

Civil Liberties in the Age of Terrorism¹
by: Floyd Abrams

I'm beginning to feel a bit like an old alum of New York Law School. A few weeks ago, I was honored to be invited to and to attend the law review banquet at which Justice Scalia spoke. Today I'm here and a few weeks from now I return to discuss another subject. So, a warning: be careful about promiscuous invitations. The invitee might accept them all.

I thought I would start today in a way public speakers are often advised not to — with a quotation. The speaker in question said the following:

“Is there an ongoing emergency today? My own view is that the degree of threat to our individual security is unparalleled in American history. We live in a new world in which foreign terrorists, dedicated to our destruction, suicidal in behavior and with possible access to the most modern and destructive of weapons, imperil our people. If I thought otherwise . . . if I thought the al-Qaeda threat was a passing one, one akin to that of the Barbary pirates of the past, or the equivalent (as Michael Mandelsbaum has said) of a ‘badly stubbed toe’ that caused pain but left the world . . . much as it had [been] before, I would not be at all so ready even to consider painful compromises between the claims of security and freedom.”²

¹ The Otto Walter Lecture, New York Law School, April 5, 2006.

² F. Abrams, “Freedom in Especially Perilous Times,” 36 Rut. L.J. 909 (2005).

I begin with those words — which are, I fear, especially apt in this city — to let you know at the start that the second half of the title of my speech today is something I take very seriously. When I first wrote the words I’ve just quoted to you — who else would I quote so early in this speech? — we were a lot closer to 9/11. I would, however, say them all again today and I offer them to you to let you know at the outset that I am prepared to make some compromises in the civil liberties arena to deal with the awesome nature of the threat we face. That threat, incidentally, is not an existential threat to the existence of our nation; we are speaking of terrorists, not states. Nonetheless, the risk remains an enormous one to the survival of many of our people — especially here in New York.

At such a time and during a sort of war — part very real, part metaphoric — how stands our civil liberties? That is, in turn, dependent on the views and conduct of the Administration in power. And this Administration, as I will set forth in detail, seems to me in throe to a view of virtually unrestricted, nearly unlimited presidential power, with Congress viewed as an irritant with little to no truly relevant role to play and the courts treated as unworthy intruders.

I could begin to flesh this out with a number of examples, but I think the most revealing, most telling one is the Administration’s position about “enemy combatants” as revealed in the case of *Hamdi v. Rumsfeld*, which was heard by the Supreme Court on April 28, 2004.³ Hamdi had been captured by the Northern Alliance, our coalition allies, in Afghanistan in 2001. He was turned over the US military and transferred to Guantanamo Bay in January of 2002. There it was discovered that Hamdi was a US citizen, whereupon he was held incommunicado at a naval brig

³ 542 U.S. 507 (2004).

in Virginia. In June of 2002, Hamdi's father filed for a writ of habeas corpus alleging that Hamdi was being held without charges in violation of the Fifth and Fourteenth Amendments. Hamdi's father also asserted that his son was a relief worker in Afghanistan, not an enemy combatant as the Government maintained. Because the Supreme Court accepted that the Authorization for Use of Military Force, the congressional authorization for an American military response in Afghanistan, provided congressional authorization to detain citizen enemy combatants, the question presented to the Court was "what process is constitutionally due to a citizen who disputes his enemy-combatant status."⁴

Before discussing the scope of the Government's position in *Hamdi*, it is worthwhile to take a moment to describe what it means to be declared an enemy combatant. Enemy combatants may be held in military custody throughout the "duration of the particular conflict in which they were captured," a potential life sentence in an ongoing and perhaps endless "war against terrorism." They may be interrogated, and they may be tried by military tribunals for violations of the law of war.⁵ Or they may not be tried at all. They may be held, never charged and never released. That was the Administration's view. Moreover, the Administration has taken the position that al Qaeda and Taliban detainees are not prisoners of war and therefore are not entitled to the protections of the Geneva Convention.⁶ For a citizen of the United States, the ramifications of being declared an enemy combatant are deprivation of liberty and the transfer from the crimi-

⁴ *Hamdi*, 542 U.S. at 524.

⁵ *Hamdi* 542 U.S. 518—19.

⁶ Brief for the Respondents at 9—10, 24, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (hereinafter "Government's Brief").

nal court system to military tribunals, if, that is, the government chooses to assert any claim of criminal culpability at all.

Despite the severe consequences attendant to the determination that a citizen is an enemy combatant, the Government maintained throughout the *Hamdi* proceedings that the only permissible review by the courts was limited to “whether the military [was] authorized to detain an individual that it has determined [was] an enemy combatant.”⁷ The Government position bifurcated the issue of detention into the legal authority to detain and the factual basis for the detention and claimed exclusive executive jurisdiction over the latter. By doing so, the Administration sought to remove its factual basis for detention from judicial habeas corpus scrutiny.

At most, the Government suggested, the courts might apply a “some evidence” standard of proof in which a court would be obliged accept as true *any* articulated basis for detention and would consider only whether that basis was a lawful one.⁸ Under such a standard, the Government argued, “the focus is exclusively on the factual basis supplied by the Executive to support its own determination,” and accordingly, there is no need to consider the truth or persuasiveness of that evidence or to weigh any countervailing evidence.⁹ In *Hamdi*, the factual basis considered sufficient by the Government to detain one of its own citizens consisted solely of the declaration of one Michael Mobbs, who identified himself as a Special Advisor to the Under Secretary

⁷ Government’s Brief at 26.

⁸ Government Brief at 27.

⁹ Government Brief at 34.

of Defense for Policy and who indicated that based on his “review of relevant records and reports” he was familiar with the circumstances related to the capture and detention of Hamdi.¹⁰

At the same time that it offered such hearsay evidence in support of its designation of Hamdi as an enemy combatant, the Government’s habeas argument strenuously advanced the position that it was entirely unnecessary to afford a detainee *any* opportunity to be heard.¹¹ It has long been understood that the central meaning of procedural due process is that a person whose rights are to be affected is entitled to be heard by a neutral decision maker. When pressed on this point at oral argument, Deputy Solicitor General Clement asserted that the “interrogation process itself provides an opportunity for an individual to explain that this has all been a mistake.”¹² Thus, the government’s argument was that due process could be satisfied by affording a U.S. citizen the chance to explain to his captors, under interrogation conditions, that they were wrongfully holding him captive.

The Government’s position in *Hamdi* was similarly aggressive with respect to access to counsel; during oral argument, Mr. Clement asserted that the Government’s interest in interrogation justified withholding access to counsel.¹³ The Government devoted a substantial portion of

¹⁰ *Hamdi* 542 U.S. at 512—13.

¹¹ Government Brief at 37—38.

¹² Transcript of Oral Argument at 40, *Hamdi* 542 U.S. 507 (2004).

¹³ Transcript of Oral Argument at 28, *Hamdi* 542 U.S. 507 (2004) (“there are plenty of individuals who either have a paramount intelligence value that ... providing them with counsel whose first advice would certainly be to not talk to the Government is a counterproductive way to proceed in these cases”).

its brief to the argument that Hamdi was not entitled to access to counsel.¹⁴ Citing the importance of gathering intelligence through interrogation, the Government asserted that “there is no cause for a detained enemy combatant to enjoy a generalized right to counsel to challenge the Executive’s core Article II judgment that he is an enemy combatant.”¹⁵ While the Government’s claim to a compelling interest in unmediated interrogation of enemy combatants is a forceful one, it holds only where the subject of interrogation is in fact an enemy combatant. Where, as in *Hamdi*, that status is the very issue challenged, the notion collapses into a tautology. Moreover, the Government’s proposed solution, that it would permit “access to counsel at the point that the commanders who are responsible for gathering intelligence . . . reach a judgment that such access would not interfere with those vital efforts,”¹⁶ presents a grave threat that a citizen detainee, wrongfully deemed an enemy combatant, would languish incommunicado until such time as his captors determined to afford him access to counsel. In this regard it should be noted that (not at all coincidentally) Hamdi himself was not granted access to counsel until February of 2004, after certiorari been granted and more than two year after his capture in Afghanistan.

When the case reached the Supreme Court, the plurality opinion authored by Justice O’Connor held that a citizen-detainee “must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision

¹⁴ Government’s Brief at 39—46.

¹⁵ Government’s Brief at 41.

¹⁶ Government’s Brief at 44.

maker.”¹⁷ Though the Court acknowledged that hearsay evidence such as the Mobbs declaration might be accepted and that a presumption in favor of the Government would be permissible, it provided that a citizen detainee has the right to meaningfully challenge the Government’s case. The plurality also rebuffed the Government’s claim that the courts must forego an individual inquiry into the factual basis for declaring a citizen an enemy combatant, stating “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁸ The Court recognized that a circumscribed role for the courts in this matter would serve “only to *condense* power” in the Executive branch and that absent a suspension of the writ of habeas corpus by Congress, a situation the Government did not assert, “a citizen detained as an enemy combatant is entitled to this process.”¹⁹ Notably, the plurality left open the issue of access to counsel, remarking that Hamdi had been permitted access to counsel and “unquestionably has the right to access to counsel in connection with the proceeding on remand,” but that no further consideration of that issue was necessary at that stage of the case.²⁰

Justice Scalia, joined by Justice Stevens, dissented from the plurality, not to side with the Government, but because the plurality did not go far enough in asserting the role of habeas. Reasoning that the courts are open to criminal charges against Hamdi, Scalia concluded that as a citizen “Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings

¹⁷ *Hamdi* 542 U.S. 533.

¹⁸ *Id.* at 536.

¹⁹ *Id.* at 536—37.

²⁰ *Id.* at 539.

are promptly brought, or (2) Congress has suspended the writ of habeas corpus.”²¹ Under Scalia’s view, the plurality’s procedural requirements are no substitute for Congressional action and the courts may not “make illegal detention legal by supplying a process that the Government could have provided, but chose not to.”²² However, Scalia specifically limited his views “to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court.”²³ As such, were his holding to control, it might create the perverse incentive to detain citizens outside of the territorial jurisdiction of the federal courts.

Last week, the Supreme Court heard arguments in *Hamdan v. Rumsfeld*. Salim Ahmed Hamdan, a Yemeni in U.S. custody at Guantanamo Bay, is alleged to have been Osama bin Laden’s driver and has been charged by the Government with conspiracy to commit attacks on civilians and civilian objects. Like *Hamdi*, the detainee’s habeas claim is essentially that the Government is using an unconstitutional process, in this case, trial before a military commission for the criminal offense of conspiracy. The Supreme Court accepted jurisdiction over habeas claims filed by aliens held at Guantanamo Bay in the June 2004 decision *Rasul v. Bush*.²⁴ However, Hamdan’s petition is complicated by the Government’s argument that Congress withdrew jurisdiction from the Supreme Court when it passed the Detainee Treatment Act last December.

²¹ *Hamdi* 542 U.S. 573 (Scalia J. dissenting).

²² *Id.* at 576.

²³ *Id.* at 577.

²⁴ 542 U.S. 466 (June 28, 2004).

The Detainee Treatment Act, otherwise known as the DTA, began as Senator McCain's attempt to prohibit the "cruel, inhuman, or degrading" treatment of any detainee in U.S. custody. The Graham amendment, adopted by the Senate in November of 2005, after the Court had granted certiorari of *Hamdan*,²⁵ provides that "no court, justice, or judge shall have jurisdiction to consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay."²⁶ The Graham amendment provides only two situations in which an alien detainee at Guantanamo Bay has access to the federal courts. The first is to challenge the determination that the detainee is an enemy combatant.²⁷ The second is to challenge a final decision by a military commission.²⁸ However, it bears remembering that under *Hamdi*, the Government may detain an enemy combatant without charges for the duration of the particular conflict in which they were captured. Therefore, there is no guarantee that once designated as an enemy combatant, a detainee will have subsequent access to the courts to challenge the duration or condition of his imprisonment.

²⁵ 126 S.Ct. 622 (Nov. 7, 2005).

²⁶ Detainee Treatment Act of 2005, 10 U.S.C. §1001(e)(1); see Anthony Lewis, *Prisoners of the Senate*, N.Y. Times, Nov. 15, 2005, available at <http://www.nytimes.com/2005/11/15/opinion/15Lewis.html?ei=5090&en=e0e2d54d0129de1e&ex=1289710800&partner=rssuserland&emc=rss&pagewanted=print>.

²⁷ Detainee Treatment Act of 2005, 10 U.S.C. §1001(e)(2)

²⁸ Detainee Treatment Act of 2005, 10 U.S.C. §1001(e)(3)

It also bears noting that this amendment was adopted in the wake of several months of tense negotiations between the White House and Congress during which the Administration pressed Sen. McCain to drop the measure and then to modify it to exempt the CIA from the ban on torture.²⁹ Indeed, the President only relented in his veto threat after the House gave veto-proof support for the bill.³⁰ Moreover, when signing the bill into law, the President remarked that “the executive branch shall construe the new law in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power which will assist in . . . protecting the American people from future terrorist attacks” — language so filled with ambiguity and the sense and mood of intended non-compliance with the new law, as to fill a reader with concern.³¹

Accordingly, the Government filed a motion to dismiss Hamdan’s habeas claim for lack of jurisdiction. On February 21st, the Court declined to act on the motion, instead deciding to take up the jurisdictional question as part of the argument on the merits.³² At oral argument, now Solicitor General Clement maintained that the Supreme Court lacked jurisdiction over habeas claims by detainees at Guantanamo Bay, an argument that did not appear to fare well with

²⁹ Josh White, *President Relents, Backs Torture Ban*, Washington Post, Dec. 16, 2005, at A01.

³⁰ White, *supra*.

³¹ President’s Statement on Signing of H.R. 2863 the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006.” (Dec. 30, 2005).

³² Linda Greenhouse, *Detainee Case Will Pose Delicate Question for Court*, N.Y. Times, Mar. 27, 2005, available at <http://www.nytimes.com/2006/03/27/politics/27scotus.html>.

most of the Court. Article I, Section 9 of the U.S. Constitution provides that the “Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” At one point, Justice Breyer asked Clement, “what is the answer to the claim that it is not constitutional for Congress, without suspending the writ of habeas corpus, to accomplish the same result by removing jurisdiction from the courts in a significant number of cases, even one?”³³ Clement replied that the DTA does not “raise a serious Suspension Clause problem” because “deferring review or channeling it to the Court of Appeals does not amount to a suspension.”³⁴ In response to Justice Stevens’s later call for clarification on this point, Clement presented the Government’s position, “We think Congress, in this action, did not do anything that triggers the suspension of the writ,” but if it did, “the terms of the Suspension Clause would be satisfied here because of the exigencies of 9/11.”³⁵

Clement’s argument went so far as to say that Congress could inadvertently suspend the writ. This suggestion elicited Justice Souter’s angry response that “a suspension of the writ of Congress is just about the most stupendously significant act that the Congress of the United States can take” and his incredulous question, “you are leaving us with the position of the United States that the Congress may validly suspend it inadvertently. Is that really your position?”³⁶ To which Clement replied “I think at least if you’re talking about the extension of the writ to enemy

³³ Transcript of Oral Argument at 52, *Hamdan*, No. 05-184 (Mar. 28, 2006).

³⁴ Transcript of Oral Argument at 52, *Hamdan*, No. 05-184 (Mar. 28, 2006).

³⁵ Transcript of Oral Argument at 56—57, *Hamdan*, No. 05-184 (Mar. 28, 2006).

³⁶ Transcript of Oral Argument at 57—58, *Hamdan*, No. 05-184 (Mar. 28, 2006).

combatants.”³⁷ Justice Souter’s forceful retort to this position asserted “The writ is the writ....There are not two writs of habeas corpus for some cases and for other cases...the rights that may be vindicated, will vary with the circumstances, but jurisdiction over habeas corpus is jurisdiction over habeas corpus.”³⁸

This exchange illuminates the central tenant of the Administration’s ideology with respect to the rights of detainees. Clement’s suggestion that jurisdiction over habeas corpus might differ based on the status of the petitioner embodies the Administration’s belief that it can apply an entirely distinct and separate body of law to those individuals it deems to be enemy combatants, a determination that it argues should, in turn, also be insulated from judicial review. This interpretation of the Government’s position is borne out in its arguments on the merits of military commissions established to try and punish enemy combatants. When asked by the Court what law the military commissions will apply, Clement answered “they basically enforce the laws of war.”³⁹ As a basis for the Presidential authority to establish such commissions, Clement suggested “Article 21 of the [Uniform Code of Military Justice] gives Congress’s sanction to any military commissions, to the extent they try crimes that are triable by the law of war.”⁴⁰ However, Clement made clear that the Administration believes the “laws of war” may be the products of Executive fiat when he stated “you have a controlling executive act in the form of the regula-

³⁷ Transcript of Oral Argument at 58, *Hamdan*, No. 05-184 (Mar. 28, 2006).

³⁸ Transcript of Oral Argument at 59, *Hamdan*, No. 05-184 (Mar. 28, 2006).

³⁹ Transcript of Oral Argument at 37, *Hamdan*, No. 05-184 (Mar. 28, 2006).

⁴⁰ Transcript of Oral Argument at 38, *Hamdan*, No. 05-184 (Mar. 28, 2006).

tions themselves that make it clear that the executive views things like conspiracy to violate the laws of war, to be actionable under the laws of war.”⁴¹ Here again, there is a sort of Catch 22: The laws of war govern but it is for the president, not the courts, to determine what the laws of war are.⁴²

Though the DTA provides for review of combatant status by the U.S. Court of Appeals for the District of Columbia, this review is limited to consideration of (1) whether the status determination was consistent with the standards and procedures specified by the Secretary of Defense, and (2) to the extent the Constitution and law of the United States are applicable, whether the use of such standards and procedures is consistent with the Constitution and laws of the United States.⁴³ The Administration’s position is that alien enemy combatants have no rights under the Constitution and laws of the United States.⁴⁴ Thus, the sole basis for challenging status determinations under this regime would be an allegation that the military tribunal did not adhere to its own procedural requirements.

Let me offer another example of the mindset of the Administration. It arose in the controversy about the government’s ongoing warrantless domestic surveillance activities of American citizens. On December 16, 2005, the N.Y. Times published a report exposing that shortly after the September 11th attacks, President Bush had secretly authorized the National Security

⁴¹ Transcript of Oral Argument at 37, *Hamdan*, No. 05-184 (Mar. 28, 2006).

⁴² See Transcript of Oral Argument at 42, *Hamdan*, No. 05-184 (Mar. 28, 2006).

⁴³ Detainee Treatment Act of 2005, 10 U.S.C. §1001(e)(2)

⁴⁴ Transcript of Oral Argument at 50, *Hamdan*, No. 05-184 (Mar. 28, 2006).

Agency to eavesdrop on Americans and others inside the United States without the court approved warrants ordinarily required for domestic spying.⁴⁵ The President admitted this practice, but contested its legality in a January 19, 2006 letter to Congress from the DOJ.

The Foreign Intelligence Surveillance Act, otherwise known as FISA, requires that the Government establish before a district court judge sitting as a member of the secret FISA court that, among other things, the target of the surveillance is a foreign power or agent of a foreign power.⁴⁶ The FISA statute states that an application may be deferred for up to 72 hours, with the government empowered to commence wiretapping in the interim. It provides that during a time of war, the President may authorize electronic surveillance “without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”⁴⁷ And it provides that FISA provides the “exclusive” remedy available to an Administration that seeks to engage in otherwise illegal surveillance of American citizens. The Government does not claim that it adhered to these requirements. Rather, it argues that Congress authorized warrantless electronic surveillance when it passed the Authorization for Use of Military Force and that if it did not, it is of no moment because the President has inherent constitutional authority to order the surveillance.⁴⁸

⁴⁵ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

⁴⁶ 50 U.S.C § 1803(a), 1805(a)(3)(A).

⁴⁷ 50 U.S.C § 1811.

⁴⁸ Dep’t of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* 2, 6 (Jan. 19, 2006) (hereinafter Dep’t of Justice Letter).

The Government argues — in one of the worst, least credible legal submissions by any Administration in living memory — that the AUMF authorization of “all necessary and appropriate force against those nations, organizations, or persons” the President determined to be involved in the September 11th attacks constitutes statutory authorization to engage in domestic wiretapping of Americans.⁴⁹ The Government cites *Hamdi* for the proposition that the “as a majority of the Court concluded ... that as the AUMF authorizes detention of U.S. citizens who are enemy combatants without expressly mentioning the President’s long-recognized power to detain, so too does it authorize the use of electronic surveillance without specifically mentioning the President’s equally long-recognized power to engage in communications intelligence targeted at the enemy.”⁵⁰ This not only ignores the reality that no member of Congress could be found who would say that she intended by voting for the AUMF to eliminate the need to obtain a warrant to listen to an American citizen’s calls but plainly misconstrues the plurality in *Hamdi*. The plurality reasoned that the power to detain individuals in the limited category considered in that case was “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate’ force Congress has authorized the President to use.”⁵¹ In contrast, the power to conduct warrantless domestic spying was expressly circumscribed by Congress under FISA, even in wartime.

⁴⁹ Dep’t of Justice Letter 10, 23.

⁵⁰ Dep’t of Justice Letter 24.

⁵¹ *Hamdi*, 542 U.S. at 518.

As critics of the Government's position have pointed out, for the AUMF to have authorized electronic surveillance, it must have implicitly repealed FISA's exclusivity provision.⁵² The Government advances the position that the criminal sanctions section of FISA which provides "A person is guilty of an offense if he intentionally engages in electronic surveillance under the color of law except as authorized by statute"⁵³ shows that Congress anticipated that future statutes might grant additional surveillance powers. However, Supreme Court precedent establishes that the "cardinal rule is that repeals by implication are not favored."⁵⁴ The presumption against repeal by implication is so strong that they can be established only by "overwhelming evidence" that the competing statutes are irreconcilable.⁵⁵

The Government also claims that the President has inherent constitutional authority to conduct warrantless surveillance as Commander-in-Chief and as the nation's sole representative with foreign nations. This, let me say at the start, is a far more respectable position than the government's embarrassing position that it had statutory authority to proceed with the surveillance program. However, this position contradicts the Court's determination in *Hamdi* that

⁵² Memorandum of the Constitution Project and the Center for National Security Studies in Response to U.S. Department of Justice's Defense of Warrantless Electronic Surveillance, as Amicus Curiae, at 22, *In re Warrantless Electronic Surveillance*.

⁵³ 50 U.S.C. § 1809(a)(1).

⁵⁴ *Cook County v. Chandler*, 538 U.S. 119, 132 (2003) (citing *Posadas v. National City Bank of N.Y.*, 296 U.S. 297 (1936)).

⁵⁵ Memorandum of the Constitution Project and the Center for National Security Studies in Response to U.S. Department of Justice's Defense of Warrantless Electronic Surveillance, as Amicus Curiae, at 22 (citing *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001)).

“[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”⁵⁶ Interestingly, both the Administration and its critics cite *Youngstown Sheet & Tube Co. v. Sawyer*⁵⁷ to support their competing propositions for primacy in the shared sphere of individual liberties.

In *Youngstown*, the Supreme Court rebuffed President Truman’s efforts during the exigencies of the Korean War to seize most of the Nation’s steel mills. In his celebrated and much quoted concurrence, Justice Jackson posited three classifications of Presidential action ranging from the proposition that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” to the conclusion that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”⁵⁸ It is, I suspect, because of that opinion, that the Government has been obliged to latch on to the AUMF to claim that with respect to the domestic surveillance, the “President’s authority is at its zenith.”⁵⁹ Far more persuasive is the opposing view that the President is taking

⁵⁶ 542 U.S. at 536.

⁵⁷ 343 U.S. 579 (1952).

⁵⁸ *Id.* at 636—38.

⁵⁹ Dep’t of Justice Letter at 11.

measures incompatible with the expressed will of Congress embodied in FISA and therefore that “his power is at its lowest ebb.”⁶⁰

Given the clarity of FISA, in fact, its express treatment of Presidential powers during war, it seems plain that opponents of the President’s asserted authority have much the better of this argument. Moreover, this is not the only relevant language from *Youngstown*. Writing for the Court, Justice Black maintained, “Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”⁶¹ Likewise, I suspect, we cannot with faithfulness to our constitutional system accept that the Commander in Chief of the Armed Forces has the ultimate power to determine the scope of civil liberties.

Let me now turn to another area of law — the First Amendment. I will not dwell on the Patriot Act here, despite the fact that it does raise some serious problems in this area, problems others have dealt with at length, with respect to potential searches, say, of library records. Much in the Patriot Act, however, including its core provisions allowing easier access, under judicial supervision, by the FBI to wiretaps and e-mails of suspected terrorists, seems to me to be entirely defensible. I turn instead therefore to what I consider the gravest present threat now in the courts with respect to freedom of speech or of the press. On August 4, 2005, the Department of Justice

⁶⁰ Letter of Bradley et al. to Members of Congress, January 9, 2006.

⁶¹ *Youngstown*, 343 U.S. at 587.

persuaded a Grand Jury in the Eastern District of Virginia to return an indictment against Steven J. Rosen and Keith Weissman charging both men with participation in a conspiracy to communicate national defense information to persons not entitled to receive it, an act in violation of the 1917 Espionage Act.⁶² Neither individual worked for the government; both were employed by the American Israel Public Affairs Committee. They are the first *non-government* employees ever accused of violating the Espionage Act by receiving classified information. The sections of the Espionage Act at issue are sweepingly, almost breathtakingly, overbroad. The sections provide for fines or imprisonment up to 10 years for whoever, possession of “information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation willfully communicates...the same to any person not entitled to receive it,” or in the case of those in unauthorized possession, anyone who “willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it.”⁶³ The Grand Jury found that Rosen and Weissman had met with Lawrence Franklin, a Pentagon employee who “disclosed to Rosen and Weissman national defense information relating to a classified draft” document.⁶⁴ The Grand Jury also charged that Rosen and Weissman disclosed confidential information to foreign officials and members of the media.⁶⁵ Franklin was also indicted by the Grand Jury for passing on information that he was

⁶² 18 U.S.C §§ 793(d), (e), and (g)

⁶³ 18 U.S.C. §§ 793(d) and (e).

⁶⁴ Superseding Indictment, *U.S. v. Franklin*, Criminal No. 1:05CR225, at 10 (E.D. Va. Aug. 4, 2005).

⁶⁵ Superseding Indictment, *U.S. v. Franklin*, Criminal No. 1:05CR225, at 11 (E.D. Va. Aug. 4, 2005)

lawfully in possession of, but the indictments of Rosen and Weissman mark the first prosecution ever of a private citizen for receiving and distributing classified information.⁶⁶

It is worth pausing on that for a moment. As every journalist who covers national security issues would attest, virtually everything worth knowing is classified. As well as a lot that's not worth knowing. Anyone 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. Only this permits any serious discussion of the government's most important acts. Max Frankel, the Washington Bureau Chief of the New York Times in 1971, summed it up this way in an affidavit he submitted in the Pentagon Papers case:

"First, [the government] is our regular partner in the informal but customary traffic in secret information, without even the pretense of legal or formal "declassification." Many of the "secrets" [revealed to me] and all of the "secret" documents and pieces of information that form the basis of many newspaper stories remain "secret" in their official designation.

Second, the Government and its officials regularly and customarily engage in a kind of ad hoc, de facto "declassification" that normally has no bearing whatever on considerations of the national interest. To promote a political, personal, bureaucratic or even commercial interest, incumbent officials and officials who return to civilian life are constantly revealing the secrets entrusted to them. They use them to barter with the Congress or the press, to curry favor with foreign governments and officials from whom they seek information in return. They use them freely, and with a startling record of impunity, in their memoirs and other writings.

Third, the Government and its officials regularly and routinely misuse and abuse the "classification" of information, either by imposing secrecy where none is justified or by retaining it long after the justification has become invalid, for simple reasons of political or bureaucratic convenience. To hide mistakes of judgment, to protect reputations of individuals, to

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Dan Eggen, *White House Trains Efforts on Media Leaks*, Washington Post, Mar. 5, 2006, at A01.

cover up the loss and waste of funds, almost everything in government is kept secret from a time and, in the foreign policy field, classified as “secret” and “sensitive” beyond any rules of law or reason. Every minor official can testify to this fact.”

All that was true in 1971; it remains true today.

Franklin pled guilty to violation of the Espionage act and was sentenced on January 20, 2006. At his sentencing, Judge Ellis, who also presides over the trials of Rosen and Weissman, stated “people will argue lots of things about this statute, about the nature of the information, who it was disclosed to, all sorts of things. It doesn’t matter. What this case is truly significant for is the rule of law. The law says what it says.”⁶⁷ Later in the sentencing, Ellis expanded the scope of his comments, stating:

We are committed to the rule of law. So, all persons who have authorized possession of classified information, and persons who have unauthorized possession, who come into possession in an unauthorized way of classified information, must abide by the law. They have no privilege to estimate that they can do more good with it.

So, that applies to academics, lawyers, journalists, professors, whatever. They are not privileged to disobey the laws, because we are a country that respects the rule of law, and that’s the real significance.⁶⁸

⁶⁷ Transcript of Sentencing Hearing, *U.S. v. Franklin*, 1:05 Cr 225, at 16 (E.D. Va. Jan. 20, 2006).

⁶⁸ Transcript of Sentencing Hearing, *U.S. v. Franklin*, 1:05 Cr 225, at 23—24 (E.D. Va. Jan. 20, 2006).

Judge Ellis's comments, issued in response to a guilty plea and coming as they did the day after Rosen and Weissman filed a sealed motion to dismiss, might be read as a reflection on the arguments mustered in defense of Rosen and Weissman. Indeed, Judge Ellis's assertion that § 793 of the Espionage act applies regardless of whether the person disclosing the information thinks "that they are doing more good than harm" reflects an interpretation that the §793 language, "information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation" is not a question of the possessor's belief about overall effect of disclosure, but merely a test of whether the possessor had any reason to believe that the information could injure the U.S. or advantage any other nation. Likewise, Judge Ellis's conclusion that § 793 applies to "academics, lawyers, journalists, professors, whatever," would seem to preclude the argument that the Espionage act's application to the press might render it overbroad.

Yet Judge Ellis has more recently made plain that he is deeply troubled by the potential overbreath of the statute. "We are a bit in new, uncharted waters," he said. "How can a defendant, a potential defendant, trying to decide whether or not he's stepping across the line, determine when . . . information is mentioned is national defense information and when it isn't?", Judge Ellis asked. To which the Assistant U.S. Attorney trying the case replied, "It all depends upon the facts, your honor."

My point here is not to predict how Judge Ellis will rule. It is to say that when the Department of Justice determined to bring this action, they took a long step towards impairing First Amendment interests of the greatest moment. In that respect, let me quote Max Frankel again:

"We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets — varying in their "sensitivity"

but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington — Government and press alike — this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret — and then unraveled by that same Government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

The governmental, political and personal interest of the participants are inseparable in this process. Presidents make “secret” decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct “secret” research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor. The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the Government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the order of those superiors. Though not the only vehicle for this traffic in secrets — the Congress is always eager to provide a forum — the press is probably the most important.

That is reality and it is that reality that is threatened by the AIPAC indictments. For make no mistake: 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.

I want to close not by commenting on a case, indeed not even by commenting on something that occurred in the United States, but by saying a few things about comments of the Administration about some events abroad. On February 3, 2006, in the midst of the demonstrations and protests against the now famous Danish Cartoons, State Department spokesman Sean McCormack answered a press corps request for a U.S. response to the uproar. McCormack

stated “that while we certainly don't agree with, support, or in some cases, we condemn the views that are aired in public that are published in media organizations around the world, we, at the same time, defend the right of those individuals to express their views. For us, freedom of expression is at the core of our democracy and it is something that we have shed blood and treasure around the world to defend and we will continue to do so.” So far, so good, I think. But then he said this: “Anti-Muslim images are as unacceptable as anti-Semitic images, as anti-Christian images or any other religious belief. We have to remember and respect the deeply held beliefs of those who have different beliefs from us. But it is important that we also support the rights of individuals to express their freely held views.”⁶⁹

I consider this an utterly unacceptable way to seek to bridge what should be understood to be an unbridgeable gap between those who believe in freedom of expression and those who do not. For one thing, the bulk of the cartoons were not “anti-Muslim” at all, unless we are to permit adherents of a religion to decide that their spiritual founder may not be portrayed by others visually at all. And those that were critical are well within the bounds of ordinarily accepted propriety — at least as defined in liberty-protecting states. The Danish government, to its great credit, refused to condemn the Danish newspapers that had first published the cartoons. We should have done the same, with no equivocations.

I want to conclude this lecture with a special note of appreciation and admiration of some people in Washington who, at considerable personal risk, refused to participate in the assaults on civil liberties I have briefly sketched for you today. To name just three, I begin with former

⁶⁹ U.S. Dep't of State, Daily Press Briefing, Feb. 3, 2005

Deputy Attorney General James Comey who refused, in the face of the greatest pressure to the contrary, to authorize the warrantless surveillance of American citizens that the Administration had determined to engage in. There is Harvard Law Professor (and former Assistant Attorney General) Jack Goldsmith, who, with Mr. Comey, “stood up to the Hardliners, centered in the office of the vice president, who wanted to give the president virtually unlimited powers in the war on terror.”⁷⁰ And I want to cite to you as well Alberto J. Mora, the former general counsel of the United States Navy, who fought bravely, if ultimately in vain, against those in the Defense Department who insisted on authorizing abusive and likely illegal treatment of captives in Guantanamo.

These people deserve our thanks for their dedication to principal. They and others like them deserve the honorary degrees that are too easily showered on political figures who take few chances — and certainly not any that would imperil their careers. I conclude with a tip of my hat to them.

⁷⁰ “Palace Report”,
<http://www.msnbc.com/id/110079547/site/newsweek/print/1/displaymode/1098/>.