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Crossing the threshold:
While we're all fretting over the Patriot Act, John Ashcroft's Justice Department is after much bigger game

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ONE DAY IN 1985, Dr. Wolfgang Vogel, the famed East German "spy trader," sat down to breakfast at Boston's historic Parker House with an American lawyer he had retained to defend an East German physicist accused of spying. As they discussed the case, the lawyer noticed two men at a nearby table wearing trench coats despite the indoor warmth. He whispered to Vogel that he suspected they were FBI agents. "What makes you think they are FBI?" asked Vogel. "Their trench coats," the lawyer replied. Vogel smiled wryly: "They could just as easily be KGB. They all get their trench coats from the same manufacturer, you know."

Vogel knew this much about intelligence and law-enforcement officials on both sides of the Iron Curtain: they all shared the same "trench coat" motivations and instincts, regardless of ideology. There was just one difference, but it was all-important to the outcome of their work: those in the West, and particularly in the United States, were constrained by legal institutions that temper individual excesses and abuses of state power. In the Anglo-American West, the culture itself had been shaped by the rule of law.

But as everyone knows, "everything changed" on September 11, 2001, perhaps most worrisomely the rule of law. Indeed, among all the national-security measures taken since that fateful day — including two major foreign wars and the establishment of the Department of Homeland Security — none has been more controversial than the USA Patriot Act. Personally shepherded through Congress by Attorney General John Ashcroft, it authorizes the kinds of things that send shivers down civil libertarians' spines: invasions of personal privacy, restrictions on financial transactions, racial and ethnic profiling, blurring the line between foreign intelligence and domestic law enforcement, and punitive registration requirements for immigrants and visitors. And that's just a partial list.

Yet the hue and cry raised over the Patriot Act has distracted most of us from the Bush administration's far more dangerous assault on another class of liberties, which might be called "threshold rights." After all, the Patriot Act can be rolled back if the people decide that the government has overreached or the emergency has receded, and some provisions of the act have automatic expiration dates. But threshold rights — fair elections, open and publicly accountable government, judicial review of executive action, the right of the accused to a public jury trial, separation of powers among the three branches of government, and the rights to free expression and free association — are *structural*, and therefore changes to them are more enduring.

Threshold rights enable civil society to know what government is doing and to rein in abuses. Think of it this way: temporary restrictions on some forms of privacy enable the government to know what *you* are doing, which is troubling enough. Threshold rights enable you to know what the *government* is doing, and that's why they form the core of democratic society. The degree to which a society protects threshold rights speaks to whether it is free and open, and whether self-correction can occur without violence. If the press is free, the electorate has open elections, and the courts are performing their sworn duty, even a president who tries to assume the powers of an emperor can be dealt with.

Attacks on threshold rights supposedly justified by the "war on terrorism" are particularly menacing because this war has no foreseeable end, and the dangers are indisputably real. Nor will the war be contained geographically; as Ashcroft warned the House Judiciary Committee in June 2003, he now considers the streets of the nation to be "a war zone." On Ashcroft's domestic battlefield, threshold liberties are indeed under grave attack, and none with more alarming success, at least thus far, than the right to judicial oversight of the executive branch, specifically the writ of habeas corpus — the oldest and most fundamental right of free citizens in the Anglo-American legal tradition.

THE WRIT OF habeas corpus (Latin for "you have the body") compels the executive branch to produce a prisoner and disclose the legal basis for his or her detention, so the court may decide whether that detention is constitutional. This procedure, which stems from the English Magna Carta of 1215, lies at the very heart of constitutional government, consisting of separated powers guided by the rule of law. Without habeas corpus, there is nothing to prevent the executive from locking a person up without charge or lawful justification, never to be heard from again. Known appropriately in English history as the "Great Writ," habeas corpus is the brilliant light that protects Americans from the gulag. In a world where many governments have the power "to lock them up and throw away the key," habeas requires the judiciary to keep a spare key. In fact, the check habeas provides on executive detention powers doesn't stop with

the courts: the US Constitution grants power to suspend the writ only to *Congress*, and even then only in the event of "rebellion or invasion."

The government's assault on habeas corpus began six days after September 11, when Attorney General Ashcroft circulated draft legislation — what would soon become the Patriot Act — that included provisions for suspending the writ. As reported in Steven Brill's book *After: How America Confronted the September 12 Era*, Republican Wisconsin representative James Sensenbrenner, chair of the House Judiciary +, made it clear to the attorney general that habeas suspension was a "nonstarter" and that he wanted it out of the bill. The provision quietly evaporated from subsequent drafts, but Ashcroft has since pursued alternate means of circumventing habeas protections.

Some of the most fundamental changes are gaining ground through a strategy best described this way: start with the right test cases, keep the judiciary from interceding, and keep the press from learning too much by, for example, refusing to release the names of foreign prisoners and keeping case dockets under seal. If these changes remain below the radar of Congress and the people, and if they are left unchecked by our courts, it will be exceedingly difficult for fundamental liberty to recover even when the current crisis has passed.

Once threshold rights are stripped away, the only thing that stands between any of us and arbitrary imprisonment is the good will of the president, the attorney general, and the secretary of defense. Even if one trusts the judgment of the current occupants of these offices, to leave such power in their hands (and those of their successors) would violate the clear intent of the drafters of the Constitution. As Supreme Court justice Felix Frankfurter once wrote: "The historic phrase 'a government of laws and not of men' epitomized the distinguishing character of our political society.... [F]rom their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power, however disguised."

Fortunately, there is good reason to believe that the Supreme Court sees the need to balance liberty against security in Frankfurter's terms. Such optimism might come as a surprise to many, since the court has turned down opportunities to consider a variety of questionable governmental practices that have burst onto the scene since 9/11. But over the past three months, the court has agreed to review three cases that, taken together, go to the heart of habeas corpus. All concern the question of whether the president has unchecked authority to seize and hold a variety of prisoners as "enemy combatants," and to what extent the other branches of government — particularly the courts — should play a role in constraining such power.

The first case involves the consolidation of *Rasul v. Bush* and *Al Odah v. United States*, appeals by several prisoners being held at a remote US military base in Guantánamo Bay, Cuba. The question here is, can the federal courts review the legality of their detention and the government's plans for them? Because these prisoners are foreign nationals captured outside the territorial limits of the United States, the Departments of Justice and Defense claim that the courts have no business even asking why they are detained. In effect, the government's argument is that Guantánamo should amount to an American-controlled gulag — a no-man's land where unrestrained presidential power prevails.

After agreeing to review the Guantánamo case in November, the court surprised the DOJ and ordered a second case placed on its docket: the habeas corpus petition of Yaser Hamdi, an American citizen captured abroad and now being held in a US Naval brig off the coast of Virginia. During the 2001 war in Afghanistan, Northern Alliance forces had captured Hamdi, whom they described as armed and loyal to the Taliban, and handed him over to the US military. Hamdi's father filed a habeas corpus petition in June of 2002, seeking judicial review of his son's detention since the son, held incommunicado, could not file himself.

Hamdi, who lost his case in the lower courts and sought Supreme Court review, offers a variation on the question raised by the Guantánamo petition: whether an American citizen captured on foreign soil may be held in this country, designated an enemy combatant, and held in essentially the same status as the Guantánamo prisoners. In *Hamdi v. Rumsfeld*, the government's claims are not quite as bold as in the Guantánamo case; it does not claim that the courts have no authority at all, but rather that the courts' power extends merely to hearing why the government chose to treat a citizen in this fashion — not to question its decisions.

Once the Supreme Court agreed to hear *Hamdi*, the DOJ sought the court's review in a third case, that of another American citizen, Jose Padilla. Unlike Hamdi, Padilla was arrested in the US, but he too was designated an enemy combatant and held incommunicado in a military brig with neither charges lodged against him nor rights granted to him. When a lower court sided with Hamdi's claim that he was entitled to meaningful habeas corpus review, the DOJ had little choice but to seek the court's review of *Padilla v. Rumsfeld.*

The cases of the Guantánamo prisoners, Yaser Hamdi, and Jose Padilla, will be decided by the time the court takes its summer recess. What's at stake in all three is essentially whether we are governed by a president or a king. All other post-9/11 legal issues pale in comparison.

Some people believe themselves insulated from all this because Ashcroft's extreme measures have been targeted more heavily at foreigners and citizens of recent foreign origin — people with names like Yaser, Iyman, and Ali, whom native-born citizens with native-born parents

could easily dismiss as being "them" rather than "us." Indeed, in an August 19, 2003, speech, Ashcroft defended the Patriot Act in part by asserting that most Americans feel safe from its reach. Under our system of laws, however, such confidence is misplaced. The Bill of Rights insists that all persons be treated not only fairly, but equally. This constitutional mandate is bolstered by the common-law notion that previous court decisions serve as precedents that determine the outcome of later cases presenting similar facts. The Supreme Court, in reviewing the three habeas corpus cases before it, may make distinctions between the rights of people held abroad versus within US territorial limits, or between citizens and noncitizens. But it's pretty clear that these cases are linked in the court's mind, and that whatever rights the court accords these prisoners will determine the rights of anyone else who ends up on the wrong side of a presidential decree.

ON THE MORNING of June 10, 2002, criminal-defense attorney Donna Newman was driving to work. In the Manhattan federal courthouse where she was headed, Judge Michael Mukasey's calendar indicated that her client Jose Padilla, a Brooklyn-born US citizen who had been jailed for nearly a month as a "material witness" for a federal grand jury, would appear for a hearing the next day, in which Mukasey would consider whether Padilla's continued detention was justified. Then Newman's cell phone rang: late the night before, military officials had come to Padilla's cell and — without informing Newman — spirited him away to a Naval brig in Charleston, South Carolina, where he was being held incommunicado. Newman later told *Time* magazine she was incredulous — "This has never happened to anybody before" — and couldn't help thinking it was a joke. But in a press conference later that day (broadcast, with insufficient attention to appearances, from Moscow), Attorney General Ashcroft announced that the president had classified Padilla an enemy combatant because he was "a United States citizen who had joined the enemy" by conspiring with Al Qaeda officials to detonate a radioactive "dirty bomb" somewhere in the United States.

After unsuccessfully seeking information about Padilla's status from the Department of Defense, Newman hastily drafted a petition for a writ of habeas corpus on Padilla's behalf, arguing that this military detention violated his constitutional rights and asking the court to order him released from military custody and returned to New York. The following morning, still denied information about her client's status beyond what she could get from news reports, she filed the petition with Judge Mukasey.

Holding civilians in military custody is not entirely new, but it is extremely rare. In the past, it has also been limited in duration and subject to oversight by the courts. But grabbing both foreign nationals and US citizens, placing them in military custody, denying them access to friends, family, and attorneys, and then attempting to shield their jailers from judicial (and public) scrutiny is simply unprecedented.

The Justice Department has argued that Padilla's detention is a matter for military decision-making and that respect for the separation of powers requires the courts to avoid inquiring too deeply. In words reminiscent of Orwellian Newspeak, the DOJ responded to Padilla's habeas corpus petition this way: "The Court owes the executive branch great deference in matters of national security and military affairs, and deference is particularly warranted in respect to the exceptionally sensitive and important determination [of enemy-combatant status] at issue here." In other words, a constitutional right that only Congress can suspend and that assures an arrestee judicial review can be thwarted solely on the say-so of the branch holding him prisoner — and that for the judiciary to second-guess the jailer is a violation of the separation of powers! According to Ashcroft, the respect that one branch of government owes another goes in only one direction.

The DOJ initially also responded to Newman's habeas petition by making the Catch-22 argument that Newman had no standing to bring the petition on Padilla's behalf because she — denied access to her client by the military authorities holding him — had failed to consult him. Making matters worse, it attempted "forum shopping" — seeking to be heard by the court most favorable to one's side — by requesting that the case be transferred some 700 miles south, to the District of South Carolina, where the prisoner was being held and where any appeal would go to the notoriously pro-government US Court of Appeals for the Fourth Circuit, in Richmond. Judge Mukasey, however, refused the transfer and ordered the government to provide Padilla with access to attorney Newman so that the two could respond to the government's claims. The burden placed on the government was quite modest — all it had to do to keep Padilla locked up was show that there was "some evidence" supporting the enemy-combatant classification.

The Justice Department was not satisfied. It asked Mukasey to reconsider, arguing that Padilla should not be permitted to respond, because the only question was whether the government did indeed have "some evidence" to hold him; Padilla's response to that evidence was irrelevant. And what was that evidence? A government declaration asserting little more than that the president had reason and authority to designate Padilla an enemy combatant. Revealingly, the DOJ decided to supplement that cursory justification with a second declaration, written by Vice-Admiral Lowell Jacoby, head of the Defense Intelligence Agency, which asserted that to provide Padilla access to a lawyer would "substantially harm national security interests" by offering him some hope of freedom: "Padilla is unlikely to cooperate if he believes that an attorney will intercede in his detention.... Providing him access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil-litigation process. This would break — probably irreparably — the sense of dependency and trust that the interrogators are attempting to create."

Usually, when the government wants to convince a court not to grant a prisoner a right, it merely argues that the prisoner doesn't need the right. Here, for the first time in memory, the government seeks to justify squashing a constitutional right (access to legal counsel) precisely because denying that right would further an improper goal (namely, using isolation to break Padilla's will) — and it has the audacity not only to admit this to a court, but to seek the court's assistance in preserving that coercive environment. This turns the rationale for granting constitutional rights on its head. The rule of law exists to prevent, not promote, such a sense of hopelessness in the face of unrestrained governmental power.

Judge Mukasey refused to be swayed, again ordering the military to grant Padilla access to Newman. Padilla, he said, should be permitted to learn some facts and to challenge the government's evidence. Undaunted, the Department appealed to the Second Circuit Court of Appeals in New York, which had jurisdiction because Judge Mukasey had blocked the DOJ's effort to move the case to the more compliant Fourth Circuit. The Second Circuit was even less persuaded than Judge Mukasey. Its 2-1 decision rejected the claim that the president has authority to detain those he alone defines as enemy combatants. In addition, the court said that the military detention of US citizens as enemy combatants violates the Non-Detention Act of 1971, which states: "No citizen shall be imprisoned or detained by the United States except pursuant to an act of Congress." Congress has not passed any kind of enemy-combatant statute. The New York panel of judges, on December 18, 2003, ordered Padilla released within 30 days to face criminal charges in the civilian justice system — the order that the Supreme Court agreed to review on an expedited basis so that it could be decided along with the Guantánamo and Hamdi cases.

As the New York arm of the Justice Department chafed against both the Manhattan trial judge's and the Second Circuit's exercise in judicial independence, their colleagues to the south were, predictably, having better luck with Hamdi's case, which was being heard by the executive-friendly Fourth Circuit. In this case, the Justice Department went a step further than it did in *Padilla* and argued that the courts should give *total deference* to executive judgments: "A court's inquiry should come to an end once the military has shown ... that it has determined that the detainee is an enemy combatant." In other words, the government did not want to have to produce *any* evidence, other than the circumstances of his capture, to justify detaining Hamdi. This argument was based on the fact that Hamdi, unlike Padilla, was captured by the military outside the territorial limits of the US. The DOJ claimed that the courts simply have to accept the military's conclusion that, based on that circumstance alone, the prisoner is an enemy combatant. A three-judge panel of the Fourth Circuit agreed, ruling that a lone document asserting that Hamdi was captured while in a "zone of active combat operations"

(regardless of his purpose for being there), submitted by a government official who was not even a direct witness to the capture, was sufficient to end the inquiry.

That Hamdi's case was heard by the Fourth Circuit, widely considered the most pro-government of all the federal courts, gave the government an advantage. Interestingly, however, even the Fourth Circuit was not as united and deferential as the DOJ might have wished in Hamdi's case. In deciding not to reconsider the three-judge panel's decision, the full Fourth Circuit split eight to four. The dissent penned by Judge Diana Gribbon Motz drove to the heart of the issue, expressing alarm that "a short hearsay declaration by ... an unelected, otherwise unknown, government 'advisor'" was sufficient basis for deciding the court had no power to question this exercise of executive authority, and hence no further habeas role. But Judge Motz was in the minority, and the attorney general thus effectively circumvented Representative Sensenbrenner's refusal to consider including the suspension of habeas corpus in the Patriot Act.

In addition to Padilla and Hamdi, the court will consider the rights of the nearly 700 noncitizens detained at the US military base in Guantánamo Bay, Cuba. This site — a broad expanse of cell blocks hastily welded out of stacks of shipping containers turned on their sides, surrounded with razor wire, draped with green plastic sheets, and placed under the glare of outdoor halogen lamps — was selected for a very deliberate reason. The curious legal status of the land at Guantánamo — occupied by the US under a long-term lease granted by the Cuban government in 1903 — means that although it's under US control, it is technically not part of the sovereign territory of the United States. American power controls Guantánamo, but American justice does not prevail.

In *Rasul v. Bush* and *Al Odah v. United States*, the two habeas corpus petitions brought on behalf of several Kuwaitis, Australians, and Britons held at Guantánamo, the Court of Appeals for the DC Circuit used this lease status, together with the noncitizen status of the detainees, as grounds to refuse to assert jurisdiction — and therefore to deny the right of review: "[N]o court in this country has jurisdiction to grant habeas relief ... to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States." When the prisoners sought Supreme Court review, the DOJ objected with the remarkable argument that the law "does not establish that aliens detained by the military abroad are without any rights or process, but rather that the scope of those rights or procedures are to be determined by the Executive and the military, and not the courts." In other words, argued the DOJ, the president — not the Supreme Court — gets to determine the rules. The US Supreme Court, rising to this challenge to its authority, agreed to hear arguments on the question of the judiciary's role and power.

Some Guantánamo detainees will soon be tried in the executive branch's new military tribunals, which (if the DOJ has its way) will have the power to impose capital punishment free of any civilian judicial review of the penalty, the verdict, or even the grounds for declaring the condemned to be enemy combatants in the first place. This marks a huge departure from both normal courts-martial and the World War II tribunals that the DOJ claims are its model. According to rules recently issued by the Department of Defense, tribunals can now block defendants and their lawyers from obtaining any evidence — classified or unclassified — that prosecutors deem "protected information" for unspecified "national security" reasons, including evidence of innocence. Defense lawyers are required to report to the government certain types of "national security" information learned from their clients, and attorney-client conversations may be monitored for "intelligence purposes" — provisions that violate both legal ethics and the attorney-client privilege. Defense lawyers are barred from hiring outside consultants or experts. And prisoners have no right of appeal to civilian courts — a provision to which even military defense lawyers have objected. Even if a Guantánamo detainee manages to win an acquittal from a military tribunal under these circumstances, it could be a Pyrrhic victory; the government has reserved the power to hold military-tribunal defendants indefinitely, *even if they are found not guilty*. There is an old lawyers' quip that military justice is to justice what military music is to music, but these new rules — particularly those barring civilian-court review — force military justice a huge step further down into the dungeon.

Some have attempted to justify these secret proceedings as a way to protect sensitive national-security information from falling into the wrong hands. In effect, they argue that any FBI agent or military official with an executive-branch security clearance is more trustworthy than a federal judge appointed for life by the president and confirmed by the Senate. Whatever the *real* reasons why the administration seeks to keep judges' noses out of the darker corners of these military prisons, surely fear that judges cannot be trusted to keep secrets in the name of national security cannot seriously be one of them.

Unless the Supreme Court rejects the DOJ's arguments in these three cases, the department will have effectively emasculated the Great Writ, and done so not by defying the court, but with its acquiescence. Ashcroft will accomplish indirectly what Sensenbrenner warned him against trying directly in the Patriot Act.

On June 5, 2003, Ashcroft told the House Judiciary Committee: "When a person is part of a war against the United States as a combatant against the United States, that person is subject to detention under the power of the president to protect the United States. And the courts have not interfered with that in any significant way. And I don't think courts will." If Ashcroft is correct, and the Supreme Court bows to the government in the three enemy-combatant cases now under review, then the most fundamental underpinning of liberty will have all but

disappeared in the hard cases for which the writ was designed, and no one will be able to claim that the president either suspended the writ or otherwise acted lawlessly. Tyranny will be clothed in the garments of legitimacy.

THE EVISCERATION of habeas corpus, creating a shadowy network of military brigs and prison camps, would also have a profound impact on the part of the justice system the public does see. It would turn those trials into show trials rather than true adversarial legal proceedings in which defendants and their lawyers can actually question the government's evidence and present evidence of their own.

In Arthur Koestler's powerful novel *Darkness at Noon*, set during the Soviet show trials of the 1930s, the protagonist is accused of crimes against the state and is given a choice by his jailers. If he signs a confession and admits wrongdoing, he will receive a public trial. But if he refuses to cooperate, his case will be dealt with "administratively" and out of sight. This two-track justice system, in which "problem" cases were whisked from view and dealt with in secret while public trials merely paraded the coerced guilt of the "accused," converted the Soviet Union's justice system into an appalling masquerade. And it is this kind of two-track system that habeas-free enemy-combatant detentions threaten to create. The American and Stalinist Soviet justice systems are, of course, far from identical, but it is dangerous to adopt a device that totalitarian governments have found so useful.

This pernicious process begins prior to the trial, when the prosecutors seek a confession. In the past, prosecutors could use the threat of long prison sentences or even the death penalty to convince defendants to plead guilty rather than risk a trial. With the threat of enemy-combatant detention hanging over plea negotiations, however, prosecutors now have a far more potent coercive tool to use against those suspected of terrorism-related crimes. By merely declaring a person an enemy combatant, the government can detain a citizen or noncitizen with minimal, if any, judicial review and without having to prove anything. For the defendant who is offered a plea bargain, the implicit choice is thus no longer between a plea bargain and a public criminal trial in accordance with the Bill of Rights, but rather between a plea bargain and the legal black hole of indefinite detention. Under this paradigm, there will be few, if any, public trials of terror arrestees, but more plea bargains and, for those who don't recognize an offer that cannot be refused, more enemy-combatant detentions. Two recent cases — a plea bargain achieved under the threat of enemy-combatant status, and a criminal prosecution that became an enemy-combatant detention in lieu of trial — illustrate how this Soviet-style system operates.

Consider the case of Iyman Faris. In March 2003, federal prosecutors secretly arrested the 34-year-old Faris, a naturalized US citizen from Kashmir accused of plotting to destroy the Brooklyn

Bridge and derail a train in Washington, DC, held him incommunicado for two months, and then made him an offer: he could cop a plea and cooperate with the FBI, or they would designate him an enemy combatant. Faced with disappearing into the black hole of indefinite military detention, he accepted the certainty of a plea bargain and a long sentence. Faris's lawyer, J. Frederick Sinclair (himself a former federal prosecutor), cooperated with prosecutors to draft a plea agreement in which Faris pled guilty to "material support of terrorism," signed a five-page "statement of facts" regarding the alleged plot, and waived all rights to obtain his case records under the Freedom of Information Act or to appeal his sentence or conviction. These waivers make it nearly impossible for anyone to determine whether the statement Faris signed is true. Indeed, Faris told interrogators in June that the "facts" were a lie. Jail authorities then medicated him with antidepressants and antipsychotics. Nevertheless, Faris stood up during his sentencing hearing in October to insist that he had pled guilty because of pressure by prosecutors and federal agents. He was sentenced to 20 years.

Within days of announcing Faris's plea bargain, the Justice Department showed what happens to those who refuse to cooperate. Qatari student Ali Saleh Kahlah al-Marri, accused of lying to the FBI and engaging in allegedly terrorist-related credit-card fraud, tried to call the prosecutors' bluff by pleading not guilty, presumably believing he would be able to defend himself successfully before a jury of ordinary Americans in a public trial. His lawyer, Lawrence Lustig, was optimistic, telling the *New York Times* that he and his client "thought he had a powerful defense." But one month before al-Marri's scheduled trial, the Justice Department announced that "national security interests" required that he be held as an enemy combatant. He is now in military custody, with no access to his lawyer.

This pair of cases illustrates how prosecutors can use the threat of enemy-combatant detention to condition a prisoner's access to the civilian justice system upon the prisoner's agreement to plead guilty and read a government script. What kind of trial is it when the alternative to going along with the script is rotting in an enemy-combatant twilight zone? Before 9/11, prosecutors were assumed to have no such power over anyone, either American citizens or foreign nationals.

Absent a trial, the government is never forced to produce evidence supporting its accusations. As they did with both Faris and al-Marri, prosecutors can publicize sensational accusations, issue dark hints about secret evidence, declare another victory in the war on terror, and then move on to the next prosecution without ever having to substantiate anything.

Indeed, prosecutors have another incentive to evade courts and juries: not all "terrorism" accusations to date have survived the scrutiny of dedicated, impartial jurors. Take, for example, one of the few recent cases of alleged terrorism to reach a jury, in which federal prosecutors

accused four Arab immigrants in Detroit of providing material support for terrorism and conspiring to engage in fraud or misuse of visas, permits, and other documents. During the trial, prosecutors had little hard evidence, instead depending on hazy suggestions of terrorist ties. They made much of the fact, for example, that the defendants' apartment contained 100 audiotapes of lectures by a Muslim cleric, which they described as extremist advocacy for holy war, and of home videos and sketches that they claimed were attempts to case sites like Disneyland and the MGM Grand in Las Vegas. However, according to one juror quoted in the *New York Times*, the jury did not allow this cloud of vague suspicion to affect its deliberations: "We totally separated 9/11, the war on terrorism, from what we were doing." This showed in the verdicts: of the four defendants, the jury acquitted one entirely, found one guilty only of document fraud, and found the other two of guilty of both document fraud and the terrorism-related charges. When DOJ officials try to steer terrorism cases away from jury trials, they claim that public trials might compromise national security and intelligence-gathering methods. But it is hard to ignore the suspicion that their real concern is that ordinary, conscientious jurors might not buy the DOJ line uncritically. After all, the courts have many years of experience conducting public jury trials of cases with national-security implications, in which closed sessions are used only for the presentation of evidence that the judge rules too sensitive for public display.

Of course, sometimes even the scrutiny of jurors is not enough to assure the triumph of truth. In the Detroit case, the two terrorism convictions have been tainted by prosecutors' apparent efforts to stretch the facts further than ethically possible. Revelations surfaced in December that during the trial, prosecutors withheld from the defense important evidence that cast doubt on the reliability of the government's key witness, a scam artist from Morocco who was a former roommate of the defendants. According to a letter from the witness's cellmate in jail, intercepted by prosecutors, the witness described to his cellmate "how he lied to the FBI, how he fooled the Secret Service agent on his case." That prosecutors felt it necessary to stoop to such misconduct indicates that many of these "terror" prosecutions are so flawed and lacking in real evidence that the government has a huge incentive to avoid the criminal-justice system.

Full-dress trials are already becoming rare in terror cases. Even before the Faris case, prosecutors were pursuing plea bargains rather than trials. Three of the most prominent terrorism cases — Richard Reid (the "shoe bomber"), John Walker Lindh (the "American Taliban"), the "Lackawanna Six" (described by prosecutors as a sleeper cell), and James Ujaama (a Seattle man accused of ties to Al Qaeda) — ended when the defendants agreed to plead guilty. And, like the Faris plea bargain, some of these earlier plea bargains were struck under coercive threats of imposing "enemy combatant" status. When discussing the Lackawanna case with the *Washington Post*, US Attorney Michael Battle said that although his office never

explicitly threatened the defendants with "enemy combatant" status, all sides knew the Defense Department had a "hammer" on the table: "We are trying to use the full arsenal of our powers," he told the *Post.*

Moreover, for the few cases that do not end in a plea bargain, prosecutors retain the right to yank the case from public view and return the defendant to military detention, even after the trial has *already begun*. Take, for example, the ongoing case of Zacarias Moussaoui, the alleged "20th hijacker" in the September 11 plot. When Moussaoui requested access to three potential witnesses who are in US military custody, prosecutors balked, refusing to obey the court order granting Moussaoui such access because, prosecutors asserted, it would "necessarily result in the disclosure of classified information." Unless the prosecutors are permitted to continue the trial without producing the witnesses, government officials have indicated that they may abandon the criminal prosecution and instead subject Moussaoui to a military tribunal.

Besides, there is nothing under this new system to stop prosecutors from re-imprisoning the defendant even *after* a trial in which the defendant has *prevailed*. In civilian criminal prosecutions, the Fifth Amendment's prohibition against double jeopardy would prevent such an abuse. But no such prohibition exists for post-acquittal enemy-combatant" detentions. Thus, a terror suspect could stand trial and be acquitted by a jury, but subsequently be forced back into military custody as an enemy combatant. This power to re-arrest after acquittal recalls one particularly noxious historical example: in Nazi Germany, on the rare occasions when the Volksgerichtshof ("People's Court") failed to find a defendant guilty, the Gestapo would often take the prisoner into "preventive detention" immediately after the verdict — sometimes even before the defendant had left the courtroom. A nation need not be as deeply evil as Nazi Germany to make a mockery of justice by embracing such a device.

This is the broader consequence of the assault on habeas corpus. The Justice Department is creating a two-track justice system that renders the normal criminal-justice process largely irrelevant for terrorism defendants, shunting difficult defendants into secret, unreviewable military custody and reserving increasingly rare public trials for those few cases in which conviction or, more likely, a coerced and scripted guilty plea, is almost certain because the DOJ has rewritten the rules.

THIS IS NOT the first time the executive branch has tried to limit habeas corpus. In 1996, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act. This law created a series of procedural hurdles making it more difficult for civilians charged with criminal offenses to use habeas to challenge the validity of an original trial on appeal. However, with the aid of a lawyer, a prisoner could still present his or her case once the procedural hurdles were overcome.

The current curtailment of the writ is even more dangerous than President Lincoln's wartime suspension of habeas. Lincoln, though he initially acted on his own, sought congressional authorization as soon as practicable, calling a special session to consider his wartime measures. Also, rather than suspend the writ everywhere at once, he moved incrementally, starting with areas most likely to rebel. Most important, Lincoln suspended the writ only for the duration of the Civil War. In contrast, today's DOJ is trying to eviscerate habeas corpus everywhere at once, without seeking congressional authorization for its actions, and without suggesting a clear endpoint at which the "wartime" conditions will cease.

For civil libertarians, of course, the most egregious example of past habeas corpus violations remains the notorious internment of Japanese-Americans during World War II. The facts are well-known: the US government forced some 110,000 Americans of Japanese ancestry, two-thirds of whom were US citizens, out of their homes and into military internment camps for the duration of the war, allegedly because suspected saboteurs were hiding in Japanese-American communities. In a 1944 decision widely criticized as a nadir for American civil liberties and judicial review, the Supreme Court in*Korematsu v. United States* gave the internment program the imprimatur of constitutionality. In this extraordinary move, the judiciary deferred to a military measure that treated citizens like prisoners of war.

Not that the court wasn't uneasy about it. Justice Robert Jackson expressed concern that the court, "having no real evidence before it," had no choice but to accept a document titled "Final Report: Japanese Evacuation from the West Coast, 1942," submitted by General J.L. DeWitt, who oversaw the internment program and argued that the exigencies of the security situation forced him to advocate urgent measures. It would later be revealed that the report, citing long-since-discredited allegations, deliberately misled the court about the danger of sabotage. It was also later revealed that in the *non-public version* of the report circulated solely among top War Department officials, DeWitt justified the internment on explicitly racist grounds — namely, that the Japanese people as a whole were peculiarly inscrutable, making it "unfeasible" to determine individual loyalty or disloyalty. In May 1943, amid worries about how this racial prejudice might look to the Supreme Court, DeWitt and other Army officials quickly rewrote the report, deleting the racial justification and replacing it with concerns about exigency. Once this new report was printed, the War Department systematically destroyed all copies of the original report, except for one that accidentally escaped notice and ended up in the National Archives.

Four decades later, historians uncovered this scandal, and soon thereafter the courts rescinded the criminal convictions of those who had defied their internment orders. That it took more than 40 years to clear the names of the Japanese-Americans in these cases is not exactly a ringing endorsement of our judiciary — especially since the legal conclusions of *Korematsu*,

concerning the breadth of executive and military powers in times of emergency, remain on the books.

Yet in three important respects the Japanese internment cases did *less* damage to basic principles of democracy than today's assault on habeas corpus threatens to do. First, in the WWII cases, the government felt compelled to concoct an elaborate lie to convince the court of its noble intentions, which suggests that it took seriously the need to persuade the court that detention was necessary. Today the government is not showing even that backhanded measure of deference to a co-equal branch of government, choosing instead to submit nothing more than two-to-three-page statements written by officials without firsthand knowledge and expecting courts to acquiesce without questioning the evidence or hearing anything from the other side. Second, in the WWII cases, detained citizens had the opportunity to consult lawyers and attempt to rebut falsehoods presented by the government. Finally, although the Japanese internment orders affected a much larger number of people than the "terror" detentions have done thus far, the WWII internment was limited by the finite duration of the war. In contrast, the present ill-defined "war on terrorism" and the attendant detentions have no foreseeable end.

Even if, years hence, the nation concludes that the terrorism emergency has ended, will the people still have the institutional wherewithal and presence of mind to restore the lost structures of liberty? How far will liberty corrode before the American people challenge executive power, as England's barons confronted King John at Runnymede in the summer of 1215, when the Magna Carta and the writ of habeas corpus were born? Those great men may have devised the foundation of our liberty — a foundation upon which our nation's Founders built — but it is our own noble obligation to preserve it for posterity.

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