



OWEN FISS

Law Is Everywhere

TRIBUTE

The phrase “War on Terror” has no discrete legal content. It was politically inspired and used by the administration of George W. Bush to mobilize American society, much like the “War on Drugs” or the “War on Poverty.” Yet the declaration of the “War on Terror” marks the beginning of a unique phase in American law that began on September 11, 2001, and continues to this day. Living through this period has made the lessons of Aharon Barak all the more urgent.

Aharon Barak was born in Lithuania in 1936. He was one of the few who miraculously survived the slaughter of Jews in that country during the Second World War—together with his mother, he hid in the walls of a neighbor’s house. Barak moved to Israel after the war, became a professor of law at Hebrew University in 1968, and later served as Dean of the Law Faculty. From 1975 to 1978 he was the Attorney General of Israel, and in that capacity helped shape the Camp David peace accord between Egypt and Israel. Barak was appointed to the Israeli Supreme Court in 1978, became the president of the court in 1995, and retired from the court in September 2006. His rulings, particularly those involving issues of national security, have been heralded throughout the world and teach an important lesson— which we in the United States have yet to learn—on how to be faithful to the rule of law in the face of a terrorist threat.

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I.

Although the War on Terror is not itself a war, during the six years since it began, the United States has launched three wars. One is in Iraq. Terrorism was not the basis of our decision to invade, but if anything, terrorism has become a consequence of the war and the occupation that inevitably followed. When the United States invaded Iraq in March 2003, the administration had no evidence that Saddam Hussein sponsored the terrorist attacks of September 11, 2001, nor has any been discovered since.

The second war—the invasion of Afghanistan in October 2001—had a direct and immediate connection to the events of September 11. The administration determined that al Qaeda was responsible for the attacks on that day, and furthermore that the Taliban regime then in control of Afghanistan had a special—indeed symbiotic—relationship with al Qaeda. Al Qaeda had helped bring the regime to power, and in return the Taliban had harbored and protected al Qaeda. When the Taliban refused to capture or turn over al Qaeda's leaders, the United States invaded the country.

The third war—the war against al Qaeda itself—is the most difficult for many of us to accept as a war, largely because al Qaeda is not a nation with discrete geographic boundaries. It is an international organization that operates in secret, but much like an enemy nation, has the declared aim of killing Americans en masse, regardless of where they are found—Kenya, Tanzania, New York, Washington, Kabul, or Baghdad. The purpose of these killings is not clear—the stated justifications have ranged from the presence of U.S. military bases in Saudi Arabia, to support for Israel, to the debased nature of American civilization. But it was not necessary to identify a clear purpose behind al Qaeda's actions or determine that it wishes to overthrow the government in order to treat it as belligerent.

One week after the September 11 attacks, Congress passed a resolution authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”¹ It was this resolution that authorized the invasion of Afghanistan. That war has not eliminated the determination or ability of al Qaeda to attack Americans, at home or abroad, and as a result, the United States remains very much at war with al Qaeda. Indeed, it is this war against al Qaeda, more than the invasion and occupation of Iraq and the continuing American presence in Afghanistan, that gives continuing vitality to the War on Terror. The administration has insisted that

1. Authorization for Use of Military Force, 50 U.S.C. § 1541 (Supp. I 2001).

the war against al Qaeda is a war that must be fought wherever al Qaeda might be found, including the American homeland, and as a result the prosecution of this war has posed the sharpest challenge to America's commitment to the rule of law.

In speaking of the rule of law, I am referring to the law of the Constitution, not the larger body of law that I call code. Code consists of the edicts, rules, and regulations issued by government officials and agencies to serve the purposes of the state. Sometimes these edicts instruct public officials on how to discharge the duties of their offices. Elsewhere (for example, in the Internal Revenue Code), these edicts are addressed to citizens in general. War often requires adjustments in these codes or calls for the enactment of new codes that help the state respond to the enemy.

In times of war, the threat is more to the Constitution than to code. As the embodiment of the public morality of the nation, the Constitution is not limited to the words appearing in the document written in 1787 or in the twenty-seven amendments formally adopted over the last 220 years. It includes principles, such as the separation of powers or the right to travel from state to state, that are inferred from the overall structure of the Constitution. It also extends to certain enactments of Congress that further expound the values found in the text of the Framers. The Civil Rights Act of 1964, for example, has given the nation a fuller expression of "equal protection of the laws."² Understood in this broader sense, the Constitution is laden with a special normative value that derives from the role it plays in defining our national identity—what it means to be American—and in articulating the governing principles of our society.

War places great stress on society. It calls for major readjustments in government and in ordinary life. Often people are called on to make enormous sacrifices. In order to respond to these needs, code is often changed. The executive promulgates new regulations, and Congress enacts statutes to meet the exigencies of the war. The governing assumption of American society is that these war measures will be undertaken within the terms of the Constitution—that the allocation of powers among the branches set forth in the Constitution will be respected and basic liberties will be honored. Ours is a Constitution for times of war as well as times of peace.

The last six years have confounded this assumption and rendered the example of Justice Barak especially compelling. He has honored the special security needs of Israel while being adamant in protecting Israel's democratic character. The contrast with the American experience is stark, even when a

2. U.S. CONST. amend. XIV, § 1.

principle as sacrosanct as the prohibition against torture is at stake. The war against terrorism seems to have absolved the current administration from any sense of limits.

Under a program called extraordinary rendition, persons suspected of having al Qaeda ties have been abducted by American officials and then transferred in secret to countries that routinely engage in torture as part of their interrogation techniques. In delivering a person to a country where he will likely be tortured, our government is as culpable as it would be had it engaged in torture itself. Suits brought in the United States by some of these victims were summarily dismissed by the lower federal courts. The judges thought that any inquiry into the merits of the allegations would compromise the President's direction of foreign affairs and military operations, and thus would be inconsistent with the deference that is his due.³

Internal memoranda of the administration, leaked after the disclosures of the abuse of prisoners in Abu Ghraib in Iraq, reveal a similar disregard for the prohibition against torture. These memoranda narrow the definition of torture in order to broaden the range of techniques that interrogators could use against prisoners who might possess information about al Qaeda. An August 2002 Department of Justice memorandum said that the infliction of physical pain amounted to torture only when it was "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁴ A separate Department of Defense memorandum, issued only months later, established guidelines for interrogations at the Guantanamo Bay Naval Station. It suggested that two practices until then universally understood as torture—the use of scenarios designed to convince detainees that death is imminent, and use of a wet towel and dripping water to induce fear of suffocation ("water-boarding")—though forbidden "as a matter of policy . . . at this time," nonetheless "may be legally available."⁵

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3. See *El-Masri v. United States*, 479 F.3d 296, 303-04, 313 (4th Cir. 2007); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 281-83, 287 (E.D.N.Y. 2006).
 4. Memorandum from the U.S. Dep't of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.
 5. Memorandum from William J. Haynes II, Gen. Counsel of the Dep't of Def., to the Sec'y of Def. (Nov. 27, 2002), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf>. A federal criminal statute implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, see 18 U.S.C. § 2340 (2000), specifically provides that torture includes the mental anguish caused by the threat of imminent death. See also Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).

These internal memoranda not only sought to lessen the force of the prohibition against torture by broadening the range of permitted conduct, but went further and implied that the prohibition did not apply whatsoever to the President's pursuit of al Qaeda. The August 2002 Department of Justice memorandum treated the prohibition against torture as nothing more than code and therefore denied that it bound the President in his capacity as Commander in Chief. Although in December 2004 the Department of Justice publicly released a memorandum repudiating the strained definition of torture announced in its 2002 memorandum, the 2004 memorandum did not disavow the earlier assertion that the President had the power to authorize torture. Rather, the memorandum said it was "unnecessary" to address the issue because the President had—subsequent to the disclosures of Abu Ghraib and the release of the earlier memorandum—issued a directive that U.S. personnel not engage in torture.⁶

In the Detainee Treatment Act of 2005, Congress codified the constitutional ban on torture.⁷ The President fiercely resisted that measure, and although he eventually signed the statute into law, he did so only with the declaration that he intended to construe the law as consistent with his constitutional powers as Commander in Chief and his duty to protect against future terrorist attacks.⁸ This statement was widely understood to indicate that the President does not believe himself bound by the terms of the Act. The President was entirely correct that some statutes are mere code that cannot constitutionally interfere with his powers as Commander in Chief, but the statutory ban on torture and conduct falling within the broader category of cruel, inhumane, and degrading treatment is different, because it codified an underlying constitutional prohibition rooted in the Eighth Amendment that is superior to the President's power to command the military.

Another constitutional principle that has been placed in jeopardy by the United States' prosecution of the war against terrorism is the right of the people to speak freely with one another without fear that the government is eavesdropping on their conversations. This freedom is guaranteed by the Fourth Amendment but, in contrast to the rule against torture, is not

6. Memorandum from Daniel Levin, Acting Assistant Att'y Gen., to James B. Comey, Deputy Att'y Gen. (Dec. 30, 2004), <http://www.usdoj.gov/olc/18usc23402340a2.htm>, *superseding* Memorandum from the U.S. Dep't of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President, *supra* note 4.

7. Detainee Treatment Act of 2005 § 1003, 42 U.S.C.A. § 2000dd (West Supp. 2007).

8. President's Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>.

absolute—only “unreasonable” invasions of privacy are banned. Yet the judiciary has historically protected the right of people to speak freely with one another by requiring that the government, if at all possible, apply for a warrant from a court before eavesdropping on private conversations.

The President was unprepared to abide by this rule in the pursuit of al Qaeda. In 2005, news media revealed that soon after the September 11 attacks the President authorized the National Security Agency (NSA) to intercept communications between persons in the United States and persons abroad if the NSA believed that one of the parties was linked to al Qaeda. These wiretaps were conducted without warrants or any judicial oversight.

Out of deference to the President on issues of national security, the Supreme Court has been reluctant to bring wiretapping of the type in the NSA program within the warrant requirement of the Fourth Amendment. In 1967, the Court broke with precedent and held that wiretaps were a form of search and thus fell within the terms of the Fourth Amendment and its warrant requirement.⁹ In reaching this conclusion, the Court was careful to distinguish the case before it—the prosecution of an illegal gambling ring—from surveillance for national security and declined to speak on the latter issue.¹⁰ In 1972, as protests against the Vietnam War became more turbulent, the Supreme Court extended the warrant requirement to what it termed “domestic security cases”¹¹—the particular case before the Court involved the prosecution of a person suspected of having blown up a CIA office in Ann Arbor, Michigan. The Court explicitly left unresolved whether warrants would be required for surveillance against foreign powers and has not ruled on this issue to this day.¹²

In 1978, Congress sought to fill this void by enacting the Foreign Intelligence Surveillance Act (FISA).¹³ This statute prohibits governmental surveillance of any communications involving a foreign power and a person within the United States—even surveillance for national security purposes—without authorization from a special court. The judges of this court are selected by the Chief Justice of the U.S. Supreme Court; they meet in secret; the subject of the tap receives no notice of the government’s application; the court’s decision is rendered on the papers filed by the government; and the government can prevail by showing only that the tap is likely to lead to foreign intelligence that cannot reasonably be obtained through other methods.

9. *Katz v. United States*, 389 U.S. 347 (1967).

10. *Id.* at 358 n.23.

11. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 320 (1972).

12. *Id.* at 308-09.

13. 50 U.S.C. §§ 1801-1811 (2000).

Since its enactment, FISA has been regarded as a comprehensive framework for foreign intelligence surveillance of the type involved in the NSA program. In his initial defense of that program, the Attorney General claimed, rather unpersuasively, that the congressional resolution permitting the use of force against terrorism had implicitly authorized the warrantless searches.¹⁴ This argument was overshadowed, however, by the Attorney General's bolder claim that subjecting the President to the FISA requirements would unconstitutionally impinge on his power to conduct war. The Attorney General acknowledged that Congress has powers in the war domain—it can declare war, make general regulations governing the armed forces, and appropriate the funds for the military. Yet the Attorney General maintained that the NSA wiretaps should be viewed much like any other strategic engagement with the enemy, and, as such, within the President's powers as Commander in Chief.

Although this stance of the Attorney General raised significant questions concerning the allocation of powers between Congress and the President, that controversy now seems largely to have been overtaken by subsequent events. In January 2007, after a federal court denied the government's motion to dismiss a suit challenging the NSA program¹⁵ and voters gave the Democrats control of Congress, the Attorney General announced that the President would let the authorization for this program lapse, although the Attorney General continued to insist that the program was lawful.¹⁶ In July 2007, the court of appeals reversed the lower court's denial of the motion to dismiss the NSA lawsuit.¹⁷ It ruled that the plaintiffs lacked standing. In August, Congress amended FISA to authorize, for a period of up to one year, warrantless wiretapping similar to that involved in the NSA program.¹⁸

The debates over the legality of the NSA wiretapping program should not have focused on the conflict between the President and Congress and issues of separation of powers, but rather on whether the program violated the Fourth

14. Letter from Alberto Gonzales, Att'y Gen., to Senator William Frist (Jan. 19, 2006), *available at* <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906ltr.pdf>; *see also* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), <http://www.usdoj.gov/opa/whitepaper/onnsalegalauthorities.pdf>.

15. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (mem.), *vacated*, 493 F.3d 644 (6th Cir. 2007).

16. Letter from Alberto Gonzales, Att'y Gen., to Senators Patrick Leahy and Arlen Specter (Jan. 17, 2007), http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.

17. *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007).

18. Protect America Act of 2007, Pub. L. No. 110-55, § 2, 121 Stat. 552 (2007) (to be codified in scattered sections of 50 U.S.C.).

Amendment, which is superior to any claims the President might have as Commander in Chief and which is beyond the power of Congress to modify. Although the Supreme Court has declined to speak to this issue, the reasons that led the Court to impose the warrant requirement both in ordinary criminal cases and in domestic security cases apply equally to wiretaps of the kind involved in the NSA program. The warrant requirement does not prevent the President from discovering criminal activity or from preventing acts of terrorism, but requires only that he put his case to an independent magistrate, as a way of minimizing abuses and avoiding the impairment of communicative freedom that would occur if the public knew that the President could tap the phones of anyone he claims is linked to al Qaeda.

While the debates over torture and warrantless surveillance have involved disputes over the definition of terms and the applicability of various statutes, the War on Terror's challenge to other constitutional principles has been more overt and even more clearly illuminated by Barak's work. One striking example involves what I call the principle of freedom.

In the United States, the principle of freedom is rooted in the Constitution's Article I, Section 9 guarantee of the writ of habeas corpus—the historic means of testing the legality of detention—and even more fundamentally, in the Fifth Amendment guarantee that no person shall be deprived of liberty without due process of law. The principle has given rise to the long and noble American tradition against preventive detention, and denies the government the power to incarcerate anyone without charging him with a crime and swiftly bringing him to trial. The principle of freedom contains an exception for the exigencies of war: as a matter of necessity, enemy combatants can be seized on the battlefield and imprisoned for the duration of hostilities.¹⁹

In the midst of combat operations in Afghanistan, the President declared that soldiers of the Taliban and al Qaeda taken into custody were not ordinary prisoners of war but rather unlawful combatants or illegal enemy combatants.²⁰ According to the administration, this special designation removes such detainees from the protection of the Third Geneva Convention for prisoners of war and allows the military to interrogate them on a protracted basis; to incarcerate them indefinitely, even beyond the duration of hostilities;

19. *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

20. Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001); see also Press Release, White House, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>; Memorandum from the President to the Vice President et al. (Feb. 7, 2002), <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

and to try and to punish them for the simple act of fighting. Traditionally the designation of unlawful combatant applied to individual spies, saboteurs, and civilians who took up arms—never, as the President would have it, to entire armies.²¹

An initial test of the administration's detention policy came in the prosecution of John Walker Lindh—the young American captured in Afghanistan who admitted that he had taken up arms for the Taliban but denied that he had any contacts whatsoever with al Qaeda. Citing the historic rule that fighting is not a crime, Lindh filed a motion to dismiss the indictment charging him with conspiracy to kill Americans. The district judge denied the motion on the theory that Lindh was an illegal enemy combatant because he had fought for the Taliban. Although the judge said that he was not blindly deferring to the President's categorization, his opinion suggests otherwise. He put the burden on Lindh to prove that he was not an unlawful combatant and relied in part on inappropriate evidence—a book written before the war indicating that the Taliban came to power by killing civilians—to conclude that soldiers of the Taliban had been properly classified as unlawful combatants.²²

The prisoners at Guantanamo—all foreign citizens—have also been treated as illegal enemy combatants. A prison was set up at the Naval Station in January 2002, and although al Qaeda suspects seized in a large number of countries, including Bosnia, Thailand, and Zambia, have been incarcerated there over the last five years, Guantanamo was first and foremost a prison for persons captured in the war with Afghanistan. At one point it held as many as 800 prisoners, and as of this writing more than 300 remain.

Some of these prisoners denied having taken up arms against the United States or having links to al Qaeda or even the Taliban, insisting instead that they were in Afghanistan or the border area for personal reasons or as aid workers. These prisoners pressed their claim for freedom through writs of habeas corpus. The U.S. Court of Appeals for the D.C. Circuit dismissed their petitions on jurisdictional grounds, reasoning: "We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional protections are not."²³ In its June 2004 decision in *Rasul v. Bush*, the Supreme Court set aside the judgment of the court of appeals, but did not address in any direct and forthright way the lower court's underlying premise that aliens held

21. *Ex parte Quirin*, 317 U.S. at 30-36.

22. *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002); see also Owen Fiss, *In the Shadow of War*, 58 U. MIAMI L. REV. 449, 467-68 (2003).

23. *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 (2004).

in Guantanamo have no constitutional rights.²⁴ The Supreme Court held simply that the habeas statute gave the federal courts jurisdiction over such petitions—and in so doing placed the right to freedom of the Guantanamo prisoners at the mercy of the legislature. In December 2005, as part of the Detainee Treatment Act, Congress amended the habeas statute to bar petitions by the Guantanamo prisoners.²⁵

The administration has not been content to confine the illegal enemy combatant designation to those seized in Afghanistan or other theaters of armed conflict. The war against al Qaeda knows no bounds, and the members of al Qaeda can be seized and held as unlawful combatants, the administration has insisted, wherever they may be found, including the United States. Under this policy, the government arrested a citizen of Qatar (Ali Saleh Kahlah al-Marri), who was studying at Bradley University in Illinois but who the administration believed was an operative of al Qaeda—a so-called sleeper agent. He is now being held as an illegal enemy combatant at a naval brig in South Carolina. Similarly, an American citizen (Jose Padilla) was arrested at O'Hare International Airport in Chicago and held in the same brig for more than three years before being charged with a crime in federal court.

Although al-Marri recently won an important victory in the U.S. Court of Appeals for the Fourth Circuit—a panel of the court held that it had jurisdiction to consider his habeas petition and that there was no basis to hold him as an enemy combatant—that decision is now being reviewed by the Fourth Circuit sitting en banc.²⁶ In the case of Padilla, the Supreme Court had two opportunities to address his claim of freedom, and in each instance, failed to do so. On the first occasion, the Court said merely that Padilla should have filed his habeas petition in South Carolina rather than in New York, even though that alleged error had no bearing on the power of the Supreme Court to address his claim to freedom.²⁷ On the second occasion, the Supreme Court denied Padilla's certiorari petition.²⁸ Presumably, the Court thought that the petition was moot since days before the response to Padilla's petition for a writ of certiorari was due, the administration changed its strategy and charged him

24. 542 U.S. 466 (2004).

25. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (to be codified at 28 U.S.C. § 2241(e)).

26. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

27. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

28. *Padilla v. Hanft*, 547 U.S. 1062 (2006).

with a crime in federal court in Florida, though carefully reserving the power to treat him as an illegal enemy combatant in the future.²⁹

The sweep of the administration's detention policies poses a grave threat to American society. The issue is not whether the fight against al Qaeda is a "war," but whether the United States is a "battleground" similar to Afghanistan. To treat it as such would threaten the fabric of ordinary life and put the enemy combatant exception to the principle of freedom in the position of undermining the principle itself. The executive would be able to imprison anyone living within our midst—citizen and noncitizen alike—without ever charging him with a crime and putting him on trial.

The administration's policies in its fight against terrorism have also called into question yet another constitutional principle rooted in the Due Process Clause—the principle of fair procedure. In July 2004, the administration established at Guantanamo a system of tribunals, denominated Combatant Status Review Tribunals, to resolve the claims of prisoners held there who maintained that their detention was improper because they had neither fought for nor lent material aid to the Taliban or al Qaeda.³⁰ Even though about forty prisoners have been released by these tribunals over the last three years, the procedures used by these tribunals are an affront to elementary notions of fairness. They are staffed by the military and freed of the ordinary rules of evidence. The prisoners are provided with "personal representatives," but these representatives are not lawyers—only military officers with security clearance. In the December 2005 statute denying the Guantanamo prisoners the right to secure their freedom through a writ of habeas corpus, Congress gave the U.S. Court of Appeals for the D.C. Circuit exclusive jurisdiction to review the decisions of the Combatant Status Review Tribunals, but limited the scope of review. The court of appeals could not set aside a decision even if the court believed that the decision was clearly erroneous. It could do no more than ascertain whether the tribunals' decisions complied with the standards and procedures established by the Secretary of Defense and whether those standards and procedures are constitutional "to the extent that the Constitution and laws of the United States are applicable."³¹

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29. In August 2007, Padilla was convicted of conspiracy to commit murder and of conspiracy to provide material support to terrorists. See Peter Whoriskey, *Jury Convicts Jose Padilla of Terror Charges*, WASH. POST, Aug. 17, 2007, at A1.
30. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.
31. Detainee Treatment Act of 2005 § 1005(e)(3), 10 U.S.C.A. § 801 note (West Supp. 2007). The adequacy of the procedures of these status review tribunals is now under review by the Court of Appeals. See *Bismullah v. Gates*, Nos. 06-1197, 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

Although all of the Guantanamo prisoners are being held indefinitely and have been subject to relentless and aggressive questioning, some have the additional burden of being charged with war crimes and being placed on trial before military commissions. These commissions are to be distinguished from courts-martial or federal courts, inasmuch as they were convened for limited purposes—to try some of the Guantanamo prisoners—and follow procedures specially designed, as one might expect of code, to accommodate the perceived necessities of the war against al Qaeda.

In its June 2006 decision in *Hamdan v. Rumsfeld*, the Supreme Court held the use of these commissions unlawful.³² Speaking generally, the Court described military commissions as tribunals of exigency and emphasized that they had historically been used to try persons “caught redhanded in a theater of war.”³³ The Court put to one side the use of military commissions in a battlefield, and warned against transforming military commissions “from a tribunal of true exigency into a more convenient adjudicatory tool.”³⁴ Yet, avoiding any due process ruling, the Court held only that the Guantanamo military commissions violated a provision of the Uniform Code of Military Justice requiring that all the rules and regulations for courts-martial and military commissions be “uniform insofar as practical.”³⁵

By way of example, the Court noted that, in contrast to procedures for courts-martial, the regulations governing the Guantanamo commissions allowed the accused to be excluded from proceedings or denied access to the evidence used against him under a broad range of circumstances. The Court further noted that the commissions operated under an evidentiary standard more permissive than that governing courts-martial, one that seemed to permit evidence obtained from coercion.³⁶ The Court was also concerned that the accused had no right to appeal his conviction to a civilian court unless the penalty imposed was death or imprisonment for more than ten years. For lesser penalties, appeals were at the discretion of the reviewing court.

The Court’s narrow statutory response to what was fundamentally a constitutional question—a minimalist approach of the kind Justice Barak has often warned against—had the perverse effect of further imperiling fundamental values. In response to *Hamdan*, Congress enacted the Military Commissions Act of 2006, which affirmed the ban on habeas petitions by the

32. 126 S. Ct. 2749 (2006).

33. *Id.* at 2785.

34. *Id.* at 2792-93.

35. *Id.* at 2756 (quoting 10 U.S.C. § 836(b) (2000)).

36. *Id.* at 2786.

Guantanamo prisoners, clearly making it applicable to all pending cases, and explicitly granted the administration authority to use military commissions to try those prisoners.³⁷ Only in a few respects were the procedural protections of the accused enlarged. In February 2007 the U.S. Court of Appeals for the D.C. Circuit upheld this statute against a constitutional challenge. The court reaffirmed its view that the Guantanamo prisoners have no constitutional rights and thus are not protected by the rules limiting congressional power to suspend the writ of habeas corpus.³⁸ In June 2007, the Supreme Court agreed to review this judgment, providing itself another opportunity to address the issue that previously it steadfastly had declined to examine.

At issue in *Hamdan* were the rights of foreign citizens held not in the United States but in Guantanamo. Even when the liberties of American citizens are at issue, however, the Court has been willing to accommodate the demands of the executive by compromising due process values. This occurred in the 2004 decision in *Hamdi v. Rumsfeld*, involving an American citizen who had been taken into custody in Afghanistan and imprisoned in a naval brig in Norfolk, Virginia.³⁹ The government claimed that the prisoner had fought for the Taliban and therefore was an illegal enemy combatant. His father (who had brought the suit) denied that allegation and insisted his son went to Afghanistan in August 2001 to do relief work.

In her opinion for the Court, Justice O'Connor tried to strike a balance between conflicting considerations, as Justice Barak often did. Much in his model, she declared that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."⁴⁰ She held that the prisoner was entitled to an evidentiary hearing to test the government's allegations. She based this ruling on the Fifth Amendment right to due process—a consideration noticeably lacking in *Hamdan*. She also indicated—without any elaboration—that Hamdi had a right to counsel in these proceedings.

However, the balance O'Connor struck was far more compromising of fundamental principles than Barak would have allowed. As she put it, the prisoners' procedural rights had to be carefully "tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military

37. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

38. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 27 S. Ct. 3078 (2007).

39. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

40. *Id.* at 536 (opinion of O'Connor, J.).

conflict.”⁴¹ Accordingly, Justice O’Connor allowed the government to support its charge that a prisoner is an enemy combatant by submitting an affidavit based on records, maintained by the military, of battlefield detainees. Such an affidavit would create a presumption, she said, that the prisoner is an enemy combatant. The prisoner would then bear the burden of presenting evidence to rebut the presumption and to prove that he is not an enemy combatant. In this way, O’Connor nominally denied the administration its “blank check” while nonetheless acceding to its demands for deference in matters of national security.⁴²

Justice O’Connor also expressed the view—in this instance not supported by a majority—that a military tribunal could provide the evidentiary hearing that she required. Such a concession does a disservice to due process, which has long been held to require an impartial or neutral decision maker when only property rights are threatened by the government. It also ignores the constitutional basis of the prisoners’ claim of freedom and the need to hold the evidentiary hearing in a federal habeas court, not simply because such a court can achieve a measure of impartiality unavailable to a military tribunal judging the action of the military, but also and more fundamentally, because in the American constitutional scheme, it is the federal judiciary that is responsible for determining whether an individual has been deprived of a constitutionally guaranteed right, like the right to freedom.⁴³

II.

In all these ways the administration’s prosecution of the war against terrorism has endangered the Constitution. Since September 11, we have witnessed an assault on a number of constitutional principles—the prohibition against torture, the requirement of judicial warrants for wiretapping, the principle of personal freedom, and the insistence upon fair procedures to test government-imposed deprivations of liberty. These transgressions—and more may later come to light—have done great violence to the rule of law and have made the achievements of Aharon Barak appear all the more remarkable. What once was an attitude of admiration, only six years into America’s War on Terror, has now become one of marvel. He safeguarded basic liberties in a

41. *Id.* at 533.

42. *Id.* at 533-34.

43. See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 243-44 (2006).

context in which the threat to national security was as great as, if not greater than, the threat facing the United States.

We in the United States have the benefit of geographic distance. Iraq and Afghanistan are geographically remote. Al Qaeda might have agents within the United States, but its nerve center is located half a world away—somewhere in the mountains between Afghanistan and Pakistan. Israel's enemies, like Syria and Iran, are its neighbors, and terrorist organizations have their centers on Israel's borders: Hezbollah in Lebanon and Hamas in Gaza.

The suicide bombings in Israel and the rockets of Hezbollah and Hamas may not have the same quality of spectacle as the September 11 terrorist attacks on the United States, but they have been more pervasive and have wrought death and destruction on an enormous scale, especially given the small size of the country. The threat of terrorism is part of the fabric of everyday life in Israel.

Some of the acts of terrorism Israel has encountered are fueled by the same kind of inchoate hatred that impels al Qaeda. Others have a discrete strategic objective: to bring an end to Israeli occupation of the West Bank and Gaza, and thus to create a Palestinian state in those territories. Still others, for example the terrorist attacks associated with Hezbollah and Hamas, seek to eradicate Israel as a nation and establish a Palestinian state stretching from Jordan to the sea. The attacks that al Qaeda has aimed at the United States cannot plausibly be regarded as having such grandiose ambitions.

Not only were the pleas of military necessity confronting Barak more pressing than those faced by American courts in recent years, but the sources upon which claims of rights rested were more elusive. As he acknowledged, he had to develop "constitutional law without a constitution."⁴⁴ Israel has no written constitution. At the time of its founding, plans were made for the formulation and adoption of a constitution. Indeed, its Declaration of Independence promised that a constitution would be adopted no later than October 1, 1948. But those plans never came to fruition. So Barak, following in the tradition of his predecessors, constructed the governing principles of Israel—its body of constitutional law—as an elaboration of Israel's foundational aspiration, set forth in the Declaration of Independence, to be a free and democratic society. In his terrorism cases, Justice Barak drew on a variety of sources, including customary international law and various statutes, but in the end, constructed what he described as Israel's "constitutional law" on the basis of theoretical reflections on the requirements of democracy. Such a rationalistic endeavor is also the core of the process that has given content and

44. Aharon Barak, *Constitutional Law Without a Constitution: The Role of the Judiciary*, in *THE ROLE OF COURTS IN SOCIETY* 448 (Shimon Shetreet ed., 1988).

life to the American constitutional tradition, but the American court has enjoyed the comfort of a material anchor – the written Constitution of 1787 and all its amendments.

Israel is governed through a parliamentary system, which among other things means that it is committed to the principle of legislative supremacy. Once the plan to adopt a written constitution failed, the Israeli Parliament (the Knesset) began enacting a series of statutes known as the Basic Laws which purported to set forth the governing principles of Israeli society. For Israel's first forty years, the Basic Laws primarily addressed the structure and organization of government powers. In 1992, however, the Knesset took a new turn and adopted a Basic Law guaranteeing human dignity and freedom, a law that resembles the American Bill of Rights in both the generosity of its spirit and the generality of its language. This Basic Law has functioned for Justice Barak much like a written constitution with one important exception: the supremacy of the legislature is preserved.

In a well-known 1995 decision, Justice Barak held that because the Basic Laws were passed by the Knesset sitting as a constitutional assembly, they took precedence over ordinary legislation (even if adopted after the enactment of the Basic Law).⁴⁵ Yet the legislature remains supreme. The Knesset possesses the power to amend any Basic Law in order to allow a statute that would otherwise be invalid because of a conflict with it. Generally, a Basic Law can be amended by a simple majority of the members of the Parliament present, although certain provisions of some of the Basic Laws – not the one on human dignity – stipulate that an amendment requires an absolute majority of all members of Parliament or a supermajority.

Israel is a small country of around seven million people, covering a compact geographic area roughly the size of New Jersey. Its political culture is characterized by vibrant public discussion (to understate the matter). Barak's decisions are widely known throughout the nation and remain a subject of great controversy. They have even provoked attempts to overturn his decisions by legislative means. Most recently, the Minister of Justice proposed amending the Basic Law on human dignity in order to overturn a decision – one of Barak's last – that invalidated a statute that had exempted the state from compensating Palestinians in designated zones in the Occupied Territories for injuries caused by Israeli security forces, even if the injuries did not relate to military operations or the war against terrorism.⁴⁶ Yet, as of this writing, none

45. CA 6821/93, 1908/94, 3363/94 *United Mizrahi Bank v. Migdal Coop. Vill.* [1995] *IsrSC* 49(4) 221, *translated in* 31 *ISR. L. REV.* 764, 777-94 (1997).

46. See Yuval Yoaz, *Friedmann Seeks New Version of "Intifada Law," Bypassing Court*, HAARETZ (Tel Aviv), June 5, 2007, <http://www.haaretz.com/hasen/spages/867274.html>.

of these efforts has succeeded. It is a testament both to Justice Barak and to the strength of the country's foundational commitments that no Basic Law has been amended to overturn a Supreme Court decision relating to terrorism or issues of national security more broadly.

Barak's constitution is a constitution without borders. It binds Israeli officials wherever they may be and protects citizens and noncitizens alike. There are no black holes such as Guantanamo. Its overarching aim is to protect human dignity. Barak sees human dignity as lying at the foundation of democracy, and treats it as the source of rights people are owed simply by virtue of their humanity. The depth of his commitment to human dignity is most clearly revealed in his decision denying the military the authority to subject anyone, including Palestinians or even suspected members of Hamas or Hezbollah, to harsh and aggressive interrogation techniques that he regarded as torture.⁴⁷ Impelled by respect for the dignity of all persons, he fashioned a prohibition against torture that is as absolute as the one found, at least before September 11, in the U.S. Constitution.

Some commentators have called into question the absolute nature of this prohibition by imagining a scenario in which the only way to avoid a great loss of human life and other disastrous consequences is through torturing a prisoner. In this scenario, a bomb of enormous power is ticking away in a city and only the prisoner knows where it is located. In his ruling banning especially aggressive interrogation techniques, Justice Barak confronted this dilemma, even though the facts before him did not require him to do so, and he held that even in such a dire context a prior authorization of torture would be unconstitutional. The offense to human dignity would be too gross.

Barak acknowledged that, at a criminal trial after the fact, the guard who tortured the prisoner in this imagined scenario might—only might—be able to assert the defense of necessity and on that ground be exonerated. Some have criticized him for this concession. They fail, however, to account for the fact that even the most absolute of rules are often tempered in administration. In the United States, for example, someone who tortured a prisoner to save innocent lives or the destruction of a city could assert a necessity defense or, more likely, trust a sympathetic jury to nullify the law through a general verdict of “not guilty.”

For the most part, Justice Barak's principles are not absolutes like the prohibition against torture, but rather seek an accommodation of conflicting

47. HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Israel* [Sept. 6, 1999] slip op., available at http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf.

values, or as he has put it, “clashing considerations.”⁴⁸ In that sense, they are like the Fifth Amendment’s requirement of due process or the Fourth Amendment’s protection against unreasonable searches. The terms “due” and “unreasonable” necessarily entail a consideration of conflicting values, and as a result the liberties that these amendments promise are especially vulnerable in times of stress. Military necessity is often invoked in such circumstances to justify a sacrifice of individual freedom. For that reason, Barak’s work is especially instructive because he has sought to create a distinctive judicial method—call it a jurisprudence—that acknowledges military necessity without permitting it to overwhelm fundamental freedoms.

This method accounts for two of his most important rulings on terrorism. One required the Israeli military to reroute the security fence that it was building between itself and the Occupied Territories to prevent the infiltration of suicide bombers and other terrorists.⁴⁹ The other—the so-called targeted killing case—limited the power of the military to kill persons who are civilians but who are suspected by the military of engaging in terrorist activities in Israel.⁵⁰

Like any good judge, Barak began his analysis in these cases with an acknowledgment of the values—all the values—at stake in the controversy. He recognized the interest served by the government’s action as well as the harms that would likely be inflicted by the proposed action. He accepted that national security—the survival of the nation and the protection of the lives of Israeli citizens—was a compelling justification for government action. But he also maintained that respect for human rights and human dignity were pillars of democracy and could not be casually brushed aside.

Although many jurists have faced similar dilemmas, Barak’s distinctive contribution has been to place limits on the deference due to the military. In his opinions, he drew a vital distinction between the assessment of military needs and the question of whether the military action is normatively justified, given its impact on fundamental values. He was prepared to defer to the government in its assessment of military needs, but saw it as the essence of his job to determine whether the pursuit of those needs unjustifiably interfered with the exercise of a protected liberty or a fundamental value.

48. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* [Dec. 11, 2006] slip op. para. 22 (quoting HCJ 7957/04 *Mara’abe v. Prime Minister* [2005] para. 29), available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

49. HCJ 2056/04 *Beit Sourik Vill. Council v. Israel* [June 30, 2004] slip op., available at http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf.

50. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* [Dec. 11, 2006] slip op., available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

In the case regarding the construction of a security fence, for example, those contesting the route of the fence offered evidence—experts with considerable military experience—to demonstrate how the military’s needs could be satisfied by building the fence along a line other than the one proposed. Yet Justice Barak was unprepared to second-guess the military on that score, and regarded the military’s judgment on how to satisfy its needs as determinative. He took this view not simply because of the military’s expertise on issues of national security, but rather, and perhaps more fundamentally, because the military alone is responsible for the technical quality of its actions. By contrast, Barak reserved for the court the function of determining whether the infringement of basic rights would be so great as to bar the military from acting as it wished. There was to be no deference in the realm of values. That judgment, in his view, belonged to the judiciary.

We in the United States have a strong tradition of judicial deference to military authorities, but fail to make Barak’s distinction. Our deference goes not just to the military’s technical assessment of the needs of national security, but also to the question of whether, given the harm to fundamental values, its proposed actions are justified. By granting the executive wide latitude both in its pursuit of its objectives and in its determination that those objectives merit sacrificing basic freedoms, the American judiciary allows the executive to strike the balance between military necessity and fundamental values. Such blanket deference overlooks the genuine danger to fundamental values posed by a political agency’s response to perceived military needs or external dangers. It is true that in a presidential system, such as that of the United States, the executive and the legislature have independent sources of legitimacy, and thus the legislature can act as a check on the executive. Yet, as the enactment of the Detainee Treatment Act of 2005, the Military Commission Act of 2006, and the recent amendment of FISA illustrate, the legislature can also be complicit in the transgression of basic liberties in its response to the call to war. In this respect, judicial deference to the executive of the type Barak opposed is no more justified in a presidential system than in the Israeli parliamentary system.

Justice O’Connor was explicit in *Hamdi* about the need for deference to the executive in fashioning procedural rules for adjudicating a claim to freedom by any individual—even a citizen—accused of being an enemy combatant. Not only was she willing to place on the prisoner the burden of proving that the military’s field records were mistaken, but she also would have allowed military tribunals to decide the merits of that claim. A similar deference was manifest in the Supreme Court’s refusal to force the government either to charge Jose Padilla with a crime or set him free, as well as in lower courts’ decisions not to give redress to victims of extraordinary rendition or even to inquire into the merits of their allegations. I suspect that fear of interfering

with the executive's capacity to conduct foreign affairs also explains why in 1972 the Supreme Court, in the case involving the bombing of a CIA building in Ann Arbor, created an artificial distinction between "domestic security cases" and "foreign intelligence surveillance," and declined to create a warrant requirement for the latter.⁵¹

Not only has Barak rejected this kind of blanket deference as a dereliction of what he understands to be the duty of a judge, but he has also identified with greater clarity than any American jurist the appropriate inquiries for determining when a government action that affects fundamental values is justified. These inquiries, which he generally refers to as the "proportionality test," examine both the instrumental and the substantive rationality of the government's action. Justice Barak pursued these inquiries in all manner of cases, especially in recent years, but they had their greatest force in his rulings on national security. For that reason, they are especially illuminating in gauging the American response to terrorism.

The instrumental inquiry concerns the relation between means and ends. It asks whether the means chosen by the government are rationally related to the end, and more importantly, whether the chosen means are the least restrictive alternative. Barak requires that the means be narrowly tailored to achieve their purpose, fitting, to use his metaphor, as closely as a suit might fit a body.⁵² The sacrifice of fundamental values must be kept to an absolute minimum. He expects that if the government has an alternative way of meeting its needs that entails less of a sacrifice in fundamental values, the original, more burdensome actions cannot be justified.

In the targeted killings case, for example, Barak fully appreciated the danger of terrorist attacks, but sought to carefully cabin the power of the military to kill suspected terrorists. He drew a sharp line between enemy combatants and civilians, and was wary of placing civilians who were suspected of terrorism in yet a third category—unlawful combatants—that would afford neither the protections given to combatants nor those given to civilians. Although the laws of war allow the military to kill combatants in the course of armed conflict, civilians are fully protected. Civilians forfeit this protection when they participate in hostilities, such as terrorist attacks, but Justice Barak stringently defined the conditions for such forfeiture. Links to or membership in a terrorist organization were not sufficient. The person targeted, according to Barak, had to take a direct part in hostilities and was vulnerable to attack only while engaged in such hostilities. Even then, the military had the

51. See *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 308-09 (1972).

52. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 256-57 (2006).

obligation to pursue only the least harmful means and could not kill the suspected terrorist if arrest and trial were feasible. As Barak reasoned, “among the military means, one must choose the means whose harm to the human rights of the harmed person is smallest.”⁵³

The American Supreme Court, under the rubric of strict scrutiny, has required that when a fundamental value such as free speech or racial equality is threatened, the government must use the least restrictive means available to pursue its end—or to use another formulation, governmental interference with a privileged value must be no greater than necessary. Unfortunately, however, the Court applies strict scrutiny only intermittently, and hardly ever in the context of war. Perhaps most famously, the Supreme Court did not insist upon the least restrictive means or least harmful alternative in the *Korematsu* case, even though in that decision the Court announced—for the very first time—that racial classifications should be strictly scrutinized.⁵⁴ *Korematsu* gave constitutional legitimacy to the mass relocation of persons of Japanese ancestry in the western states during the Second World War. Although the Court said that it was applying strict scrutiny to the relocation program, it nevertheless deferred to the government’s assessment of the need for such a policy and, furthermore, never considered whether less harmful alternatives were available.

The second type of inquiry in Barak’s decisions—an inquiry which could be characterized as an investigation into substantive rationality—asks whether the harm of the government action is disproportionate to the benefit that might be achieved from it. In other words, even if the government’s action serves compelling interests and its means are rationally connected to the pursuit of those interests, and in fact represents the least restrictive alternative, that action will nevertheless be unjustified and thus unlawful if the harm it inflicts is disproportionately greater than the gains it achieves. Aside from some concurring and dissenting opinions by Justice Breyer,⁵⁵ there is no trace of this proportionality requirement in the decisions of the U.S. Supreme Court, certainly not in the context of war, and yet Justice Barak routinely and successfully applied it in a wide range of cases in which fundamental values were at stake.

In fact, proportionality was the linchpin of Barak’s opinion in the security fence case. Although he accepted the military’s claim that its proposed lines for

53. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Isr. [Dec. 11, 2006] slip op. para. 40, available at http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

54. *Korematsu v. United States*, 323 U.S. 214 (1944).

55. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2819 (2007) (Breyer, J., dissenting); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401-02 (2000) (Breyer, J., concurring).

the security fence would be the most effective in saving the lives of Israeli citizens and that any redrawing of the lines would result in increased loss of life from terrorist attacks, he nonetheless ordered sections of the fence built along a different line in order to reduce the harm to Palestinians that would result from division of their communities and separation from their fields and places of work. The harm of the lines proposed by the military was deemed disproportionate to any advantages in the realm of security. Put another way, Barak was prepared to impair the achievement of military ends—to risk Israeli lives—in order to avoid the greater harm to the Palestinian communities that would have resulted from the erection of the security barrier as originally planned. His intention was not to demean the importance of the military objective, but rather to find a way to accommodate two compelling, but conflicting, values.

In all this—his refusal to defer to the military in the tradeoff of values, his insistence upon the least restrictive alternative, and finally his application of the requirement that the harm to fundamental values not be disproportionate to the security gains—Justice Barak held firm in his attachment to law and the belief that law is the embodiment of reason in the service of humanity. His method was to demand, systematically and relentlessly, that any sacrifices of rights required by a proper regard for human dignity be fully and rationally justified. In so doing, Barak revealed a deep and profound commitment to reason—the common element that unites his life as a professor and as a judge and that defines his unique place in Israeli society and the world legal community. For him to declare, as he has done on many occasions, that “law is everywhere”⁵⁶ is to invite us to imagine that every aspect of our public life, even war, should be governed by reason and reason alone.

Aharon Barak and I are the closest of friends, but I have often wondered in private: Isn't it remarkable that in such a small corner of the world, so often racked by violence and religious passions, a modern day apostle of the Enlightenment has risen and taken a place not just in the history of Israel, but of all mankind?

56. See, e.g., BARAK, *supra* note 52, at 309.

