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# Liberty and Security? Challenges in a New World Situation Transcript of the Symposium

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# The Arlin M. Adams Center FOR LAW AND SOCIETY

## Susquehanna University

The March 16, 2004, dialogue on “Liberty and Security? Challenges in a New World Situation” is the third in a series of annual lectures sponsored by The Arlin M. Adams Center for Law and Society at Susquehanna University. Established in 2001, the center focuses on the law and its impact on institutions and people, providing a rich learning and experiential resource for students, faculty, visiting scholars and members of the community.

The family of Sigfried and Janet Weis and The Degenstein Foundation of Sunbury, Pa., with support from the Annenberg Foundation, founded the center in honor of prominent Philadelphia jurist Arlin M. Adams whose distinguished legal career includes 17 years on the bench of the 3rd U.S. Circuit Court of Appeals. The center explores the significant place law occupies in our ever-changing social, political, economic and cultural life. It provides a forum for thought-provoking examination of contemporary issues in areas such as human freedoms and civil rights, social responsibility, technology and privacy, and constitutional interpretation.

Susquehanna’s emphasis on undergraduate liberal arts education and pre-professional studies offers an ideal home for the Adams Center. The center supports activities and resources that expose students to the theory and practice of law through internships and field experiences, networking, professional seminars, independent study, research projects, and enhanced library resources. The interdisciplinary programs and activities of the Adams Center enrich and inform civic life in the Central Susquehanna Valley and nationally.

# Introductory Remarks

Dr. Michelle DeMary

Good evening. My name is Michelle DeMary and I am an assistant professor of political science here at Susquehanna. I also have the honor of being the director of the Arlin M. Adams Center for Law and Society. I would like to welcome you all this evening for what will be a thought-provoking and engaging discussion.

Allow me to take a moment to introduce the topic which will be discussed tonight, and the participants who will discuss it.

The topic for this year's dialogue involves a perennial question for a democracy. How do we balance the need for national security-something we all value-with the equally important need to protect the rights of the individual against the awesome power of the state?

This is not a question which is new in American history. The Alien and Sedition Acts, passed by the U.S. Congress in 1798, were presented as necessary to protect the newly developed national government from treasonous speech. Anyone who is familiar with President Lincoln's activities during the Civil War will recognize that our nation's chief executives have felt it essential to take steps which limit liberties in times when the nation's security is threatened; limits like stopping the mails, suspending the Writ of Habeas Corpus and using military tribunals for civilians. One finds similar actions with laws enacted by Congress in response to increasing fears of Communist threats after World Wars I and II. Both Presidents and Congresses have felt it necessary to take actions that in "normal times" might not be seen as acceptable.

As Abraham Lincoln famously said in a message to Congress, "To state the

question more directly, are all the laws but one to go unexecuted and the government itself to go to pieces, lest that one be violated?”

In hindsight, some of these past actions have been judged to be legitimate. Others have been judged to be excessive, but that is in hindsight. The question we currently face is how to find that balance, a balance between security and liberties, without the benefit of hindsight. Tonight we will explore that question as it involves the detention and trial of non-American citizens in Guantanamo Bay, Cuba, and the detention of Americans Jose Padilla and Yasser Hamdi, whose cases will be heard by the United States Supreme Court later this spring.\* And we have with us tonight two excellent speakers to help us explore this question.

Speaking first tonight will be Mr. Anthony Lewis. Mr. Lewis was a long-time columnist for the New York Times, who has twice won the Pulitzer Prize for his reporting. He is a journalist whose columns I have often used in my classes and for that I thank him. Mr. Lewis has also written several books, his most famous being Gideon’s Trumpet. Mr. Lewis, we are very pleased to have you with us here this evening.

Joining Mr. Lewis on the stage tonight is Major General Michael Nardotti, a former judge advocate general for the U.S. Army and a decorated combat veteran. He retired from the military in 1997 and is now a partner at the Washington, D.C. law firm of Patton Boggs. A few of us who are in the audience tonight heard the general speak on the topic of military tribunals at a taping of the National Public Radio show Justice Talking last fall. Once we heard him, we had no doubt that he was the man we wanted to discuss this issue, and we are very pleased that you could join us tonight. Welcome, General.

Michele DeMary, Ph.D.

Director, Arlin M. Adams Center for Law and Society

Assistant Professor of Political Science

Susquehanna University

\*On June 28, 2004, the United States Supreme Court issued rulings in the cases of Yasser Hamdi, Jose Padilla, and the detainees at Guantanamo, essentially holding in each decision that while the Bush administration has broad authority by way of wartime executive powers to detain enemy combatants, these individuals are entitled to contest their designation, thereby establishing minimum civil liberties standards. The Court left many questions unanswered, however, and these issues are expected to be revisited in the months and years ahead. The principles underlying the positions presented in this dialogue are essential to understand the ongoing discussion of the Constitutional and legal rights of these detainees against the backdrop of a global war on terrorism.

# The Dialogue

Mr. Anthony Lewis

Over many years, the United States has criticized other countries for detaining people without trial, subjecting them to intensive interrogation under psychological pressure and denying them the right to consult counsel. Those practices were deemed foreign to fundamental American beliefs, but now they have become American practices. President Bush and his administration are using those tactics in the name of fighting terrorism, and, I believe, in violation of the Constitution and law.

Consider first an extraordinary claim of executive power. The claim is that President Bush can designate any American citizen, anyone in this room, to be an enemy combatant, and then imprison that person indefinitely, perhaps as long as he or she lives, without a trial, without a lawyer.

Two Americans have now been in prison for more than 20 months under that theory. I think it is the most dangerous threat to American freedom in my lifetime. I'll tell you about one of the detainees, whose name you've already heard, Jose Padilla.

He was born in Brooklyn, grew up there, became a gang member and served several jail terms. In prison, he converted to Islam. In May 2002, Padilla flew into O'Hare Airport in Chicago from abroad. Federal agents arrested him there and took him to New York as a material witness before a grand jury looking into the terrorist attack on the World Trade Center. A judge appointed a lawyer, Donna Newman, to represent him. The judge set a hearing for June 11, 2002, to consider the lawfulness of the material witness warrant. But on June 10, Attorney General John Ashcroft announced that Padilla was being taken out of the legal system and held without trial in a Navy brig as an enemy combatant. Ashcroft said on television, "We have captured a known terrorist. Padilla trained with the enemy in Afghanistan and Pakistan."

That was an alarming description, but of course there had been no trial before Ashcroft pronounced Padilla guilty, and there has been none since.

Donna Newman, appointed as Padilla's lawyer, was now unable to see him, but she went ahead and brought a petition for Habeas Corpus, the writ used to test the lawfulness of an imprisonment.

At first, the Bush administration opposed any Habeas Corpus proceeding, arguing that the courts could not review at all what the government had done. Then it backed off under criticism, backed off a little, and said there could be a Habeas Corpus hearing of a very limited kind. All the government had to do, it said, was produce some evidence, that is, any evidence.

What the government produced was a statement by a Pentagon official not subject to cross-examination and with no firsthand evidence of what Padilla was supposed to have done. Padilla was not present at the hearing, of course, since he was in a brig in South Carolina in solitary confinement, and there was really no effective way for Donna Newman to challenge the Pentagon's statement.

The judge held that that was enough to justify Padilla's detention, but the judge said that Ms. Newman should be able to have a limited interview with Padilla to get any facts in conflict with the description of him by the government. The administration reacted with outrage to that part of the decision. It said any visit by a lawyer to Padilla's prison might hurt the process of interrogation by destroying the necessary "atmosphere of dependency and trust between the subject and interrogator."

That was a bit of inadvertent candor, I think. What it meant was that a lawyer's visit might inhibit the effort to overbear the prisoner's will. It is precisely because a prisoner alone in the hands of his jailers may be overborne that we have the Miranda Rule in the criminal law and the constitutional guarantee of the right to counsel.

A panel of the United States Court of Appeals for the Second Circuit in New York held by a vote of two to one that President Bush did not have the claimed power to detain Padilla without trial. Even the dissenter said Padilla should be able to consult a lawyer.

The Supreme Court then agreed to hear the case. It will be argued before the court on April 28 along with the case of the other American citizen detainee, the case of Yasser Hamdi.

Historically, American courts have been reluctant to hold presidents to constitutional standards in time of war or national stress. In World War II, for example, the Supreme Court refused to interfere with President Roosevelt's order removing 100,000 Japanese Americans from their homes on the west coast and confining them in desert camps.

Chief Justice Rehnquist published a book a few years ago, before September 11, 2001, a book with the title that you've already heard tonight, *All the Laws but One*, on that and similar cases of judicial deference in wartime.

In those past cases, we often came, as I think Michele said, to regret what had happened. Years after World War II we apologized. Congress, that is, passed a statute apologizing to the Japanese Americans and paying the survivors of the detention modest compensation. But it is hard to say when there will be an "after" in the war on terrorism. It seems likely to go on, here and there, endlessly. The terrorists are not going to come aboard a United States battleship, as the Japanese government did at the end of World War II, and surrender.

Perhaps that fact, the endlessness of the prospect we face, will make the Supreme Court more sensitive this time to the threat of civil liberties, more willing to enforce the Constitution. But I don't have to tell you, after years of covering the Supreme Court as a journalist, it's foolish to predict what the Supreme Court will do.

What we can say is that the Court's mere willingness to hear the cases of Jose Padilla and Yasser Hamdi has evidently led the government to ameliorate its treatment of the two men. Both have been allowed visits from their lawyers, but under curious conditions. Donna Newman visited Padilla at the brig in South Carolina. Padilla was kept in a separate room behind a glass wall. A Defense Department lawyer, a military lawyer, rather, and an intelligence official were present at the meeting, and it was videotaped. Of course there could not be a real lawyer-client consultation under the circumstances.

The other administration program that we're going to discuss is the detention of foreigners at Guantanamo Bay, Cuba. Until recently, about 660 men and boys were being held there in prison cages. Most of us thought, or at any rate I did, that they had all been captured by U.S. forces in Afghanistan during the war there and were in either the Taliban or Al Qaeda, but that turns out not to be true. A substantial number were arrested in countries as remote from Afghanistan as Gambia,

in West Africa, turned over to American authorities and taken to Guantanamo. I learned that from a brief filed in the Supreme Court by 175 members of the British Parliament; a brief as a friend of the court because a dozen or so British subjects are or were among those held in Guantanamo. The brief described what was known about those British prisoners in Guantanamo. For example, three of the British subjects were young men from Tipton, in the British midlands. One was Asif Iqbal, whose parents came to England from Pakistan decades ago. In July, 2001, the parents went to Pakistan to find a bride for Asif, who was 20 years old. He followed in September. The marriage was arranged, and Asif told his parents he was going to Karachi to meet friends. He telephoned from there and was not heard from again. The other two from Tipton were friends of his who followed him to Pakistan, they said, for the wedding, and who also ended up in Guantanamo. Last week, those three young men from Tipton were released from the Guantanamo prison and sent home to Britain. They were arrested by British police and then freed after one night in jail. None will face charges, nor will two other Britons sent home from Guantanamo. One of those two, the other two, Jamal Udeen, said he had been confined in a prison in Kandahar by the Taliban, who called him a spy because he was traveling through Afghanistan to Iran and had a British passport. When the Taliban fled during the war, he said, CIA officers found him in the prison and he was sent to Guantanamo. A reporter from the British newspaper The Times of London, Tim Reed, confirmed part of that story. He saw Udeen in the Kandahar prison. Udeen told the British press that American military policemen beat him in Guantanamo when he refused to be injected with an unknown substance. Of course there's no way to check the truth of that statement, and we can be skeptical. American officials vigorously denied it but, ironically, the denials may be harder to sustain because the Bush administration has worked so hard to keep the courts from examining the state of the prisoners in Guantanamo.

Relatives of British, Australian and other prisoners there filed petitions for Habeas Corpus in the United States courts. The Bush administration argued that the courts had no jurisdiction to hear the cases because Cuba was sovereign in Guantanamo, even though the United States has total control over the Guantanamo territory under a perpetual treaty, one that can never be changed without American agreement. Lower courts agreed with that government argument and dismissed the cases. But then, in something of a surprise, the Supreme Court agreed to review those cases also.

Underlying the Guantanamo cases is a question of international law. The



United States has signed and ratified the third Geneva Convention. It provides that when there is a question about the legal status of someone captured in a war, whether, for example, the person is a legitimate soldier, or a spy or terrorist, the question is to be decided by a competent tribunal. Many such tribunals were ordered for prisoners taken by American forces in the Gulf War of 1991, but the present President Bush has declined to comply with the Geneva Convention. He declared that all the prisoners at Guantanamo were unlawful combatants, so no tribunals were needed.

The Guantanamo detentions have aroused widespread international criticism, notably in Britain, whose government is the most supportive ally of the Bush administration. A member of the highest British court, Lord Stein, made an extraordinary speech on the subject. Extraordinary in that a sitting judge passionately denounced United States policy. "The Guantanamo prisoners," Lord Stein said, were in "a legal black hole. As matters stand at present," he went on, "United States courts would refuse to hear a prisoner at Guantanamo Bay who produces credible medical evidence that he has been and is being tortured. They would refuse to hear prisoners who assert that they were not combatants at all. As a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice."

I do not think that Guantanamo prisoners have been tortured in, say, the horrifying ways that Saddam Hussein used in Iraq. On the other hand, endless interrogation, isolation and harsh conditions of confinement are said by medical experts to take a heavy psychological toll. Twenty-five prisoners in Guantanamo have attempted suicide.

There is an important theme that runs through both of the subjects I have been discussing: the detention of American citizens without trial and the holding of the prisoners in Guantanamo. That is the insistence of President Bush and his officials that they alone must decide the fate of these individuals without interference by the courts or any other outsiders. The Bush administration has often been charged with unilateralism in its foreign policy, notably in its rush to war on Iraq without the support of the United Nations or many allies, but the Padilla case and the Hamdi case show that it is just as determined to act unilaterally on occasion at home, even if the most profound rights of Americans are involved. In the Padilla case, after all, the administration claims the right to decide both the law and the facts. It asserts the legal power to detain Padilla without trial as an enemy

combatant, and it effectively controls the facts by claiming that it can deny Padilla any meaningful chance to contest that designation—to say, in any effective way in a Habeas Corpus proceeding, “You’ve got the wrong man. I didn’t do any of those things.” He can’t do that.

Similarly, in the Guantanamo case, the administration claims that it can ignore a treaty to which the United States is a party, and it strenuously resists the right of the courts to hear the complaint of some prisoners that they were not, in fact, fighting against the United States. I think the same is potentially true, and this I’ll just say in a few words, is potentially true of the military tribunals that the administration plans to use to try some of the Guantanamo prisoners for terrorism or similar crimes. The tribunals would be dominated by the command structure; five of the military lawyers designated already to act for defendants have complained that they cannot do their job properly because they would not be allowed to appeal to a civilian court. The attempts to avoid meaningful review by the courts is, to me, especially alarming. Judges are the last line of defense for citizens against abuse of government power. The great American contribution to political theory has been the idea of “a government of laws, not men,” a phrase first used more than 200 years ago by John Adams. We rely on the law to protect our system of government and our freedom. I think we abandon that faith in the law at our peril. To turn away from the law would be to yield to the lawless values of the terrorists. It would weaken this country in the worldwide struggle for reason and humanity.

Thank you.

# The Dialogue

Major General Michael J. Nardotti, Jr.

Thank you very much, ladies and gentlemen. I'm honored to be here tonight to take part in this dialogue with Mr. Lewis. On behalf of Susan and myself, I'd like to thank the university for the warm hospitality you've shown, especially President and Mrs. Lemons for dinner this evening. Special thanks to Dr. Michele DeMary for seeking me out to participate in this event, and for the opportunity to speak with students earlier today. I enjoyed that experience very much.

Thanks to the Adams Center, to the Degenstein family for their support, and, most importantly, deepest thanks and respect to Judge Adams for a lifetime of dedicated and truly outstanding service and for inspiring the establishment of the center.

The topics tonight are certainly timely and important. That is very clear, given the fact that three of the issues, the Guantanamo detainees and the Hamdi and Padilla cases, will be argued and decided by the United States Supreme Court within the next six months. These cases probably will be decided by early summer, and certainly the issue of the military commissions is rapidly coming to the forefront as well. Although the process has been slow, it is finally moving forward now, and some military commissions should be underway by late summer. Once the commissions are underway, it will be evident whether or not the procedural protections the administration has now agreed to will meet the standards appropriate for these circumstances. At least on the detention issues, when we hear what the Supreme Court has to say in the next few months, you'll know how truly enlightening this discussion tonight was or was not.

The issues to be discussed tonight and in the coming weeks, especially before the Supreme Court, are critically important and must be addressed. I should say that while I come to this issue from the legal perspective certainly, I approach it from another perspective as well. I was a soldier before I was a lawyer. I served in combat.

I led troops in combat. My concern as a soldier about the resolution of these issues is how it will impact the troops at ground level. I hope we have the opportunity to discuss this perspective in more detail in the question and answer session.

As well as being timely and important, these issues also are very complex and controversial. There are some aspects that one may point to as clear evidence of how difficult it has been and will be to come to the right answer as to what can and must be done.

The first point to note is that, within the Department of Defense, there was a vigorous debate about the course of action to be taken on all these issues. It might surprise you that the initiative to pursue the concept of military commissions was not an initiative that arose from the uniformed side of the defense establishment. It arose from the civilian side. None of the uniformed lawyers now are even old enough to remember when military commissions were last used 60 years ago.

I also find interesting and another indicator of the controversial nature of the detentions and commissions issues the people who have lined up on either side of the arguments. An amicus brief, a friend of the court brief, filed on behalf and in support of the Guantanamo detainees, included the names of two of my former military colleagues, two former judge advocates general of the Navy. On the other side of the issue, and this is in the spirit of full disclosure, a former Air Force judge advocate general, another former Navy judge advocate general, a former Army judge advocate general (that being me), and a former staff judge advocate to the Commandant of the Marine Corps, have signed on to an amicus brief supporting the administration's position.

There are other indicators of the complexity and the difficulty with this issue. For those of you familiar with the major publications of the Washington, D.C., area, you know and understand very well that the Washington Times in Washington, D.C., is not Washington's analog to the New York Times. It is a decidedly conservative publication. On the issue of military commissions, however, in the early stages of the debate, the Washington Times disparagingly described the military commissions concept as "drumhead justice." On the other side of the issue, the Washington Post, generally considered to be more liberal, has given qualified support to the concept of commissions, particularly in light of the issues that have surrounded the Moussaoui (the alleged "twentieth hijacker" in the 9/11 attacks) case

in federal court in Virginia. When I say qualified support, I mean that the Washington Post has expressed some concern about the procedures to be used and that issue certainly has been an evolving one. I also would point to another indicator of the difficulty of these issues. When the concept of military commissions was first broached, the Senate Judiciary Committee examined the issue and several people were called before the Committee to testify. I was called to testify as part of a panel of witnesses on December 4, 2001. On the same panel was Professor Laurence Tribe, the Tyler professor of constitutional law at Harvard Law School. In the course of the discussion, members of the Committee were examining the procedural requirements that would apply to the military commissions. In fairness, I must say that I have not called Professor Tribe since that time to discuss this issue. The limited statement of his to which I will refer is part of a very lengthy statement he made, but I think it demonstrates the seriousness and difficulty of the issue at hand. With respect to administering justice in this kind of environment (i.e., dealing with international terrorists in a wartime environment), he said, "The classic requirement of proof beyond a reasonable doubt is chosen to reflect the old adage that it is better to free a hundred guilty men than to imprison, much less execute, one innocent -a calculus that neither the Constitution nor conventional morality necessarily imposes on a government when the one hundred guilty who are freed belong to terrorist cells that slaughter innocent civilians and may well have access to chemical, biological and even nuclear weapons."

With those points in mind, I ask that you consider that for anything I am going to say to you tonight to make sense, the essential premise that you must accept, at least for the sake of argument, is that we are at war. I don't mean war in an abstract sense, as the "war on terror" being the equivalent of the "war on drugs" or the "war on poverty." We are at war with Al Qaeda, an international terrorist organization that has the ability to strike around the world. If you accept the proposition that we are at war, it changes the equation dramatically as to the extraordinary powers that the President has exercised. He would have no authority to exercise those powers if we were not in a state of armed conflict. What evidence is there of a state of armed conflict? The events of September 11, 2001 -in which an international terrorist organization struck halfway around the world in a coordinated attack and killed almost 3,000 people from 90 nations in three different locations, New York, Virginia, and over the skies of Pennsylvania -clearly indicate that we are involved in something beyond more routine criminal or terrorist activity.

What else do we know about this organization (Al Qaeda) and what was there that we now see in hindsight to give us any indication that the state of war didn't just begin on September 11th, but already was ongoing for a considerable period of time? If you look carefully at the last decade or more, you would find incidents for which Al Qaeda was responsible, starting in 1992 up through just this last week in Spain, where the organization demonstrated its ability to inflict terror on a massive scale. It should not have been a surprise. In 1996, Osama Bin Laden declared war against Americans who were serving on the Arabian Peninsula. In 1998, Osama bin Laden and others went further and issued a "fatwah," a religious edict, which stated, "In compliance with God's order, the ruling to kill Americans and their allies, civilians and military, is an individual duty for every Muslim that can do it in any country in which it is possible to do it." While that statement may have been viewed as the rantings of a fanatic in 1998, Al Qaeda demonstrated on September 11, 2001, that there certainly were people prepared to take this fatwah to heart and to act on it.

Things change in war. The President has authorities that he would not otherwise have. Even in other parts of the world, however, it should be evident that important things change in war. As an example, in the European Union, the death penalty has been abolished. The enabling document for the European Union that deals with the abolition of the death penalty is Protocol No.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty. Article 1 of Protocol No.6 declares, "The death penalty shall be abolished. No one shall be condemned to such penalty or be executed." However, in Article 2, Death Penalty in Time of War, it states, "A state may make provision in its law for the death penalty in respect to acts committed in time of war or imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with the provisions." So even in the European Union, where it is clear the death penalty is not favored, member nations recognize that, in war, there can be an exception. I'm not suggesting that you will see any of these provisions highlighted in the context of the actions to be taken in response to Al Qaeda. The fact that a wartime exception is memorialized in an important document, however, demonstrates that there are circumstances in which a change from the norm may be important and is possible. The President's actions and the administration's actions concerning the detention of the Guantanamo detainees and the proposal to conduct military commissions were not concepts created out of whole cloth by the administration as a result of these terrorist events. The President

is taking wartime actions recognized in history and in law. Of the issues for discussion this evening, I would like to talk about the Guantanamo detainees and the military commissions first, and then discuss Hamdi and Padilla later. The detention issues with respect to U.S. citizens have other very serious additional considerations and, quite frankly, create more serious difficulties for the administration.

With respect to the detainees being held indefinitely, during World War II, and historically, it has been the practice that if enemy combatants are taken, or if surrender is offered by the enemy, it is the obligation of the opposing force to accept that surrender. In exchange for that acceptance, the opposing force is entitled to take that combatant out of the fight indefinitely. In World War II, there were many thousands of German, Japanese and Italian prisoners of war who were captured and detained for no other reason than the fact that they were combatants. They were held for the duration of the conflict and released after the conflict was over.

In fact, the concept of detaining combatants actually is a humanitarian measure. Historically, if you go back far enough, the concept of taking no prisoners was an accepted practice. Denying quarter -executing those who would otherwise become prisoners -was a reality of war. When the world became sufficiently outraged over time, rules were established requiring the acceptance of a surrender when the enemy is prepared to offer it. Detention became the logical follow-on to keep the surrendering combatant out of the fight for the duration of the conflict. If you think about it, when -as in the current situation -the Commander-in-Chief is given the authority by Congress "to use all necessary and appropriate force" against the enemy, to include killing and destroying the enemy, it is logical that a lesser application of force (i.e., detention) would be equally valid. In this case, where U.S. forces didn't kill or destroy the enemy but instead captured the enemy, that enemy is kept out of the fight in the future by detention. The concept of detention without trial runs against the grain of most Americans. I suggest, however, that in a wartime environment the range of acceptable action, by necessity, must be dramatically different than what would happen in a normal situation. These circumstances are clearly distinguishable from other instances of detention without trial (in non-wartime environments) which the United States and other governments have criticized as unjustified. As a historical point on this issue, I would note that detention of unlawful combatants is not an action by the President without judicial support. In the World War II case involving the capture, trial and execution of eight Nazi saboteurs (the

Quirin case), the Supreme Court recognized the authority of the President to detain combatants as well as to try them for violations of the law of war.

Assuming detention is lawful and proper, we move to the next issue and question: What do you do with the Guantanamo detainees who are alleged to have committed violations of the law of war? If you have followed much of the relevant debate, you may recall that combatants can fall into two categories: lawful combatants and unlawful combatants. What is an example of a lawful combatant? As defined by the Hague and Geneva Conventions long ago, a soldier of a nation-state who is subject to a chain of command, who wears a uniform or distinct insignia recognizable at a distance, who carries arms openly, and who conducts his actions in combat in accordance with the law of war, is a lawful or “privileged” combatant. Thus, a soldier who is a lawful combatant and who fights in a war and kills the enemy cannot later be prosecuted for murder. Unlawful combatants fall into another category, and this category is not the product of an abstract or recently derived concept but is a product of the application of the standard established by the Geneva and Hague Conventions. Unlawful combatants essentially are the converse of lawful combatants. Thus, a combatant, who is not subject to a chain of command, who does not wear uniform or distinctive insignia, who does not carry arms openly, and who does not comport their conduct with the law of war, is not a lawful combatant.

Members of Al Qaeda fail to meet the lawful combatant criteria on all counts. Al Qaeda is not a nation-state. The prerogative of war belongs to nation-states. Private organizations cannot undertake war, and certainly not in the way that Al Qaeda has done it. Without wearing uniforms, Al Qaeda members have surreptitiously entered national territories and targeted civilians on a regular basis. In all respects, Al Qaeda members are unlawful combatants. Civilized nations, through international law and custom, have determined that in order to discourage such conduct by unlawful combatants, they should not be treated in the same way prisoners of war of a legitimate nation-state would be treated. If nations made no distinction, what incentive is there for unlawful combatants to change their behavior? There would be none. So nations have concluded that different treatment is appropriate -a different measure of due process, which still must be fair, but which can be something less than that which nations would accord lawful combatants. Certainly unlawful combatants would not be entitled to the measure of justice that would be accorded in the federal criminal courts of the United States.



More to the point on this issue, however, there was a great deal of concern at the beginning about the procedural protections which would apply and whether they would meet minimal standards of due process. While some criticized the military commissions concept in the early stages, in my opinion they were measuring it against the wrong standard. Some critics believed that because military commission proceedings would not mirror and provide the same protections as federal criminal proceedings, military commissions could not be the right solution. I suggest, however, that the better standard to apply in dealing with foreign nationals to determine whether or not military commissions meet the minimal standards of due process is the standard found in criminal tribunals in the international community. Comparison of the procedural protections available in those tribunals with the protections available in military commissions is the more proper measure. If you examine the military commission rules as they are established right now, you will find that the following protections equal or exceed the protections available in international tribunals. The proceedings before commissions will be open, generally. The presiding officer will have the ability to close the proceedings where there is a need to consider classified information. The presumption of innocence will apply; conviction will require proof beyond a reasonable doubt. A qualified military defense counsel will be assigned to the accused at no cost. The accused also may request a second military lawyer, and I strongly suspect that in many of these cases, you will see at least two qualified military lawyers defending the unlawful combatants who go to trial. The accused also can have a civilian attorney at his own expense. You should understand that in the federal criminal justice system, accused individuals have court-appointed attorneys only if they are indigent. There's no guarantee of an attorney paid for by the government if you otherwise have the means. In international tribunals, it is possible for the prosecution to appeal an acquittal... a concept that's foreign to our system. If you are acquitted in the federal system, before military commissions, or before courts-martial, the case is over.

So the procedural protections of military commissions compare quite favorably with international tribunals. It is true, of course, that the proposed rules for military commissions have changed as a result of vigorous debate. The American Bar Association initially was very critical, but engaged in a dialogue with the Department of Defense and with others. Quite honestly, it was that dialogue and criticism and vigorous debate that resulted in the changes and improvements to the procedures for military commissions.

Returning to the issue of the Guantanamo detainees for a moment, I would note a point I neglected to mention earlier. Under the Geneva Convention, if there is doubt as to whether an individual is a lawful combatant, a determination by a “competent tribunal” -known as an Article 5 tribunal -is required. There is no definition in the Geneva Convention of “competent tribunal.” In the past, a “competent tribunal” has been a three-person tribunal consisting of military officers, one of whom is legally trained. While Article 5 tribunals were not used in these cases, I would point out to you that the 660 detainees ultimately sent to Guantanamo were the result of screening of many thousands more. Almost 10,000 detainees were initially screened. That screening consisted of at least three levels of examination by military authorities in the Afghanistan theater, followed by subsequent levels of examination by other authorities. With all that effort, it would not have made any sense for the U.S. government to send any other than those whom they believed to be the most dangerous to be confined at Guantanamo. I’m not suggesting to you that this process was error free. As evidence has demonstrated, there have been mistakes. Considering the wartime situation we are dealing with and the kind of enemy with whom we are confronted, however, most would agree that if there were to be any error, it needed to be on the side of caution in taking those people to Guantanamo and confining them.

Please allow me to speak briefly about the Hamdi and Padilla cases, and then I will conclude. The justification for detaining both Hamdi and Padilla fundamentally is the same as that which applies to the Guantanamo detainees. If they (Hamdi and Padilla) are determined to be unlawful combatants, then the Commander-in-Chief and the military have a justification for keeping them out of the fight in the same way they would foreign nationals.

Hamdi was captured on the battlefield, by the Northern Alliance, turned over to the United States, and later sent to Guantanamo. When it was learned that he was born in Louisiana and a United States citizen, he was sent to the consolidated naval brig at Charleston. In the course of the litigation of his case, a very interesting series of events took place which I believe demonstrate the potential difficulty in involving the federal courts in the determinations concerning detainees. At one point in a rather pointed exchange between the district court judge and the government, the court demanded that the government produce an array of information in order for Hamdi to challenge the accuracy of the declaration by Michael Mobbs, a Defense Department official. That declaration established the factual basis for the unlawful combatant

determination of Hamdi and, hence, his detention. The judge demanded the names and addresses of everyone who had questioned Hamdi, including names of the members of the Northern Alliance who were involved in the capture of Hamdi. The judge demanded all of Hamdi's statements and the names of all the government officials who had been involved in the unlawful combatant determination. The Fourth Circuit Court of Appeals, considering those demands by the federal district court, noted that if that request were honored, if the military were made to comply during a time of ongoing conflict when we still had soldiers in the field, there would be an unacceptable disruption to the conduct of their mission. That potential disruption with military operations in a time of war needs to be considered in determining how the issue of the detention of unlawful combatants can and should be addressed.

Padilla, in some important respects, is a much more difficult case for the government. A fact Mr. Lewis did not mention but which creates a challenge for the government in the Padilla case concerns a name that hasn't been mentioned tonight—John Walker Lindh. John Walker Lindh is a United States citizen who was captured in the battlefield of Afghanistan. Everybody knows him. Taliban John. After capture, he was brought back, placed in the federal court system, prosecuted, and sent to jail. The government took those steps with respect to Lindh as an American citizen because the President decided at the very beginning that U.S. citizens would not go before military commissions. Therefore, the only remaining alternative, the expected alternative, would be to put such people as Hamdi and Padilla in the federal criminal courts ultimately. They will not go before military commissions. John Walker Lindh, U.S. citizen, went immediately into the federal criminal court system. Hamdi and Padilla, also U.S. citizens, went almost immediately into indefinite military detention. That inconsistency, in my judgment, has hurt the administration's position.

On the other hand, the President personally signed the determination that Padilla is an unlawful combatant. How should we view the President's involvement in this process? I would suggest that when the President signs a document asserting facts in support of this proposition and that document will be submitted to federal courts for consideration, that document has received an intense scrutiny by the Justice Department and the Defense Department. I believe both departments would have been extraordinarily careful to ensure the information placed before the President to make this kind of determination is correct. If that information is

correct, then Padilla did present a significant danger. Padilla went to Egypt in 1998 and later traveled to Saudi Arabia, Afghanistan, and Pakistan. According to the intelligence gathered, he met with Al Qaeda officials and received training to conduct terrorist acts in the United States. If those facts are accurate or even reasonably accurate, then the President's determination that he is an unlawful combatant whose detention is necessary was the right decision. Again, any error should be on the side of caution. As a final point, I would note that while the facts both in the Hamdi and Padilla cases may have justified their determinations as unlawful combatants and, hence, their detentions, we're a long way from a situation where virtually any citizen could be determined to be an unlawful combatant, as some have argued. There must be a reasonable basis for that determination, and I believe that the facts in these two cases establish such a basis.

I probably have gone over time and I apologize for that. I look forward to your questions.

Thank you very much.