

# **EQUAL JUSTICE** in the balance

America's Legal Responses to the  
**Emerging Terrorist Threat**

Raneta Lawson Mack  
& Michael J. Kelly

With a Foreword by **Michael Ratner**

**The University of Michigan Press**  
Ann Arbor

Copyright © by the University of Michigan 2004

All rights reserved

Published in the United States of America by

The University of Michigan Press

Manufactured in the United States of America

© Printed on acid-free paper

2007 2006 2005 2004 4 3 2 1

No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, or otherwise, without the written permission of the publisher.

*A CIP catalog record for this book is available from the British Library.*

Library of Congress Cataloging-in-Publication Data

Mack, Raneta Lawson, 1963–

Equal justice in the balance: America's legal responses to the emerging terrorist threat / Raneta Lawson Mack and Michael J. Kelly ; with a foreword by Michael Ratner.

p. cm.

Includes bibliographical references and index.

ISBN 0-472-11394-1 (cloth : alk. paper)

1. Dues process of law—United States.
  2. Privacy, Right of—United States.
  3. Terrorism—United States—Prevention.
  4. Law enforcement—United States.
- I. Kelly, Michael J., 1968– II. Title.

KF4765.M23 2004

342.7308'5—dc22

2003027630

Author's note: The bulk of this work was produced during the 2002 calendar year. Consequently, all analyses, case and legislative reviews, references to documents, and supporting material are current as of that period. While the authors have undertaken to selectively update portions of the text during 2003, within the confines of the publishing and production process, any oversight in this regard remains solely their own.

To Helen and Ernest Lawson, with love —R.L.M

To James and Rosemary Kelly, with love —M.J.K

**We may assume** that the threat to Hawaii was a real one; we may also take it for granted that the general declaration of martial law was justified. But it does not follow from these assumptions that the military was free [to violate the] Constitution . . . especially after the initial shock of the sudden Japanese attack had been dissipated.

From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights. That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised.

The . . . constitutional rights of an accused individual are too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.

—Justice Murphy’s concurring opinion in the U.S.

Supreme Court decision against application of martial law in Hawaii, *Duncan v. Kahanamoku* (1946), quoted in support of federal district judge Nancy G. Edmunds’s decision to open INS deportation hearings against the government’s request to keep them secret in *Detroit Free Press v. Ashcroft* (2002)