THE CENTURY FOUNDATION'S HOMELAND SECURITY PROJECT
WORKING GROUP ON THE PUBLIC'S NEED TO KNOW

SECURITY AND LIBERTY

ANTHONY LEWIS

A CENTURY FOUNDATION REPORT

THE CENTURY FOUNDATION

Headquarters: 41 East 70th Street, New York, New York 10021 • 212-535-4441
D.C.: 1755 Massachusetts Ave., N.W., Suite 550, Washington, D.C. 20036 • 202-387-0400
www.tcf.org • www.homelandsec.org

Contents

Foreword

In collaboration with the John D. and Catherine T. MacArthur Foundation and the John S. and James L. Knight Foundation, The Century Foundation's Homeland Security project is helping to inform the public and policymakers about complex challenges related to preventing and responding to domestic terrorism. Three high-level working groups have overseen the development of a number of publications related to homeland security. Former governors Richard Celeste and Tom Kean have cochaired the overall project as well as the Working Group on Federalism Issues. The cochairs of the Working Group on the Federal Response are former White House chiefs of staff Ken Duberstein and John Podesta, and the chair of the Working Group on the Public's Need to Know in the Post–September 11 Era is John Seigenthaler, the founder and president of Vanderbilt University's First Amendment Center.

The Working Group on the Public's Need to Know is composed of journalists and former public officials who will use a series of case studies from incidents since September 11 to explore the role of the media in covering homeland security news stories, the obligations of the government in disclosing information, and certain related privacy and civil liberties issues. John Stacks, former executive editor of *Time* magazine, serves as executive director. This working group has commissioned several case studies, two of which have been released: one by Patricia Thomas of the media coverage of the 2001 anthrax attacks and their aftermath and another by Paula DiPerna of media coverage of the performance of the philanthropic community.

This study, by Anthony Lewis, a former reporter and columnist for the *New York Times* and Pulitzer prize-winning author of *Gideon's Trumpet* and *Make No Law: The Sullivan Case and the First Amendment,* provides an insightful examination of several precedent-breaking actions by the

Department of Justice. After September 11, Lewis makes clear, America entered controversial territory with regard to its own system of law enforcement and jurisprudence. His reporting of these events provides a much needed roadmap of the route we have taken, while enriching public understanding of how much is at stake.

For the last year and a half, discussions of homeland security policy have tended to provoke an unusual degree of consensus among participants, as the natural tendency to "pull together" in a time of adversity trumps all other concerns. Still, most of what we know about the performance of institutions—businesses, nonprofits, and government—is that good performance, over the long haul, depends on transparency and accountability. To those running such institutions, it is easy to embrace the apparent short-term advantages that flow from not having to deal with outside criticism. These positive features, however, are almost always overtaken in time by the inevitable weaknesses that flow from bureaucratic inertia and the pursuit of self-interest. Whether one is talking of Enron's management, the American Catholic Church, or the Nixon White House, it is certainly arguable that the worst problems those institutions encountered would have been reduced if there had been broad and early public access to emerging problems.

And there is a second compelling argument that underpins the call for more informed debate about the policies and practices being adopted to fight terrorism: the changes in law enforcement, privacy, secrecy, immigration, travel, and other areas are just too important to be implemented without an informed public debate.

Finally, the case for greater knowledge rests on a fundamental assumption about the American system of government: that the public has a right to know what is going on and why.

On behalf of The Century Foundation and its working groups on homeland security, I thank Anthony Lewis for this invaluable investigation of a timely and important topic.

RICHARD C. LEONE, *President*
The Century Foundation

Security and Liberty

Security is like liberty in that many are the crimes committed in its name.

—Justice Robert H. Jackson,
dissenting in *Knauff v. Shaughnessy*, 1950.

Ellen Raphael, born in Germany, went to England in 1939 as a refugee. She served in the Royal Air Force for three years during World War II, then got a job as a civilian employee of the U.S. Army occupation forces in Germany. There she met and married another civilian employee, Kurt W. Knauff, a German-born naturalized U.S. citizen who had served in the U.S. Army during the war. In 1948, she sailed for the United States to become a citizen under the War Brides Act, which allowed swift naturalization for women newly married to soldiers or ex-soldiers. But at Ellis Island she was denied admission and detained. The attorney general excluded her on the ground that she was a security risk, without telling her the reasons for that finding or giving her a hearing. She sued, challenging the secret process—and lost in the Supreme Court by a vote of 4 to 3.

The majority opinion, by Justice Sherman Minton, emphasized the power of the president, delegated here to the attorney general. "Upon the basis of confidential information," the opinion said, the attorney general had concluded "that the public interest required that Mrs. Knauff be denied the privilege of entry into the United States. He denied a hearing on the matter because, in his judgment, the disclosure of the information on which he based that opinion would itself endanger the public security."

Justice Jackson, himself a former attorney general, rejected that logic. "The menace to the security of this country," he said, "be it great as it may, from this girl's admission, is as nothing compared to the menace to free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary oppressions on evidence that is secret. . . . The plea that evidence must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome and the corrupt to play the role of informer undetected and uncorrected."

The dangers that Justice Jackson saw half a century ago have returned in more menacing form since September 11, 2001. In his war on terrorism, President Bush has asserted the power to designate any American citizen an "enemy combatant" and to detain that person indefinitely without charge or trial, barring the detainee from speaking to a lawyer and denying him or her the right to contest the factual basis of his detention in court.

Secrecy marks other steps taken since September 11 by the president and Attorney General John Ashcroft. In the months after the terrorist attack, more than one thousand aliens were taken into custody and detained for long periods of time; their names were kept secret on the ground that disclosing them would give terrorists clues to the effectiveness of U.S. intelligence. At the behest of Attorney General Ashcroft, the chief immigration judge ordered that all deportation hearings involving allegations of terrorist connections be held in secret. The government imposed blanket secrecy on the detention camp in Guantanamo, Cuba, where alleged fighters for al Qaeda and the Taliban were imprisoned.

Secrecy puts civil liberties at risk for a reason stated by Justice Potter Stewart when the Supreme Court decided the Pentagon Papers case in 1971. The usual legislative and judicial checks on executive power scarcely operate on national security matters, he wrote. So "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public

opinion which alone can protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free, most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened citizenry."

To Justice Stewart's adjectives for the kind of press needed to check executive power—alert, aware, free, informed—one more must be added: courageous. The American press found its courage in the Vietnam War. Through most of the twentieth century it had had a cozy relationship with the holders of executive power; columnists and Washington bureau chiefs were intimate with secretaries of state. In Vietnam, journalists broke from that intimate relationship to speak truth to power—to challenge official talk about the light at the end of the tunnel with the facts on the ground. The decision of the *New York Times,* the ultimate establishment newspaper, to publish the Pentagon Papers, the secret history of the war, symbolized the end of coziness, and then came the *Washington Post*'s dogged pursuit of Watergate.

But the war on terrorism is like World War II, not Vietnam: a good war, with a genuinely evil enemy. American journalists naturally sympathize with it. They know that there may be more terrorist attacks, inclining the public toward security at any cost. They may be concerned about looking unpatriotic if they criticize the government's methods—especially when officials denounce criticism as siding with terrorists. Three months after September 11 Attorney General Ashcroft said: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies." The government's secrecy, the Ashcroft statement that criticism is unpatriotic, and the supine political opposition after September 11 have together made for subdued press coverage of civil liberties issues.

◆ ◆ ◆

This is not the first time in American history that civil liberties have suffered during war or national alarm; it has happened again and again. Each time the country later regretted what had happened.

The first such episode was the Sedition Act of 1798, passed supposedly to deal with the terrors of French Jacobinism. It made it a crime to publish malicious criticism of the president and was used against supporters of Vice President Thomas Jefferson in the run-up to the election of 1800, when he would oppose President John Adams. Jeffersonian editors, publishers, and even a member of Congress were fined and imprisoned. Jefferson denounced the act as a throwback to George III. When he took office, he pardoned those convicted; Congress repaid fines. In 1964, the Supreme Court, in *New York Times v. Sullivan,* said the 1798 act had been judged unconstitutional "in the court of history."

Another Sedition Act was passed by Congress in World War I and used to prosecute speech that now seems tame. Eugene Debs, the great Socialist leader, was sentenced to ten years in federal prison for expressing sympathy for men jailed for counseling others on how to avoid the draft. Americans subsequently regretted those excesses, and the Supreme Court has made clear that the speech then prosecuted would now be protected by the First Amendment. We also came to feel shame about the removal of Japanese-Americans from the West Coast in World War II, and paid modest compensation to the survivors.

To recall past episodes of repression and regret is to realize that there is something different about incursions on liberty today. The war on terrorism is being waged against a hidden enemy who is not going to surrender in a ceremony aboard the U.S.S. *Missouri*. There is indeed no way to foresee how or when this war will end. The fear of terrorism may well go on for the rest of our lives. We may not have breathing space to understand and regret punitive excesses. If we are to preserve constitutional values—the values of freedom—understanding and resistance must come now.

In another way, too, the war on terrorism is more threatening to civil liberty than past crises. It provides more potential justifications for secrecy. The classic formula for silencing the press during war emergencies was laid down by Chief Justice Charles Evans Hughes in 1931 in the case of *Near v. Minnesota*. The government, he said, may prevent the publication of such things as "the sailing dates of troop transports." The troopship rule, as it came to be known, played a central part in the Pentagon Papers decision. The Supreme Court had to decide, as Justice William J. Brennan, Jr., put it, whether in the material the *New York Times* had there was anything "kindred to imperiling the safety of a transport already at sea." But terrorism may strike in myriad ways: by the commandeering of civilian airliners, the smuggling of small containers of nerve gas or biological weapons, and so on. Anything may be a troopship, and the government demands unencumbered power to deal with it.

The claim of executive power is the heart of the matter. There has been no more sweeping claim, in living memory, than the Bush administration's assertion of power to hold any American in detention forever, without a trial and without access to counsel, simply by declaring him to be an enemy combatant. That claim is presented, legally, in two cases now going through the courts: the cases of Jose Padilla and Yaser Esam Hamdi.

Padilla

Jose Padilla was born in Brooklyn in 1971, became a gang member, and was held for murder as a juvenile, age fourteen. Criminal records show a half-dozen other arrests and several jail sentences. After release from a Florida prison in 1992, he apparently married a Muslim woman, and he took the name Abdullah al-Muhajir. A declaration filed in court by the government, prepared by a Defense Department official, Michael E. Mobbs, said that Padilla traveled to Egypt, Saudi Arabia, and Afghanistan. Unnamed confidential sources quoted in the declaration said Padilla approached "senior Osama Bin Laden lieutenant Abu Zubaydeh" in Afghanistan and proposed

stealing radioactive material in the United States in order to build a bomb that would spread radiation when it exploded. The government alleged that he did research on that project at an al Qaeda safe house in Pakistan.

One of the confidential sources said he did not believe Padilla was a member of al Qaeda. But the Mobbs declaration said he had "extended contacts with senior Al Qaeda members," "received training from Al Qaeda operatives in furtherance of terrorist activities and was sent to the United States to conduct reconnaissance and/or conduct other attacks on their behalf."

On May 8, 2002, Padilla flew into Chicago from abroad. He was taken into custody at O'Hare Airport by federal agents. The Justice Department went before the U.S. District Court in New York and got a warrant for his arrest and detention as a material witness for a grand jury sitting there to investigate the September 11 attacks. Padilla was then moved to a jail in New York. On May 15, he was brought before Judge Michael B. Mukasey, who appointed Donna R. Newman as his lawyer. Newman, after conferring with Padilla in jail, moved to vacate the material witness warrant. The judge set June 11 for a hearing on the motion.

But on June 9, the government told the judge that it was withdrawing its subpoena for Padilla to testify before the grand jury. It disclosed to Judge Mukasey that President Bush had designated Padilla an enemy combatant and directed Secretary of Defense Donald Rumsfeld to take custody of him. Padilla was flown to a Navy brig in South Carolina and kept in solitary confinement, forbidden to see his lawyer, his family, or any other outside person.

The next day, June 10, Attorney General Ashcroft, who happened to be in Moscow, made a statement that was broadcast on television to the United States. "We have captured a known terrorist," Ashcroft said. "While in Afghanistan and Pakistan, al-Muhajir trained with the enemy. . . . In apprehending [him] as he sought entry into the United States, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'"

On June 11, the date originally set for a hearing on the material witness warrant, Newman, Padilla's lawyer, told Judge Mukasey that she was not allowed to visit Padilla in South Carolina or speak with him; government lawyers said she could write him a letter, but he might not receive it.

Newman filed a petition for habeas corpus, the ancient writ that requires any authority holding a prisoner to show justification for the imprisonment. She asked for an order allowing her to consult with Padilla. In response, government lawyers raised technical objections, arguing for example that the case belonged in South Carolina, not New York. On the merits, they argued that Judge Mukasey should defer to the judgment of President Bush and the Defense Department because courts were not competent to weigh wartime necessities.

What was done in the case of Jose Padilla made a radical change in our assumptions about the limits on government power. At the start, Attorney General Ashcroft's statement in Moscow effectively convicted Padilla of grave crimes—without a trial or even an indictment. "We have acted," Ashcroft said, under "clear Supreme Court precedent, which [establishes] that the military may detain a United States citizen who has joined the enemy and has entered our country to carry out hostile acts." That was evidently a reference to the 1942 case of *ex parte Quirin,* in which the Court upheld the military trial of a group of German saboteurs—one of them an American citizen—who were landed on Long Island by a submarine in World War II. But to call that decision a clear precedent could politely be called an exaggeration. The Nazi saboteurs, unlike Padilla, were given a trial. They had full access to lawyers, and very able lawyers they were. (One of them, Kenneth C. Royall, was later secretary of the army.)

If Padilla in fact did what Attorney General Ashcroft said, why was he not indicted and tried for those offenses? Plainly, it is much more convenient for the government simply to hold him without going through the effort, and very likely the awkwardness, of producing the evidence and convincing a jury of his guilt. The *Economist* magazine speculated that prosecutors at first hoped

he would cooperate and provide information, but he would not. Detaining him without trial obviated having to disclose sources of intelligence that the government might want to keep hidden. It avoided the publicity of a trial. And it allowed the government to keep trying to persuade Padilla to talk.

The hope of getting Padilla to talk was in fact cited by government lawyers to Judge Mukasey as a ground for barring his access to counsel. With considerable candor, their briefs said any consultation with a lawyer would interfere with the continuing process of questioning Padilla. Of course there is an irony in that. One of the very reasons the Constitution guarantees all criminal defendants the right to counsel, and the Supreme Court in the case of *Gideon v. Wainwright* in 1963 held that poor defendants must be given counsel by the state, is that defendants on their own may be overborne by police and prosecutors.

But this was not a criminal case, the government argued. It was an effort to meet the ongoing threat of terrorism. And letting Padilla talk with his lawyer would "jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America." The first of those two aims, government briefs said, required continued, unimpeded questioning. The second ruled out access to a lawyer because al Qaeda operatives are trained to use intermediaries such as lawyers to pass messages to fellow terrorists, even if the "intermediaries may be unaware that they are being so used." The government coupled these particular arguments on the issue of Padilla's access to counsel with a general warning that judges should not interfere with a president's conduct of a war: that judges must pay that power great deference.

Judge Mukasey decided the case on December 4, 2002, in a 102-page opinion that will likely be a landmark in the conflict between liberty and security. He deferred to the president's war power in broad terms, but he declined to withdraw entirely from the judicial duty of scrutinizing official action that impinges on individual liberty.

First, Judge Mukasey held that the president has the authority to order American citizens held, without trial, as "unlawful combatants." He accepted the government's argument that the *Quirin* case (about the Nazi saboteurs) went at least that far, by its application to one American among the group of saboteurs. "It matters not," he said, "that Padilla is a United States citizen captured on United States soil." But he went on to say, "It would be a mistake to create the impression that there is a lush and vibrant jurisprudence governing these matters. There isn't." The *Quirin* case said nothing about how to make the threshold determination that someone is an unlawful combatant, because it stipulated that the saboteurs were.

Second, on the crucial question of Padilla's right to see a lawyer, Judge Mukasey gave Padilla a limited victory. He rejected the government's contention that a lawyer could unwittingly transmit advice from Padilla to terrorists as "gossamer speculation." But Padilla could consult with Donna Newman for only a limited purpose, he held: to prepare for submission to the court any facts challenging the Mobbs declaration and the president's finding that he was an unlawful enemy combatant.

Third, Judge Mukasey said the court would scrutinize the finding that Padilla was an enemy combatant—but would hold the government to a very low standard of proof. He said the court would consider only whether there was "some evidence to support" the president's "conclusion that Padilla was, like the German saboteurs in *Quirin,* engaged in a mission against the United States on behalf of an enemy with whom the United States is at war." Merely "some evidence," not "a preponderance of the evidence," the standard in civil cases in this country, much less "proof beyond a reasonable doubt," the test in criminal cases.

A *Washington Post* editorial characterized the decision as "a pointed reminder that even during wartime, the president's power to lock up an American citizen must be justified to the courts, and that hearing from the accused is essential to the court's task." The judge understood, the *Post* said, "that without access to a lawyer and at least some ability to contest the government's claims in court, nobody's rights are safe."

How safe will we be if Judge Mukasey's formula becomes the final legal rule? The fact remains that an American citizen was seized at a Chicago airport and detained in solitary confinement, without a trial, for what could be, for all we know, the rest of his life. And that was done on the say-so of government officials alone, with no check except the rather slim possibility of the citizen showing that the government had not even "some evidence" of his wrongdoings—in other words, that it had no evidence. The *Economist,* which has kept a sharp eye on the state of American liberties since September 11, wrote shortly after Judge Mukasey's decision: "It is hard to imagine that America would look kindly on a foreign government that demanded the right to hold some of its own citizens in prison, incommunicado, denying them access to legal assistance as long as it thought necessary, without ever charging them with a crime."

A few hours after Attorney General Ashcroft's June 10 statement on Padilla, President Bush made an eloquent statement on the importance of the rule of law. In the war on terrorism, he said, the "rule of law" and "limits on the power of the state" were "non-negotiable demands of human dignity." At this writing, Jose Padilla remains in isolated detention, while the government appeals Judge Mukasey's decision.

Hamdi

"This case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal and without access to a lawyer."

With those blunt words, U.S. District Judge Robert G. Doumar of Norfolk, Virginia, began an opinion and order in the case of Yaser Esam Hamdi. Judge Doumar was skeptical of the basis for the government's assertion that Hamdi was an "unlawful enemy combatant." He wanted to look over at least some of the evidence himself. The U.S. Court of Appeals

for the Fourth Circuit intervened, admonishing Judge Doumar to show proper deference to decisions of the military and repeatedly setting aside his orders. But the appellate court's chief judge, J. Harvie Wilkinson III, also said he was reluctant to embrace "a sweeping proposition—namely that, with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."

The Hamdi case was, as Judge Doumar said, the first in which the Bush administration sought to imprison a suspect without trial instead of prosecuting him. It presented the issue of presidential power less starkly to the public than the Padilla case because Hamdi had more of the indicia of an ordinary prisoner of war. He was actually captured on the battlefield in Afghanistan, or so the government alleged. That made his situation seem less menacing to an ordinary American's rights than that of a citizen seized on arrival at O'Hare Airport, but the legal issues were not all that different.

Hamdi was "affiliated" with a Taliban unit in the Afghan war, according to the government—a rather strange description that caught Judge Doumar's eye. The unit surrendered to the Afghan Northern Alliance in November 2001, and in due course he was turned over to the American military. In February 2002, he was flown to the U.S. prison camp in Guantanamo. But he claimed American citizenship; his father, a Saudi engineer, was working for Exxon on a petrochemical project in Baton Rouge, Louisiana, where the boy was born. The U.S. Army checked the claim and apparently found it correct. In April, he was moved to a Navy brig in Norfolk. On the assumption that he would be charged with a criminal offense, he was assigned a lawyer, Frank W. Dunham, Jr., a federal public defender. There was no prosecution, but Frank Dunham became a dogged advocate of Hamdi's rights.

"He surrendered with an enemy unit, armed with a military-style assault rifle, on a foreign battlefield," government counsel argued in one of its numerous

briefs. So whether or not he was a citizen, he was "subject to capture and detention by the military during the conflict." That was powerful public argument, for after all, prisoners of war do not usually have the opportunity to contest their status in court. The difficulty—one of the difficulties, at any rate—arose from the brief's phrase "during the conflict." This conflict is not likely to come to a defined end. There is no one on the other side with whom to negotiate, no one who would agree to a surrender or armistice or peace. So the government view could mean a life sentence for Yaser Hamdi, without any kind of meaningful legal process.

But the more acute issue posed by the government argument was whether its description of Hamdi was accurate. And how could that question be answered without giving Hamdi a chance to challenge the government's version through counsel? That was the point on which Judge Doumar focused in his extended consideration of the case.

The government relied on a declaration by Michael Mobbs, whom it described as special adviser to the undersecretary of defense for policy, the same man who filed a declaration in the Padilla case. It was a two-page paper that in nine paragraphs made the case—all that the government wanted to make—that Hamdi was an unlawful enemy combatant. Judge Doumar was not satisfied. He said the declaration raised "more questions than it answers." For one thing, it said Hamdi was "affiliated with a Taliban military unit" but did not explain what "affiliated" meant. It did not say whether that unit was ever in any battle in which Hamdi participated. The declaration said he was classified as an enemy combatant by "military forces" in Afghanistan. Which military forces, U.S. or Northern Alliance? The declaration did not say. The declaration cited an interview with Hamdi as confirming that he surrendered and gave up his weapon, but the judge said the Mobbs declaration merely paraphrased the interview; what did Hamdi actually say? Judge Doumar asked to see the text of any interviews. He noted that, according to Hamdi's counsel, Dunham, some of those texts were given to counsel for John Walker Lindh, the American who actually was prosecuted for fighting with the Taliban.

To all this, the government's answer was that to reexamine decisions of the military, some made on the battlefield, would be a heavy burden and "could significantly hamper the nation's defense." If there was to be any judicial review in such cases, government counsel said, a secondhand statement like the Mobbs declaration should satisfy it. More would be too intrusive.

The case went back to the Court of Appeals for the Fourth Circuit, and on January 8, 2003, it gave the government a sweeping victory. The opinion, by Chief Judge Wilkinson, said courts owed deference to the executive on issues of war and national security. It said flatly that Hamdi was "not entitled to challenge the facts presented in the Mobbs declaration." It was enough, the court said, that Hamdi had been captured "in a zone of active combat operations abroad." (The court said its reasoning was not intended to cover a case like Padilla's, of someone arrested in the United States.) But the fact that Hamdi was on a foreign battlefield, suspicious though it surely is, cannot be legally conclusive as the Fourth Circuit said. Persons other than combatants are found on battlefields—journalists, for example—and in the chaos of Afghanistan, many might be.

Hamdi's case, like Padilla's, came down to a question of power: the power of the executive branch and the power of the courts. The Framers of the Constitution and the Bill of Rights would surely have been outraged at the notion that a president's appointees could take a citizen into custody and keep him there forever, in silent isolation, on their unilateral assertion that he was an enemy. On the other hand, the Framers could not have imagined the danger of a terrorist enemy that had already killed thousands of American civilians and might acquire weapons of mass destruction.

In this conflict over a broad claim of presidential war power, one thing must be kept in mind: Past assertions by U.S. governments that national security would be at risk if courts applied the Constitution have repeatedly turned out to be wrong. Government lawyers virtually predicted that the Vietnam War would be lost if the N*ew York Times* published the Pentagon Papers. On the fourth day of publication, by the *Times* and then the

Washington Post, counsel for the *Times,* Alexander M. Bickel, observed dryly to the judge, "The Republic still stands." There was no impact whatsoever on the war. So one should be skeptical of the claim that, if the government were forced to give the courts firsthand evidence to support its designation of someone as an enemy combatant, it "could significantly hamper the nation's defense."

Any assertion may look convincing if it has not been tested by the time-honored means of the law: cross-examination, checking of the evidence. Anyone who has seen a courtroom drama knows that the most convincing story can explode under the hammer of the legal process. Indeed, one case brought by the Bush administration after September 11 makes the point in a dramatic way.

An Egyptian student, Abdallah Higazy, spent the night of September 10–11, 2001, at the Millenium Hilton Hotel, overlooking the World Trade Center in New York. After the terrorist attack, a security guard in the hotel said he had found an aviation radio in the room Higazy had occupied. Higazy denied that it was his. He was given a lie detector test and was told he had failed it. He then confessed to owning the radio. After weeks of detention in solitary confinement, he was indicted on a charge of lying when he said the radio was not his. But within a few days of the announcement of his prosecution, a pilot came forward and said it was his radio—he had left it in another room at the hotel. The security guard admitted that he had made up his tale of Higazy owning the radio. And Higazy was released. So a prosecution that looked ironclad turned out to be based on falsehood. (Why did Higazy make his false confession? He said his FBI interrogators told him they would harm his family if he did not talk. The FBI denied that.)

"A cardinal protection of liberty in this country," the *Washington Post* said in one of a remarkable series of editorials on the Hamdi case,

> is the requirement that the government justify deprivations of freedom. Yet the emerging hallmark of the enemy combatant cases is the

> unwillingness of the government to do precisely that. In Hamdi's case, the Justice Department initially argued that its designation was unreviewable by any court. Even now . . . the government contends that the courts should not look beyond the sketchiest of evidentiary statements it has offered in justifying its view of Hamdi. . . . It is critical that judges remember how the doctrine they are creating could be used against people other than the ones whose cases they are currently seeing. The government's case against Hamdi may be solid. But if it is allowed to detain him without some procedure that requires a persuasive showing, it will create a rule that allows Americans to be exempted from the protections of the Bill of Rights on the strength of a two-page statement the government condescends to present in court.

◆ ◆ ◆

Treatment of Aliens

The "Palmer raids" were one of the most notorious episodes in American legal history. A. Mitchell Palmer, President Woodrow Wilson's attorney general from 1919 to 1921, rounded up three thousand allegedly subversive aliens for deportation. Only about three hundred were actually deported, but the roundup was widely deplored as a crude and lawless method of intimidation.

In the wake of September 11, Attorney General Ashcroft carried out the most sweeping round-up of aliens since the Palmer raids. Between eleven hundred and two thousand people were arrested and detained. The exact number is unknown because the Justice Department, after announcing running totals, stopped when criticism grew. The last published figure, in November 2001, was 1,147. Perhaps in part because Ashcroft put a lid of secrecy on the operation, the roundup has not aroused the kind of outrage that Palmer's did.

David Cole, a law professor at Georgetown University and the country's foremost civil liberties advocate in the immigration field, provided the

most complete discussion of the Ashcroft sweep in the *Boston Review* of December 2002–January 2003. He described it as a program that used thin legal pretexts to hold aliens for extended periods so the FBI could question and investigate them.

After days or even weeks without being informed of any reason for their detention, Cole wrote, most of those held were charged with minor violations of their immigration status—working without authorization, for example, or taking too few courses for a student visa, neither of which would ordinarily call for such draconian treatment as extended imprisonment. That the real purpose was to keep people incommunicado while they were investigated by the FBI was in time made evident. In a number of cases that have come to light, detainees who had violated the terms or conditions of their visas agreed to leave the country voluntarily but were held for months more until they finally were allowed to depart. As of September 2002, only four of the detainees had been charged with crimes related to terrorism.

Because of pervasive secrecy, little was known about how the detainees were treated while being held until the *New York Times* published a story by David Rohde on January 20, 2003. It was datelined Karachi, Pakistan. Rohde had interviewed five Pakistani men deported from the United States after being detained in Ashcroft's post–September 11 sweep. All were charged with violations of legal immigrant status, such as overstaying a visa or entering the United States without a valid visa.

One of the men, Anser Mehmood, said he was held for four months in 2002 in solitary confinement in a windowless cell in a federal detention center in Brooklyn. Two overhead fluorescent lights were on all the time. "No one from the FBI and INS came to interview me," Mehmood said. The other four men said they had been asked only cursory questions such as "Do you like Osama bin Laden? Do you pray five times a day?"

Detainees who were charged with deportable offenses had secret deportation hearings, closed to family members, the press, and the public. On orders from the attorney general, the chief immigration judge, Michael Creppy, told immigration judges to close all hearings that the government

called of "special interest." Those cases were not to be listed on the public docket, and their existence was not to be confirmed or denied if anyone asked. Once again, the Bush Justice Department asserted the need for secrecy on the unilateral initiative of the executive—unilateral and, in the administration's view, unchallengeable.

The order for closed deportation hearings was challenged in two lawsuits that reached the U.S. Courts of Appeals for the Third and Sixth Circuits. The two courts came to opposite conclusions.

A three-judge panel of the Third Circuit upheld the secrecy directive by a vote of 2 to 1. Chief Judge Edward R. Becker said there was an insufficient tradition of open immigration hearings to come within a Supreme Court decision that the First Amendment barred closed trials because they had historically been open. "Although there may be no judicial remedy for these closures," he said, "there is, as always, the powerful check of political accountability on executive discretion." It was a singularly inapposite comment—some might say cynical—given that the very secrecy at issue prevented public accountability.

A panel of the Sixth Circuit held unanimously that the Creppy directive violated the First Amendment rights of the press and public to attend deportation hearings. The government could move to close particular hearings, the court said, by making a showing of security concerns to the judge, but it could not simply rule a whole class of cases out of bounds without any showing of need. The opinion, by Judge Damon J. Keith, had some strong language on the role of the press and the danger of secrecy.

The government has great power to establish immigration policy and law, Judge Keith wrote.

> The only safeguard on this extraordinary governmental power is the public, deputizing the press as the guardians of their liberty. Today the executive branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny. Against non-citizens, it seeks to deport a class if it unilaterally calls them "special interest" cases. The executive branch seeks to uproot people's lives, outside the public eye and behind a closed door.

> Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation.

The secrecy imposed by Attorney General Ashcroft on the identities of those detained in the alien sweep was challenged in a third case, brought in the District of Columbia. The government defended the secrecy rule as essential to national security. Disclosing the names of those held, it argued, would give al Qaeda clues as to how the government was searching for terrorists. Federal District Judge Gladys Kessler rejected the argument. "The first priority of the judicial branch," she said, "must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship. Unquestionably, the public's interest in learning the identity of those arrested and detained is essential to verifying whether the government is operating within the bounds of law." The government appealed Judge Kessler's decision.

In the atmosphere of fear after September 11, and Attorney General Ashcroft's orders to use sweeping measures against possible terrorists, agents of the Immigration and Naturalization Service (INS) and the FBI inevitably made mistakes—at a high human price. Muslims, citizens as well as aliens, were picked out for treatment that was often harsh and humiliating. Because of the pervasive secrecy, only occasionally did these episodes come to public attention.

Nacer Fathi Mustafa and his father, American citizens of Palestinian descent, were on their way back home to Florida on September 15, 2001, after a business trip to Mexico. At the Houston airport they were stopped by immigration agents, then arrested and charged with altering their passports. The implication was that they had done so because they were terrorists. For sixty-seven days they were held in a Texas jail. Then the government decided that there was nothing wrong with their passports after all. "What bothered me most," Nacer Mustafa said, "was at the end, they just said I could go. Nobody ever apologized."

Ali Erikenoglu, an American-born Muslim of Turkish descent, was at home with his family in Paterson, New Jersey, when four FBI agents knocked at the door late one night a year after September 11. They had questions for him: Are you anti-Semitic? What kind of American are you? Why do you have a Bible? (He had attended a Catholic high school.) Many Muslims live in Paterson, and Erikenoglu was one of hundreds questioned on the basis of their religion. He told the newspaper *Newsday,* "Not only am I terrified. I am angry. You felt essentially at their mercy. . . . For the first time I felt like I had to justify my innocence."

M. J. Alhabeeb, a professor of economics at the University of Massachusetts in Amherst, was visited in his office by an FBI agent and a campus policeman. They said they had had a tip that he held anti-American views and asked him to explain. Alhabeeb, a U.S. citizen who came to this country from Iraq, told the *Boston Globe* that he felt compelled to prove his loyalty by saying that his brother-in-law had been executed by Saddam Hussein's regime. "I came to this country to get away from that kind of thing," the suspicion of disloyalty, he told the *Globe*. "Every Iraqi has this fear. For Americans, it's hard to comprehend."

The focus on people of Muslim religion and Middle Eastern names was not just the work of individual agents. It was official Justice Department policy, based on the premise that future terrorist attacks were most likely to be carried out by people with those characteristics. As the department explained, "they meet a number of intelligence-based criteria and are identified as presenting elevated national security concerns."

Regulations approved by Attorney General Ashcroft required males older than sixteen from twenty-five listed countries who were in the United States without permanent resident status to register with the INS. All of the twenty-five countries are Arab or predominantly Muslim, except North Korea. Those rules set off the first large-scale public protest against post–September 11 security measures when hundreds of men, mostly from Iran, were detained when they registered in southern California in December 2002. Most were said to have violated the terms of their visas.

The government of Pakistan, which has supported American policy, especially resented the inclusion of its citizens in the registration order. The Pakistani foreign minister, Khursid Mahmud Kasuri, visited Ashcroft and Secretary of State Colin Powell in January to protest. He suggested that the rules so offended Pakistani opinion that it would be more difficult to defend any U.S. military action in Iraq.

Given the identity of the September 11 attackers, it was not surprising that U.S. authorities would keep a more careful watch on visitors from Arab and Muslim countries. But the peremptory handling of suspects by the Justice Department, their extended detention in many cases, and the sweeping together of the plainly innocent with legitimate suspects were not only offensive to American constitutional values but likely to arouse anti-American feelings.

◆ ◆ ◆

The most menacing steps taken by the Bush administration since September 11 have been the claim of power to detain any American indefinitely without counsel by designating him or her an enemy combatant and the widespread detention of aliens of Middle Eastern origin. But there are other measures, too numerous and disparate to discuss in detail, of like character.

One oppressive measure has been the distortion of a law that allows the courts, at the government's request, to hold people as "material witnesses." The purpose of the statute was to make sure that witnesses who might flee appeared for criminal trials. But since September 11, the Justice Department has used the statute to hold people for months without calling them to testify; the evident aim, as with the extended detention of aliens, has been to question and investigate them.

A general reason for concern has been the Justice Department's determined opposition to meaningful judicial review of any of its antiterrorism proceedings. For example, one of the first steps taken by President Bush was an order providing that noncitizens suspected of terrorism or "harboring" terrorists be tried by military tribunals. The order said that decisions of the

tribunals could not be challenged in any court. Later, the White House counsel, Alberto Gonzalez, said that prisoners could seek writs of habeas corpus—but the department would surely press for a very narrow scope of any habeas corpus review, as it did in the Padilla and Hamdi cases.

The government has opposed any judicial consideration of its prison camp in Guantanamo for men captured in the Afghan war. The prisoners are described as Taliban soldiers or al Qaeda or other terrorists. But a story in the *Los Angeles Times* in December 2002 said some were in fact farmers, laborers, and others conscripted by the Taliban regime, not dangerous military or terrorist figures. The story said intelligence officers in Afghanistan had recommended that at least fifty-nine of them be sent home, not taken to Guantanamo. And now, the story said, some military leaders feared that the men's continued imprisonment was feeding animosity toward the United States.

When a lawsuit sought a writ of habeas corpus for Guantanamo prisoners, the government argued—and the judge agreed—that the court had no jurisdiction over the prison camp because it was not in U.S. territory. That ruling brought an extraordinary comment from the High Court in Britain, which was considering a suit over a British subject who is one of the Guantanamo prisoners. The Master of the Rolls, Lord Phillips, wrote: "We find surprising the proposition that the writ of the United States courts does not run in respect of individuals held by the [U.S.] government on territory that the United States holds as lessee under a long term treaty. . . . What appears to us to be objectionable is that [this prisoner] should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before a court or tribunal."

A British magazine that is as pro-American as any journal in the world, the *Economist,* wrote a year after the terrorist attacks: "Too many freedoms have been eroded in America since September 11." Reasonable people would not complain, an *Economist* editorial said, about being subject to more checks at airports and elsewhere than they used to be. But, it continued, "the administration

has been much too ready to try to evade both the law and the courts, to act in secret and to resort to indiscriminate means of oversight and investigation."

◆ ◆ ◆

The Bush administration robustly denies that its measures against terrorism have unnecessarily or wrongly harmed civil liberties. To get the administration's viewpoint, I spoke with the assistant attorney general for legal policy, Viet Dinh. He has played a large role in designing the antiterrorist policy. And for reasons of both skill in legal articulation and personal history, he is a remarkable spokesman for the policy.

Viet Dinh came to this country from Vietnam in 1978, three years after American helicopters lifted off the embassy roof in Saigon and the Communists took over. He was ten years old. Other members of his family came at different times, some escaping Vietnam on hazardous boats. His father was in a reeducation camp for years.

Viet Dinh's life in the United States has been the immigrant story in dramatic form. A dozen years after he arrived as a refugee he was an editor of the *Harvard Law Review.* He was a law clerk on the U.S. Court of Appeals for the District of Columbia Circuit, then for Justice Sandra Day O'Connor on the Supreme Court. He was thirty-three years old when he became an assistant attorney general.

In a speech in June 2002, Dinh defined liberty by quoting Edmund Burke, the hero of enlightened conservatives. "The only liberty I mean," Burke said, "is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist without them at all." In other words, Dinh said, "ordered liberty. Order and liberty, under this conception, are symbiotic; each is necessary to the stability and legitimacy essential for a government under law."

In our conversation, Dinh emphasized the distinctive character of the war against terrorism as compared with traditional wars. "The underlying fact," he said, "is that this so-called war operates not on the usual battlefield,

geographically located. Here the war knows no bounds. The terrorists have made it the world."

That has legal consequences, Dinh said, involving the two high functions of the president: as chief law enforcement officer and military commander in chief.

> In traditional wars past the division between the two functions was clear. This time you have a confluence, by Al Qaeda's choosing, where both hats come into play. An enemy activity may be both a violation of the laws of war and of domestic law. The president may choose to deal with it as law enforcement officer or commander in chief. The decision is his, and the commander in chief has a significant function even in the United States, because Al Qaeda has made the U.S. a target.

How does that justify the denial of counsel to detainees like Padilla and Hamdi? "There's no question," Dinh said, "but that if the armed forces capture someone on the battlefield, you wouldn't have the panoply of the legal process." The key question is whether the president's role as commander in chief requires deference. If it does, as the government believes and argues, then an enemy detainee has no more right to counsel than he would have, say, a right to a jury trial.

But what about the factual question of whether he is in fact an enemy combatant? How can that be left to the uncontrolled discretion of the executive?

"Frank Dunham [the public defender acting on behalf of Yaser Hamdi] is doing a wonderful job," Dinh said. "He has a right to challenge the designation as enemy combatant. But the law gives him a very limited license to challenge the President's judgment and the intelligence underlying it."

That is not much of a right, is it?

"No, because he's a battlefield detainee, an enemy combatant. The intelligence may indeed be faulty. . . . But when the President acts as commander in chief, he's entitled to a lot of deference. The stakes are so large in war."

The department was confident of its legal position before the administration took its various legal actions, Dinh said. "It's not to say our judgment is infallible. We constantly reevaluate what we do."

At the end of the conversation I said I had a tough question to ask him. Dinh laughed—and laughed and laughed. He knew what I was going to ask: He and his family left Vietnam to escape from a totalitarian society where there was no way to challenge the rulers. In the United States, from the beginning, everything has been subject to check. Yet you are introducing a system where there is no effective check. How does that strike you, as a human being who left that other system?

"It's a question I've asked myself, obviously, many a time," Viet Dinh said.

> The thing that I love so much about America . . . and appreciate so much every day is that government works—both in the sense that it is effective for stability and that it provides safeguards against encroachments.
>
> I think it is critical that one recognize that the first function—even if you are an ardent anarchist you have to recognize—that the function of government is the security of its polity and the safety of its people. For without them there can be no structure so that liberty can survive. We see our work not as balancing security and liberty. Rather we see it as securing liberty by assuring the conditions for true liberty. I do not see, therefore, that there is a contradiction between the measures that we have taken and the Constitution or my personal history.
>
> I do not think that we have sacrificed the mechanisms of accountability and appropriate review. We have simply recognized the constitutional authority and deference that the government has, and needs to have, in order to do its job. . . . What we're trying to do here is protect authority so the liberty of law-abiding people can flourish. We will not take advantage of the moment to sacrifice the core values of liberty. . . .

> Unlike economists, we don't have the luxury of assuming away the problem.

No one could argue the case for the administration's measures better than Viet Dinh. But is he really correct when he says that he and his colleagues are not, like economists, assuming away the problem? Most lawyers, and most Americans, would have thought that the right of anyone detained by the state to consult a lawyer was one of "the core values of liberty."

◆ ◆ ◆

The Courts

The distinctive American contribution to the philosophy of government has been the role of judges as protectors of freedom. Over the past half century, the Supreme Court has greatly expanded that role, defining and enforcing constitutional rights in new ways. And other countries have for the first time given their courts the function of enforcing written constitutions, copying the American pattern. Germany, France, South Africa, India, now even Britain, have vested that power in judges.

But the story is different in wartime. Then judges, wary of imposing their views in areas where they do not feel competent and where lives may be at stake, tend to defer to military and civilian war leaders. Chief Justice William H. Rehnquist summed up the practice in a 2000 speech: "While we would not want to subscribe to the full sweep of the Latin maxim *inter arms silent leges*—in time of war the laws are silent—perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice."

A striking example of that reality was the Supreme Court's 1943 decision upholding President Franklin Roosevelt's order removing 100,000 people of Japanese descent from the West Coast and confining them in desert camps, *Korematsu v. United States*. The majority opinion was written by the Court's most ardent advocate of civil liberties, Hugo L. Black. Its

rationale was deference to the executive's military judgment—even though that turned out later to have been based on scare stories about Japanese-American subversion.

Will the Supreme Court adopt such a deferential attitude when it judges the constitutionality of the Bush administration's antiterrorist measures? The answer to that question will likely determine the fate of the president's claim of power to detain Americans indefinitely without trial and without counsel after designating them enemy combatants. It will similarly affect challenges to the secret detention of aliens and secret deportation hearings. And it may define the limits on new ways of invading privacy of communication in order to ferret out possible terrorist plans.

The outcome may turn on another question: Is this a war? President Bush responded to September 11 at once by announcing a "war on terrorism." Congress quickly authorized him to take sweeping measures. But it is very different from other wars, against known enemies with defined territories and military aims. Judges will be aware of those differences. They will surely know that this "war" could go on for decades, so deference to the president's war power could effectively change the balance of the Constitution and make the executive branch the dominant institution in the tripartite system created by the Framers.

There is, or at least there should be, a further constraint on the Supreme Court's willingness to give presidential orders judicial sanction. It is that a constitutional ruling of the Court would give more permanent meaning and legitimacy to temporary measures.

Justice Jackson made that point, eloquently, when he dissented from the Japanese relocation decision, *Korematsu*. "A military order," he said, "however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in . . . transplanting

American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can forward a plausible claim of an urgent need!"

That passage in Justice Jackson's dissent was quoted by the president of the Supreme Court of Israel, Aharon Barak, in a 2002 article in the *Harvard Law Review.* He was making the point that a judge deciding a question of human rights during a time of terrorism must not deceive himself by believing that, "at the end of the conflict, I can turn back the clock."

Israel has struggled with terrorism for years. Its supreme court has not been entirely consistent in resolving the conflicting claims of security and liberty. But in recent years, the court has increasingly defended human rights against challenged Israeli government practices. Notably, it forbade torture of detainees that officials said was needed to discover terrorist plans.

"Terrorism does not justify the neglect of accepted legal norms," Barak wrote in the law review article. "This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism, a democratic state acts within the framework of the law and according to law. . . . It is, therefore, not merely a war of the state against enemies; it is also a war of the Law against its enemies."

One of the particular issues in the Hamdi case and others before the American courts—whether judges should closely examine the facts underlying security claims—was also touched on by Justice Barak. "Security considerations are not magic words," he said. "The court must insist on learning the specific considerations that prompted the government's actions. The court must also be persuaded that these considerations actually motivated the government's actions and were not merely pretextual. Finally, the court must be convinced that the security measures adopted were the available measures least damaging to human rights."

Justice William J. Brennan, Jr., of the U.S. Supreme Court, chose Israel—specifically the law school of the Hebrew University in Jerusalem—as the

site of an important 1967 speech on civil liberties in times of security crises. Again and again, he said, "sudden national fervor" had led "people to exaggerate the security risks posed by allowing individuals to exercise their civil liberties and to become willing 'temporarily' to sacrifice liberties as part of the war effort." Looking at American history, he warned about the exaggeration of security concerns.

"The perceived threats to national security [that] have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded," he said. "The rumors of French intrigue during the late 1790's, the claims that civilian courts were unable to adjudicate the allegedly treasonous actions of Northerners during the Civil War, the hysterical belief that criticism of conscription and the war effort might lead droves of soldiers to desert the Army or resist the draft during World War I, the wild assertions of sabotage and espionage by Japanese Americans during World War II and the paranoid fear that the American Communist Party stood ready to overthrow the government were all so baseless that they would be comical were it not for the serious hardship that they caused during the times of crisis."

Will American judges look at the issues of terrorism and freedom in the spirit of Justices Barak and Brennan? Judges are not immune from the sense of vulnerability, of fear, instilled in Americans by the attacks of September 11, 2001. A majority of the present Supreme Court may be instinctively inclined to defer to presidential power in wartime—to "speak with a muted voice," as Chief Justice Rehnquist put it. On the other hand, it is an exceptionally bold Court, not shying away from making up new constitutional law of federalism—or from deciding a presidential election. An imperial Court, it has been called. Will it enforce constitutional limits on a newly imperial presidency?

◆ ◆ ◆

The Press

"To the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."

James Madison, the drafter of the First Amendment, wrote that in his broadside against the Sedition Act of 1798. Even a passionate advocate of press freedom today might find his words a bit over the top. *All* the triumphs? But Madison knew a scandalous press—fly-by-night sheets whose editors often worked for political parties—and he still believed that newspapers were an essential tool for the citizens who were to be the ultimate sovereigns of his new republic.

Today's press—and that word is used here to include both print and broadcast, avoiding the dread word media—has far greater pretensions than did editors at the end of the eighteenth century; it regards itself as America's tribune of liberty. Its lawyers respond galvanically when they perceive a threat, however remote, to its "First Amendment rights." When a Supreme Court decision finds press interests outweighed by other values—privacy, say, or law enforcement—some editor will see tyranny on the horizon.

But how effective is the press in highlighting threats to freedom in times of stress? Not very, some historical examples suggest. There was no sounding of the alarm during World War I when men and women were imprisoned for even mildly expressed disagreement with President Wilson's policies. Not much was said about the confinement of Japanese Americans in World War II until years into that outrage.

Years of judicial decisions expanding civil liberties have made this country, including the press, more sensitive to issues of constitutional rights. But terrorism and the dangers to liberty in combating it may bring out endemic weaknesses in the press: short attention span, running with the pack, the

lure of the sensational. And despite Vietnam and all that has followed it, there can still be too much bowing to authority.

A telling example of the obeisance arose soon after September 11. On October 7, 2001, five major network television outlets broadcast a taped message from Osama bin Laden. On October 10, Condoleezza Rice, President Bush's national security adviser, got top executives of the five networks on the line in a conference telephone call. She asked them to cut "inflammatory language" from future bin Laden tapes before broadcasting them. She said she was concerned that the messages might contain coded instructions to followers. She also said the tapes might inflame Muslim populations in such places as Malaysia and the Philippines, which are reached by international outlets of CNN and NBC.

The five executives stayed on the line after Rice hung up and considered her request. They agreed to broadcast only short segments of any al Qaeda tape and to cut out any rhetoric calling for violence against Americans. They also agreed not to broadcast excerpts repeatedly, as they had done with the previous bin Laden tape.

Walter Isaacson, chairman of CNN, said, "After hearing Dr. Rice, we're not going to step on the landmines she was talking about." Andrew Hayward, president of CBS News, said: "This is a new situation, a new war and a new kind of enemy. Given the historic events we're enmeshed in, it's appropriate to explore new ways of fulfilling our responsibilities to the public."

As described in a Century Foundation briefing paper, the networks' response was carried out in the following months. On November 3, the Arabic news channel al Jazeera broadcast a new bin Laden videotape. The five American networks carried only brief sound bites. And no American newspaper printed a transcript. On December 27, Al Jazeera broadcast a tape of bin Laden delivering a new message. The American networks used portions of the tape, but their accompanying commentary emphasized his gaunt appearance and immobile left arm.

A more candid way for the network executives to explain their decision on October 10 would have been to say: "We don't want to look unpatriotic." Condoleezza Rice's point that a bin Laden tape might contain coded instructions to followers was singularly unpersuasive, since the original tapes had already been broadcast by al Jazeera. As to inflammatory rhetoric, is it better that the world know the true nature of bin Laden or that it be hidden? Should the world press in the 1930s have reported Hitler's speeches to German rallies denouncing Jews—and radio-broadcast them—or have kept its audiences in ignorance of that terrifying reality? The conclusion is unavoidable that television network executives are not filled with courage when they deal with the White House.

The press, print or broadcast, may understandably be reluctant to criticize a war president. And President Bush, after September 11, used the aura he had acquired to make disagreement seem unpatriotic. Not only the press but Congress, which in Madisonian theory should balance executive power, became a virtual rubber stamp in the days after the terrorist attacks. The USA Patriot Act, a collection of powers long sought by the FBI and CIA for surveillance and other purposes (drafted, incidentally, by Viet Dinh), was pushed through so swiftly that virtually no member of Congress had read it before voting yes.

The press likes to proclaim that it serves the public's right to know. But what if the public does not want to know? In the immediate trauma of September 11, not many Americans wanted to know about the possible implications of the Patriot Act for American liberty; most were just concerned to chase and destroy terrorists. That is an explanation for less than probing press coverage, not an excuse.

Then again, immediate drama is more the stuff of journalism than long-term reflection. Attorney General Ashcroft's announcement from Moscow of Jose Padilla's arrest made exciting television and page-one headlines, with little or no attention to its outrageously one-sided character. Only slowly in the following months did the press focus on the implications of Padilla's indefinite detention without trial and without access to counsel.

The courtroom arguments over the imprisonment of Padilla and Yaser Hamdi were signal events in the history of American freedom, but they made few if any network evening news programs—or major newspaper headlines. Nor was great attention paid to the aliens imprisoned for months in anonymous silence. Much of the Bush administration's domestic antiterrorist campaign was so secluded that it did not fall naturally into the press's domain.

There is also the inescapable fact that television, the principal source of news for most Americans, is not usually given to exploration of trends beneath the headlines. Not usually, but there was Edward R. Murrow's exploration of the character of Senator Joe McCarthy. But even there, the face and voice of the man told the story of his corrupting influence in a dramatic visual way. How would television bring home to audiences the significance for all Americans of what is being done to Jose Padilla or the nameless hundreds of aliens in detention? We are in an age, moreover, of news in a rush. Nine-second sound bites from candidates are supposed to illuminate political campaigns. Brief items on the screen compete with running words below.

Against those negatives there must be weighed an encouraging development. Journalists are better educated today than they have ever been. They care about the public good—about civil liberties as well as official wrongdoing.

What a difference the press can make at its best. The case of Ellen Knauff testifies to that. Her story did not end when the Supreme Court rejected her appeal. The attorney general of the day, J. Howard McGrath, moved by press and public attention to her case, ordered that she be given the immigration hearing that she had theretofore been denied. At the hearing, in March 1950, three witnesses said that while working for the army in Frankfurt she had spied for a Czechoslovak mission there. She denied the charges and said she had never seen those witnesses before. On November 2, 1951, Attorney General McGrath ordered her admitted to the United States.

In 1957, Ellen Knauff was remarried to William B. Hartley and took his name. She and her husband wrote many books and articles, a number of them for children. Both of them died in 1980, when Ellen Hartley was sixty-five.

◆ ◆ ◆

"Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."

Madison again, in a letter written to Vice President Jefferson on May 13, 1798. How foresighted he was. What he perceived proved true again and again in the next two centuries. But perhaps we should take some satisfaction from that record. For the fact is that, with all the dark episodes in those years, all the harm to individuals, the United States at the millennium was an astonishingly free country.

The question is whether Americans' commitment to freedom will prove as resilient in an endless conflict with terrorism. The signs so far are mixed. The Bush administration seems determined to press its every measure to the limit, dismissing civil libertarian concerns. Congress has not emerged as a guardian of liberty. But the print press is taking hold of such issues as the detention of Americans as enemy combatants on the president's say-so. Nearly two dozen cities have passed ordinances urging respect for civil liberties. Some have long been identified with libertarian causes—Boulder, Colorado, for example, and Berkeley, California. But they may reflect a larger stirring of concern.

Much is at stake. America's extraordinary prosperity and strength have been produced by an open society, where every policy was subject to debate. American power in the world has been as much the power of its ideals—of freedom—as of its weapons. If terrorism leads us to close down the society, then the terrorists will have won.

"Freedom and fear are at war," President Bush said in an address to Congress on September 20, 2001. In a sense different from what he meant, they are.

About the Author

Anthony Lewis joined the staff of the *New York Times* in the late 1940s and spent nearly his entire career there. He also worked for the *Washington Daily News,* where in 1955 he won the Pulitzer Prize for his articles on the federal government's loyalty security program. He won a second Pulitzer Prize in 1963 while working in the Washington Bureau of the *New York Times* for his coverage of the U.S. Supreme Court. He reported from Europe for eight years as the *New York Times* bureau chief in London, during which time he began writing a regular column that appeared twice a week on the *New York Times*' op-ed page. He frequently writes about international affairs, but also covers U.S. domestic issues, including politics, law, and a variety of social issues. Although he is not a lawyer, he is an authority on U.S. constitutional law, especially free speech and free press issues, and for fifteen years he was a lecturer at Harvard Law School. Since 1983 he has been the James Madison Visiting Professor at Columbia University. He is the author of three widely read and influential books: *Gideon's Trumpet* (1964), *Portrait of a Decade: The Second American Revolution* (1964), and *Make No Law: The Sullivan Case and the First Amendment* (1991).

About The Century Foundation

The Century Foundation sponsors and supervises timely analyses of economic policy, foreign affairs, and domestic political issues. Not-for-profit and nonpartisan, it was founded in 1919 and endowed by Edward A. Filene.

Board of Trustees of The Century Foundation