The Constitution, Terrorism, and Civil Liberties

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Introduction

It is truly an honor to give the Annual Constitution Address here at Dickinson College – fittingly, the first college to be chartered in an independent United States and, as aptly described by John Dickinson, "tuta libertas" a bulwark of liberty. Like Dickinson College, the Annual Constitution Address is steeped in history and distinguished by exceptional speakers. While I am certain that I do not belong in their august company, there could be no better venue for this annual celebration of the Constitution, especially in these times when the United States is engaged in combating international terrorism around the world and at a price many say is too dear to our civil liberties. Has our Constitution failed to be, in the war on terrorism, our bulwark of liberty? Many say yes. I have a different view, as you will hear.

My topic tonight is: "The Constitution, Terrorism, and Civil Liberties." This past year's Supreme Court term witnessed a number of important decisions, but none more so than its decisions on June 28, 2004, in *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Rumsfeld v. Padilla*.[1] All three of these cases presented the Supreme Court with its first significant opportunity since World War II and the Korean War to define the limits imposed by the Constitution on the reach of the powers of the President in times of war or other national emergencies. That the Supreme Court did, in these decisions, at least begin to address how the Constitution resolves some of the tensions between national security and civil liberties in the war on terrorism makes my topic tonight a nearly mandatory one for this year's Constitution Address.

What protections does our Constitution afford during such a war? Must we give up a large measure of our civil liberties in these dangerous times? Does the Constitution even permit us to make that choice to try to achieve an appropriate balance between national security and civil liberties? When and for how long may citizens and non-citizens be detained as enemy combatants without a trial or hearing of any kind, and when may the military, rather than our civilian courts, detain or try those accused of participation in terrorism?

These are some of the many hard questions presented by the tension between the war on terrorism and preserving our civil liberties, and I will talk about them during the course of this address. I warn at the outset though that I offer no definitive answers or silver bullet solutions indeed, I do not believe there are any. I also do not speak as a constitutional scholar, but rather from the vantage point of a former U.S. Attorney charged with investigating and prosecuting international terrorists, whose office eventually indicted Osama bin Laden himself (twice), including in June 1998 before he or al Qaeda had killed any Americans.

Perhaps it will come as no great surprise that I gravitate toward those interpretations of the Constitution that broadly endorse the powers of the Executive and military in times of war and national emergency. Supreme Court Justice Robert Jackson's famous theme that the Constitution is not a suicide pact resonates with me.[2] You should also know upfront that I favored a military response to international terrorism, both before and after the attacks of September 11th. I also disagree with the knee-jerk reactions of many who insist that our Constitution has been violated by nearly every counterterrorism measure our country has adopted since 9/11: whether it be the USA Patriot Act, the voluntary questioning of young men of Arab descent, the establishment of

military tribunals, or the detention of enemy combatants.

But I also strongly believe, as Justice O'Connor said this past term, in *Hamdi v. Rumsfeld* that:

> *"[A] state of war is not a blank check for the President…. Striking the proper constitutional balance…is of great importance to the nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear….It is in these times that we must preserve our commitment at home to the principles for which we fight abroad."*[3]

So, how do we strike the proper constitutional balance and indeed the optimal balance between national security and civil liberties in the war on terrorism? To explore that question, my plan tonight is to: (1) first, very briefly, review a little constitutional history; (2) then, discuss what the Supreme Court's decisions this past term mean to the war on terror and civil liberties; and (3) finally, discuss the realities (as I see them from my own experience as U.S. Attorney) of the grave risks we face from international terrorism and how best to respond to those risks, consistent with our civil liberties.

I. The Constitutional History

Let's start with the constitutional history. We as a nation, and the Supreme Court in particular, have confronted, on a number of prior occasions in our history, the issue of national security and civil liberties in times of war: beginning in the Civil War when President Lincoln suspended the writ of habeas corpus; during and after World War I when Congress passed statutes criminalizing various sorts of dissenting speech; during World War II when, many say at our lowest constitutional moment, citizens of Japanese ancestry were relocated from the West Coast and interned in camps on the say so of President Roosevelt on the advice of his military commanders who feared home-grown spies and saboteurs.

Graduates of your college played a central role in some of these defining events in our history. The judge who told President Lincoln no – that the President had no constitutional authority to empower his military commanders to suspend the writ of habeas corpus and arrest and detain citizens was the Chief Justice of the Supreme Court, Roger B. Taney, who administered the presidential oath to Lincoln and who graduated from Dickinson College in 1795.

Another of Dickinson's graduates, Robert C. Grier, appointed to the Supreme Court by President James Polk in 1846, joined in the majority opinion in *Ex Parte Milligan*[4] which held that neither the President nor Congress could, at least so long as the civilian courts were operating, suspend the writ of habeas corpus during the Civil War and try, convict, and sentence to death a citizen before a military tribunal. The citizen was Lamben P. Milligan, a highly respected lawyer and resident of Indiana, who was accused of conspiring against the United States, largely because of his publicly expressed criticisms of President Lincoln and the Civil War.

The entire *Milligan* Court firmly rejected the Government's argument that the Bill of Rights were only "peace provisions of the Constitution" that cease to function in times of war "when the safety of the people becomes the supreme law."[5] Ex Parte Milligan is considered by many constitutional scholars to be the Supreme Court's high watermark of protecting civil liberties in times of war. [But the decision was hardly universally acclaimed at the time; in addition to criticism from the New York Times, the *New York Herald* wrote:

> *"This…opinion is utterly inconsistent with the deciding facts of the war, and therefore utterly preposterous. These antediluvian judges seem to forget that the war was an appeal from the Constitution to the sword…."*[6]

Then, as now, no good deed goes unpunished in the American media.]

The high watermark for civil liberties established by *Ex Parte Milligan* was, in due course, lowered by the Supreme Court during our World Wars.

During World War I, the Supreme Court, on its first occasion to address a First Amendment challenge to a federal statute, unanimously upheld the conviction of Charles T. Schenck for violating the 1917 Espionage Act as a result of Schenck's printing and distributing leaflets that urged resistance to the draft.[7] Justice Oliver Wendell Holmes wrote in *Schenck v. United States*:

> *"When a nation is at war many things which might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight…. No court could regard them as protected by any constitutional right."*[8]

So much for free speech and open debate of vital national issues. Fortunately, on that score, our laws have changed for the better, although our Attorney General may wish otherwise.

During World War II, the Supreme Court largely upheld the constitutional validity of the executive order signed by President Roosevelt (as well as subsequently passed criminal statutes), authorizing curfews, reporting requirements and the removal of citizens and non-citizens of Japanese ancestry from the West Coast of the United States to camps away from the coast. The Court, in *Ex Parte Quirin*, also upheld the conviction and death sentence by a military commission of an American citizen who had joined the German armed forces in World War II and had entered the United States to bomb war industry facilities.[9] It is the *Quirin* decision, which Justice Scalia describes as "not [the Supreme Court's] finest hour,"[10] that the Government argues today justifies the indefinite detention of another American citizen, Jose Padilla, who was arrested in the United States in the war on terrorism.

This historical backdrop, which is often forgotten by many critics of post-9/11 counterterrorism measures, reflects the great deference the Supreme Court has given historically to the President's exercise of his powers during wartimes. As Chief Justice William Rehnquist, in his book, *All the Laws But One*, has observed:

> "While the laws will not be silent in the time of war,...they will speak with a somewhat different voice.... It is neither desirable nor is it remotely likely that civil liberty will occupy as favorable a position in wartime as it does in peacetime."[12]

Right or wrong–agree or disagree, the slate on which we must judge the lawfulness of the measures undertaken by the President after the attacks of September 11th is a slate that broadly empowers him as a matter of established constitutional law. It is also the slate on which the Supreme Court wrote this past June when it largely continued the historical deference to the Executive in conducting the war on terror. And yet the Court did not abdicate its responsibilities to be a meaningful check on constitutionally excessive exercises of Executive power.

II. The 2004 Trilogy of Cases

Let me now turn to the present day to see how the Supreme Court handled the tension between civil liberties and national security in the war on terrorism in the trilogy of cases the Supreme Court decided this past June.

- In *Hamdi v. Rumsfeld*, the Supreme Court, in a plurality opinion authored by Justice O'Connor, held that Congress' Authorization for the Use of Military Force passed in response to the attacks of September 11th authorized the President and the military to detain an American citizen asserted by the Government to be fighting with the Taliban in Afghanistan, initially turned over to U.S. authorities in Afghanistan and thereafter designated by the President and held in the United States as an "enemy combatant," so long as active fighting continues in Afghanistan.[13] But the Court also held that Hamdi may *not* be held indefinitely without being given a meaningful opportunity to contest the factual basis for his enemy combatant designation before a neutral decision maker, and ultimately the right to challenge his detention in federal court by way of a habeas corpus petition.[14] (Justice Scalia, in a scathing dissent, concluded that no citizen may be constitutionally detained by the military, at least in the U.S., unless Congress has suspended the writ of habeas corpus; domestic criminal charges are required to do that.)[15] Justice O'Connor, in what Justice Scalia decries as an inappropriate "Mr. Fix-it Mentality,"[16] goes on to suggest that the process that is due to detainees could be supplied by a properly structured military tribunal, and that the Government's designation of a person as an enemy combatant could constitutionally be given the benefit of a rebuttable presumption. Some proof could consist of hearsay, and detainees could be made to shoulder the ultimate burden of proof. The Government, to much criticism, has already taken advantage of Justice O'Connor's suggestions and has convened military commissions to review enemy combatant designations challenged by Guantánamo Bay detainees, who were the beneficiaries of the second of the Supreme Court's 2004 trilogy decisions.

- In *Rasul v. Bush*, the most far-reaching of the three decisions, the Court held that foreign nationals detained at the U.S. Naval Base in Guantánamo Bay, Cuba (over which the U.S. has unfettered jurisdiction) are also entitled under the habeas statute to challenge their indefinite

detention in federal court.[17] (In another scathing dissent, Justice Scalia accuses the majority of "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field."[18] Justice Scalia laments what he calls the "breathtaking" consequences of extending the habeas statute to "the four corners of the earth."[19]) As you may have seen in this Sunday's *New York Times*, the Government, in response to the Supreme Court's ruling, has apparently begun to return almost 200 detainees from Guantánamo Bay to their home countries for further detention or release – to Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden and Britain.[20] On Saturday, the Pentagon said that five such detainees had "gone back" to fight against the United States.[21]

- In *Rumsfeld v. Padilla*, perhaps the hardest of the cases from a constitutional law point of view, the Supreme Court largely "punted." It seems clear, though, that Jose Padilla, an American citizen suspected of planning terrorist attacks in the United States, who had been initially arrested in Chicago on a material witness warrant and thereafter designated by the President as an enemy combatant and detained in a military brig in South Carolina, will be entitled to challenge his designation as an enemy combatant by way of habeas corpus in federal court.[22] But the Supreme Court did not decide whether an American citizen not captured abroad on an active battlefield can be detained by the military in the United States as an enemy combatant rather than being charged with a crime and tried in our civilian courts because Padilla's habeas petition had been filed in the wrong court – the SDNY – rather than in South Carolina, the place of Padilla's physical detention at the time the writ was filed. (In *Padilla*, Justices Stevens, Souter, Ginsburg and Breyer dissented.[23] They would have reached the merits in Padilla, a case which they described as "involving nothing less than the essence of a free society."[24])

What is the upshot of this trilogy of Supreme Court decisions as a constitutional and practical matter? Certainly, the Court did not return to the civil liberties high watermark of *Ex Parte Milligan*, but neither did it abstain or close the civilian courts to those detained by the United States military as enemies in the war on terrorism. Indeed, the decision may mean that the federal courts are open by way of habeas petition to perhaps every detainee in the war on terror to challenge their detention. What it will take to obtain any ultimate relief, however, is a separate and much more doubtful matter.

There has been much debate about whether the Supreme Court handed the President a huge defeat in the post-9/11 war on terror or, in large part, vindicated his exercise of the war powers. Interestingly, but perhaps predictably, the answers given by major editorial voices diverged dramatically, depending upon political orientation and the relative weight to be given to the competing interests of civil liberties and national security.

[The *New York Times* said this of the decisions, in its editorial entitled "Reaffirming the Rule of Law:"

> *"Part of the new normal that the Bush administration ushered in after September 11 was a radically broader view of the government's power to detain people.... Yesterday, the Supreme Court delivered a stinging rebuke to these policies.... [T]he Court made it clear that even during the war on terror, the government must adhere to the rule of law."*[25]

Similarly, Anthony Lewis' column in the *New York Times* declared that the Supreme Court:

> *"firmly rejected [President Bush's] presumption of omnipotence. It was as profound a day in the Court as any in a long time. The justices did what they have often shied away from doing: said no to the argument that the title commander-in-chief means that the President can do whatever he says is necessary to win a war."*[26]

So the trilogy of cases was seen by the *New York Times* and Anthony Lewis as a significant victory for civil liberties.

But, the *Wall Street Journal* editorialists and commentators had a decidedly different view. In its editorial entitled "Terror and the Court," the Wall Street Journal said:

> *"The instant reading of Monday's Supreme Court rulings on terror suspects is that they were, as AP asserted, 'a setback to the Bush administration's war against terrorism.' After reading the opinions, we'd say it's more accurate to call them a modest but important victory for the President. The Court's rulings will surely*

complicate U.S. detention policy, at least at the margins…. But…they uphold the longstanding and proper deference that the Supreme Court has shown throughout its history to the executive branch on national security, especially in wartime."[27]

In a *Wall Street Journal* op-ed piece, John Yoo, a Berkeley law professor and former Bush Justice Department official, expressed a similar view. Professor Yoo's conclusion was:

"…[D]espite the pleas of legal and media elites the justices did not turn back the clock to September 10, 2001. While the Court unwisely injected itself into military matters, closer examination reveals that it has affirmed the administration's fundamental legal approach to the war on terrorism, and left it with sufficient flexibility to effectively prevail in the future."][28]

My own view is that the decisions were neither a total victory nor a significant defeat for the President in conducting the war on terrorism. I also believe that the Supreme Court struck the right balance between national security and civil liberties. It opened the civilian courts to permit review of the President's actions, but without unnecessarily interfering with the President's ability to effectively conduct the war on terrorism.

III. The Realities That Should Not Be Blinked At

In *Hamdi v. Rumsfeld*, Justice O'Connor emphasized that, in striking the proper constitutional balance between the competing interests of national security and civil liberties in the war on terrorism, "our due process analysis need not blink at [the] realities [of war and combat]."[29]

In the last part of my remarks, I want to focus more broadly on that phrase: "Our due process analysis need not blink at the realities."[30] That phrase, to me, is key to understanding the Supreme Court's decisions – both this term and historically – because it is the realities of war and the dangers posed to public safety that have guided and will guide the Supreme Court in striking the permissible constitutional balance between national security and civil liberties in times of war. It is also these realities, tempered by a genuine concern for civil liberties, that should largely guide our counterterrorism policies and strategies.

But what are the realities of today's international terrorism? Many people have lost confidence in the credibility of the Government when it plays "the war on terror" card in justifying a wide range of counterterrorism initiatives. How much risk do we really face from al Qaeda and other terrorist groups? Are all of these post-9/11 initiatives that make us so uncomfortable from a civil liberties point of view really necessary? For some answers, I turn directly to my own past experience.

Let me take you back to the pre-9/11 world, from my perspective as the former United States Attorney whose office was in charge of most of the major international terrorism prosecutions and investigations being done in the U.S. from 1993-2001. A quick reminder of what those cases were:

The first major prosecution of international terrorism in my tenure as USA was of those responsible for the 1993 bombing of the World Trade Center in which 6 people died and for which 6 terrorists were convicted, including eventually the mastermind, Ramzi Yousef, who fled NYC on the day of the bombing – February 26, 1993 – and remained a fugitive for nearly two years. All six of those terrorists are now serving life sentences in federal prison, without the possibility of parole.

Next quickly came the prosecution of the thwarted 1993 plot to simultaneously blow up the U.N., the FBI building in New York, the George Washington Bridge, and the Lincoln and Holland Tunnels connecting New York and New Jersey, a plot in which 1000s of people were supposed to die on a single day in New York. A dozen terrorists were convicted for that plot, including its leader, the blind cleric Sheik Omar Abdel Rahman, who is also serving a life sentence in federal prison without the possibility of parole.

Then, in 1996, our office successfully prosecuted 3 terrorists in the so-called Manila Air plot, a plot hatched in late 1994 in the Philippines by Ramzi Yousef, the mastermind of the 1993 WTC bombing while he was a fugitive. Manila Air was a plot to blow up 12 U.S. jumbo jets in a single 48-hour period flying from Southeast Asia to the U.S. – another horrific terrorist plot that had it not been thwarted by the fortuity of a fire in the apartment where Yousef and his cohorts were building the bombs, would have also resulted in 1000s of deaths of innocent civilians over the Pacific Ocean. The three terrorists captured abroad and brought to trial in New York for the Manila Air plot are also serving life terms of imprisonment.

Next came the August 7, 1998 bombings of our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania in which 224 innocent people lost their lives, and for which 6 terrorists have so far been convicted and for which Osama bin Laden and the entire al Qaeda leadership were indicted in November 1998.

Next came the investigation of the bombing of the U.S.S. Cole in October 2000 in which 17 American Navy servicepeople were killed.

Finally, our Office spearheaded the initial stages of the investigation of the September 11th attacks, leading, in December 2001, to the indictment in the federal Court in Virginia of Zacarias Moussaoui, the so-called 20th hijacker, an indictment I co-signed before leaving office in January 2002.

It is a very chilling chronology and part of those realities that Justice O'Connor tells us our Constitution need not blink at when deciding how to strike the optimal balance between national security and civil liberties in the war on terrorism. So what did we learn or think we learned about the realities of international terrorism from the investigations and trials in the SDNY?

We pretty quickly learned two very harsh realities. Those realities were – and are – that today's world has been shrunk in a very unwelcome way by international terrorism and that international terrorism has indeed come – and will come again – to America.

In some ways, the trial of the East African Embassy bombings case, held in Manhattan federal court in 2001 just prior to September 11th, just a few blocks from the WTC, was surreal – so many deaths, so far away; most of the victims and witnesses were African citizens who worked at our embassies. Only 12 of the 224 victims of the embassy bombings were American citizens – not that that fact matters at all, either to the horror or tragedy of the loss of human life, or to the escalated and enhanced danger that those simultaneous massive bombings represented.

But I fear that, for most Americans, the distance from our shores of those bombings and deaths made the terror seem less real, less threatening and less dangerous than it was and is. The trial of the East African embassy bombings, however, brought home to at least those of us involved how the world had indeed been shrunk by international terrorism; how it strikes and slaughters innocent people everywhere; and how very much alike we all are. Losing a *husband*, a *mother*, a *brother*, a *friend*, a *colleague*, a *child*, is the same around the world; the grief and loss cut across the country of citizenship, and all differences in culture, language and religion.

We also learned from these cases and investigations that we can't think that terrorism abroad directed at Americans and American interests is somehow not our problem here at home. It is. We found out on February 26, 1993, when the WTC was first bombed by international terrorists, that terrorism had been brought from abroad to America. We were reminded of that lesson again when just prior to the Millennium New Year's Eve, Ahmed Ressam, an Algerian terrorist affiliated with al Qaeda, tried to bring in from Canada into Seattle the ingredients for a massive bomb intended to blow up a terminal at the Los Angeles airport. Then, we had that lesson and message forever riveted in our hearts and minds by the horror of September 11th when international terrorists struck again in NYC and at the Pentagon. And the danger of being attacked here at home has most certainly not passed.

We also learned from these cases that:

- *The people committing and planning these terrorist acts are smart and getting smarter and more sophisticated.*

--It took us awhile to recognize this. It was a running joke in the media after the 1993 Trade Center Bombing that the first terrorist arrested (Mohamed Salameh) was exceedingly dumb to have gone back to the Ryder Truck rental facility in New Jersey to pick up his $300 rental deposit on the truck that had been identified by its VIN as the truck that carried the WTC bomb. And, based upon another lapse, Nidal Ayyad, a chemical engineer and naturalized U.S. citizen, was connected to the 1993 WTC bombing when the DNA from his saliva was identified on the envelope of an anonymous letter sent to the New York Times claiming credit for the bombing. Law enforcement counts on such acts of stupidity and carelessness all the time to catch criminals. But these are no ordinary criminals.

--Many of the 9/11 hijackers were highly educated and came from well-to-do families. One was a physics teacher; another went to law school; another was made the imam of an established

mosque at the very young age of 22. A number had graduate degrees, including the operational ringleader, Mohammed Atta. Atta, the son of a lawyer, had earned his bachelor's degree in architectural engineering at Cairo University before going to Germany in 1992 to obtain his masters and doctoral degrees in engineering.

--Ramzi Yousef, a mastermind of the 1993 WTC bombing and the chief architect of the Manila Air Plot, is also highly educated, also with degrees in engineering; he speaks Urdu, Arabic and English fluently. He entered the United States on September 1, 1992 on a phony Iraqi passport, talking his way through immigration by claiming political asylum. He was also smart enough to flee the day of the WTC bombing – get out of the U.S. and it took two years to catch him. Yousef also used very sophisticated encrypted computer communications in plotting from the Philippines to blow up the multiple U.S. jumbo jets in the Manila Air plot. Yousef served as his own lawyer in his trial in New York for the Manila Air Plot – he lost, but it was chilling to see him (a non-lawyer with no legal training) performing so well and learning so quickly even in the totally unfamiliar context of an American courtroom.

--Obviously, when false identification papers, internet chat rooms, and suicide bombers are used (as was true in the East African bombings as well as in the September 11th attacks), it makes detection and apprehension very difficult.

--Certainly, the 9/11 terrorists knew a lot about our country and, in particular, airport and airplane security. So it would be our serious mistake to underestimate them.

•*How much does it cost to carry out one of these terrorist operations?*

--Not nearly enough.

--It is estimated that the 1993 WTC bomb cost no more than $10,000 to build and detonate.

--Chillingly (especially after 9/11), Ramzi Yousef told the agents on the plane bringing him back to the U.S. for trial, after he was apprehended in Pakistan in 1995, that his goal when he bombed the WTC in 1993 was to topple the twin towers of the WTC into each other so that more people would be killed than had died in Hiroshima. He failed, he said, this time, because he ran out of money to build a big enough bomb.

--There was more money involved in the 9/11 attacks. The 9/11 Commission estimates the figure somewhere between $400,000 $500,000[31] – but even if it took twice or three times that amount, it is still not an astronomical sum.

--As we learned from the East African Embassy bombing case and in investigating al Qaeda, bin Laden and the al Qaeda terrorist organization have, and have access to, a lot of money. It is because of the terrorists' resources that our government has correctly put such a high priority on finding, freezing, and seizing assets that could fund further terrorism. Every dollar matters. Disrupting the flow of funds (even in small amounts) can stop or postpone an imminent attack and give us time to try to stop it.

•*Who are these terrorists and how do they operate in the U.S.?*

--All of the terrorists charged and convicted in the SDNY cases were Islamic extremists (as were all of the 9/11 hijackers) who defiled the highly honorable religion of Islam by the doctrine of hate and evil they preached and the acts they carried out in the name of the terrorists' own self-created religion. Killing innocent civilians obviously isn't sanctioned under Islam or any other religion.

--Most of the terrorists in the SDNY terrorism cases, like all of the 9/11 hijackers, were citizens of various countries in the Middle East. But a few of the indicted terrorists in the New York cases were also American citizens, as are most of the more terrorists in Portland, Oregon, Detroit, Michigan, and Lackawanna and Albany, New York, charged with providing material support to the al Qaeda terrorist organization.

--Some of the SDNY terrorists, like Ramzi Yousef, entered the U.S. *illegally*, using fraudulent immigration and entry documents. Some entered *legally* on one kind of visa or another and then overstayed their visas and just disappeared into our country. Some, like most of the 9/11 terrorists, legally entered and legally remained in the United States on one kind of visa or another.

--We simply must dramatically reform the INS function and enhance our immigration procedures and laws. If anyone had any doubts about that, they should have evaporated when the INS last year extended the visas of Atta and el-Shehhi, two of the 9/11 hijackers, so that they could continue their flight training. They both had, of course, died on September 11th as they slammed the planes they had hijacked into the WTC. The INS situation is completely intolerable; our borders are out of control. Immigrants have made this country what it is, and we never want to lose that. But we must get greater control over who enters and who stays in our country. In doing so, we must not act unlawfully, but we must also not shy away from tighter laws and more rigorous enforcement of existing laws. It is a critical national security issue.

•*Why do these terrorists hate us, why are they attacking us?*

--Essentially, the terrorist leaders have declared their own, perverted brand of "jihad" (violent war) on the West and, in particular, America. Why?
--Because they consider all governments, Western and Islamic alike, to be the tools of infidels if they don't believe and act as the terrorists believe they should – and thus, in the terrorists' view, they need to be toppled.
--The terrorists don't like the United States because it supports other governments the terrorists don't like – not just Israel but also Egypt, for example.
--Al Qaeda opposed the involvement of the U.S. in the Gulf War in 1991 and in the U.N.'s Operation Rescue Hope in Somalia in 1993 (the subject of the movie "Blackhawk Down").
--Al Qaeda doesn't like our Middle East policies generally. Bin Laden doesn't like it that we, after the Gulf War at the invitation of the Saudi government, had troops stationed in Saudi Arabia where Muslim holy sites are located.
--In February 1998, bin Laden issued a fatwa – a religious edict or order – to all Muslims to kill all Americans – military or civilians – wherever in the world they can be found. This fatwa was the centerpiece of the 6/98 indictment of bin Laden for conspiring to kill American nationals. That chilling fatwa remains in effect today.
--Sadly, but predictably, the August 1998 bombings of our embassies in East Africa soon followed bin Laden's fatwa, and then, two years later, the October 2000 bombing in Yemen of the U.S.S. Cole, and then, less than a year later, September 11th. America is considered the "Great Satan" by these terrorists, and they will not stop their efforts to destroy our government and to do so by killing innocent civilians.

It is thus not difficult to see why we are and must be at war and that the war we are waging in response to the September 11th attacks is a war that is essential to win – not just to achieve justice and vindication for the 3,000 deaths on September 11th, but also to ensure the future safety of the world.

•*And yet many ask why we can't just leave it to the civilian criminal justice system to combat international terrorism after September 11th, and let our courts safeguard the civil liberties of terrorists and the rest of us.*

To be sure, during my tenure as U.S. Attorney, over 30 international terrorists were charged in Manhattan federal court – and not one was acquitted. But, over a dozen remained fugitives, including bin Laden himself, his number two in command, Ayman al-Zawahiri, and Khalid Sheik Mohammed, one of the alleged masterminds of the September 11th attacks, who was not apprehended until March 2003 in Pakistan. (Khalid Sheik Mohammed, Ramzi Yousef's uncle, was indicted in 1996 in the SDNY for involvement in Yousef's Manila Air plot to blow up the dozen U.S. jumbo jets.)

By any conventional measure, these cases were a huge prosecutorial success story (100% conviction rate, all affirmed on appeal) and at a time when there was no USA Patriot Act, there were no military tribunals, there was seldom detention of aliens for minor immigration offenses, and there was most certainly no significant military action in response to terrorism, let alone a preemptive war for regime change in Iraq. Given the success and fairness of our criminal justice system, some critics say that we don't need most of the post-9/11 counterterrorism measures that make us uneasy as a nation committed to an open society, civil liberties, and to the rule of law. I strongly disagree with these

critics.

--The criminal justice system is an important counterterrorism tool, but it is not and cannot begin to be the answer to combating international terrorism. No one, least of all those of us involved in the SDNY cases and investigations, ever thought it was. We are now at war and combating terrorism is largely in the hands of the military, where in my view, pre- and post-September 11th, it belongs.

--The criminal justice system, as effective as it has been in dealing with terrorists, has obvious limitations. Two of the primary limitations of the criminal justice system are that it necessarily can deal with only a small fraction of the world's tens of thousands of terrorists and criminal prosecutions have only limited deterrent effect.

--Obviously, each of the SDNY cases followed the one before it, ending (most recently) in the horrific attacks of September 11th. Convicting Ramzi Yousef for the 1993 WTC bombing and for the Manila Air Plot did not stop other would-be terrorists from bombing our embassies in East Africa in 1998 or from flying those planes into the WTC and the Pentagon on September 11th, 2001.

--And, the 100% conviction rate notwithstanding, these cases were extrraordinarily difficult to do in our criminal courts. Safeguarding critical intelligence and intelligence sources in criminal trials, consistent with our criminal discovery rules, is extremely hard and indeed can prove impossible, requiring dismissal of charges or an entire case out of deference to the more i important intelligence and national security interests. Witness the difficulties in the Zacarias Moussaoui case. Witness the judge's threat just last week in the case in Albany, New York, to dismiss the indictment if the Government does not timely produce information from intelligence sources to the defendants accused of providing material assistance to al Qaeda.[32]

--A global, systematic, military, diplomatic, and financial strategy to combat international terrorism is plainly necessary. Greater emphasis on intelligence and prevention is critical; if we are to get better at preventing terrorist attacks, it is vital that we enhance our abilities to collect intelligence and analyze it real-time, and then share it real-time, not only throughout this country, but also around the world. Intelligence from detainees has been critical in this ongoing war and in preventing future attacks. We must be able to continue to obtain that intelligence.

--Reaching out and strengthening understanding with the greater Muslim community is also very important in the war on terrorism and it is the right thing to do. Targeted economic aid and better education are also essential components of any long-term solution. Understanding and dealing effectively with the ultimate causes of terrorism are necessary if we are to be successful in preventing as many terrorist attacks as possible in the long term.

But we do not have the luxury of time. We must, in the short run, use every lawful means to safeguard our national security. We must be solicitous of civil liberties as we do so, but we must survive first and prevail against terrorism, or there will be no place in the world where civil liberties matter.

Conclusion

Although perhaps of little comfort to many, we should not forget that none of the anti-terrorism measures we have adopted since September 11th comes close to the severely criticized laws and measures we adopted in response to earlier national emergencies in our history – nothing close to the internment of citizens of Japanese ancestry after the bombing of Pearl Harbor during WWII, or to the criminalization of free speech during World War I; habeas corpus has not been suspended as it was during the Civil War. And, whether we agree or disagree with the decisions, we need to remember that most of these more extreme measures have been upheld by the Supreme Court as justified by the war or other national emergency that occasioned them. We saw no retreat from that deference in this term's decisions. The Constitution wisely allows that deference. But, having said that, we must ensure that our response to terrorism does not become a war *on* the very freedoms we are fighting to preserve.

Our best hope to avoid that are a well-informed and outspoken citizenry, real and bipartisan Congressional oversight (if there can be such a thing), and our courts – most especially our courts. Although there has been much criticism of the judiciary in times of war for excessive deference to the Executive Branch, the judiciary remains our most important civil liberties safeguard. And if we look

objectively at the post-9/11 court docket, we see our courts serving as a meaningful check and balance on the exercise of Executive powers in the war on terrorism as envisioned by our Constitution.

The trilogy of Supreme Court cases we discussed tonight is Exhibit A. The mere availability of judicial review will help keep the Executive in check during the war on terrorism. Witness the government's permitting Hamdi and Padilla access to counsel while their cases were pending in the Supreme Court; it also wouldn't surprise me to see Padilla charged with a crime before his case comes back to the Supreme Court. And, much to Justice Scalia's chagrin, the Supreme Court has now reached out to extend and even prescribe procedures that will be required by the Constitution. There will be no blank check to indefinitely detain anyone in this likely indefinite war on terrorism. That is a very good thing for civil liberties – and it is consistent with our nation's security as well.

We have also seen a resisting judiciary in other terrorism cases: in several of the rulings by the federal judge in the Zacarias Moussaoui case requiring that Moussaoui be given some kind of meaningful access to potentially exculpatory evidence that detainees in Guantánamo may have; in any number of pretrial and bail rulings in the cases brought since 9/11 against: Richard Reid, the shoe-bomber; Lynne Stewart, the lawyer for the blind Sheik; and in the case of the defendants accused of providing material assistance to al Qaeda. Unlike many of the critics of the judiciary, I think it is doing its job, its hard job of safeguarding civil liberties during the war on terrorism.

When our nation is most threatened, as it surely is now, our freedoms are also most threatened. The Constitution stands between us and those threats. Its principles must not be compromised. But the Constitution should also not be invoked in knee-jerk response to oppose measures that are both necessary for our national security and justified under our Constitution.

The horrific atrocities of September 11th are permanently emblazoned in our hearts and minds. We must never forget that day or those who died that day. As we go forward from 9/11, we must protect ourselves and the world too. We have granted our officials new and broader powers so that they can do that. Our Constitution allows that. But our officials must not be too emboldened by their new powers or too literal about the law. They do not always have to go to the outside of the legal envelope in every situation, even to combat terrorism. They should always act wisely and fairly, and consistent with both the letter and spirit of the rule of law. For it is that spirit that defines our country and all democratic societies.

If we were to lose that spirit or lower the bar on our fundamental principles and civil liberties, we would be the ultimate losers in the war against terrorism no matter what the scorecard of individual battles reads.

Endnotes:

[1] 124 S. Ct. 2633 (2004), 124 S. Ct. 2686 (2004), and 124 S. Ct. 2711 (2004).

[2] See Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J. dissenting); see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963).

[3] Hamdi, 124 S. Ct. 2633, 2650, 2648.

[4] 4 Wall 2, 71 U.S. 2 (1866).

[5] Id.

[6] January 2, 8, 1867 (quoted in William H. Rehnquist, All the Laws But One 133 (Vintage Books 2000) (1998).

[7] William H. Rehnquist, All the Laws But One 174 (Vintage Books 2000) (1998).

[8] 249 U.S. 47, 52 (1919).

[9] William H. Rehnquist, All the Laws But One 137 (Vintage Books 2000) (1998); see also Ex Parte Quirin, 317 U.S. at 45-46 (1942).

[10] Hamdi, 124 S. Ct. 2633, 2669.

[11] Padilla, 124 S. Ct. 2711, 2716.

[12] William H. Rehnquist, All the Laws But One 225 (Vintage Books 2000) (1998).

[13] See Hamdi, 124 S. Ct. at 2141.

[14] Hamdi, 124 S. Ct at 2648-49.

[15] Hamdi, 124 S. Ct. at 2671-72.

[16] Hamdi, 124 S. Ct. at 2673.

[17] Rasul, 124 S. Ct. at 2699.

[18] Rasul, 124 S. Ct. at 2701.

[19] Rasul, 124 S. Ct. at 2706.

[20] James Risen, 35 Guantánamo Detainees Are Given to Pakistan, *N.Y. Times*, September 19, 2004, at A35.

[21] Id.
[22] Padilla, 124 St. Ct. at 2726.
[23] Padilla, 124 St. Ct. at 2729.
[24] Padilla, 124 St. Ct. at 2735.
[25] *N.Y. Times*, June 29, 2004, at A26.
[26] Anthony Lewis, Court v. Bush, *N.Y. Times*, June 29, 2004, at A27.
[27] Review & Outlook, Terror & the Court, *Wall Street Journa*l, June 29, 2004, at A14.
[28] John Yoo, The Supreme Court Goes to War, *Wall Street Journal*, June 30, 2004, at A8.
[29] Hamdi, 124 S. Ct. at 2467.
[30] Id.
[31] The 9/11 Commission, The 9/11 Commission Report 169 (W. W. Norton & Co. 2004).
[32] Michael Virtanen, Judge Says Trial Should Proceed Promptly Despite Security Review, September 15, 2004, Associated Press.