

## THE CENTURY FOUNDATION



Larry Goldman



Donna Newman

### “Enemy Combatants and the Supreme Court: The Tension Between National Security and Civil Liberties”

May 10, 2004

On May 10, the New York chapter of the American Constitution Society and The Century Foundation sponsored a forum entitled “Enemy Combatants and the Supreme Court: The Tension Between National Security and Civil Liberties.” **Jeremy Kamens**, the assistant federal public defender appointed, with **Frank Dunham**, to represent Yaser Hamdi; the attorneys representing Jose Padilla, **Donna Newman** and **Andy Patel**; and the attorney arguing for the Guantanamo detainees, **Barbara Olshansky**, assistant legal director of the Center for Constitutional Rights, spoke at the panel discussion. **Lawrence Goldman**, immediate past president of the National Association of Criminal Defense Lawyers, moderated.

Jose Padilla is an American citizen born in New York and raised in Chicago, Illinois. He is accused of but has not been charged with plotting to detonate a radioactive “dirty bomb” in the United States. Padilla was arrested at O’Hare International Airport in Chicago in May 2002 coming off a flight from Pakistan. The President thereafter declared him an “enemy combatant,” and he has been held since in a naval brig, without charges, and, until very recently, without any communication with an attorney.

Yaser Hamdi is also an American citizen born in Louisiana. He was arrested on the battlefield in Afghanistan in November 2001, deemed an “enemy combatant” by the president, and has been incommunicado since then, held in military custody, without charges and without access to his attorneys.

The approximately 660 prisoners in Guantanamo Bay, Cuba, were mostly picked up in the fighting in Pakistan and in Afghanistan in the months following the September 11 attacks. The government has labeled them “enemy combatants,” and they have been held in harsh conditions for the past three years, without charges and without any type of judicial review.

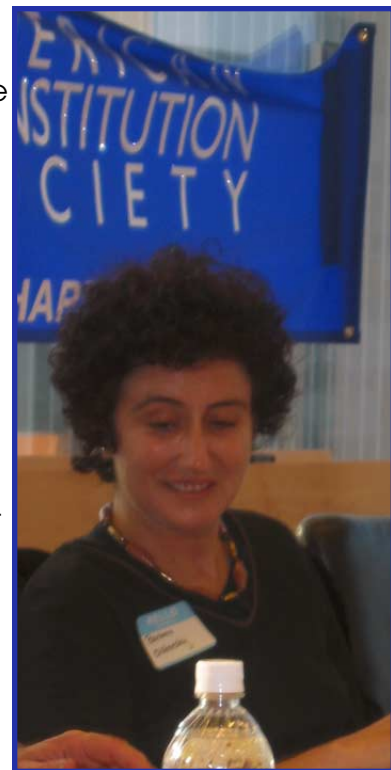
The lawyers all agreed that the main thrust of the government’s argument is quite simply, “Trust us, we know what we’re doing,” an argument that has clearly been undermined by recent events. The adminis-



Andy Patel

tration asserts that when the government is on a “war-footing,” the executive is accorded broad, if not complete, deference by the courts, including the right to arrest and imprison individuals without charges or the right to an attorney. The question raised by these cases basically comes down to this, the attorneys said: Can the President, of his own authority alone, strip American citizens of their constitutional rights?

Donna Newman, Padilla’s attorney, explained that the major precedent offered by the government is *Ex Parte Quirin*, in which German World War II saboteurs arrested in the United States were tried and executed by a military commission. While the administration has tried to argue that *Quirin* validates the application of “enemy combatant” status (a category, Newman said during the question and answer period, that has no legal meaning) and other powers of detention and use of a special tribunal, she



Barbara Olshansky

argues that *Quirin* has no relevance. The German saboteurs who were defendants in *Quirin* had identified themselves as members of a foreign army, which Padilla has never done; in setting up a military tribunal for the defendants in *Quirin*, the president was acting according to statutes laid out by Congress in a declaration of war, while no such act of Congress supports the current administration’s actions; the question in *Quirin* was whether or not the defendants would be tried by a civilian or military court-but the government has announced no intention of trying Padilla at all; and finally, the decision to send the German saboteurs to a military tribunal turned on the Court’s review of the facts of the case, a standard the government’s case against Padilla has never been held to.

Newman and Kamens said they were arguing that the precedent set forth in the Civil War case *Ex Parte Mulligan* is more appropriate to their clients’ situations. The Court decided in *Mulligan* that so long as American courts are functioning, a non-military American citizen accused of planning crimes against the Union army must be tried in a civilian court according to his constitutional rights, regardless of whether the country is at war.



Barbara Olshansky and Jeremy Kamens

Indeed, Newman and Kamens argued, the law is actually very clear about the executive’s right to detain citizens. The Non-Detention Act (18 U.S.C. § 4001(a)), passed in the wake of the large scale internment of Japanese Americans during World War II, forbids the detainment of any American citizen except by express Congressional authorization, a standard certainly not met in either the Padilla or Hamdi cases.



Larry Goldman, Barbara Olshansky, and Andy Patel

Barbara Olshansky has challenged the reach of the administration in a different arena: the prisoners detained at Guantanamo Bay. *Rusal v. Bush*, which was recently argued before the Supreme Court, challenges President Bush's November 2001 Executive Order in which the president asserted a right to detain non-citizens identified as enemy combatants at the Cuban installation where, the administration asserts, the protections usually afforded prisoners of war by the Geneva and Vienna Conventions have been suspended. As a

result of this order, the Guantanamo detainees have been left with no legal recourse to plead their case or question their status as enemy combatants in the first place.

According to Olshansky, the controversial military tribunals also established by the order deviate substantially from military courts martial and do not include many of the due process protections afforded by the American criminal judicial system.

The government has narrowed the *Rusal* case to a question of jurisdiction: whether the United States judicial system has any authority over those held at the Guantanamo base. Olshansky reported that the justices' questions indicated a concern about what, if any, limits the executive was placing on powers of detention. Solicitor General Ted Olson, representing the government, clearly lost ground, Olshansky said, when he told Justice Stevens he thought the suspension of habeas corpus in Guantanamo would conceivably continue beyond the end of the war on terrorism.



Larry Goldman and Tova Andrea Wang, of The Century Foundation



All of the attorneys expressed frustration at the government's refusal to allow the most basic rights of attorney-client communications. Most communications have been fully monitored and when Hamdi's lawyers were finally allowed to see him, their entire conversation was classified and therefore deemed inadmissible in court.

The Supreme Court is expected to issue decisions in these cases at the beginning of July.