Constitutions, Democracy, and the Rule of Law
Terror and Civil Liberties
October 17, 2003
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“A Democracies Die Behind Closed Doors”

Akeel Bilgrami: The theme of our second day’s symposium is more explicitly current than yesterday’s. The PATRIOT Act, and a series of somewhat less publicized executive orders and interim regulations, have raised various issues of concern. This, to begin with, the scaling up of secrecy, leads to the anxiety that Judge Damon J. Keith memorably expressed when he said, “Democracies die behind closed doors.” There’s the issue of undermining and entrenched distinction between intelligence operations and law enforcement, by lowering the protections that individuals have against criminal investigation. There is the issue of the criminalization of dissent raised by the powers created to arrest or deport those who are members of—or even donors to—groups which are suspected of being associated with terrorism.

And there is the issue, even if not one of civil liberties directly, created by the very fact of a plethora of executive orders outside of the reach and the ratification of the legislature and the judiciary. That is the issue of the immersion of what is familiarly described as the system of checks and balances. This today, it came close to being suggested, that it is a source of wholesale skepticism about the element of judiciary review in this system. That the judiciary sometimes clamor to ratify rather than resist and its executive aspiration that we do not like. But that cannot be quite right. At any rate, it cannot be anymore right than it is to suppose that it is a source of wholesale skepticism about the system of democratic predictions. That it sometimes overwhelmingly produces electoral outcomes that we do not like.

The issues I mentioned speak to the rights registered in the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. But in fact, the situation in Guantanamo Bay speaks more widely as well to the basic tenets of international law and of human rights quite outside of the United States Constitution.
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Now, of course I put these matters tendentiously, one-sidedly. The question before us really is whether and to what extent the context of terror and the question of security that it raises may allow us to see these issues that I've mentioned as something that a doctrinal commitment to civil liberties may take within its stride. So to take just two examples, in the context of a very serious threat to public safety raised by terrorism, might we not see it now as an interpretatively more open matter? How much do you process the Fifth and Fourteenth Amendment to commitment to due process should be seen as demanding?

So also, might not the same context leave interpretatively more open what is to count as unreasonable in the Fourth Amendment than unreasonable searches and seizures? In a word, the question before us is how contextual should our constitutional understanding of these liberties be?

The Diverse Disciplines of the Speakers

The speakers this morning who come from four different disciplines: law, sociology, political science, and philosophy, bring diverse angles to this question. George Fletcher addresses the legal issues and takes a sturdy position on them. James Fearon complicates the question by looking to long- and short-term concerns about terror, and sees these as demanding differential response in each case. Diego Gambetta raises a higher-order question about whether we really are epistemically well placed to so much as take any definite position at all on civil liberties because of the difficulties of assessing the terrorist threat on the basis of information which is gathered and transmitted under assumptions that are murky and under pressures that discourage rational investigation. And G.A. Cohen, in a paper that is at once provocative and humane, stands aside from the civil liberties to ask an intriguing question in moral philosophy about what the appropriate location is for making moral judgments about terror.

I want to just add that it is a matter of real sorrow and regret for everyone on this platform, and many in the audience, that a remarkable philosopher and a remarkable man, Bernard Williams, who died a few months ago is not here to speak today as he was scheduled to do. This promises to be a day of great brilliance and great fun but it will be less brilliant and less fun because Bernard's not here. You have the biographies of each speaker in your hands, so I will not rehearse them now. I will just ask our own George Fletcher from the Columbia Law School to speak first.