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Striking the Balance between Civil Liberties and Security

Equal and exact justice to all men, of whatever state or persuasion, religious or political; . . . freedom of religion; freedom of the press, and freedom of person under protection of habeas corpus, and trial by juries impartially selected. These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation.

The wisdom of our sages and blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from them in moments of error or of alarm, let us hasten to retrace our steps to regain the road which alone leads to peace, liberty, and safety.

—Thomas Jefferson, first inaugural address, March 4, 1801

Pursuit of justice through repression of fundamental freedoms in the name of protecting a free society serves neither. The incongruity of this familiar trap is self-evident. Succeeding generations of Americans have wrestled with it: from the foundation of this fragile republic in the eighteenth century through the Civil War of the nineteenth to the communist scare of the McCarthy era in the twentieth. The events of September 11 have now thrust this dilemma on our generation in the twenty-first century. We must face it truthfully, with due regard to credible concerns on both sides of the

argument. Balancing freedom and security in the scales of justice is no small task. But it perhaps becomes easier to comprehend when we step back and realize that justice is in the balance as well.

Both Presidents Lincoln and Wilson recognized the temptation to tip the balance between law and security in favor of security during wartime. Lincoln noted, after suspending habeas corpus and disregarding Chief Justice Taney's order to release a prisoner held by executive fiat in *Ex Parte Merryman*,¹ "The Constitution is different in its application in cases of Rebellion or Invasion, involving the Public Safety, from what it is in times of profound peace and public security."² And Wilson observed, "There is an old saying that the laws are silent in the presence of war. Alas, yes; not only the civil laws of individual nations but also apparently the law that governs the relation of nations with one another must at times fall silent and look on in dumb impotency."³

However, both presidents were faced with different kinds of wars than the threat posed by terrorists to our country. Congress had declared war in both instances when these executives decided to tip the balance toward security over justice. The nation was literally torn in half during the Civil War. And America, not yet a superpower, was embroiled in its first global conflict during World War I. Neither circumstance validates those actions but may explain them. In the war on terror, there is no visible enemy, no one country at which to direct our military might beyond Afghanistan, and no pronouncement of war from the people's representatives. Indeed, statements by congressmen admitting their irresponsible reaction to Attorney General Ashcroft's scare tactics indicate that Congress was coerced into passing the USA Patriot Act.

This book has analyzed the manifest possibilities for injustice that exist in that legislation. Some remain inchoate possibilities, others have risen to the level of probably, and still other injustices have been realized. The major thrust of the act—providing federal agencies with more surveillance options that are easier to activate while simultaneously decreasing judicial supervision of that process—has encouraged abuses that are just beginning to come to light. Given the increasing backlash to the act's provisions, the future portends much controversy, but the fallout may well be restoration of the delicate balance between the needs of national security and the demands of equal justice.

This book has also explored other legal responses to the September 11 attacks, from the joint resolution authorizing the use of force against al Qaeda and the creation of military tribunals to try those captured on the international side to the creation of a federal homeland security agency and the exercise of prosecutorial discretion on the domestic side. Judicial reaction, although only in its initial stage, has also been explored. Surveying this legal landscape, we have determined that the scales not only have shifted away from freedom and equal justice toward secrecy and national security in this war on terrorism but continue to shift in that direction today.

The executive branch's accrual of power to itself has not been checked by the legislature, which is paralyzed for fear of seeming unpatriotic, and the first decisions by the independent federal judiciary are just now beginning to come down—with mixed results and clearly not enough force to restore the balance as yet. The administration's entreaty to trust it not to abuse its increasing power has not been challenged by a cowed public; only the press has dared question it, as in this *New York Times* editorial of December 2001:

The administration has argued that even if the powers it is seizing are broad, it will not use them abusively. This has been a constant theme of Mr. Ashcroft and the administration in general—that they are people who can be trusted to use these broad, repressive rules wisely. That is not the way the American system works. This is a nation built around the rule of law, not faith in the goodness of particular officials.⁴

Fundamental rights of American citizens have been curtailed without their knowledge. By rewriting FBI rules crafted to curb abuses of the J. Edgar Hoover era, the DOJ has given that agency the power to unleash its agents into the private lives of Americans without any indicia of illegal activity, let alone the former low-level presnooping requirements of reasonable suspicion or probable cause. Citizens can also now be detained as “material witnesses” indefinitely, without being charged, without access to counsel, incommunicado, and in solitary confinement.

Alternatively, when courts have challenged the use of that method, Attorney General Ashcroft has substituted in the label of

“enemy combatant” to justify handing those Americans over to Secretary Rumsfeld’s DOD—which threw them into military brigades and wrapped their detention in the shroud of secrecy. Does that mean that these Americans have been stripped of their citizenship? No. However, it does mean that the U.S. military is holding American civilians against their will.

Are they being interrogated? Are they being tortured? We don’t know the answers to these questions. All we know is that they are Americans who have been summarily denied their rights as citizens. Based on the government’s newfound power to use either of these labels, Americans can now be snatched off planes, off streets, and even out of their own homes, secretly “processed,” and thrown into prison or a military jail indefinitely without a lawyer. Such tactics are the antithesis of due process and speak volumes about how far the American justice system has departed from its constitutional moorings.

Basic rights of noncitizen residents in the United States have also been infringed upon wholesale. Protection against preventive or indefinite detention, privacy of the attorney-client relationship, the right to a jury trial and to appeal, as well as the right to public hearings have all been swept aside by more Ashcroft initiatives implemented by the INS. The effect has been to construct an alternate justice system for noncitizens weighted in favor of the government to summarily deport people they deem undesirable.

Noncitizens outside the United States are not even accorded hearings guaranteed them under the Geneva Convention. Hundreds now languish below the tropical sun at Camp X-Ray in Guantanamo Bay, Cuba, undergoing military, FBI, and CIA interrogation without access to counsel. These detainees, known by the new sobriquet “unlawful combatants,” could remain at this improvised but expanding prison forever—just beyond the territorial reach of American federal courts. They are victims of a legal status created by our government that refuses to acknowledge them as prisoners of war even though they were captured in the “war on terrorism,” which Congress acknowledged through joint resolution as the constitutional equivalent of a declared war.

The government is also using its power to control information as a means of restricting public access to public records. Under new rules issued by Ashcroft to executive agencies directing them to

read the parameters of the FOIA as narrowly as possible while the administration's war on terrorism continues, many formerly available documents are being reclassified and withheld from public scrutiny. As the following newspaper account shows, even mundane requests are increasingly denied:

When United Nations analyst Ian Thomas contacted the National Archives in March to get some 30-year-old maps of Africa to plan a relief mission, he was told the government no longer makes them public. When John Coequyt, an environmentalist, tried to connect to an online database where the Environmental Protection Agency lists chemical plants that violate pollution laws, he was denied access. And when civil rights lawyer Kate Martin asked for a copy of a court order that has kept secret the names of some of the hundreds of foreigners jailed since Sept. 11, the Justice Department told her the order itself was secret. "They say, 'there's a secrecy order barring us from telling you this. But the language of the secrecy order is secret, so you'll just have to take our word for it,'" she says.⁵

Without access to basic information, the public, the press, non-governmental organizations, and civil society itself cannot sufficiently assess the motives, actions, or justifications of our public officials. And if we cannot do that, then we cannot challenge those motives, actions, or justifications as illegal or otherwise unacceptable. Public debate in this free democracy is thereby reduced to charges and countercharges based on hearsay and speculation. When public discourse is reduced to such a level, paranoia flourishes and takes democracy as its primary hostage. Indeed, this is why individuals routinely avoid talking to Western reporters in closed societies.

All Americans, indeed most people around the world, understand that there is an inherent tension between the desire to have a free society and the desire to have a secure one. In a time of clear threat to our nation, there is a natural tendency to favor a secure one. However, if we compromise our most basic freedoms in order to have this "secure" society, are we truly any better off? Are we consciously trading one type of society for another? Did not the free

societies emerge victorious over the closed societies in World War II? in the cold war? Is it not true now that how we as a society react to the threat we face will inevitably define us as a people?

Freedom is not a luxury that we can indulge in when at last we have security and prosperity and enlightenment; it is, rather, antecedent to all of these, for without it we can have neither security nor prosperity nor enlightenment.

—Henry Steele Commager, *Freedom, Loyalty, Dissent*
(1954, during the height of McCarthyism)

EQUAL JUSTICE
in the balance

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