

# Preface

To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve.

—John Ashcroft, U.S. attorney general, statement before the Senate Judiciary Committee questioning the patriotism of anyone challenging the administration’s antiterrorism legal initiatives

It is precisely our deep sense of patriotism that motivated us, not only as law professors but as citizens, to write this book. The arrogance of power demonstrated by the Bush administration in its legal responses to the terrorist attacks suffered by this country on September 11, 2001, encapsulated by the notion demonstrated time and again that it holds a monopoly on the right course of action and any opposition to or fair questioning of that course amounts to treason, cannot be allowed to continue unchallenged in this, the greatest of the world’s democracies.

History is littered with the remains of shattered nations whose leaders consolidated power in times of adversity while entreating the people to “trust them” to do the right thing. Crassus manipulated the Roman Senate into making him consul to defeat the revolt of Spartacus, which he engineered to threaten the city—the first step in transforming Republican Rome to Imperial Rome. Lenin implored the Russians to trust him and his provisional committee to lead them through the interim phase of socialism toward communism when the Bolsheviks took over in 1917. Stalin repeated this

entreaty several years later. Hitler used it to calm the German people on his accession to power in 1933. While we may trust the current executive to lead this country's war on terror, does that mean we write a blank check? What about the next executive and the one after that? Does accumulated power get handed back when the present executive's term is over? Not likely.

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The statement here by our attorney general raised hackles on Capitol Hill and beyond. Senator Patrick Leahy, chair of the Senate Judiciary Committee, responded, "This is not a question of whether you are for or against terrorists. Everyone is against terrorists. This is about whether we are adequately protecting our civil liberties."<sup>1</sup> Editorials proliferated against the attorney general's characterization. The *St. Petersburg Times* bristled that the Senate hearing "was a legitimate and responsible exercise of congressional oversight authority. But Ashcroft, in dismissive fashion, suggested that any inquiry into his controversial antiterrorism policies was an act of disloyalty."<sup>2</sup> And the *Buffalo News* issued this riposte:

Flawed justice is flawed justice, whether or not it comes wrapped in the American flag, packaged as patriotic duty. Attorney General John D. Ashcroft, charged with upholding the Constitution and administering the American rule of law, ought to keep that firmly in mind as he wields the power of the Justice Department. And he also ought to realize that reasonable people can disagree on how far that power should extend, even in times of war. Not everyone who disagrees with the administration's new anti-terrorism powers, or its quest for more of them, should be accused of aiding terrorists by the chief lawyer of the United States. . . . Reasoned dissent is not a crime in this country. Neither is it unpatriotic. If anything is eroding national unity and respect for national leadership, it is not the loyal opposition Ashcroft blames—it is the arrogant assumption that every decision made by the administration is above question. Along that path lies the real danger.<sup>3</sup>

There are 537 elected leaders in our federal government—535 on Capitol Hill and 2 more down the street. They are responsible for defining the parameters of action that the hundreds of thousands of

appointed unelected federal employees take in performing their assigned functions. In our republican system of governance, it is the duty of an informed citizenry to hold those 537 elected leaders accountable for this oversight responsibility. At least two such citizens are doing so by authoring this book.

The democracy that we enjoy today is not exactly the one that was created two centuries ago, although it is based on that framework. Perhaps a product of their times, our founders only empowered white landowning males in this new country, but they had the right idea about how that power should be divided. Today, every person who enjoys the mantle of “citizen” shares in the power of this democracy, and even those who are not citizens must be treated with respect and enjoy a larger set of basic rights as aliens here than they would in many cases back in their home countries. Today, also, we see that the founders’ ideas about power division have endured, even if their conception of an informed citizenry has expanded beyond what they could have imagined.

That the executive should be strong but constrained, that the legislature should be representative but not beholden, that the judiciary should be independent but responsive are all the ideas we began with—and they are the ones we must continue to move forward with through the crisis presented by September 11 and beyond. To alter that delicate balance in pursuit of vengeance is to abandon the ideas we inherited. America is better than that. America is stronger than that. It is not for nothing that we are known as “the land of the free and the home of the brave.”

In penning this book, we in no way wish to diminish the magnitude of what happened on 9/11 in New York, Washington, and Pennsylvania. The nearly twenty-eight hundred victims who perished that day at the hands of the al Qaeda terrorist organization deserve to be remembered, grieved, and honored. They also deserve to have their killers hunted down, apprehended, and brought to justice, as all criminals should be in a civilized society. But abhorrent to their memory would be the sacrifice of equal justice and civil liberty in pursuit of the perpetrators. That is a sacrifice that needn’t be made to accomplish the task at hand. We already have legal tools adequate for the task. We must use them wisely, cleverly, and resourcefully.

Finally, we gratefully acknowledge the contribution of Michael

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Ratner, our foreword author, and encourage him to continue litigating on behalf of those whose freedoms are unjustifiably threatened by the government. We also wish to extend our thanks to former attorney general Janet Reno for her detailed review of the manuscript and the many suggestions she offered during the final edits. We appreciate the help of our research assistants, Carmin Ballou, Kate Blanchard, and Rachel Alexander, and the support of Creighton University School of Law. We also thankfully acknowledge the understanding of our families, who made do without us for several days and nights while we tackled manuscript or research work. In many ways, although this book is dedicated to the author's parents we undertook it for our children—Raneta's daughter, Kandace, and Mike's son, Durham—who deserve no less a bright future in a wonderful, free, and vibrant democracy than we have enjoyed and seek now to protect.

As former president Theodore Roosevelt argued in an editorial for the *Kansas City Star*, opposing President Woodrow Wilson's crackdown on dissent upon America's entry into World War I:

To announce that there must be no criticism of the President, or that we are to stand by the President, right or wrong, is not only unpatriotic and servile, but is morally treasonable to the American public. Nothing but the truth should be spoken about him or any one else. But it is even more important to tell the truth, pleasant or unpleasant, about him than about any one else.<sup>4</sup>

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