

**The 2006 Otto L. Walter Lecture**  
**Civil Liberties in the Age of Terrorism**  
**April 5, 2006**

“I am prepared to make some compromises in the civil liberties arena to deal with the awesome nature of the [terrorist] threat we face,” said Floyd Abrams – one of the nation’s best-known and most well-regarded lawyers specializing in First Amendment rights such as freedom of speech and freedom of the press – during the 2006 Otto L. Walter Lecture, which examined the standing of civil liberties in an age where terrorism is a real and constant threat. Abrams said that if he thought that the terrorist threats facing the United States were a “passing one,” then he “would not be at all so ready even to consider painful compromises between the claims of security and freedom.”

Since the September 11, 2001 attacks in the United States, Congress had passed laws granting the Executive branch and its agencies broad powers to prevent and prosecute acts of terrorism. But when reviewing some of the legal measures taken by the Executive in the current war on terror, Abrams concluded that “this administration . . . seems to me in throw to a view of virtually unrestricted, nearly unlimited presidential power, with Congress viewed as an irritant with little or no truly relevant role to play and the courts treated as unworthy intruders.” Abrams said that, in fact, several of these measures have eroded the standing of freedom of speech, freedom of the press, and the right to due process, all in the name of protecting national security.

In one example, he cited the government’s vigorous attempts to restrict the rights of suspected terrorists (including an American citizen) captured outside of U.S. borders. He noted that the case of *Hamdi v. Rumsfeld* – where the U.S. military detained and designated as an “enemy combatant” an American citizen accused of helping alleged terrorists in Afghanistan – represented “the most revealing, most telling” example of the administration’s efforts to concentrate power in the Executive branch. Administration officials had said, among other arguments, that an American citizen detained and designated as an enemy combatant could not dispute his status or seek access to courts or counsel. Abrams said that “for a citizen of the United States, the ramifications of being declared an enemy combatant are deprivations of liberty . . .”

But he noted that the U.S. Supreme Court ruled (in a 6-3 decision in June 2004) that while the military had the authority to detain an American citizen who ultimately proved to be an enemy combatant, the current war on terror did not give “a blank check for the President when it comes to the rights of the nation’s citizens.” The Court decided that Hamdi (as an American citizen) was still entitled to his due process rights afforded by the Constitution, including “notice of the factual basis for his classification,” and also a “fair opportunity to rebut the government’s factual assertions before a neutral decision-maker” such as a court.

In another example which Abrams says reveals how the administration’s policies have eroded the standing of civil liberties, he pointed to a once secret and now-suspended program which allowed federal agents to eavesdrop on and intercept communications – such as telephone calls and e-mail messages – between American citizens and people in other countries without a court warrant. Abrams argued that under the Foreign Intelligence Surveillance Act (or FISA), the government must adhere to certain requirements before proceeding or continuing efforts to eavesdrop on American citizens and foreign agents. Yet, he noted, the administration argued that “the President has inherent constitutional authority to order the surveillance” even though “the power to conduct warrantless domestic spying was expressly circumscribed by Congress under FISA, even in wartime.”

Abrams concluded his lecture with a current case which he considers “the gravest present threat now in the courts with respect to freedom of speech or of the press.” In August 2005, the U.S. Department of Justice persuaded a grand jury to indict two individuals working for the American Israel Public Affairs Committee of participating in a conspiracy “to communicate national defense information to persons not entitled to receive it, an act in violation of the 1917 Espionage Act.” Abrams said that certain sections of the Espionage Act are “sweepingly, almost breathtakingly, overbroad,” and that a conviction of these two individuals in this particular case of passing along what was believed to be classified information could threaten basic civil liberties such as freedom of the press.

While not disputing the fact that certain government information and secrets must remain classified to protect national security, Abrams questioned whether government officials – working through political or bureaucratic convenience – may have imposed secrecy on certain documents without sufficient justification or may have retained secrecy even when it is no longer needed. He noted that “anyone [such as journalists] who covers the CIA, the Department of Defense, the Department of Homeland Security, and the like are routinely provided classified information by people in and out of government.” In deciding to pursue this case within this context, Abrams said that the Justice Department may have impaired First Amendment interests: “If all of us (not just government officials) are hereafter to be bound by a decision by some bureaucrat that certain information is classified, all of us will not only be less informed, but more subject to government control about what may and may not even be the subject of serious public discussion.”