorism. Fear of terrorism has been made the reason for the President to brush aside, abruptly, rights protected by the Constitution and international law. Ideas foreign to American beliefs – detention without trial, denial of access to counsel, years of interrogation in isolation – are now American practices.

Fear and its repressive consequences are not something new in our history. At the very beginning of the republic, in 1798, Congress passed and President Adams signed into law a Sedition Act[6] that made it a crime to criticize the President. The stated reason for the Act was the threat of French Jacobin terror[7] coming to the United States. The then

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See generally Deborah Sontag, *Terror Suspect's Path From Streets to Brig*, N.Y. TIMES, Apr. 25, 2004 at 1.

[6] The Alien and Sedition Acts, passed by Congress on July 14, 1798, declared that any treasonable activity, including the publication of "any false, scandalous and malicious writing," was a high misdemeanor, punishable by fine and imprisonment. By virtue of this legislation, twenty-five men, most of them editors of Republican newspapers, were arrested and their newspapers were forced to shut down. *See* The Alien and Sedition Acts, July 6, 1798; Fifth Congress; Enrolled Acts and Resolutions; General Records of the United States Government; Record Group 11; National Archives.

[7] In the context of the French Revolution, a *Jacobin* originally meant one of a society of violent agitators which supported the Revolution of 1789 during its early stages. The name *Jacobins* has been popularly applied to extreme leftists or radicals. *See generally* Jacobin, *http://dictionary.reference.com/search?q=jacobin* (last visited Sept. 29, 2004).

dominant Federalist Party used the statute to prosecute, fine and imprison members of the emerging Jeffersonian opposition: editors, publishers, even a Jeffersonian member of Congress.

Again and again in our history, politicians have used fear as a weapon.[8] "The paranoid style in American politics," the late Richard Hofstadter[9] called it. Woodrow Wilson's Justice Department sent people to prison for long terms for criticizing the draft during World War I and for criticizing Wilson. His Attorney General, A. Mitchell Palmer,[10] rounded up thousands of aliens in a night and deported them as menaces. Fifty years ago we had Senator Joe McCarthy[11] playing on the fear of communism.

If the United States has been especially susceptible to the politics of fear, it is not only an American phenomenon. Lord Steyn,[12] one of the law lords who make up Britain's highest court, said recently: "It is a recurring theme in history that in times of war, armed conflict or perceived

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[8] Anthony Lewis, *The Justices Take On the President*, N.Y. TIMES, Jan. 16, 2004 at 21.

[9] American political historian Richard Hofstadter (1916-1970) won a Pulitzer Prize in History for *The Age of Reform from Bryan to FDR* (1955), which argues that American political reformers habitually revert to antiquated eighteenth century ideals. *See generally* Richard Hofstadter, *at* http://www.jbuff.com/rhof.htm (last visited Apr. 18, 2004).

[10] In 1919, President Woodrow Wilson appointed A. Mitchell Palmer as his Attorney General. Mr. Palmer had previously been associated with the progressive wing of the Democratic Party and had supported women's suffrage and trade union rights. However, once in power, his views on civil rights changed dramatically. Mr. Palmer claimed that Communist agents from Russia were planning to overthrow the American government. 10,000 suspected communists and anarchists were arrested. Large numbers of these suspects were held without trial and later deported. *See generally* A. Mitchell Palmer, *at* http://www.spartacus.schoolnet.co.uk/USApalmerA.htm (last visited Apr. 18, 2004).

[11] Joseph McCarthy pursued those whom he classified as Communists and subversives through widely publicized hearings, the use of unidentified informers, and reckless accusation. Careers were ruined on the flimsiest evidence, and his methods came under increasing attack. In December 1954, the Senate voted to "condemn" McCarthy for abuse of certain senators and for insults to the Senate itself during the censure proceedings. *See generally* Joseph Raymond McCarthy, *at* http://www.infoplease.com/ce6/people/A0830834.html (last visited Apr. 18, 2004).

[12] Lord Johan van Styl Steyn was born on August 15, 1932. Lord Steyn served as a Lord Justice of Appeal from 1992 to 1995 and currently serves as a Lord of Appeal in Ordinary. *See generally* Rt Hon the Lord Steyn, *at* http://www.politicallinks.co.uk/POLITICS2/BIOG/ld_BIOGS/bio.asp?id=2052 (last visited May 21, 2004).

national danger, even liberal democracies adopt measures infringing human rights in ways that are wholly disproportionate to the crisis."[13]

Lord Steyn gave some British examples of what he called "disproportionate infringement of civil liberties in wartime," notably the detention of aliens during World War II – among them German Jews who had found refuge in Britain from Hitler – without any proper hearing. But the main target of his remarks was the Bush Administration's handling of the prisoners it is keeping in Guantanamo Bay, Cuba.

There are roughly 660 of those prisoners, men and boys. The Pentagon sent home a 13-year-old and two other teenagers who had been imprisoned for a year.[14] From what we know, which is not much, the prisoners are held in stringent conditions, in solitary confinement, and are subject to frequent interrogation. We have the impression that almost all were captured in the war in Afghanistan as fighters for the Taliban or Al-Qaeda, but that impression seems to be wrong. A substantial number were arrested by governments as remote from Afghanistan as Gambia in West Africa, turned over to American authorities and then taken to Guantanamo.

A brief filed in the United States Supreme Court in January 2004, by members of the British Parliament,[15] gave me my first insight into the fact that numbers of the Guantanamo prisoners were apparently not fighting in Afghanistan. The brief describes what is known about 10 British subjects and two others with British connections, who were held in Guantanamo – most of whom, were released in March of 2004.

One is Martin Mubanga,[16] the son of a former government official in Zambia, in southern Africa. His father moved to London thirty years ago. Martin was arrested while visiting Zambia. He was turned over to U.S. agents, for reasons never explained, and taken to Guantanamo.

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[13] Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, Twenty-Seventh F.A. Mann Lecture (Nov. 25, 2003) (transcript available at http://www.fairgofordavid.org/pubdocs/LordSteynlecture.pdf).

[14] *See* Associated Press, *Teenagers Are Released From Guantánamo and Sent Home*, N.Y. TIMES, Jan. 30, 2004 *at* 21.

[15] Brief of Amici Curiae 175 Members of Both Houses of Parliament of the United Kingdom at 12, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) (Nos. 03-334 and 03-343).

[16] On March 1, 2002, Martin Mubanga was arrested in Zambia after returning from Afghanistan and taken to Guantanamo Bay. BBC News, *Guantanamo Britons 'must come home,'* available at http://news.bbc.co.uk/1/hi/uk/3088527.stm (last modified July 23, 2003).

Three of the British subjects, all of Pakistani descent, were friends who lived in Tipton, in the British Midlands. One was Asif Iqbal. In July 2001, his parents went to Pakistan to find a bride for him. Asif, who was 20 years old, followed in September. The marriage was arranged, and Asif told his parents he was going to Karachi to meet friends. He telephoned from there, and next was in Guantanamo. Asif's two friends followed him into Pakistan. There, the brief says, the three were apparently seized and turned over to Northern Alliance forces in Afghanistan. They in turn handed the three over to American forces, which were offering rewards for possible terrorists.

Jamal Udeen[17] was a web designer in Manchester, England. He was going through Afghanistan to Iran in 2001, he said, when Taliban soldiers saw his British passport and accused him of being a spy. He was imprisoned in Kandahar and tortured. British officials said they would help him get home, but he was turned over to the United States instead.

Of course those men and the other British prisoners may have given a false picture of their activities and may have terrorist connections. But there has been no real opportunity to test the truth.

The Third Geneva Convention,[18] which the United States has signed and ratified, provides that when there is a dispute about a prisoner's status – whether he is a regular prisoner of war, for example, or something unlawful like a spy or a terrorist – the issue is to be decided by an independent "competent tribunal." The Bush Administration declined to follow the Convention. It declared unilaterally that everyone in Guantanamo was an "unlawful combatant." An Administration brief in the Supreme Court put it bluntly. "The President," it said, "in his capacity as Commander in Chief, has conclusively determined that Guantanamo detainees...are not entitled to prisoner-of-war status under the Geneva Convention."

Parents and relatives of some of the Guantanamo prisoners challenged President Bush's unilateral determination that they were unlawful combatants by filing petitions for habeas corpus, the ancient writ

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[17] Jamal Udeen Harith, 35, from Manchester was placed in detention in Cuba on Feb. 2002, after being moved from Kandahar in Afghanistan. *Id.*

[18] The Third Geneva Convention regarded the treatment of prisoners of war. It was adopted in 1929 as an extension to the rights guaranteed by the Hague Convention of 1907. It was revised in 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. One of the more specific provisions is the exact definition of lawful combatant. *See generally* Third Geneva Convention, *available at* http://en.wikipedia.org/wiki/Third_Geneva_Convention (last modified Feb. 24, 2004).

used to test the legality of an imprisonment, on their behalf. The Bush Administration took the position that United States courts could not consider the cases because Guantanamo is outside American sovereignty. Though the United States has total control of the area under a perpetual treaty with Cuba, the United States Court of Appeals for the District of Columbia Circuit agreed with the government argument.[19]

When the plaintiffs sought review in the Supreme Court, the Justice Department warned that this was not the Court's business, but a matter committed to the President for decision as Commander in Chief. But the Supreme Court agreed to hear the cases.[20] They will be argued and presumably decided in the present term.[21]

It is in the Supreme Court case that the British brief I mentioned earlier, the one describing how the British detainees got to Guantanamo, was filed.[22] It is a remarkable document, signed by 175 members of the House of Commons and the House of Lords. Among them are a former Conservative Lord Chancellor, Lord Mackay, and a greatly-respected law lord, now retired, Lord Browne-Wilkinson.

The Guantanamo detentions have aroused strong and widespread criticism in Britain. Prime Minister Tony Blair and his government have been pressed to seek changes in the American policy – an embarrassment for Blair, given his strong support of George Bush's wars in Afghanistan and Iraq.

It was Guantanamo that led Lord Steyn to speak out about wartime civil liberties in a lecture last fall.[23] It was an extraordinary speech from a sitting judge, passionate in its condemnation of the U.S. policy.

The Guantanamo prisoners, Lord Steyn said, are in "a legal black hole."[24] "As matters stand at present," he said, "United States courts would refuse to hear a prisoner at Guantanamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants

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[19] Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).
[20] Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-343).
[21] The Supreme Court subsequently reversed the D.C. Circuit's judgment. Shafiq Rasul, et al., Petitioners v. George W. Bush, President of the United States, et al. Fawzi Khalid Abdullah Fahad Al Odah, et al., Petitioners v. United States et al., 124 S. Ct. 2686 (June 28, 2004).
[22] *See* Brief, *supra* note 15.
[23] *See* Steyn, *supra* note 13.
[24] *Id.*

at all..."[25]

"As a lawyer brought up to admire the ideals of American democracy and justice," Lord Steyn concluded, "I would have to say that I regard this as a monstrous failure of justice."[26]

I know of no reason to believe that Guantanamo prisoners have been physically tortured in, say, the horrifying ways used by Saddam Hussein in Iraq.[27] On the other hand, endless interrogation, isolation and harsh conditions of confinement are said by medical experts to take a heavy psychological toll. Twenty-one of the Guantanamo prisoners have attempted suicide.

Shortly after the terrorist attacks of September 11, 2001, President Bush issued an order calling for military tribunals to try any non-Americans who supported terrorism or harbored terrorists.[28] The Defense Department has indicated several times that some of the Guantanamo prisoners may be charged before such tribunals, but so far no tribunals have been set up.

If and when there is a tribunal proceeding, difficult legal questions would inevitably be presented. What law would a defendant be charged with violating? Would a criminal law of the United States be said to apply to, say, an Afghan citizen who fought against American forces on behalf of the Taliban, whose government then controlled almost all of Afghanistan? Would Al-Qaeda terrorists be charged under international human rights laws of the kind applied by the International Criminal Tribunal for the Former Yugoslavia?[29] Or the law to be applied by the new International Criminal Court against suspected perpetrators of genocide and war crimes[30] – the court that is so fiercely opposed by the Bush Administration? The Pentagon has already designated some military lawyers to sit as defense counsel before the tribunals. But five of the uniformed officers who were selected filed a brief in the Supreme Court arguing that the system created by President Bush was flawed by its failure to provide for ultimate appeal from the military tribunals to a

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[25] *Id.*

[26] *Id.*

[27] That sentence was written before disclosure of the abuse of Iraqi detainees in Abu Ghraib prison, in Iraq.

[28] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 222 (Nov. 13, 2001).

[29] *See generally* International Criminal Tribunal for the Former Yugoslavia, *at* www.un.org/icty/ (last visited Apr. 11, 2004).

[30] *See generally* International Criminal Court, *at* www.icc-cpi.int/php/index.php (last visited Apr. 11, 2004).

civilian court.[31]

Another area of harsh policy on the part of the Bush Administration is its treatment of aliens inside the United States. In the weeks after 9/11, Attorney General Ashcroft ran a program of mass detention of aliens, targeting mainly Muslims and Arabs, on suspicion that they had a connection to terrorism. At first the Justice Department issued a weekly running total of detainees, but it stopped on November 5, 2001, when the figure reached 1,182. The total number detained in this and other Ashcroft programs is probably around 5,000.

Many of those arrested were held for long periods in jail, weeks or months. In the words of a *New York Times* legal writer Adam Liptak, their treatment "inverted the foundation principles of the American legal system."[32] They were arrested essentially at random, without probable cause to believe they were supportive of terror. They were held for long periods without charges. They were treated as guilty until proven innocent – detained, that is, until a lengthy F.B.I. process concluded that they "posed no danger to the United States."[33] Eventually, nearly all were charged with violations of immigration law, such as overstaying visas or a visiting student failing to inform the government of a change of courses. Many were held for months after judges ordered them released or after they had agreed to leave the country.

What was done to those detainees in prison is hard for an American – this one, anyway – to believe. They were beaten, humiliated, kept in solitary confinement with fluorescent lights on 24 hours a day. At the Metropolitan Detention Center in Brooklyn, New York, guards allowed prisoners to try to telephone a lawyer once a week. Guards informed them it was time to make that call by asking a prisoner, "Are you okay?" That was supposedly shorthand for, "Do you want to place a legal telephone call this week?"[34]

The mistreatment of the detainees was described in a report by the Justice Department's Inspector General, Glenn A. Fine.[35] His report was especially critical of the Brooklyn Center. But he said the whole alien detention program was problematic, with F.B.I. agents making little effort

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[31] *See* Neil Lewis, *Suit Contests Military Trials Of Detainees At Cuba Base*, N.Y. TIMES, April 8, 2004 at A25.

[32] Adam Liptak, *Threat and Responses: Assessment; For Jailed Immigrants, A Presumption of Fault*, N.Y. TIMES, June 3, 2002, at A18.

[33] *Id.* at A18.

[34] *Id.*

[35] Memorandum from Glenn A. Fine, Inspector General, to the Attorney General and the Acting Deputy Attorney General (Nov. 5, 2003), *available at* www.usdoj.gov/oig/challenges/2003.htm.

to distinguish real terrorist suspects from people picked up by chance, and detainees held without access to lawyers or family members.[36] In fact, it was hard for families to find the detainees. Their names were kept secret so that if they were arrested away from home, their families would be left to think they had just disappeared. Places of detention were also kept secret and deportation hearings were closed. The whole program was blanketed in secrecy, a hallmark of tyranny.

When the Inspector General published his report, Attorney General Ashcroft brushed off the criticism. His spokeswoman, Barbara Comstock, said, "We make no apologies for finding every legal way possible to protect the American public from further terrorist attacks."[37] The Inspector General's description of lawless behavior by prison guards was confirmed, six months later, when videotapes taken at the Brooklyn prison were found there – tapes that officers said had been thrown away.

The two areas I have described, the Guantanamo Bay prison and the mass detention after 9/11, both involve non-Americans. American citizens may feel they are safe from the methods used against aliens, but they are not. The Bush Administration has used similar methods against citizens, the two I mentioned earlier who are being detained in solitary confinement.

One of the American detainees, Yasar Esam Hamdi, was seized in Afghanistan during the war there. President Bush declared him to be an "enemy combatant" and ordered him held without charge. When Hamdi's father sought his release on a writ of habeas corpus, the United States Court of Appeals for the Fourth Circuit held that the President had the power to detain a citizen when he was found, like Hamdi, on or near a foreign battlefield.[38] The court said it was not deciding what the President could do with someone arrested inside this country on suspicion of a terrorist connection.[39]

That is the case of the other detainee, Jose Padilla. He was born in Brooklyn, was a gang member, served several prison terms and in prison converted to Islam. In May 2002, he flew into O'Hare Airport in Chicago from abroad. Federal agents arrested him there and took him to New York, serving him with an order to be a material witness before the grand jury looking into the terrorist attack on the World Trade Center. A

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[36] *Id.*

[37] Press Release, Department of Justice, Statement of Barbara Comstock, Director of Public Affairs, Regarding the IG's Report on 9/11 Detainees (June 2, 2003), *available at* www.usdoj.gov/opa/pr/2003/june/03_opa_324.htm.

[38] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *reh'g en banc denied,* 337 F.3d 335 (4th Cir. 2003).

[39] *Id.*

judge appointed Donna Newman to represent Padilla, and set a hearing for June 11, 2002. But on June 10, Ms. Newman got a telephone call saying that she need not come to court the next day. There would be no hearing because her client had been taken away to a Navy brig in South Carolina and detained as an enemy combatant. Neither she nor her co-counsel, Andrew Patel, has been able to speak with Padilla since then.

On that June 10 when Donna Newman heard about the removal of her client, Attorney General Ashcroft told the world about the case. He happened to be in Moscow, but he made a statement on television. "We have captured a known terrorist...," he said.[40] "While in Afghanistan and Pakistan, Padilla trained with the enemy...In apprehending him, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'"[41]

I thought legal ethics barred a prosecutor from pronouncing a prisoner guilty before a trial, but perhaps that is an old-fashioned view. In any event, what Ashcroft said sounded frightening; but of course there has been no process to test the truth of his dramatic statement.

In a habeas corpus proceeding before the United States District Court in New York, the judge found that the government merely had to show "some evidence" for its description of Padilla as an enemy combatant.[42] The evidence produced by the government was a statement by a Pentagon official,[43] not subject to cross-examination and without any first-hand witnesses. The judge said that was enough to justify Padilla's detention.[44] But he did say that Padilla should be allowed to talk to his lawyers, for the limited purpose of informing them of any facts inconsistent with his designation as a terrorist.[45]

The judge's call for a limited right to counsel was strongly disputed by the Bush Administration. It said any visit by a lawyer to Padilla might damage his interrogation by destroying the necessary "atmosphere of dependency and trust between the subject and interrogator."[46] That seemed to me a bit of inadvertent candor – an implicit acknowledgement

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[40] Attorney General John Ashcroft, Address Regarding the Transfer of Abdullah Al Muhajir (born Jose Padilla) To the Department of Defense as an Enemy Combatant (June 10, 2002) (transcript available at www.usdoj.gov/ag/speeches/2002/061002agtranscripts.htm).
[41] *Id.*
[42] Padilla *ex rel.* Newman v. Bush, 233 F.Supp.2d 564 at 570 (S.D.N.Y. 2002).
[43] *Id.* at 573.
[44] *Id.*
[45] *Id.* at 604.
[46] *See* Christopher Dickey, *We Have Ways of Making You Talk* (Aug. 22, 2003), *available at* http://www.msnbc.msn.com/id/3068190.

that the interrogators want to overbear Padilla's will. In the criminal law, after all, the *Miranda* rule[47] assures the right to counsel at the start of any questioning precisely because a prisoner alone in the hands of his jailers may be overborne in interrogation. Donna Newman and Andrew Patel took the *Padilla* case to the United States Court of Appeals for the Second Circuit – and won.[48] By a vote of 2 to 1, a panel of that court rejected President Bush's claim of power to detain Americans without trial. Even the dissenting judge said that Padilla should be allowed to consult counsel.[49]

Before that decision, Hamdi's father had asked the Supreme Court to hear his case. The Bush Administration strongly opposed review. But the court granted the Hamdi petition, and the Justice Department sought review of the Padilla decision as well.[50] I think the outcome of those two cases will have a large import for American freedom.[51]

President Bush and his Administration have been much criticized for unilateralism in foreign policy – acting without consulting allies or in disregard of their views. The *Hamdi* and *Padilla* cases show a striking unilateralism at home. In both, the President claims a right to determine not only the law but the facts on his own. He asserts the novel legal power to detain American citizens indefinitely, without trial or counsel, in the absence of specific authorization by Congress.[52] And his lawyers have argued for habeas corpus proceedings so narrow that the detainees have no real ability to contest the facts underlying their designation as enemy combatants. In the Guantanamo cases, too, President Bush claims the power to determine law and facts on his own.[53] He has

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[47] Miranda v. Arizona, 384 U.S. 436 at 466 (1966).
[48] Padilla v. Rumsfeld, 352 F.3d 695 at 712 (2d. Cir. 2003).
[49] *Id.* at 732.
[50] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S.Ct. 981 (Jan. 9, 2004).
[51] The Supreme Court reversed the fourth circuit's judgment in the *Hamdi* case and ordered that Hamdi be given an opportunity to challenge the pentagon's assertions before a neutral decision-maker. *See* Hamdi v. Rumsfeld, 124 S.Ct. 2633 (June 28, 2004). The Court also reversed the Second Circuit's decision in *Padilla*, holding that the habeas corpus action should have been brought against the commander of the Naval base where Padilla was held instead of Secretary of Defense Rumsfeld. *See* Rumsfeld v. Padilla, 124 S.Ct. 2711 (June 28, 2004). Lawyers for the Justice Department announced an agreement requiring Hamdi to renounce his American citizenship among other stipulations in exchange for his return to Saudi Arabia. *See* Eric Lichtblau, *U.S., Bowing to Court, to Free 'Enemy Combatant,'* N.Y. TIMES, September 23, 2004 at A1.
[52] *Padilla*, 352 F.3d at 724-725.
[53] *See generally* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

"conclusively" decided that the prisoners are unlawful combatants, as his lawyers put it, notwithstanding the terms of the Geneva Convention. And he claims that his determination is beyond review in any court.[54]

The attempt to prevent any meaningful access to the courts is especially alarming. Judges are the last line of defense for citizens against the abuse of official power. The British parliamentarians' brief in the Guantanamo case makes the point well:

> "The United Kingdom and the United States share an unshakeable commitment to the rule of law... Recourse to an independent and impartial tribunal is required by the rule of law, especially when the justification for detention is contested or uncertain.
>
> We respectfully submit that this Court should preserve the judiciary's vital role to insure that executive actions violate neither the Constitution of the United States nor the international rule of law and human rights."[55]

Britain's interest in the Guantanamo situation raises a question: Why are we less concerned about it than they are? If someone tried to file a similar brief in the Supreme Court on behalf of members of the United States Congress, he would have little chance of finding 175 Senators and Representatives willing to sign it. There is not much public outcry about the Bush Administration's disregard for civil liberties. The press has begun to pay serious attention.

The basic reason for the lack of American public concern must be fear. The attacks of September 11 were traumatic, making us feel more vulnerable than we had in living memory. And the fact is that there is more reason to fear more terrorist outrages than to fear critical speech in World War I or disloyalty by Japanese-Americans in World War II.

The repression of civil liberty accompanying the present fear is especially dangerous, I think, because it has no time limit. Wars are usually over in a few years. After them, Americans have tended to regret abuses done in the name of security. We eventually apologized to the Japanese-Americans who were removed from their homes on the West Coast and confined in desert camps.[56] But it is hard to imagine or even

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[54] Brief for Appellee at 15, Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *petition for cert. granted*, (U.S. Nov. 10, 2003) (Nos. 03-334 and 03-343).
[55] *See* Brief, *supra* note 15.
[56] 133 Cong. Rec. H7555 (Sept. 17, 1987) (Civil Liberties Act of 1987).

define an end to the war on terror. The terrorists are not going to sign a surrender.

The endless prospect of perceived national danger should make us be on our guard, more than ever before, against loss of liberty in the name of security. If we let down our guard, if we allow our freedom to be eaten away, the terrorists will have won.

The idea of a political system based on law has been the great American contribution to political theory – a government of laws, not men, as John Adams put it.[57] We rely on the law to protect our system and ourselves. We abandon that faith in the law at our peril.

The President of the Israeli Supreme Court, Justice Aharon Barak, a judge much respected around the world, has memorably addressed the question of terror and the law. He speaks from experience, given Israel's unending struggle against terrorism.

"Terrorism does not justify the neglect of accepted legal norms," Justice Barak said. "This is how we distinguish ourselves from the terrorists themselves. They act against terrorism. A democratic state acts within the framework of the law... It is, therefore, not merely a war of the State against its enemies; it is a war of the Law against its enemies," Justice Barak said.[58]

[57] *See* Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137 at 163 (1803).
[58] Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 151-152 (2002).