

# THE TWO MOST IMPORTANT TRIALS OF THIS YOUNG CENTURY

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There are important things going on in the world right now.<sup>1</sup> On the top of most lists, we are at war with Iraq.<sup>2</sup> Anytime what is going on includes “We are at war with...,” that overshadows everything else. That overshadowing is understandable, it is natural, and it is desirable. Our friends and neighbors are in harm’s way. Law students have been called up.<sup>3</sup> Children of law students have been called up. War must not be shoved to the side in our consciousness, it must not be easily dismissed or taken lightly. The cost is high and attention must be paid.

It is in this context that I want to discuss what I think are the two most important trials of this young century.

1. One of the two most important trials is that of Hashem Aghajari. You may not have heard of him. He gave a speech critical of the government. He criticized its notions of its own infallibility. He was arrested, tried, and convicted, and he was sentenced to death. All of this happened in Iran.

Hashem Aghajari was a history professor at a teacher’s college in Tehran. His crime occurred during a speech. He questioned whether Iranians were bound to obey each and every edict of their ruling clerics. He questioned the infallibility of the ruling clerics. Muslims are not monkeys, he said, and need not blindly follow the teachings of the ruling clerics. He was convicted of blasphemy—“insulting the prophets”—and he was sentenced to death.

Students at Tehran University began protesting this death sentence. The protests spread from there to major campuses throughout Iran. Protesters were detained and protesters were beaten, but they kept at it. They kept at it until Iran’s top leader—Supreme Leader Ayatollah Ali Khamenei—ordered the judiciary to reconsider the Aghajari verdict.

Hashem Aghajari called for a kind of “Islamic Protestantism;” he has been compared to Martin Luther. He says that he is ready to die; his actions and those

of his student supporters have been compared to Tiananmen Square.

If Professor Aghajari is acquitted, or even if his sentence is significantly reduced (say, to the misdemeanor level), this would be one more step—one very large step—in the direction of opening up Iran, of empowering its students, of democratizing that country.

The student protests began as protests against Professor Aghajari’s death sentence. As they spread, they became general protests against the ruling establishment.

In 1979, the Islamic revolution ousted the Shah of Iran, the U.S. backed monarchy. Today, half of Iran’s 65 million citizens are under the age of 25. That means half of its citizens have no memory of life under the Shah and, in fact, weren’t even born yet.

The only government this young-half of the population knows is Islamic rule by Ayatollah. The only government they know comes with high unemployment (near 40%), a crumbling economy, and a strict and repressive social order.

But they have access to the internet. According to Thomas Friedman, Iran is a more wired country than you might think, more wired than I ever would have guessed.

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They can and do use the internet to form opinions as to how life is elsewhere. And they have a growing sense that Iran needs to open up to the world or be left behind. Before this war began, they had a growing fear that Iran's old enemy Saddam Hussein would be thrown out of Iraq and Iraq would return to the international fold, while Iran got left behind.

These young Iranians protested. And the current Ayatollah ordered the judiciary to reconsider its verdict. The students said they were ready to act again if the second verdict was a repeat of the first.

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Following the order that it reconsider its verdict, the Iranian Supreme Court has overturned the death sentence. Ayatollah Mohammad Sajjadi is one of the judges who heard the case "on remand," so to speak, from the Supreme Leader. He was quoted by the Associated Press as saying that the decision overturning the death sentence "came after weeks of careful study and scrutinizing of Aghajari's entire speech. Three out of four judges decided that the charges against Aghajari were not compatible with his speech."

In addition to death, Professor Aghajari was also sentenced to 74 lashes, banned from teaching for 10 years, and banished to three remote cities for eight years. Ayatollah Sajjadi said that the Supreme Court would refer Professor Aghajari's case to an appeals court in Hamedan—the western Iranian city where he was convicted—for a review of the remainder of his sentence.

This is a trial half a world away that could end up being one of the most significant trials in the history of modern Iran. And, therefore, one of the most significant trials in the history of that whole region. And, therefore, one of the most significant trials affecting our modern history, the modern history of the world.

This is a situation that bears watching and the student movement deserves support. Not that we should arm the students, but we should be beaming the truth to them over Radio Free Europe or whatever radio we broadcast into Iran. We should be spreading the truth over the internet. We should be letting students all over Iran know what students are doing in all other parts of Iran. We should support their steadfastness, fortify their stamina, and let them know they are not alone. We should help them keep their eyes on the prize.

One of the most important ways we can feed this movement is to be as careful as we can—during this war and its aftermath—not to turn these students against us and our way of life and back towards government by Ayatollah.

And all of this was put into motion by a simple trial.

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The first of my most important trials is not over. The "retrial," if you will, is ongoing...but the Supreme Leader has weighed in on the side of freer expression and two of the three judges of the Supreme Court sitting on the case have weighed in on the side of freer expression. It is a welcome beginning. The second of my most important trials has not begun.

**II.** The second most important trial of this young century is one right here in the United States. It is one that has not taken place and may never take place and, if it does take place, we may never know about it. Because it is secret.

There is a parallel legal system in the United States.

The U.S. government claims "that the President alone can designate individuals, including American citizens, as enemy combatants. [Once designated, they] can be detained with no access

to lawyers or family members unless and until the President has determined, in effect, that hostilities between the United States and that individual have ended."<sup>4</sup>

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At least one American citizen had been shifted from the usual legal system to the parallel one. Jose Padilla. He is accused of plotting with al-Quida to build a "dirty bomb." There may be more people than just Mr. Padilla held in this parallel system. We don't know. We can't tell. It is a secret system and it cherishes its secrets.

It is a secret, very much like the parallel universe with the evil Captain Kirk ... and the evil Mr. Spock. (You could tell Spock was evil because he had a goatee.) It is a system very nearly as hidden from view as that parallel, but evil, universe.

Mr. Padilla is being held ... (Or is it was being held? We don't know. It is a secret.) He is being held at a Navy brig. He has not been charged with a crime. He does not have the right to communicate with a lawyer. There is no meaningful judicial oversight of his detention.

And, quoting the Washington Post: "Administration officials have told the courts that they can detain and interrogate him until the Executive Branch declares an end to the war against terrorism."

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What troubles me is not that while at war we are confining enemy combatants. What troubles me is how we determine who is an enemy combatant. The President decides. Wouldn't Nixon have loved this power? And Clinton? The power to designate who gets locked up, incommunicado and indefinitely, or at least until the end of this seemingly open-ended war on terrorism.

What troubles me is not that while at war we are confining enemy combatants. What troubles me is how we determine there are “hostilities between the United States and that individual.” We use this parallel system in times of war. We use it in times of attack, which includes planes slamming into the World Trade Center and the Pentagon. Can we also use it when the Oklahoma City Federal Building is bombed? The Atlanta Olympics? Waco?

We use the parallel legal system in the war on terrorism. What if we had used it in the War in Vietnam? And why not use it in the war on drugs? Haven't more Americans died from drugs; haven't more lives been ruined by drugs; haven't more children been left parentless from the war on drugs than from the terrorist attacks on 9/11? And doesn't much of this drug problem have to do with the invasion of drugs from a foreign country? Why there's even a foreign enemy here. Why not run suspected drug offenders through this parallel legal system?

Once we get used to using the parallel legal system, how do we stop ourselves?

And how do we know when hostilities have ended? Will the hostilities against terrorism ever be over? Are hostilities over if we drop from Red Alert to Yellow... and on again if we go back up to red? Does Jose Padilla have any hope that hostilities against terrorism will end during his lifetime? If he does, it is only because hope springs eternal in the human breast. If he does, it is unrealistic and baseless. Not in our lifetime will these hostilities be over.

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How this parallel legal system will be applied depends on who administers it, and this is another frightening piece of this whole secret puzzle.

- I do not want to invest this power in George W. Bush and John Ashcroft.

- I do not want to invest this power in Bill Clinton and Janet Reno.
- I do not want to invest this power in George H. Bush and William Barr. I didn't even remember who William Barr is. It was like I'd never heard of him. I had to look up the name of George H. Bush's Attorney General on the Department of Justice web page. Attorney General Barr is colorless even there: his archived official photo is in black and white.
- I do not want to invest this kind of power in Ronald Reagan and Ed Meese III.
- I do not want to invest this power in Richard M. Nixon and John Mitchell or Richard Kleindienst or Elliott Richardson or William Saxbe. (By the way, my advice: Beware of any President who, in basically one term (five years), has four attorneys general.)

And maybe soon the Department of Justice won't even have the kind of role in these decisions that it has now. Soon, much of this responsibility, much of this power, will be shifted to the Department of Homeland Security. Their job is not justice. Their job is security. It is right there in their title.

Furthermore, in terms of how it is administered, whomever administers it, this system will be like every other ever created. It becomes as a living organism. Once the system is established, two things will happen:

- First, a bureaucracy will be created.
- Second, the bureaucracy will expand.

The censor is a good analogy. A censor's job is to censor and once the one thing is censored, the censor will go after another. And once the second thing is censored, the censor will go after the third, and then... And “[t]he censor is always quick to justify his function in terms that are protective of society.”<sup>5</sup>

The security officer's function is to restrict and restrain. The job will tend to attract those who are most radically preoccupied with this kind of restriction and restraint. It is not the Department of Justice, but the Department of Security.

With no meaningful judicial review, anyone can be designated an enemy combatant. Once that designation is made, he can be detained indefinitely without charges or counsel. All of this can be done on the government's say-so. All of this can be done so long as there is a war against terrorism.

What troubles me is this trial that may never happen. This trial that may never be granted. This trial that we may never know about because, even if it does happen, it will be a secret.

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How this parallel system is administered will depend on who administers it and this leads me to what troubles me most about this procedure. The damage done may be incalculable no matter who administers it.

Put the system into the hands of the person who will administer it fairly and with pure regard for civil liberties. Even then, this system troubles me a great deal because, no matter who administers it, it violates our basic tenant: The rule of law.<sup>6</sup>

The beauty of our system is that the system is not supposed to depend on who administers it. It depends on adherence to basic legal principles laid down by the Founders. This is the rule of law and the rule of law is the principle genius of our legal system.

Ours is a government of laws, not persons. Chief Justice John Marshall's gift to the nation can be summed up in one sentence from *Marbury v. Madison*: “[The] government of the United States has been emphatically termed a government of laws, and not of men.”

This is what is wrong with this parallel legal system:

- Leave aside due process.
- Leave aside equal protection.
- Leave aside the right to speech.
- Leave aside the right to counsel.
- Leave aside the right to a speedy trial.
- Leave aside the right to a jury of one's peers.

If we leave all of that aside, here is what troubles me most about this parallel legal system where the President decides who will be detained and for how long they will be detained, all without a trial, without a judicial hearing, without access to a lawyer. It is not a government of law. It is "a government...of men." As such, it is not consistent with who we are and who we want the rest of the world to be.

For us as Americans, for us as lawyers, there is no more important concern than this: the very nature of our government. We must protect our government's essential nature from enemy combatants and we must protect our government's essential nature from those within our government who would alter its essential nature in order to fight those enemy combatants.

For us, as Americans, there is no more important role we play in the world than through our example of what can be achieved by a free people with an open government. This is what we

must protect—and we must protect it from "them" and we must protect it from "us."

Surely, freedom must be defended, and sometimes it must be defended with guns. I do not suggest national suicide. Of course we do let others destroy our freedom. And this is so whether the threat is an air attack on Pearl Harbor or one on the World Trade Center and the Pentagon. We do not stand idle while the enemy takes us down. I do not mean that. I do mean that for us there is no more fundamental value than the rule of law and before our government can infringe that rule it must prove the most compelling of reasons—infringing upon who we are to save who we are—and that there is no alternative to saving who we are other than by infringing upon who we are.

We do not go down as a nation while standing on the rule of law. As we wage our war, whether it is our war against Iraq or our war against terrorism, or whether those two are all part of the same war, we do not go down as a nation while standing on the rule of law, but we do remain true to that rule of law. In our system, these kinds of core values can only be infringed if the government can demonstrate two things.

Government must demonstrate that there is a compelling state interest in having a parallel, secret judicial system, and surely there is: national security. Government must also demon-

strate that putting persons into this parallel, secret judicial system is the least restrictive way of achieving that compelling state interest.

Government must show that the end of national security cannot be served in the regular Article III judicial system. What troubles me is that, in my opinion, this has not been done here.

III. Two trials. One that we hope begins the journey towards a more open society, even if it is only a small step, and another that we hope is not the beginning of the journey down the road to a more closed society, even if only a small step. I have faith in our leaders and in our citizens. I have faith that our tradition of the rule of law is sufficiently strong that it will survive this parallel system, much as it survived the World War II internment of American citizens of Japanese ancestry. Damage may be done, but, in the end, the rule of law will survive.

There are new federal courthouses going up all over the country. Were I the architect for one of them, or all of them, the words I would chisel into the granite over the portals are these: "Ours is a government of laws, not persons." What troubles me so much about this parallel legal system is that it is a government of persons, not a government of laws. It is not who we are and it must not be who we become.

\* This article is based on January 15, 2003 speech Professor Fenner gave at the annual Omaha Bar Association luncheon.

<sup>1</sup> Important things on the larger world-wide scale and on the smaller personal scale: We are at war with Iraq and my wife and I have our first grandchild. The confluence of these two events gives me a greater interest in the long-term future. I find myself thinking farther out. I find that the grandchild brings up in me a greater personal urgency that this war end well for the world.

<sup>2</sup> As I write, the war may just be over. Just as there was no declaration of war, there has not yet been a declaration of not war.

<sup>3</sup> From section B of the first year class, SPC Charles Garman has been called to active duty with the possibility of being sent to Iraq. His empty seat in section B classrooms is a daily reminder of the cost of war.

<sup>4</sup> Charles Lane, "In Terror War, 2nd Track for Suspects; Those Designated 'combatants' Lose Legal Protections," *The Washington Post* (Dec. 1, 2002).

<sup>5</sup> A Book Named "John Cleland's Memoirs of a Woman of Pleasure" [a.k.a. "Fanny Hill"] v. Attorney General of Massachusetts, 383 U.S. 413, 431 (1966) (Douglas, J., concurring).

<sup>6</sup> "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L. Ed. 1093, 60 S. Ct. 736 (1940).