



# THE FRAGILITY OF LAW

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**In the following article, Professor Fiss identifies what he sees as challenges to the Constitution and the American rule of law brought on by the “War Against Terrorism.”**

The phrase “War Against Terrorism” has no discrete legal content.

It was politically inspired, and used to mobilize American society.

Yet the declaration of the “War Against Terrorism” marked the beginning of a unique challenge to the rule of law that began on September 11, 2001, and continues to this very day.

In speaking of the rule of law, I refer not to the statutes and regulations that serve the purposes of the state, but rather to the Constitution itself, which creates the public morality of the nation. The Constitution is not exhausted by the words appearing in the document executed in 1787 and its twenty-seven amendments. It also includes principles, such as the separation of powers or the right to travel, that are inferred from the overall structure of the Constitution, and certain enactments of Congress—the Civil Rights Act of 1964, for example—that articulate the governing principles of American society. These principles are laden with a special normative value that derives from the role they play in defining our national identity—what it means to be American.

Since September 11, at least three of these principles have been put in issue. The first is the prohibition against torture, derived, as I see it, from the Eighth Amendment and our participation in the Convention Against Torture. The challenge comes not so much from the grotesque treatment of prisoners at the Abu Ghraib prison in Iraq, where disciplinary proceedings were brought against those responsible, but from the Administration’s actions in the war against Al Qaeda itself.

In order to broaden the range of techniques that interrogators can use against prisoners allegedly linked to Al Qaeda, an August 2002 Department of Justice memorandum argued that only acts causing pain “equivalent in intensity to the pain accompanying physical injury, such as organ failure, impairment of body function, or even death” fell within the legal definition of torture. The Department of Justice

later distanced itself from this definition, but a separate December 2002 Department of Defense memorandum establishing guidelines for the interrogation of prisoners held at Guantánamo suggested that two practices almost universally understood as torture—the use of scenarios designed to convince detainees that death was imminent, and use of a wet towel and dripping water to induce fear of suffocation—though forbidden “as a matter of policy for the time being,” nonetheless “may be legally available.”

The program of “extraordinary renditions,” in which American officials have abducted suspected Al Qaeda members and transferred them to countries that routinely engage in torture, suggests a similar disregard for the principle against torture. Indeed, it has become an open question whether the President even believes himself bound by the principle. In December 2005, when he signed a statutory ban on torture, President Bush said that he intended to construe the ban as consistent with his constitutional powers as Commander in Chief and his duty to protect against terrorist attacks, a statement that has been widely understood as indicating that he may not feel bound by the act’s language. The President is entirely correct that statutes cannot constitutionally interfere with his powers as Commander in Chief, but the statutory ban on torture merely codifies an underlying constitutional prohibition that is, of course, superior to the President’s power to lead the military. As such, it is fully binding on his actions.

The second principle that has been put into doubt is the right of the people to communicate without fear of government eavesdropping. This freedom is rooted in the Fourth

Amendment and is not absolute: the Fourth Amendment only prohibits unreasonable searches. Courts have historically protected this freedom by requiring the government, if at all possible, to apply for a judicial warrant before listening in on private conversations.

In 2005, news media revealed that soon after the September 11 attacks the President had authorized the National Security Agency (NSA) to intercept communications between persons in the United States and persons abroad if the NSA believed that one of the parties was linked to Al Qaeda. This program has proven enormously controversial, and much of the controversy has centered on whether it violated a 1978 law, the Foreign Intelligence Surveillance Act (FISA), that prohibits such governmental surveillance without authorization by a special court. In a 2006 legal

it violates the Fourth Amendment itself. Admittedly, the Supreme Court has never spoken directly to the issue of whether the government must obtain a warrant before intercepting communications like those at issue in the NSA program, but the very reasons that the Supreme Court has imposed a warrant requirement in other wiretapping cases—including those involving domestic threats to public order—are fully applicable. A warrant requirement does not prevent the President from thwarting terrorist attacks, but minimizes abuses and avoids the impairment of communicative freedom that comes from knowing that the President could tap the phone of anyone he claims is linked to Al Qaeda.

A third principle challenged by the “War Against Terrorism” is what I call the principle of freedom. This principle is rooted in the constitutional guarantee of the

Because they are being held as “illegal enemy combatants,” prisoners at Guantánamo have had little ability to press their claim for freedom. Some insisted, for example, that they never fought for the Taliban or Al Qaeda, but had been wrongly seized by local authorities or bounty hunters. At first there was no procedure to adjudicate these claims, but in July 2004 the Administration established a system of administrative tribunals to review individual cases. These tribunals were staffed by the military, freed of many of the ordinary rules of evidence, and though military personnel serve as personal representatives, the prisoners were not allowed the assistance of counsel.

The Administration is now putting some of the Guantánamo prisoners on trial, using military commissions instead of courts martial or ordinary civilian courts. Traditionally military commissions were used to try persons caught red-handed in a theater of war, and, in response to litigation challenging their use at Guantánamo, the Supreme Court expressed the fear that the Administration had transformed them “from a tribunal of true exigency into a more convenient adjudicatory tool.” But the Court stopped short of declaring these tribunals an offense to due process, holding only that they conflicted with a statute. In October 2006, Congress responded to this decision by enacting a law specifically granting the Administration authority to continue with its use of military tribunals. This statute came on the heels of an earlier use of administrative tribunals to review the status of the Guantánamo prisoners and denied them the right to petition for a writ of habeas corpus.

The Administration has not been content to confine the “illegal enemy combatant” designation to those seized in Afghanistan or another theater of armed conflict. The war against Al Qaeda knows no bounds, and the Administration has thus invited us to view the United States itself as a battleground and subject to the same rules. As a result, a citizen of Qatar studying at Butler University in Indiana (Ali Saleh Kahlal al-Marri) was seized and is now being held incommunicado at a naval brig in South Carolina. Similarly, an American citizen (Jose Padilla) was arrested at O’Hare airport and held in the same brig for more than three years before being charged with a crime in federal court.

One could accept that the war against Al Qaeda is a war, and resist the conclusion—that the United States is a battleground similar to Afghanistan—not just as a matter of ordinary usage, but because of the consequences that conclusion would have for American society. To treat the United States as a battleground in the same sense as

Afghanistan would threaten the fabric of ordinary life and put the exception to the principle of freedom for enemy combatants in the position of eating up the rule. The Administration would be able to imprison anyone living within our midst—citizens and non-citizens alike—without ever charging them with a crime and putting them on trial.

Many have decried these developments as an abuse of executive power. Yet while the Executive Branch is the driving force, the other branches are complicit in these challenges to the rule of law. When Congress enacted the 2005 statute affirming the ban against torture, legislators failed to provide any remedy for violations. Congress has not taken any steps to stop the NSA wiretapping program, though the Administration’s about-face in January 2007 made such measures less urgent. When it comes to the principle of freedom, Congress became a full partner with the Administration, passing legislation to deny aliens deemed “illegal enemy combatants” access to the protection of the writ of habeas corpus and authorizing their trial by military commissions.

The Supreme Court’s performance has been no better. Its decisions have caught the headlines because they rebuffed the Administration, but they are hardly victories for the Constitution. In one case, the Court ruled that that an American citizen (Yasser Hamdi) held as an illegal enemy combatant in the South Carolina naval brig was entitled to the assistance of counsel and an evidentiary hearing regarding his claim that he had not taken up arms against the United States. This ruling was based on due process, yet it left the prisoner to carry most of the evidentiary burden and four Justices expressed their view that a military tribunal offered a sufficient forum for the prisoner to press his claim for freedom.

In other cases, the Court’s performance has even been more timid. When Jose Padilla challenged his detention, the Supreme Court refused to rule on the merits and instead held that he had initially filed his habeas petition in the wrong court. Even more significantly, the Court has refused, at least so far, to address a ruling that the Court of Appeals in Washington, D.C., first advanced in 2003 and reaffirmed this February, that aliens held at Guantánamo do not have any constitutional rights that can be vindicated by the writ of habeas corpus. On April 2, 2007, the Supreme Court denied a writ of certiorari seeking review of this judgment. In so doing, the Court allowed the program of the elected branches to run its course, but it failed, yet again, in its duty to safeguard the Constitution and the values it embodies. ▼

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memorandum defending the program, the Attorney General argued that the wiretaps were much like any other strategic engagement with the enemy, exclusively within the President’s powers as Commander in Chief, and not subject to statutory regulation. This past January, the Attorney General modified his position, perhaps in a nod to critics or to an unfavorable lower court decision denying the government’s motion to dismiss a challenge to the NSA program. The Attorney General indicated that he had, for the first time, begun to obtain judicial approval of the wiretaps under FISA. But he did not concede the issue of Presidential power, and left unresolved important questions about the scope of judicial oversight. The Attorney General did not disclose, for example, whether the special court is approving wiretaps on an individual basis, or whether it is granting blanket authorizations that cover multiple wiretaps.

To my mind the focus of the inquiry should not be on whether the NSA program violates FISA, but rather whether

writ of habeas corpus and due process, and denies the government the power to incarcerate anyone without charging them with a crime and swiftly bringing them to trial. This principle contains an exception for the exigencies of war: As a matter of necessity, enemy combatants can be seized on the battlefield and imprisoned for the duration of hostilities.

In the midst of the Afghanistan War, the President declared that alleged soldiers of the Taliban and Al Qaeda captured anywhere in the world were not ordinary prisoners of war but rather “illegal enemy combatants.” This special designation allows the military to interrogate them on a protracted basis, to incarcerate them indefinitely, even beyond the duration of hostilities, to put them on trial before military commissions, and to punish them for the simple act of fighting. Traditionally the designation of “illegal enemy combatant” applied to individual spies or saboteurs, or to irregular militias, never to entire armies.