The Twenty-Sixth Annual
Chester Bedell Memorial Lecture

"THE INDEPENDENCE OF THE AMERICAN LAWYER"

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BARRY RICHARD

Tallahassee, Florida

BARRY RICHARD

Barry Richard, a shareholder in Greenberg Traurig, has been recognized by the *National Law Journal* as one of "the most influential lawyers in America" and has been identified as a lawyer with the power to "shape public affairs, launch industries, shake things up and get things done." He is listed as a top litigation and appellate lawyer in *Chambers and Partners USA Guide,* was selected as one of the two *National Law Journal* Lawyers of the Year in 2001, and has been noted for his "national reputation for compelling advocacy." The *New York Post* has referred to the "trademark clarity and forcefulness" of his argument and CBS anchor Dan Rather called his nationally televised argument before the Florida Supreme Court in the 2000 Bush-Gore litigation "brilliant."

Mr. Richard concentrates his practice, both jury and non-jury, in the fields of complex commercial litigation, appellate law, state and federal constitutional law, and government and election law. He is licensed to practice in Florida, New York and the District of Columbia, and has been *pro hac vice* as lead counsel in state and federal courts throughout the United States.

Mr. Richard has successfully argued three major cases before the United States Supreme Court, numerous cases before the Florida Supreme Court and all lower state and federal appellate courts in Florida. Mr. Richard has argued many constitutional cases both in Florida and nationally over the past two decades and has obtained successful appellate decisions in cases involving some of the most significant constitutional questions and some of the largest judgments in Florida history.

Most notably, Mr. Richard represented President George W. Bush in the 2000 presidential election litigation. In that capacity, he managed 46 lawsuits and personally argued several critical cases on behalf of President Bush. Under both Republication and Democratic administrations, he has been retained at various times as special counsel to the Governor, the Florida Senate, the Florida House of Representatives, the Florida Attorney General, the Florida Secretary of State, the Florida Department of Health, the Florida Department of Transportation, and the Florida Bar as its general litigation counsel and has been retained by the Florida Academy of Trial Lawyers to represent it before the Florida Supreme Court.

Mr. Richard's honors include selection as a Fellow in the American College of Trial Lawyers and the International Academy of Trial Lawyers.

THE INDEPENDENCE OF THE AMERICAN LAWYER
GUEST SPEAKER: BARRY RICHARD
Presented June 24, 2011, Kissimmee, Florida

In 1535 Thomas Moore was beheaded for refusing to recognize Henry the 8th as the supreme head of the Church of England. Moore is remembered by historians as a lawyer, writer, politician and clergyman but he is best known in popular culture as the inspiration for the Academy Award winning movie A Man For All Seasons in which Paul Scofield in the role of Moore gave Americans one of its most memorable scenes. In the scene, Moore is engaged in a debate with his future son-in-law William Roper when he analogies the laws of England to a forest of trees.

MOORE: Go he should with the devil himself until he gives the devil himself the benefit of law.
ROPER: So, now you would give the devil the benefit of the law?
MOORE: Yes, what would you do? Cut a great road to get after the devil?
ROPER: Yes, I would cut down every law in England to do that.
MOORE: And when the last law was down and the devil turned around on you, where would you hide, the laws all being flat. This country is planted thick with laws from coast to coast, man's laws, not God's, and if you cut them down, and you are just the man to do it, do you really think you could stand upright in the winds that would blow then? Yes, I would give the devil the benefit of law for my own safety's sake.

On 9/11 the devil was at the gate and the Ropers among us have been cutting down trees ever since, but in the forest of laws that protect us none is more critical to the preservation of liberties than the writ of habeas corpus. The writ is a court order to an arresting officer requiring the production in court of the person who has been detained and the satisfaction to the court that the arrest has been lawful. Significance lies in the fact that it deprives an autocratic government of its most effective tool for suppressing dissent, the ability to jail a person indefinitely without cause.

The writ has been traced back to the 14th Century where its initial purpose was to preserve the exclusive right of the crown to order the arrest of a subject. Obviously, it was not applicable to the King himself. But in a single day in 1628, the writ underwent a profound change that would cause it to become one of liberty's great sentinels and to aptly be known as the Great Writ. On May 15th, 1628 an emboldened parliament passed what is known as the Petition of Right. The Petition stated that the writ would hence forth be applicable to everyone in the realm including the King himself. At the time the King's assent was necessary for an act of parliament to become law. Needless to say, the King was less than enthusiastic about the Petition of Right, but he was desperately in need of Parliament's assistance to replenish his army and his treasury and after a week-long standoff, the King relented

and the Petition of Right became the law of the land.

At the time America was colonized, the Writ had become so important that it was the only personal right that was included in the original Constitution. And today it remains the only writ specifically named in the Constitution. Article 1, Section 9 states that the Writ shall not be suspended except during times of invasion and rebellion and even then only when public safety requires. It has been suspended only twice in our nation's history, by Abraham Lincoln during the Civil War and Ulysses S. Grant in South Carolina in a crack down on the Klu Klux Klan.

No president again attempted to suspend the Writ for 135 years. The road leading to that attempt began on an Afghanistan battlefield in 2001 when Yasser Hamdi was captured by Northern Alliance forces and because he was a naturalized American citizen, he was handed over to U.S. forces and transferred to a military prison in the United States. He was joined there by Jose Padilla, a natural born American citizen who was not captured in combat and was not known in fact to have ever been on a battlefield. He was arrested in the Chicago airport wearing civilian clothes and carrying no weapons. Both were declared enemy combatants, both were imprisoned in military facilities and no formal charges were filed and both were denied access to counsel.

Their cases reached the United States Supreme Court at the same time. The decisions are important, but they're not of significance to us today. Instead our focus will be on the positions asserted by the government in the arguments to the Supreme Court.

The United States made six assertions in *Padilla* and most of them in *Hamdi*. The first assertion was that the President of the United States can declare anyone an enemy combatant on suspicion of terrorist ties based upon a power that arises from the President's core Constitution authority as Commander in Chief, and that that power applies to American citizens.

The second assertion was that the President doesn't need congressional authorization to detain an American citizen as an enemy combatant. The government faced a problem with this second assertion because the United States Supreme Court had held that the President's war powers are at their weakest when Congress has expressly prohibited an action and Congress did precisely that in 18 U.S.C. 4001 which provides that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an act of Congress.

The government's argument in *Padilla* and *Hamdi* as to why Section 4001 was inapplicable is stunning in its concept and chilling in its implications.

Section 4001 was enacted in 1971 as a belated response to the internment of thousands of Japanese Americans during World War II. The government argued that the Japanese internment had been ordered by "civilian authorities". The word civilian is in italics precisely as it appeared in the

government's brief. It argued that, therefore, Section 4001 doesn't prohibit the imprisonment of American citizens by military authorities.

The government's third assertion was that the President as Commander in Chief has the authority to seize and detain American citizens who have been declared enemy combatants even when they're arrested on American soil.

The fourth assertion was that a person who has been declared an enemy combatant has no right to counsel.

It is the fifth assertion, however, that effectively suspended habeas corpus. The government conceded that the detainee was entitled to some form of judicial review, but it argued that that judicial review was extremely limited. The court could only inquire about whether the facts stated by the Executive Branch were sufficient, if true, to detain a person as an enemy combatant. The accuracy of the facts stated by the Executive were not for judicial inquiry. In other words, if the Executive stated that it had reason to believe that a person was aiding the enemy, that fact must be accepted. Executive determination, the government argued, was final.

The law of war was created during conventional wars where there was a clear beginning and a clear end. The captured enemy combatant was detained until the end of the war and then was entitled to be returned to his or her homeland. That scenario doesn't work with the war on terror. Who declares an end? What if it continues for 50 or 100 years? How do we reconcile that with due process? That question troubled the Justices of the United States Supreme Court in the *Padilla* case and in a dialogue between Justice Sandra Day O'Connor and then Solicitor General Paul Clement, we see illuminated the government's sixth assertion.

> MR. CLEMENT: What has happened historically, what the Geneva Convention provides is that if one of those enemy combatants is charged with a specific war crime, at that point they are entitled to counsel. But if they are just being held in preventative detention, then, in that circumstance, they are not entitled to counsel.
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> JUSTICE O'CONNOR: But have we ever had a situation like this where presumably the status, warlike status, could last 25 years, 50 years, whatever it is?
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> MR. CLEMENT: A couple of responses Justice O'Connor. First of all, in the midst of any war, the detention may seem like it's indefinite, because if you talk about a detainee in 1942, they are not going to know how long World War II is going to last, and their detention may seem indefinite. But those detentions have always been approved under the law of war. Second, with respect to Al Qaeda, and individuals who are hardcore Al Qaeda operatives, the end of the war is a very difficult thing to perceive.

The government's position in short was that the President may declare any American citizen to be an enemy combatant and having done so, incarcerate that citizen in a military prison with no congressional oversight, no judicial review, no access to counsel and no time limit. The President had now claimed the same power as the King before the adoption of the Petition of Right in 1628. This is not a liberal versus conservative issue.

In the *Hamdi* case, the majority of the Supreme Court ultimately held that a person declared an enemy combatant is entitled to some form of due process, but that that due process can be sufficiently satisfied by a military tribunal. Justice Scalia dissented. It's not surprising in itself since he's the most conservative member of the Court, often siding with the government. But the grounds for his dissent surprised many lawyers. In the 26 page dissertation on the history and significance of the writ of habeas corpus, Justice Scalia criticized the majority for failing to go far enough in restraining the power of the Executive. He summed up this way. "The very core of liberty secured by our Anglo Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."

The second tree in the forest of laws that protects us from the devil's winds, is the 4th Amendment. The amendment was a reaction by colonists to writs of assistance: the King's authorization to search the colonist's homes and businesses without limitation as to scope or duration. The Founders harbored a strong belief based on hundreds of years of experience that the Executive Branch cannot be trusted to respect individual rights. The solution was a principal at the core of both the 4th Amendment and habeas corpus: the interposition of the judiciary between the Executive and the individual.

The result was the 4th Amendment's requirement of judicial authorization based on probable cause set forth in a warrant stating with particularity the place and the person to be searched.

In the years leading to World War II, a number of federal agencies began to establish intelligence gathering operations. Initially they were directed solely to foreign governments, but in the '50s they were expanded to include domestic surveillance of communists and organized crime. In the '60s, it was expanded still further to include civil rights groups and anti-war activists.

In 1974, in the wake of disclosures of abuse of personal privacy, a number of Congressional committees began to hold hearings. The evidence produced at those hearings showed that the FBI had been engaged in warrantless wiretapping of journalists and activists, the most prominent of whom was Martin Luther King, Jr.

The evidence also showed that in 1963, the IRS had established a secret division with the written mission statement to collect information in its own words "on activist organizations and individuals". The project began with a list of 77 organizations and it ultimately grew to 3,000 organizations and

8,000 individuals. In violation of federal law, the IRS had been collecting and sharing with the White House confidential personal information on celebrities and others who criticized administration policies. The evidence at the hearing showed that among the IRS targets were Sammy Davis, Jr., Jerry Lewis, Peter Lawford, Lucille Ball, Frank Sinatra, John Wayne and a young actor named Ronald Regan.

The Congressional report found that one of the more ominous revelations was that the United States Army had established a system of secret surveillance of political activities by Americans residing in the United States and that the Army had collected and stored data on the personal lives of at least 100,000 civilians. As a result of these hearings, Congress enacted a number of measures to protect the privacy of Americans. Among them was the Foreign Intelligence Surveillance Act or FISA. FISA allowed domestic electronic surveillance without a warrant only when the Attorney General annually certified three things. First, that the surveillance was directed solely at communications between or among foreign powers or agents. Second, that there was no substantial likelihood that there would be an acquisition of communications in which an American citizen, corporation or permanent resident was a party. And third, there were procedures enforce to minimize the possibility of seizing the communications of Americans.

Forty-three days after the 9/11 attack, Congress passed the Patriot Act. The Patriot Act was an acronym standing for uniting and strengthening America by providing appropriate tools required to intercept and obstruct terrorism. Somebody lost sleep thinking up that one.

Whereas FISA required foreign intelligence gathering to be the reason for surveillance, the Patriot Act required only that be it a significant reason. Whereas, FISA retained particularity as to place and subject, the Patriot Act allowed roving wiretaps with no identification of the instruments, facilities or place to be searched or the names of particular individuals. Whereas the Patriot Act eliminated the requirement of particularity, it did retain the requirement for judicial authorization on a showing of probable cause for domestic surveillance.

On December 15th, 2005, the New York Times reported that the President had authorized warrantless eavesdropping on international calls and e-mails involving Americans in the United States in direct violation of the provisions of FISA. Days later, the President acknowledged that such eaves dropping had been taking place, but he then ordered the National Security Agency to continue to engage in such surveillance.

On December 22nd, the White House sent a letter to congressional leaders and, as with habeas corpus, the President asserted that his constitutional duty as Commander in Chief granted him all necessary authority to protect the nation and that such authority included the power for the warrantless domestic surveillance without the authorization of Congress. Six months later Deputy Attorney General James Comey gave dramatic testimony to the

Senate Judiciary Committee. On March 10th, Attorney General Ashcroft was hospitalized with severe pancreatitis. In testimony directly out of a Ludlum novel, Comey recalled that that evening he received a frantic phone call from Mrs. Ashcroft. She told him that White House Counsel Alberto Gonzales and Chief of Staff Andrew Card were on their way to Ashcroft's hospital room and she urged Comey to rush to the room. In the intensive care unit with Comey present, Gonzales and Card urged Ashcroft to sign the certification that was required annually by FISA that all FISA requirements had been met. Ashcroft stated that Comey was the Acting Attorney General and that it was his decision. Comey refused to sign and Ashcroft refused to countermand him. Comey was asked by the Congressional Committee what then happened.

> COMEY: The program was reauthorized without us and without a signature from the Department of Justice attesting to its legality and I prepared a letter of resignation.

So the Attorney General refused to certify as required by FISA and the surveillance continued nonetheless hours after the Comey testimony, President Bush attended a press conference. He didn't deny Comey's statements and he didn't attempt to defend the lawfulness of the surveillance. Instead he retreated into the historic executive justification of national security.

> KELLY O'DONNELL, NBC NEWS: Sir, did you send White House counsel Andy Card to the bedside of John Ashcroft while he was ill to get him to approve that program and do you believe that kind of conduct is appropriate?
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> PRESIDENT BUSH: There is a lot of speculation about what happened and what didn't happen. It is a very sensitive program and I am not going to speculate. I will tell you the program is necessary for protection of the American people, and it is still necessary. There is an enemy that wants to do us harm.

Less than three months after Comey testified, Congress, unlike Parliament in 1628, and unlike Congress itself in 1974, succumbed to the will of the President. The Protect America Act passed on August 4th, 2007. It authorized the President to do exactly what he had been doing in direct violation of congressional mandate. Whereas, FISA had permitted warrantless domestic surveillance only when it was directed solely at the acquisition of communications exclusively between or among foreign powers and only when there was no substantial likelihood of acquiring communications to which a U.S. citizen was a party. The Protect America Act repealed these safeguards and replaced them with one sentence, the Director of National Intelligence and the Attorney General for periods up to one year without court approval may authorize surveillance, period. No focus on foreign powers. No concern of the likelihood of spying on American citizens located in the United States and most significantly no judicial oversight. The decision to spy on Americans had not been concentrated entirely in the Executive Branch. Of the three key 4th Amendment elements, particularity was gone, probable cause was gone and for the first time since the adoption of the United States Constitution, the judicial shield between the Executive and the individual was gone. This is not a partisan issue. President Bush is not the only president and the Republican party is not the only party to encroach upon American liberties in the name of security.

In the *Hamdi* and *Padilla* cases, the government relied on two World War II cases *Ex Parte Quirin* and *Korematsu* versus the U.S. Both involved actions of Democratic President Franklin Roosevelt. Events leading to the *Ex Parte Quirin* case began on a summer night in 1942 when two submarines left Nazi Germany. One landed four saboteurs on Long Island off of New York and the second off of Ponte Vedra Beach in Florida. Within weeks all eight were arrested, unarmed wearing civilian clothes. One was an American citizen. They were ordered tried by a secret military tribunal and Army Colonel Kenneth Royal was appointed to defend them and at the risk of his military career, he did so vigorously. He petitioned the United States Supreme Court for a writ of habeas corpus arguing that his clients were entitled to trial in the United States district court. The Supreme Court denied the petition. The eight were tried in a secret military tribunal and all were convicted of spying. Six were executed in the electric chair five days later without the right of appeal to a higher court.

In the catalog of liberties violations however, the *Quirin* case pales compared to the treatment of Japanese American citizens during World War II. On December 7th, 1941, the Japanese empire launched a surprise attack on the American Pacific fleet in Pearl Harbour. The attack left the nation with a sense of national outrage and vulnerability and it spawned a wave of fear and antagonism towards Japanese Americas. Several weeks after the attack President Roosevelt issued Executive Order 9066. It first authorized the Secretary of War to evacuate certain areas on the west coast and it gave the military commander unlimited discretion to impose additional restrictions. In a series of orders issued on the authority of Executive Order 9066 Japanese Americans were first subjected to a curfew. They were then ordered to evacuated the west coast and then required to register and finally ordered to internment camps where they were kept under armed guard for the duration of the war with no meaningful due process.

Fred Korematsu, a 22 year old U.S. born Japanese American citizen refused to evacuate. He was convicted of a misdemeanor and his case made its way to the Supreme Court where the conviction was upheld by a seven to two vote. In the dissenting opinion, Justice Frank Murphy stated that the order excluding Japanese Americans from the west coast goes over the brink

of Constitutional power and falls into the ugly abyss of racism. It was the first time that the United States Supreme Court used the word racism in an opinion.

The role call of wartime liberties violations is a long one. It is a sad fact that in every period of war in American history the Executive and the Legislative branches sometimes with the acquiescence of the Judicial branch has sacrificed American liberties in the name of security.

In our own time justified by the war on terror, the Bush Administration has also waged a war of unprecedented magnitude on habeas corpus, due process and the 4th Amendment. The Executive, with the assistance of Congress, again made relevant a quote by Admiral Perry in 1813 popularized in the 1970s by political cartoonist Walt Kelly whose character Pogo said: "We have met the enemy, and he is us".

In his dissent in *Hamdi*, Justice Scalia quoted Alexander Hamilton in the Federalist Papers, a prescient statement Hamilton foresaw presidential conduct that was to occur in the future.

> Safety from external dangers is the most powerful director of national conduct. Even the ardent lover of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.

The test of true patriotism doesn't come in times of peace and security. It comes in times of fear and unrest. The founders understood that. In 1791, our country had just come within a hair's breath of losing the War of Independence. It was small and weak and at the mercy of the world's great powers. We had no Department of Homeland Security. There was no such thing as a secure border and the first Americans were under ever present threat of hostile attack, but the original patriots didn't pass the Patriot Act or Protect America Act. They passed the Bill of Rights. Patriotism is not demonstrated by anagrams that spell patriot. It is demonstrated by nourishing the roots of liberty and the roots of liberty are most in need of nourishing at times of drought. Liberty is nourished every time a legislative body refuses to bend to the will of an overreaching executive, every time a judge does what he or she knows is right in the face of an outcry of the public to do what is wrong. Every time an executive officer resists pressure and disregards the will of the legislative branch and of the Constitution, every time a lawyer risks his or her career to represent an unpopular client or cause, every time a citizen refuses to sacrifice his or her Constitutional rights on the alter of public hysteria and prejudice, every time the people refuse to be seduced by the twin siren songs of security and its pseudo patriotism and anytime anyone anywhere in the world stands up to the abuse of power.

Thank you for giving me the privilege of presenting this to you today.

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