

Elizabeth Gilson
Law Day Remarks 2011

Good morning Chief Justice Rogers, Members of the Court, fellow members of the Bar, and distinguished guests. I am very proud to be here today to participate in the Law Day discussion of "The Legacy of John Adams from Boston to Guantanamo."

* * *

[Although it was not a part of my prepared remarks, I have to acknowledge the death of Osama Bin Laden who, was killed yesterday in a shoot out with American troops. Even after all these years, Bin Laden remained a potent symbol as the mastermind of the September 11 attacks on our country – criminal acts that set in motion all of the events that followed and which I will address this morning.]

* * *

In the wake of the murderous attacks on September 11, 2001, the President declared a war on terror and vowed to do everything in his power to prevent another attack. This vow launched a radical policy of over-reaction threatening our core beliefs advanced by John Adams and our other founding fathers. The administration would, as Vice-President Cheney was quoted as saying: use "any means at our disposal" to achieve its objectives, "quietly, without any discussion." The administration crafted a new, secret detention policy: Our government could seize anyone, anywhere, and hold him forever at an offshore prison without any process or charges whatsoever.

The first prisoners arrived in Guantanamo four months to the day after 9/11. The Executive's legal position rested on the claim that the prisoners had no rights because they were foreign nationals detained outside the sovereign territory of the United States. The men were to be held in strict isolation, without access to court or counsel, without charges, without the protection of the Geneva Conventions, and subjected to repeated interrogations under excruciating conditions. All unreviewable by a court of law; all hidden from the American people. These were America's own *disappeareds*.

By 2004, nearly eight hundred prisoners from over forty countries were imprisoned at Guantanamo. The majority of the prisoners – children as young as 12 and men as old as 93 – never saw a U.S. soldier when they were captured. According to published admissions of American military and intelligence officials, the vast majority of the men had nothing to do with September 11th and had no ties to terrorist organizations. As the Wall Street Journal reported, "*American commanders acknowledge that many prisoners shouldn't have been locked up here in the first place because they weren't dangerous and did not know anything of value. 'Sometimes we just didn't get the right folks,' says Brig. Gen Jay Hood, Guantanamo's then-current commander.*" Then-deputy commander, Gen Martin Lucenti observed that "*Most of these guys weren't fighting. They were running.*" For the most part, the mayors, the ministers, the masterminds, the Taliban generals, Osama Bin Laden – they weren't at Guantanamo. The desperately poor kids they employed as drivers and cooks filled the prison cells thousands of miles from home and family, held *incommunicado*, at the mercy of their captors, beyond the reach of the law.

There is a Latin expression: "*inter arma silent legis*" – in time of war, laws are silent. Guantanamo was an effort by the Administration to silence all the laws that might constrain the war effort. However, we are not bound to choose between security and justice. We can defend our security *and* our principles

within the confines of the Constitution and the laws of war. But that balance was lost when our war on terror went over to the dark side.

Under the Geneva Conventions—which the US ratified and by which it is bound – no prisoner, without exception, can be treated arbitrarily at the jailer’s discretion. In a series of infamous legal memos, the President’s advisors determined that the President had the power to reject the Geneva Conventions as they apply to the Guantanamo detainees. That the Geneva restrictions were rendered obsolete – “quaint” – by this new war on terror. Thus, there would be no need for a case by case determination as to the prisoner’s status, no inquiry into whether he had been properly detained. Coercive interrogations could continue.

Of course the United States has the power to imprison people seized in connection with the war on terror. But the exercise of this power must be subject to the rule of law. On June 28, 2004, in *Rasul v. Bush*, the U.S. Supreme Court held in a plurality opinion that foreign nationals imprisoned without charge at Guantanamo had the right to seek a writ of *habeas corpus* challenging their captivity in U.S. federal civilian courts. The Court observed that the federal courts have had the power to review applications for *habeas* relief “in a wide variety of cases involving Executive Detention in wartime as well as in times of peace.”

My two clients, like the majority of the others turned over to the US, had been sold by local Pakistani villagers for \$5,000 apiece to bounty hunters flush with American cash. They subsequently were hooded, shackled, shipped to Guantanamo, and held *incommunicado* for years. I filed “next friend” *habeas* petitions using only the first names provided by a fellow detainee written down on a cocktail napkin. I fought for a year, traveling back and forth to court in Washington D.C., just to be allowed to visit them over government objections that I lacked next friend standing. Throughout the five years of litigation, the

government never offered a sheet of paper or any evidence demonstrating dangerousness, involvement in terrorism, criminal activity or any other basis for captivity. Nevertheless, the Justice Department lawyers maintained that the men were enemy combatants, so they languished in prison, pushed beyond despair by solitary conditions in the newly- built maximum security facility they called "a tomb above the ground." Finally, on the eve of their *habeas* hearing -- after years of delay and the expenditure of countless hours of *pro bono* attorney time -- the government conceded that my clients were *not* enemy combatants. They are now free in Switzerland.

My clients' *habeas* cases were among the first to receive a hearing. Since then, hearings have started to go forward, slowly but surely. In 39 of 54 of *habeas* decisions so far -- 64% -- judges have ruled that the detentions are illegal. That statistic is astonishing, but more astonishing is what the judges say about the government's justification for imprisoning so many for so long on such scant evidence.

Take Judge Ellen Huvelle in Mohammad Jawad's case, before she ordered his release: "Seven years and your case is riddled with holes," she said to DOJ lawyers after suppressing the government's evidence as the product of torture. "This case is an outrage." Or Judge Coleen Kollar-Kotelly, in ordering the release of a Kuwaiti detainee: "The Court is unwilling to credit confessions that the government cannot even defend as believable." And conservative Judge Richard Leon, who previously had said that detainees had no right to come to court, told the government at another hearing that its position "defies common sense."

In the case of the Guantanamo prisoners, the power of the State cannot be exaggerated. The Justice Department lawyers have engaged in elaborate measures to interfere with attorney-client relations, to withhold evidence,

intimidate litigants, or exhaust their resources. Yet the courts -- including our Supreme Court -- have ruled time and again that only by giving these men access to counsel can we safeguard human dignity against government overreaching, regardless of guilt or innocence.

But not everyone holds this opinion. Some argue bitterly that the Guantanamo litigation is using the federal courts as a tool to undermine our military's ability to keep dangerous enemy combatants off the battlefield in time of war. Political figures, bloggers, and talking heads on cable news shows express concern about lawyers and judges micromanaging the war on terror with an excessive focus on legal rights. They tell Americans that danger lies in protecting the very freedoms, rights, and principles that we value. Just last week, the National Review Online resurrected the scurrilous charge that members of the Guantanamo Bar are traitorous terrorist lawyers for challenging our clients' detention.

Conflict and disagreement are inherent in our legal system. But vilifying lawyers as unpatriotic for challenging a policy that our country can hold people in prison forever without any legal basis? For questioning a system of indefinite, open-ended and boundless detention outside the basic guarantees of our Constitution? These unwarranted attacks should be condemned by all who believe in the American system of justice. Once we begin compromising our legal principles and values, no one will be safe from arbitrary treatment devised by "infallible" government policy makers whose decisions must not be questioned.

To be sure, these are perilous times. However, that is not justification for indefinite confinement without any type of hearing or judicial review. Any contention that the Constitution tolerates the creation of a prison beyond the

reach of the judiciary, reserved for foreign nationals who may be held on mere Executive fiat, is mistaken.

So what is the legacy of John Adams as it relates to Guantanamo? I should note here that according to his biographer, David McCullough, Adams wanted more power given to the executive in the new Constitution. But he also pushed hard for a bill of rights. More than 200 years later, the Guantanamo prison was established to evade the Constitution, a deliberate attempt to alter the fundamental relationship of man to government. Instead, because lawyers and judges stood up against injustice. Guantanamo in that respect has facilitated the expansion of the Constitution. Guantanamo, the symbol, still remains a stain on our country, but the Guantanamo litigation has established the right of all individuals – not just US citizens – to challenge unlawful imprisonment.

For all these reasons, we can be proud of the litigation that helped the United States stand as one with the civilized world. As for me, I take great comfort in the words of John Adams, who was castigated for defending the British soldiers responsible for the Boston Massacre. He said that his work obtaining a fair trial for these unpopular clients was “one of the best pieces of service I ever rendered my country.” I feel the same way.
