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"Liberty, Security, and the Courts"

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Your President, Judge Leo Milonas, has asked me to repeat remarks I gave last November at a meeting of members of the Paris bar. My object was to help foreign lawyers understand the institutional context in which Americans will resolve their concerns about security and basic human rights. I described the kinds of issues that might soon arise, explained the courts' role, set forth a general framework that would help guide judicial decisions, and made clear that, not only judges, but many other Americans as well, would determine the ultimate outcome. I shall repeat the essence of that talk.

I

First, the current situation: Post September 11 civil liberties issues fall into three categories. The first includes the rights of detainees. These detainees include (1) approximately 600 individuals from 42 different countries who fought against allied forces in Afghanistan and are presently detained at Guantanamo Bay; (2) two American citizens, accused of crimes related to terrorism, who have been detained in military prisons; and (3) 200 of the thousand or so individuals arrested by the government after September 11 who are still being detained. This group includes aliens illegally present in the United States, material witnesses, and a few individuals accused of terrorism-related crimes.

The second category involves statutes increasing the government's information-gathering powers, for example, laws making it easier for the government to obtain a magistrate's approval for a search or wiretap, to proceed without approval in certain emergency situations, to listen to certain terrorist-related lawyer/client conversations (though these conversations cannot be introduced into evidence).

The third category includes those matters that might happen, but so far have not, for example, trials before military tribunals. Consequently, from a judicial perspective, the civil liberties cases involving detainees now seem more urgent.

II

Second: the legal questions presented. The detainee cases may ask the courts to decide, among other things: What law applies to the detainees in Cuba? What rights or guarantees does the applicable law grant them? Have those rights been respected? Are the restrictions imposed upon the two American citizens detained in military prisons consistent with basic Constitutional guarantees? What rights, if any, does the Constitution offer foreigners illegally present in the United States? What are the rights of material witnesses? In particular, to what extent and in what circumstances do ordinary courts lack jurisdictional competence to decide

these questions?

I cannot tell you how the courts will answer these questions. But as you understand, answers will be forthcoming. Our judicial system is open. An individual detainee, or a "next friend" if that detainee lacks immediate access to a court, can file a court complaint. The complaint can ask the judge for relief, say freedom from detention, access to counsel, or an amelioration of detention conditions. The court will respond, yes or no, grant or deny. And the losing party can appeal -- eventually to our Court. Indeed, a party concerned with delay can move for a speedy response and can seek review of an adverse ruling. And, if the government claims that the court lacks jurisdiction to decide a particular matter, the court, not the government, will decide if that is so, with the result in a lower court being subject to appeal.

Moreover, in our system, habeas corpus represents the norm, lack-of-jurisdiction the exception. The theory of the ancient habeas corpus writ is that anyone in detention can challenge the lawfulness of that detention by getting word to a judge, who can order the sheriff or other jailer to "bring me the body." If exceptions exist, courts will determine their scope and whether particular circumstances fall within them.

I emphasized these matters abroad because I wanted the European lawyers to understand that American courts remain open and will eventually answer the legal questions raised. Courts will decide how the law applies, what guarantees it provides, and whether the government has respected those guarantees. The recent decisions in the Hamdi and Padilla cases show that the process is well under way.

III

Third, a decision-making framework: We do not yet have authoritative judicial answers to many of the legal questions raised, but past experience during periods of emergency suggests several general principles that can help guide judicial decision-making.

1) *The Constitution applies even in times of dire emergency*. Who would think the contrary? Cicero did. He said inter armes leges silent -- "once the guns begin to sound, the laws fall silent." And Justice Jackson worried that the Court majority in *Korematsu* might have implicitly adopted Cicero's dictum. In dissent, Jackson warned the Court that wartime decisions could create disastrous precedents that would remain, like loaded guns, ready to be fired in the future.

But our Court, along with other modern courts, has explicitly denied Cicero's view. During the Civil War, the Supreme Court, in *Ex parte Milligan*, wrote that the Constitution does apply "in time of war as in time of peace." Indeed, in 1941, in the midst of hostilities, an English law lord, Lord Atkins, wrote that "the laws are not silent. Their substance may change, but they speak the same language." He added that England was engaged in a struggle for the right to maintain a government that would protect the liberties of its citizens. That objective demands that independent judges place themselves between government and citizen -- making certain that the government restricts liberty no more than the law permits.

These views embody the more ancient principle, summarized 350 years ago by Lord Coke, when he told England's king that his authority was limited, not "because the king" is "subject to human beings," but because "he is subject to God and to the law." We call this principle "the supremacy of law." No one in this country denies that principle. Its widespread acceptance keeps the courthouse doors open -- even in times of national emergency.

2) *The Constitution, emergency or no emergency, typically defines basic liberties in terms of equilibrium*. Law itself seeks to reconcile each individual's desire to act without restraint with the community's need to impose restraint in order to achieve common objectives. It is not

surprising that Constitutional guarantees often demand a similar balance. They seek an equilibrium permitting the government to respond to threats without abandoning democracy's commitment to individual liberty.

An equilibrium that is right in principle will yield flexibility in practice. The Fourth Amendment uses the word "reasonable," -- a word that permits different results in different circumstances. That Amendment, which ordinarily insists that a magistrate issue a warrant before a search, can relax that prior authorization requirement when a dangerous killer is loose in the neighborhood. In doing so, it does not abandon its commitment to personal privacy; it applies those protections in changed circumstances. The value does not change; the circumstances change, thereby shifting the point at which a proper balance is struck. That is what happens in wartime when more severe restrictions may be required. Justice Goldberg, paraphrasing Justice Jackson, pointed out that "the Constitution is not a suicide pact."

3) A *proper equilibrium requires courts to learn from past mistakes*. What mistakes? They include the speech-censoring Alien and Sedition Acts enacted during the Republic's early years. They include President Lincoln's suspension of the writ of Habeas Corpus during the Civil War. As a result, the Union generals imprisoned between 13,000 and 18,000 people -- all without benefit of judicial process. They include Congress's efforts during World War I to punish efforts to incite disobedience to the Draft and the Executive's efforts to use that law to prosecute political dissidents, for example, the publisher of a political cartoon showing a giant, called "conscription," crushing a worker and a farmer.

They include treatment of Japanese Americans during World War II when, soon after Pearl Harbor, the Government removed 110,000 individuals of Japanese origin, 2/3 of whom were American citizens, from their homes in California, sending them to camps located in Mountain and Mid-Western States. The Government feared sabotage -- though the FBI and J.Edgar Hoover himself *then* said they had no evidence of any act of sabotage or any sabotage threat. Politicians of the day, including our great civil liberties champion Earl Warren, supported the removal (much to their later regret). And the Supreme Court in *Korematsu*, a decision we now recognize as shameful, held that the Constitution permitted it.

Three justices, Jackson, Murphy, and Roberts, dissented. Justice Murphy pointed out that the evidence was not sufficient to accuse or convict any person of Japanese ancestry of espionage or sabotage directly after Pearl Harbor when these individuals were still free. Justice Jackson observed that the Court's holding posed a greater threat to liberty interests than the military order itself, which, "however unconstitutional, is not apt to last longer than the military emergency."

Most court historians now believe that these decisions were wrong. They benefit from hindsight. But, even so, the Court's overemphasis upon security demands seemed apparent to many at the time. And today, most believe the Court abdicated its review responsibilities, failing to find the kind of equilibrium that the Constitution demands. It seems fair to say that *Korematsu* now represents the kind of constitutional decision that courts should seek to avoid.

4) *To avoid those mistakes bench and bar must ask at least two questions: Why? and Why Not?* The question "why," when asked in respect to an unusual governmental restriction means, "why is this restriction necessary?" Courts, as well as lawyers, ask this question of government officials. Those officials can explain the special need, backing up the explanations with relevant supporting material. Courts can examine that material, in camera if necessary, even *ex parte*, say, with counsels' permission. Courts can give weight, leeway, or deference to the Government's explanation insofar as it reflects underlying expertise. But deference is not abdication. And ultimately the courts must determine not only the absolute importance of the security interest, but also, and more importantly, its relative importance, i.e., its importance when examined through the Constitution's own legal lens -- a lens that emphasizes the values that a democratic society places upon individual human liberty.

The second question, "why not," means why not achieve your security objective in less restrictive ways? Might the government, at little security cost, impose a restriction of shorter duration? Are sunset provisions possible? Might impartial administrative decision-makers play a role in the restriction's application? What about periodic reports about the implementation of the restriction, as well as its continued need?

Other nations have explored alternatives: Does the government fear a lawyer might become a conduit for a suspected terrorist's coded messages? I listened to a British lawyer describe how Britain limits the suspect's choice to a list of "secure" counsel -- a limitation that is restrictive compared to a suspect's ordinary totally free choice, but which is less restrictive than no counsel at all. Are the reasons for holding such a suspect powerfully compelling? I have heard Israeli lawyers describe how, in such circumstances, courts demand continued updates on the ongoing nature of that need.

Asking these questions -- looking for alternatives -- will not guarantee perfect constitutional results. But when lawyers, judges, security officials, and others, try to find alternatives, they help to avoid the kinds of constitutional mistakes previously described.

More importantly, the search for alternatives helps avoid two extreme positions. The first says that, insofar as war is concerned, the Constitution does not really matter. That is wrong. The Constitution always matters, perhaps particularly so in times of emergency. The second says that, insofar as the Constitution is concerned, war or security emergencies do not really matter. That is wrong too. Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies.

IV

Fourth, the role of others: Judges alone do not determine the content of the law that eventually will emerge. To the contrary, the American law-making process is one, not of law being dictated by judges or, for that matter, legislators. It is one of law "bubbling up" out of the interaction of groups of interested, affected individuals, experts, organizations such as private firms, unions, bar associations, and many others as well. Interactions take place through discussion and debate in the press, in journals, at public meetings, at colloquia, at legislative hearings, and in dozens of other formal and informal ways. These interactions take the form of a national conversation, with proposals being made, criticized, revised. And out of this conversation will emerge a legal product -- a product that often differs significantly from the original proposal.

That is why the many disagreements among us, reported in the press -- about government restrictions, security threats, civil liberties -- do not mean that disaster is upon us, but that the democratic process is at work. I believe that this is how the democratic process should work. My Court plays a role in the process, but it typically becomes involved fairly late in the day, to determine, say, whether that legal result, as applied, is consistent with basic constitutional norms.

That the Court's intervention comes late is often desirable, for we are relatively isolated from the facts and are aided by knowledge of how a particular provision has worked in practice. But that means that the job of reconciling civil liberties and security needs cannot possibly belong to judges alone. All of us -- including lawyers, administrators, legislators -- participate, and properly so.

Nor would I limit the "all" who can participate to Americans. We live in a world where communication is instantaneous, where other democracies have faced problems of terrorism, where other lawyers and judges have tried to make certain that the law respects basic individual freedom despite serious security problems. Indeed, the Council of Europe has issued Guidelines based upon Human Rights Court decisions. And the English Court of

Appeal, in a case involving British citizens being held at Guantanamo Bay, held that the legal questions at issue were for American Courts to decide, while observing that "the United States courts have the same respect for human rights as our own."

I see no reason why Americans should not read the European Guidelines or consult the lawyers, the courts, or the executive branch officials in countries with similar experiences, in our efforts properly to reconcile the relevant interests at home.

That in part, is why I am pleased to have had the opportunity to speak in France. I learned from what I heard there as I participated in a continuing conversation about the seriousness of the security problem and the importance of simultaneously maintaining our guarantees of basic freedom. Ultimately, that discussion reinforced my own conviction that the community of those concerned about security, those who remain dedicated to the protection of basic liberties, and those who place trust in the democratic process, is a world wide community. Its members learn from each other.

I conclude by pointing out that I have not told you what you really want to know -- how the civil liberties cases will be decided. I would like to know that too. I can only now describe a process. It is a process in which we all participate. And I can, and do, simply underscore the importance of your continuing participation.
