

A: I once asked Justice Brennan when I was in his chambers, I was doing a profile of him, and I asked a corny question: What's your favorite part of the Bill of Rights? He said, "Well it has to be the First Amendment because it connects with everything else in the Bill of Rights." If you want to protest, let us say, the Patriot Act's violation of the Fourth Amendment by electronic surveillance and you don't know you're being watched, you can do it by the First Amendment.

The Bill of Rights, obviously, is so important, that we wouldn't have had a Constitution... George Mason, other members who refused to sign the Constitution in 1787 said they wouldn't until we have a Bill of Rights. So they had to go into the individual states and have that added to the Constitution. It is the most vital part of the document, because again, not only freedom of speech and press, but the right to assemble, the right to petition the government for grievances, and the other rights about religion. It's the engine of our government.

Q: One of the cases we're looking at specifically in this film is the José Padilla case. Are there any historical analogies with the period of the Civil War that could give us some insight?

A: In the Civil War the venerated Abraham Lincoln not only suspended the writ of habeas corpus, which is the oldest English-speaking right, it's the most important right you have if you are in prison, because that's the right that says you have the right to go to a federal judge and have the government prove you are legally in prison. Lincoln not only suspended habeas corpus, but he allowed hundreds of people who opposed him, including newspaper editors, reporters, to be put in military tribunals with much lesser protection than the Bill of Rights has. And it wasn't until 1868, Lincoln had been assassinated by then, the war was over - and the Supreme Court, finally, in a case called *Ex parte Milligan*, said to Lincoln posthumously, "You can't do that. It's unconstitutional, so long as the civilian courts are running." And it's interesting, I looked at the record, and Lincoln's lawyers, before the Supreme Court in 1868, were using the same arguments that George W. Bush's lawyers use now: As commander-in-chief, the president had the right to do what was necessary for security - didn't have to go to the courts.

Now in the Padilla case, José Padilla - as we speak in New York City, there have been oral arguments in the Padilla case. The executive director of Lawyers Committee for Human Rights, Michael Posner, said that this is a tremendously important case. It is indeed. Padilla was arrested at O'Hare Airport. Charged, not charged, under suspicion of having something to do with the so-called 'dirty radioactive bomb'. The president, all by himself, designated Padilla an enemy combatant. Took him out of the regular justice system. Sent him to a Navy brig in South Carolina, without charges, without access to a lawyer, to be held indefinitely. And one of the things that not only the 2nd Circuit Court of Appeals, but the Supreme Court eventually is going to have to decide - there is nothing in the Constitution that gives the president this power. And as a matter of fact there is a law passed, I believe in 1971, by Congress which said explicitly that only Congress can detain an American citizen the way Padilla and one other citizen, Yaser Hamdi, has been

detained. So there is a direct analogy between not only the Padilla case and the Civil War.

What Bush has also done at Guantanamo Bay is hold hundreds of so-called ‘enemy combatants’ or whatever from various countries without any charges, without a hearing. And there’s a very interesting part of the Kentucky Resolution, written by Thomas Jefferson, passed in Virginia in 1798. Right after the First Amendment and the rest of the Bill of Rights were ratified in 1791, seven years later, Congress passed, under John Adams and the Federalist Congress, the Alien and Sedition Acts, which put people in jail, including journalists, simply for holding the government in ridicule or contempt. You can do that any second of any day. Jefferson opposed that. And in the Kentucky Resolution, he said that no president has the power to unilaterally put people in prison under any conditions. That is a violation of the separation of powers.

So all through history, despite what the Justice Department says, the Congress and people like Thomas Jefferson have pointed out the danger. Now James Madison, the principle architect of the Bill of Rights, he wrote the First Amendment and much of the others, he said at the time that there are two dangers once we have this constitutional republic: One is the people, because if majority will prevails against the individual liberties and the Bill of Rights, we don’t have a constitutional democracy. That’s why there has to be a separation of powers with the Congress overseeing an excessive executive. Then Madison said, and it couldn’t be more contemporary now, when you have one branch of the government assuming more and more power, then you have tyranny. We don’t have tyranny yet - I’m speaking to you now. The 2nd Circuit is hearing the Padilla case. But this government, more than any other government in our history, given the past of Lincoln and the Civil War, has assumed more and more executive power. And that is why, finally, members of Congress are awakening to the Bill of Rights. In part, that’s because there’s been a revolt, a grass-roots revolt. About 210 cities and towns, three state legislatures, Alaska, Vermont and Hawaii, have passed Bill of Rights Defense Resolutions with the help of the ACLU. Those resolutions, among other things, are directed to members of Congress in those areas, saying, “Hey! What’s happening to our liberties?” The result is you now have a number of bills proposed in Congress. And the leading engine for these bills are very conservative, libertarian Republicans. Some of the Democrats are going along, but the libertarians are the ones who are most concerned with individual rights and liberties. So finally there is an awakening and the Bill of Rights may rise again.

- Q: Can you ruminate a bit on the overall topic of this film. We’re looking at how various national security initiatives have impacted the Bill of Rights over the course of the last few decades. Certainly over the course of American history. Can you give us a sense of why this tension has arisen?
- A: There is always a tension between security and the Bill of Rights and our individual freedoms. It started, as I pointed out, in 1798 when Congress, under John Adams, passed the Alien and Sedition Acts, which were really a gag rule on people who were dissenting. Thomas Jefferson won the election in 1800 probably in large part because he opposed

those. Then we had, during the pre-Civil War period, in terms of the Southern states considering their security, the press was almost annihilated in terms of speaking against slavery. I mention what happened during the Civil War - and by the way, there's an important footnote to that. I wish American history were taught much better than it is in our school system, all the way from elementary school to graduate school. Most Americans have no idea, really, of what their rights and liberties are. They have a token sense of them, but they don't know what it takes to keep them. And that's what we again are experiencing now.

In the Civil War, afterwards, in *Ex parte Milligan*, the Supreme Court said – and I hope this Supreme Court keeps that in mind – the Constitution of the United States applies to everybody, including interns of war. Then we have, in the First World War, Woodrow Wilson, and I don't think many Americans know this, practically abolished the First Amendment. And there was such rising fury against dissenters in this country that, to give you one of many examples, one dissenter had an American flag wrapped around him by a mob and then he was killed. And Wilson completely insisted that there be no dissent. Labor leader Eugene Debs went to federal prison because he spoke against the draft. A woman got 10 years for saying we shouldn't go into the war. Right after the war under the Red Scare, people were afraid the Bolsheviks were coming from Russia, we had the Palmer Raids. The Attorney General Palmer, with his young, eager assistant J. Edgar Hoover, who was later the head of the FBI, rounded up scores of people – some of them immigrants, some of them American citizens. Many of the immigrants were deported. There were no real hearings. There was nothing but suspicion that they were involved somehow with 'the Reds'.

Then we had - in the Second World War it wasn't quite as bad, but there was again a lot of government against dissent. And then came the reign of Joe McCarthy and that whole McCarthyism period where people used to buy certain records and books and put paper bags around them so people wouldn't know what they were reading or listening to. So this is a continuing series. And one of the worst examples in our history was during the Second World War when Japanese Americans, by the Supreme Court, including such people as Earl Warren, and William O. Douglas, voting to put them in concentration camps. The euphemism is 'detention camps'. And interestingly, one of the key cases, Fred Korematsu was put in one of those camps, and his case finally revoked all of that. Korematsu has a friend of the court brief in the Padilla case and the Hamdi case saying, "Let's not do this again." Now the press, so far as I know, except for Jonathan Turley in Washington, has ignored that. But these parallels keep coming back.

The most dangerous part of all of this now is – you know, some of the people who support the Patriot Act say, "Well, we've had these problems in the past but eventually we get our liberties back." But Al-Qaeda and the fringe association groups that are linked to them all over the world, they're not going to go away, right away. It may take generations, I mean literally generations before they're expurgated, if ever. And that means that with Americans now having so limited a knowledge, with exceptions - but many Americans, if you ask them what's in the Fourth Amendment, even what's one of the five freedoms in the First Amendment, they don't know. They've not been taught

that. So you're going to get kids coming up now and in the future generations, who, as these restrictions on the Bill of Rights of individual liberties keep coming down and getting harsher, they'll consider that's the way it normally is in this country. So they'll be a dim memory. It's like a Ray Bradbury story. "Once we had something called the Bill of Rights. Oh, yeah, but that was a long time ago." So that's the danger because we are not fighting obviously a single country with a single army.

And yes, we need – you know the ACLU has a good slogan: We can be safe and free. And the only thing that encourages me is more and more Americans are realizing that, and members of Congress are beginning to listen to them. But let's see what happens in the presidential campaign - whether the state of health of our Constitution is going to be even a marginal issue. Sure, prescription drugs is important, what's happening in Iraq is important. But from the very beginning, in fact, the day after September 11th, the president said we are going to preserve our freedoms against these terrorists. And not long after, the Attorney General, John Ashcroft, who has been a main perpetrator of these revisions of the Bill of Rights said, "We are not violating civil liberties, we are protecting them." George Orwell called that 'Newspeak'. So the problem remains, this is going to go on a long time. We need security, but are we indeed fighting for our freedoms against people who would take them away? Or are we unwittingly being complicit with the people who are against us? You know, Justice Brandeis, who may have been the wisest man on the federal bench, I'm going to paraphrase this badly, but he said that our most dangerous people in power are the ones who with the best of intentions are so full of zeal that they misunderstand what they do. And, as a result, undermine the liberties they are purportedly protecting. We have those people now. And although Ashcroft is the usual target, the president gets a pass, but he supports all of this. In fact, I've seen on television twice, he turned to Ashcroft and said, "You're doing a fabulous job."

And the press, that's where I come from, also is much worthy of criticism. There used to be a standard in my business that if you had an important story, you stayed on it, you followed up. We do that less and less. They break a story about another violation of the Bill of Rights then it dies in a day or two. But we keep finding out more about Kobe Bryant. And that's part of the reason that the 24 hour news cycle has impeded, not increased our knowledge of what's important. So the press had better begin to wake up because they're among the people that are going to be targeted more and more. This is a government - if God forbid there is another 9/11, we are not going to be able to speak as freely as we do now or print as much as we do now. Already there are parts of – you know one of the reasons that the Congress, at least many of them, are becoming very angry at John Ashcroft, is they don't know what's happening. He doesn't say what's going on with the USA Patriot Act. And there's a reporter named Dan Kennedy at the *Boston Phoenix* who said the reason people are beginning to be apprehensive is not that they know they're being watched, they don't know they aren't being watched. And that is what makes you wonder what on earth is going on. This is supposed to be a free society, right? O.K., we have to protect a free society by not becoming an unfree society. Then who wins?

A – Nat Hentoff Q - Interviewer

Q: I'd like to hear a comparative discussion. We're looking fairly broadly at time periods, not only the contemporary era but also quite extensively back in the Reagan Administration. Particularly because there are so many people who appear in both administrations, for example John Poindexter. Can you talk about how the Reagan Administration may have laid the ideological groundwork for what we're seeing now?

A: Not only did we have John Poindexter, who was a felon except he didn't go to prison because he got immunity on a technicality. But it's not only the Reagan Administration; Bill Clinton gave Ashcroft a great deal of the framework for the Patriot Act. In 1996, Clinton pushed hard with the help of the Republicans and a complicit, dozing Democratic Congress to pass the Antiterrorism and Effective Death Penalty Act. In that, there was the use of secret evidence, which has now become amplified under Ashcroft. The roving wiretaps, which came shortly afterward, and that was pushed by Louis Freeh at the FBI, with Clinton's total enthusiastic approval, we've got that now.

Now the roving wiretaps, which Ashcroft likes to brag about - it means that, for the first time - he didn't start it; you don't have to go to a judge in every jurisdiction to get a wiretap. One stop means all the country. What most people don't know is that they also give blank warrants, John Doe warrants. So they put the wiretap on a public phone, or your office phone, and they don't know who's going to use it. But everybody who uses it gets into the database. So it's not only putting it back to Reagan, you have to include Clinton; you have to even include Harry Truman. Harry Truman gave a great speech, I happened to hear it in Symphony Hall in Boston, about keeping our freedoms. Then he had security checks which involved a lot of what McCarthy was doing.

All through our history we've had very few presidents, in fact I can only think of Jefferson, and even he supported muzzling the press, when he didn't like the press. So you know all of this comes back to something Jefferson said. He wrote this I think in the early 1800's. He said the only security for our liberties is in the people. And if they don't know what's going on - I'm obviously paraphrasing - then it's up to the press to tell them. The people now, using that term broadly, but also specifically, in terms of the 210 towns and cities, the people are rising. And finally members of Congress are listening. And the press is beginning to wake up. But then what's going to happen when the Padilla case and the Hamdi case, American citizens held without bail, without charges, without access to a lawyer, what is the Supreme Court going to do?

And the Chief Justice [William Rehnquist] and the book he wrote, *All the Laws But One*, approved in large part of what the Supreme Court did, initially putting the Japanese Americans in concentration camps. And he said in the book, there are times when you have to have fewer liberties in a time of war. So unless the people wake up enough, to communicate - you know the Justices read the newspapers, they watch television, and a lot's going to depend on what happens when these cases, Padilla and Hamdi, come up. Because otherwise, and John Ashcroft admitted this on June 5th before the House Judiciary Committee, he said, "Yes, the American streets are now a war zone." So that means the president or a succeeding president can take any American off the streets that he designates or she designates, I'm thinking of Hillary, designates as an enemy

combatant and puts them away. They vanish. That's never happened before. There's no justification for it in the Constitution. But how many people know about it?

Q: I'd like to talk just quickly about the Clinton Administration again, because there are so few commentators who actually covered the civil liberties record of that Administration. You mentioned the 1996 Act. Are there any other key infringements that came out of those years?

A: Well, one of the problems with the Clinton Administration is that, in view of his own problems, which have nothing to do with foreign affairs or domestic security, but with various women; he encouraged the use of intimidation of witnesses who might expose him. I wrote a series of articles about that, naming names and the private eyes that he used with public finance funds. So the climate of that administration was hardly an open administration in terms of worrying about people's individual liberties. And it wasn't hard for him to then allow for the Antiterrorism and Effective Death Penalty Act, to push for roving wiretaps, and there's a... Some future historians are going to finally do an illuminating look at that administration. Because not only Reagan, but Clinton as well, sowed the seeds for what Ashcroft and Bush and Rumsfeld, in terms of Guantanamo, are doing. So that nobody gets a free pass among our presidents. And that's why again, as Jefferson said, if the people want to keep their liberties, the people are going to have to be the source, the engine, the force to do that.

Q: As a final question, can you give us some sense of the role of citizen activism historically in pushing back against curtailments of civil liberties?

A: Well, our whole history is what the First Amendment right to petition the government, which can mean mass demonstrations, it could mean going to the courts, it could mean any numbers of ways we have, under the Bill of Rights and the rest of the Constitution, to protest. We wouldn't have women voting, we would still have slavery. Throughout our history the defects, the considerable defects in the Constitution itself, and in the various misinterpretations of it – I mean we had a second Constitution, after the Civil War and the Fourteenth Amendment to the United States – finally those Bill of Rights, the first ten Amendments, began. It took a long time for that to happen, but under the Fourteenth Amendment equal protection of the laws they were finally incorporated into the states and the cities, in the public high schools, so that kids could fight school boards and principals when they were being censored. And one man deserves the credit, and I don't know how many Americans know that, Justice Hugo Black. He pushed and pushed for what's called the 'incorporation doctrine', and finally, this Bill of Rights applies to everybody in every state.

Q: That's tremendous. Thanks so much for your time.