

Northeastern University School of Law
40th Anniversary Celebration
Moakley US Courthouse
October 18, 2008

Keynote Address by Anthony Lewis

Dean Spieler, President Aoun, ladies and gentleman: It is a wonderful privilege for me to take part in this great celebration. The School of Law at Northeastern has every reason to take pride in the anniversary of its reopening forty years ago. I noticed that your catalog begins with a statement of purpose: "To advance justice. To be a leader. To make a difference." You have done all those things. You have made a difference in the legal community and in the wider society. I say that not just as a generality but as someone familiar with the qualities of Northeastern law students and graduates, who have worked with my wife as lawyer and judge. And now, of course, she has a superb colleague, Justice Margot Botsford, who is a graduate of this school.

It happened that this is a time of high significance for law in our country. Fealty to law has been the great contribution of the United States to the political systems of the world. We pledged at the beginning to have "a government of laws, and not of men." John Adams put that phrase in the constitution of Massachusetts in 1780, and it remains there. But over the last eight years our national government in Washington has abandoned that pledge, with what I think are disastrous results.

Over these years the President of the United States has asserted the power to violate a criminal law against wiretapping American citizens without warrants. He has authorized torture of detainees despite treaty commitments and a domestic law forbidding torture. He has ordered the detention of American citizens, on suspicion of terrorist connections, without charge, without trial, without access to counsel, in solitary confinement without limit. He has assumed a general right to ignore provisions of

statutes passed by Congress when disapproves of them—without going through the constitutional process of vetoing the legislation and sending it back to Congress for a further vote.

In these and other actions the President and his lawyers had a consistent object: to give the President power beyond the reach of law and the Constitution. They based their campaign for power on the theory that those who created the United States Government in the 18th Century intended the President to have that ultimate power. As an assertion of history that theory is so brazenly without foundation that it is breathtaking. The Framers of the Constitution were worried above all about the concentration of power. They made every effort to build in checks and balances that would prevent autocracy.

The abandonment of law as a constraint on executive power has to be measured, in its results, in human terms. The worst, in my opinion, has been torture. I used to find it unimaginable that my country would adopt a policy of torturing prisoners. But it has done exactly that: adopted a policy. When some examples of torture techniques were exposed at the Abu Ghraib prison in Iraq, the U.S. Government took the position that they were the work of a few “bad apples.” That same argument has been used in other cases, again and again. But it is false. It was a policy, enable by legal opinions and instituted by the White House, the Defense Department and the Central Intelligence Agency.

The process began with lawyers in the Justice Department’s Office of Legal Counsel, which writes opinions defining the Government’s view of what the law is. The main draftsman, John Yoo, wrote an opinion asserting that the President had the power to order the use of torture and that Congress could not stop him. It also defined torture to almost the point of non-existence—as something that gave pain equivalent to the loss of a body organ or approaching death. John Yoo is a professor at the Law School of the University of California at Berkeley now: a fact that I regard as a scandal for that once great institution.

I should have mentioned also that the torture opinion was secret, as were many other legal memoranda treating the President as all-powerful. It seems to me a fundamental wrong that the Government should operate on the basis of legal opinions

that are secret: in effect secret laws, which are a hallmark of tyranny. And the Government did operate on the basis of those opinions. President Bush said in an interview this year that his order to use what he called “enhanced” interrogation methods on prisoners “was legal.” We had legal opinions that enabled us to do it.”

Here is one small example of the use of “enhanced” methods on detainees. Mohammed Jawad is a prisoner at Guantanamo. He was taken prisoner in 2002 and is currently on trial before a military court in Guantanamo on the charge of throwing a grenade at American soldiers in Afghanistan. He was 17 years old at the time. In 2004 he was subjected to what was known in Guantanamo as the “frequent flier program”: shackled and moved to another cell every three hour, 112 times over 14 days. The program of sleep deprivation was in fact not used to make Jawad more amenable to questioning; he was never questioned at that time. His lawyer, an Air Force major named David Frakt, said those in charge may have tortured him for sport.

I need hardly say that sleep deprivation was not the only technique used on Jawad and other prisoners. They were also exposed to extreme hot and cold temperatures, sexual humiliation, threatening dogs and waterboarding, the “water cure” that inflicts partial suffocation and that was used by, among others, the Spanish Inquisition and Japanese prison guards in World War Two—who were prosecuted by the United States as war criminals. I should add one other thing about the Jawad case. The military prosecutor recently resigned because, he said, his superiors had refused to give the defense material to which it was entitled as a matter of law.

Another group of prisoners at Guantanamo consists of 17 Uighurs, a Muslim population in western China who suffer discrimination from the Chinese government and are described by that government as terrorists. The 17 were in Afghanistan in 2001, allegedly getting some kind of military training. They went to Pakistan, where local people turned them over to American representatives in return for bounties. They have been in Guantanamo ever since. The United States concedes that they are not what it calls “enemy combatants”, but it says they have to stay in the prison because they cannot be sent to China and no other country will take them.

Last week a federal judge in Washington, who was evidently tired of Justice Department efforts to delay indefinitely a habeas corpus proceeding for the Uighurs ordered them released in the United States. That order was stayed while the Court of Appeals considered it. The Justice Department filed a brief saying the men should not be allowed in this country because they would be a “danger to the public.” In my opinion the real danger that worried the department was that their release would highlight the cruelty and irrationality of holding them all these years.

The policy of torture has been costly to this country. It has aroused much of the Muslim world to hatred of the United States. Even among our closet allies in Europe, whose people have an instinctive affection for Americans, there is a repugnance that an American government would behave in such a despicable way. Repugnance, and I should say bewilderment, because the policy has given up one of the great strengths of America in the world: its reputation for making law the backbone of its polity. Since World War Two many nations have copied the American model of a judicially-enforced constitution to protect human rights. Now what has happened to the original?

The practice of torturing prisoners has been used not only against foreigners but against at least one American, Jose Padilla. On the order of President Bush, he was declared to be an enemy combatant and held in solitary confinement without charge or trial. For two years he was denied the right to consult a lawyer. During that time, we now know, he was subjected to sensory deprivation, without books or resources, with no human contact except with interrogators. He was seen by the outside world once: when he was taken to a dentist with his eyes and ears covered to continue the isolation. When the Supreme Court was about to consider his case, counsel were allowed to see him—and found him a shattered human being. A psychiatrist found him to be in an “absolute state of terror, terror alternating with numbness.” He was then tried on charges of terrorist conspiracy, convicted and sent to an isolated cell.

What was done to Jose Padilla and to a considerable number of foreigner prisoners dispatches the notion that Americans are immune to the seductions of mistreating people they are told are less than equally human. I cannot see that picture of Jose Padilla being taken to the dentist in chains and blinders without wondering whether

the jailors who drove him over the mental edge were conscious of their wrongdoing. I know that the policy-makers who drafted the torture regime have no such consciousness.

There has been one bright spot in these dark years of official arrogance and inhumanity. That is the performance of individual lawyers who resisted the lawlessness ordered from Washington. The prisoners in Guantanamo, without power or influence, have had wonderful representation by military lawyers—judge advocates general assigned as defense counsel. And by partners in big American law firms, by sole practitioners, and by academics. These dedicated lawyers have fought all the way to the Supreme Court, where by the narrowest of margins they have prevailed against the claims of unbridled Presidential power.

That task remains unfinished. The challenge is not only to win cases but to lend our country back toward the understanding that fealty to law in hard times is not a weakness but our strength. I have no doubt that this law school—its faculty, its students, its graduates—will play its part in recommitting America to the rule of law.