

## Foreword

*Equal Justice in the Balance* paints a gloomy picture of the extent to which the executive, Congress, and the judiciary have employed different methods to limit fundamental constitutional rights since September 11, 2001. The authors stress the importance of not giving up these fundamental rights and conclude with a message of optimism, noting an increasing backlash against the administration's more draconian measures. They are right to end on this optimistic note. Although the landscape is still quite bleak, change is in the air.

Growing opposition to the administration's wholesale violations of constitutional rights has sparked a tremendous amount of grass-roots organizing. There are now over two hundred city and three state resolutions against the Patriot Act, some of which actually direct city and state employees not to cooperate with the FBI. Libraries all over the country are fighting against the provisions of the Patriot Act that permit the FBI to obtain lists of books checked out by library users; librarians are destroying these lists daily rather than make them available to authorities. A "Freedom to Read Act" that would prohibit such snooping has been introduced in the Senate—by a Republican senator. Many Democratic candidates for president are criticizing passage of the Patriot Act; former vice president Al Gore has made a major speech asking for its repeal; and, as *Equal Justice in the Balance* notes, Attorney General John Ashcroft, in what one newspaper described as "an act of desperation," was forced during the fall of 2003 to go on an eighteen-city road show to defend his policies.

Increasingly, the issues of constitutionality and basic freedoms are moving away from being Left or Right, conservative or liberal,

and becoming understood as human rights issues that cross the political spectrum. The conservative columnist William Safire has come out against military tribunals, and the Cato Institute, a libertarian think tank, supported the rights of U.S. citizens to have judicial review of their designations as “enemy combatants.” Former generals and POWs have supported hearings for those detained at Guantanamo. This is not to say that this struggle to regain lost liberty will be easy to win; but it is to say that people are beginning to fight back.

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Despite popular fears and the overarching claims of a permanent “war on terrorism,” there have also been some recent legal developments that are an additional reason for hopefulness. In a December 2003 blow to the Bush administration, the Supreme Court said it would review the incommunicado and indefinite detentions of 660 detainees at Guantanamo Bay, Cuba. Apparently the ruling shocked the administration; the lower courts had refused even to look at the legality of those detentions, and the administration claimed plenary power to do as it wished with the detainees, asserting that no court could even hear a case on behalf of the detainees. This claim of absolute power, a power unrestrained by any court review, seems to have been too much for the Court.

Just a few days after the Supreme Court granted review, the administration said it would release 140 detainees, presumably hoping to demonstrate that it could be trusted to give some kind of process to the prisoners and that a ruling against it would not be necessary. The administration also said that counsel could visit David Hicks, one of the Guantanamo detainees who may be designated for trial before a military commission.

The Supreme Court is also likely to grant review in the case of Yaser Hamdi, the U.S. citizen allegedly picked up in Afghanistan, who has been labeled an enemy combatant and held incommunicado in a military brig in South Carolina. For almost two years Hamdi has been denied access to a lawyer, but on the day prior to filing its opposition to Supreme Court review of his detention, the administration, presumably to avoid review, stated he could see his lawyer.

On December 18, 2003, in another blow to the administration, the Second Circuit Court of Appeals held that Jose Padilla, a U.S. citizen who, like Hamdi, has been labeled an enemy combatant, is entitled

to a writ of habeas corpus releasing him from military custody. He had been confined to a brig in South Carolina and held incommunicado over a year without access to a lawyer. The oral argument in the case had gone badly for the administration: Rosemary Pooler, the presiding judge, stated, "As terrible as 9/11 was, it didn't repeal the Constitution." The court, in a 2-1 decision, found that the president did not have the constitutional power to detain as an enemy combatant an American citizen seized within a country outside of a zone of combat.

These developments demonstrate that this administration cannot be trusted to act within the bounds of law unless there is judicial review of its actions. Only after the Supreme Court said it would review the Guantanamo cases did the administration act to ameliorate the unjust conditions under which it is holding prisoners. This is a hopeful sign—a concrete example of the importance of such review and a reaffirmation of the system of checks and balances embodied in the U.S. Constitution.

An issue no court has yet addressed is the administration's use of the classification "enemy combatant." It is a worrisome category without any precise legal meaning that leaves unclear what rights, if any, those designated as "enemy combatants" may have. Those persons captured in the field of battle in Afghanistan and detained at Guantanamo should have been treated as prisoners of war under the Geneva Conventions and given the rights to which the conventions entitle them. Instead, by labeling those persons as "enemy combatants," the administration claims it can treat them as it wishes, with solitary confinement, long periods of interrogation, and trials before military tribunals.

Similarly, those like Padilla who were allegedly attempting to commit acts of terrorism should have been arrested, allowed attorneys, brought before a federal court, and charged with a crime. Instead, by labeling Padilla and others as "enemy combatants," the administration claims it can imprison them indefinitely in military brigades without any rights.

These executive detentions outside the rule of law are one of the most frightening aspects of the "war on terror." For almost eight hundred years, at least since the Magna Carta of 1215, and more recently as embodied in the International Covenant on Civil and Political Rights, it has been widely understood that executive deten-

tions are anathema and one of the primary characteristics of a police state. Recent court activism signals that the courts understand the dangers of such unchecked power.

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One of the more draconian administration reactions to 9/11 was the widespread detention of hundreds and possibly thousands of noncitizens living in the United States: America's "disappeared." Most were Muslim and/or of Arabic ethnicity. They had no connection with 9/11, had committed no crime, and were detained mostly because of minor immigration violations. The administration refused to give out their names, delayed allowing them access to attorneys, shackled and chained many of them, and subjected a number of them to beatings. Although litigation was brought under the Freedom of Information Act in an effort to find out the names, the case lost in the appeals court. Other litigation against Ashcroft with regard to the treatment of those detained is still pending.

Yet, when it looked darkest for these detainees in the United States, there was a breath of fresh air from an unexpected quarter, the Department of Justice itself. Within the department there is an inspector general, whose job is, in part, to act as a check on the department. In June and December of 2003, Inspector General Glenn A. Fine issued reports castigating the department for its treatment of the post-9/11 detainees in the United States. The reports found widespread abuses, including delays in serving immigration charges on detainees, denial of the right to an attorney, a no-bond or no-bail policy, a communications blackout including restrictive use of the telephone, and unduly harsh confinement conditions including twenty-four-hour lights in cells and shackling. The reports confirmed that detainees were beaten by slamming, bouncing, and ramming them against walls. To the extent detainees had attorneys, the meetings with the attorneys were videotaped and monitored in complete contravention of the constitutional right to counsel. These findings have apparently caused some changes at the Department of Justice and have bolstered the chances of the detainees prevailing in the lawsuit against Attorney General Ashcroft.

On other fronts the picture is not as bright. It appears that military tribunals for those at Guantanamo will begin in early 2004. These are not regularly constituted courts as required by law, but ad hoc courts set up to convict. It is likely that many of those brought before such tribunals will plead guilty. They have been in custody

for almost two years without counsel or contact with family and presumably have been told that unless they plead guilty, they will be jailed in Guantanamo indefinitely.

In December of 2002, the administration appointed a four-person review panel for the tribunals. Included on the panel is Griffin Bell, a former U.S. attorney general and former appeals court judge, as well as other prominent lawyers and judges. In addition, the administration replaced Deputy Secretary of Defense Paul Wolfowitz as the “appointing authority”—the person responsible for appointing the judges for the tribunals. These new appointments are an effort by the administration to make the tribunals appear more legitimate. But they are only cosmetic. The entire system is still ad hoc: although the detainees have been questioned for two years without representation by attorneys, any statements they made can still be used against them and there is still no review by federal courts. That former judges and lawyers of some notoriety took these jobs rather than denouncing the tribunals is a sad commentary.

Meanwhile, allegations continue that the Bush administration is either using torture itself or sending detainees to other countries where torture is employed—a process called “rendering.” Reports that the U.S. military was employing torture at its base in Bagram, Afghanistan, surfaced in 2002. Detainees were reportedly forced to stand or hung by their arms from the ceiling for eighteen or more hours a day, deprived of food, subjected to hot and cold temperatures, and beaten. Two of those receiving such treatment apparently died, as an examining army doctor noted, from blunt force to the body—in other words, they were beaten to death. Remarkably, to date there has been no congressional investigation of these charges.

Nor has there been attention to “rendering,” wherein the United States sends detainees to countries where the security services will engage in torture as proxies for the United States. Countries such as Morocco, Jordan, and Egypt work closely with the United States to extract information from these prisoners.

The case of Maher Arar, a Canadian citizen born in Syria, has put a public face on rendering and become a cause célèbre in Canada. On September 26, 2002, Arar was returning to Canada from visiting his wife’s family in Tunisia and had to change planes at John F. Kennedy Airport in New York. Upon passing through immigration there, he was detained, interrogated, shackled, jailed, and eventu-

ally rendered to Syria, without his family being informed of his whereabouts. In Syria he was imprisoned for over ten months and repeatedly tortured while being continually questioned. His rendering caused a large public outcry, particularly in Canada, and Arar was finally released in November 2002. But nothing is known of the untold others who have been rendered, tortured, and disappeared.

Many of the new laws are largely affecting noncitizens. The 660 persons imprisoned at Guantanamo are noncitizens; the 1,000 to 5,000 people detained in the United States after 9/11 are noncitizens; the tens of thousands requiring special registration are noncitizens; the thousands questioned by the FBI are noncitizens; the military tribunals only apply to noncitizens; and the refusal of courts to review detentions is limited to noncitizens. In fact, American citizens have not been asked to give up many rights, so many feel the equation is simple: someone else's rights are denied, and citizens will be secure.

But history teaches us that laws applied to noncitizens will eventually be applied to citizens. They already have in the "enemy combatant" designation of U.S. citizens Jose Padilla and Yaser Hamdi, who are imprisoned in a military brig in South Carolina without access to counsel (Hamdi recently got counsel) and only limited court review of their detentions.

And inside the United States, the attacks on free speech continue. *Equal Justice* describes how the FBI has been unleashed to spy on political and religious groups and to obtain records of citizens' reading habits from libraries, and how looser standards have led to the increased use of wiretaps and searches. New limitations on dissent include restrictions on lawful demonstrations. An early instance was New York City's refusal to permit a march protesting the war in Iraq, a refusal upheld by the federal appeals court on the grounds of national security. Wooden bullets were used to stop protests at a demonstration in Oakland, and hundreds of protesters were arrested on trumped-up charges.

Sadly, that hostility to legal street protest has continued. The October 2003 Iraq funding legislation included 8.5 million dollars to pay for law enforcement in Miami, where protesters rallied against the Free Trade Area of the Americas. Police from across Florida were called in, and peaceful protesters were beaten, teargassed, and

arrested. The Steelworkers' Union, many of whose members were beaten and jailed, has called for a congressional investigation of what it calls "homeland repression in the name of homeland security."

We are in difficult times for the protection of our liberties. Nonetheless, citizens are showing an increasing willingness to resist the erosion of the U.S. Constitution. The struggle must continue. Recent victories in the courtrooms and in towns and cities across America are only the beginning of rescuing our democracy.

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