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## CONSTITUTIONAL LAW

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### Establishing the Delicate Balance Between Liberty and Security

An involved people has been the essence of American democracy from its founding and is needed as much now as ever

Since Sept. 11, the federal government has implemented numerous measures that have enhanced our security against terrorism. Some of those measures have, in varying degrees, also diminished our individual liberties. As we enter year two of the war against terrorism the people need to make certain whenever our government seeks to protect our security that the means chosen are narrowly tailored so as not to unreasonably diminish our liberty.

It is important for the people's voice to be heard now in order to make certain that as the balancing process continues, equal weight is given to our American tradition, culture, values and sense of ordered liberty. The input of the people

should be embraced by our government because the tradeoffs we make today of liberty for security will likely endure for generations to come.

The preamble of the Constitution establishes that our Constitution emanates not from government or elected officials but from "We the People." It is the people who have the right and obligation to define the scope and extent of the fundamental principles by which we choose to live, whether it be in time of peace or war.

It is the people who ultimately determine whether and to what extent there should, in return for more security, be a narrowing of such liberties as speech, religion, press, travel, association, privacy, due process and equal protection. A vital first step that the people must take before ceding more liberty for security is to be sure we understand the enormity of the threat this war poses and the amount of liberty our government believes we need to sacrifice in order to win the war.

Our enemy in this war is unlike any other in our nation's history. It is not some nation/state but a fanatical movement we call global terrorism. We have almost grown accustomed, or perhaps we are just

plain numb, to surreal warnings of terrorist threats in the form of nuclear, biological and chemical weapons of mass destruction that have the potential in a single attack to kill thousands of us and simultaneously destroy our nation's critical infrastructures.

Unlike the Cold War where the Soviet threat was perceived to come from a nuclear warhead delivered on the nose of an intercontinental ballistic missile launched by a distant enemy nation, the global terrorist is a person without a country who is a member of an organized group living amongst us in secret cells and willing to commit suicide in the process of overtly or covertly unleashing some diabolical weapon of mass destruction. They claim to be devoted to a higher cause, but We the People have difficulty even comprehending what it is.

The terrorist mind is, as our president says, an "evil one." It has no limits and knows no boundaries in its quest to kill us or destroy our way of life.

The terrorist is capable of literally any atrocity. Lest we forget just how deadly they can be, we need only gaze upon the painfully deformed Manhattan skyline and acknowledge that if a weapon of mass destruction had been available to the Sept. 11 terrorists it would have been used and the ensuing death and destruction would have been beyond comprehension.

Since Sept. 11 we have begun to defend ourselves more vigorously against the terrorists but, in doing so, we already have relinquished some of our liberty. Most of us, at least so far, don't seem to mind too much. We are solidly united

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behind the war effort and we seem willing, if asked, to sacrifice plenty more for our country. But the more government protects us from terrorism the more liberty we may need to yield.

Although Americans have much experience balancing liberty against security, it is hardly a science governed by formulaic solutions and, because of that, our government hasn't always gotten the balance right.

The importance of clearly and accurately defining what the balance should be between liberty and security first presented itself early on in our nation's history. In 1791, the people expressly added the Bill of Rights to our Constitution because we were worried that the newly created national government had so much power that our individual liberties might be diminished unless they were explicitly set forth in the text of the Constitution.

But it has been during the exigencies of America's 20th century wars that the need to precisely balance liberty and security has been the most pronounced and correspondingly the most difficult to attain.

### Censorship and Internments

During World War I Congress enacted the Espionage Act of 1917 and the Sedition Act of 1918, which censored and punished speech critical of the war and the draft. Federal authorities initiated approximately 2,000 prosecutions under these acts. Remarkable opinions, some in dissents, from Justices Oliver Wendell Holmes and Louis Brandeis in cases brought under these acts are the bedrock of our modern jurisprudence that gives speech broad protection.

During World War II the Supreme Court cited the hardships of war to sanction government curfews and internments of people of Japanese ancestry in the aftermath of Japan's attack on Pearl Harbor.

In upholding the internments Justice Hugo Black said in *Korematsu v. United States*, 323 U.S. 214, (1944), that "war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier."

Although Black's words ring theoretically true, their application in *Korematsu* has come to be generally acknowledged as a mistake and in a league with the discredited decisions in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896).

In 1988 Congress enacted the Civil Liberties Act granting restitution to some Japanese-Americans who suffered from the imposition of these hardships. The act apologized to them on behalf of the people of the United States.

During the early 1950s, the threat to liberty came from the evil of McCarthyism and its pernicious practice of blacklisting. This phenomenon claimed its justification derived from the need to strengthen our country against the communist threat, dubbed the Red Scare. The termination of Dr. Steven J. Hatfill, the so-called anthrax person of interest, by Louisiana State University, is claimed by some to be a current case of blacklisting reminiscent of McCarthyism. Time will tell whether this assessment is correct or not.

During the Korean War, Congress passed the Emergency Detention Act to combat communist espionage and sabotage activities in the United States. The act authorized detention without charge or trial and was repealed in 1971.

During the Vietnam War we saw on national television embarrassing instances of government harassment that invaded the liberty of persons engaged in anti-war protests. The brutal suppression of the street demonstrations during the 1968 Democratic National Convention in Chicago is one example. And during the Gulf War, the media complained that government restrictions on press coverage impaired the public's right to know.

History teaches us that our government has made wartime miscalculations when trying to enhance security at the expense of liberty. As a result of these mistakes, innocent people have sometimes unnecessarily been denied basic constitutional liberties. No one wants to repeat those mistakes. If we are to avoid doing so during the current war, then the people and government working together have a responsibility to precisely tailor the means used so that our safety is preserved without unreasonably suppressing our liberty.

### How Far Should We Go?

The fundamental question post Sept. 11 is not whether, but rather to what extent there should be a diminution of liberty in return for enhanced security while our nation wages a war that poses an unprecedented threat to our very survival.

We have already to an extent answered this question every time we, without complaint, enter an airport, board a plane, visit a public office building or attend a concert or sporting event. Most of us readily cooperate with body searches or the need to have photo-identity cards and don't protest one bit about these relatively minor intrusions on our liberty.

Even staunch civil libertarians such as professor Alan Dershowitz concede that because Sept. 11 was such a cataclysmic event, we must do some "rethinking and recalibration without in any way giving up our basic and core liberties." But specifically what other of our liberties need to be transformed, rethought, or recalibrated — and to what extent?

Secretary of State Colin Powell recently said the campaign against terrorism should respect the "human dignity" of men and women. No one can seriously disagree with Powell's noble aspiration, but is it really possible to protect us from terrorism without sacrificing some human dignity in return for better security? Are the people willing to do so? Do the people really have a choice? Is human dignity ever non-negotiable where weapons of mass destruction are realistic threats?

These are tough questions that have not yet been answered by the people, but will almost certainly have to be, and soon.

The people should affirm two basic points in the quest to establish a precise balance between the means used to enhance security and the amount of liberty we need to surrender. First, our Constitution is not written in stone nor is it intended to be our last will and testament bequeathing to future generations the remains of our great nation. Nor should we want our epitaph to read: Here lies a nation that succumbed to terrorism, but never relinquished any liberty.

Unlike the terrorists, We the People are not suicidal, nor is our Constitution a suicide pact. To the contrary, our Constitution is built for just this kind of national emergency.

The genius of our Constitution is that it thrives on crisis and was designed and intended to adapt, sometimes expanding and sometimes contracting its meaning through the process of judicial review and formal amendment. This is exactly what Chief Justice John Marshall meant when he wrote in *McCulloch v. Maryland*, 17 U.S. 316 (1819): "It is a *Constitution* we are expounding."

As a result, few if any of our constitutional liberties have ever been absolute. Most liberties are subject to some balancing against governmental interests and the people are accustomed to living in a society based on ordered versus unlimited liberty.

Second, the people have a right and obligation to be fully informed about the general substance, not the classified details, of government counter-terrorism measures. Without that general information, we cannot intelligently assess the impact on our liberty. During times such as this, any erosion of our liberty should not be done in secret or in haste.

What the people need to do now is make an effort to clearly understand the government's counter-terrorism means implemented during year one of the war so that in year two we can better participate in a public dialogue with our leaders and others as to what the constitutional balance should be between our security and our liberty. By doing so, we will ensure that the critical evaluation of both the wisdom and legality of the means used to enhance our security can go forward without hyperbole and in a more focused way than it has so far.

During year one of the war, the legislative and executive branches of our federal government have concurrently moved to enhance our security against terrorism. Some of the means used impacted individual liberties. Immigrants have so far borne the brunt of the government's measures but everyone has felt, or inevitably will feel, some narrowing of liberty.

The federal government's first response to the Sept. 11 attacks was to seize and detain mostly Arab, South Asian and Muslim men as part of the Department of Justice's criminal investigation. By the time the so-called Sept. 11 detentions ended, a total of 1,182 persons were detained and incarcerated at a variety of often undisclosed prison locations.

Many of these detainees were held

for more than 48 hours without charge. The detainees were typically charged with alleged violation of immigration law, criminal law, or held as material witnesses in connection with pending criminal investigations. Some of the detainees were kept incommunicado even from family members and legal counsel. Some of those held on immigration charges had their deportation or other immigration hearing closed to their families and the public. The latest reported count shows 81 individuals still remain in detention on immigration charges, and 76 on criminal charges.

Critics argue that the detention of these persons smacks of racial, ethnic or religious discriminatory profiling and is reminiscent of the World War II abuse by our government of Japanese Americans. On Aug. 12, 2002, the American Bar Association passed a resolution opposing the "incommunicado detention of foreign nationals in undisclosed locations" by the Immigration and Naturalization Service.

In addition to the Sept. 11 detainees, the federal government has also detained persons deemed to be enemy combatants. The criteria the government uses to define whether a person is an enemy combatant are crucial because enemy combatants have virtually no constitutional rights and are often held without access to a court or legal counsel.

The federal government maintains that a person is an enemy combatant if captured and detained on the battlefield in a foreign land, captured overseas and brought to the United States for detention, or captured and detained in the United States. Under these criteria virtually anyone suspected of terrorism, even a U.S. citizen captured in the United States, is eligible to be categorized as an enemy combatant.

The nearly 600 persons indefinitely detained at Guantanamo Bay fit the typical profile of enemy combatants since they are all non-U.S. citizens believed to be al Qaeda/Taliban fighters captured on the battlefield in Afghanistan or Pakistan. But in the cases of Zaccarias Moussaoui (the 20th hijacker), Richard Reid (shoe bomber), John Walker Lindh (American Taliban), Yasser Hamdi (Cajun Taliban) and Jose Padilla (dirty bomber), the government has been inconsistent in determining enemy combatant status.

Moussaoui, Reid and Lindh are not being held as enemy combatants and have been given full constitutional protections in U.S. civilian courts. Hamdi and Padilla, on the other hand, are being held as enemy combatants even though both, like Lindh, are U.S. citizens. Padilla was born in Brooklyn and Hamdi was born in Louisiana. Both are believed to be currently incarcerated at a Navy brig in Norfolk, Va., with few of the legal and constitutional rights afforded persons accused of crimes.

It is anomalous that Moussaoui and Reid, noncitizens suspected of terrorism, have constitutional protections that Padilla and Hamdi, U.S. citizens also suspected of terrorism, do not.

On Oct. 12, 2001, Attorney General John Ashcroft issued a "Memorandum for Heads of All Federal Departments and Agencies." The memorandum makes it more difficult for persons to exercise their right to know pursuant to Freedom of Information Act requests, and encourages federal agencies to be especially circumspect where a request for information has some connection to national security.

On Oct. 31, 2001, Ashcroft issued a directive authorizing government agents to monitor certain conversations between attorneys and their clients. Although the government is required to notify the attorneys and their clients in advance of any monitoring, many believe this practice threatens the attorney-client privilege.

The most significant government action in October was the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. The act has been criticized on two levels.

First, the act is 342 pages in length and was signed into law less than six weeks after the Sept. 11 attacks. Critics say the act is flawed because there was inadequate time to study, debate and reflect on its wisdom and legality. Second, some have challenged substantive sections of the act as being either unwise, illegal, or both. Two of the most controversial measures are:

(1) Section 213, which authorizes search of a person's home or office without prior notice where the government can show "reasonable cause to believe that providing immediate notification of the

execution of the warrant may have an adverse result.” These so-called “sneak and peek” searches are not limited to anti-terror investigations and critics claim they violate the Fourth Amendment prohibition against unreasonable searches and seizures; and

(2) Section 218, which amends the Foreign Intelligence Surveillance Act by greatly expanding the Federal Bureau of Investigation’s power to conduct surreptitious electronic and physical searches. The government wants to take down a wall that exists between criminal prosecutors responsible for bringing criminal charges and FBI counterintelligence agents responsible for foreign intelligence surveillance. The Foreign Intelligence Surveillance Court refused to do so and the government has appealed to the three-judge United States Foreign Intelligence Surveillance Court of Review.

On Nov. 9, Ashcroft directed members of the government’s Anti-Terrorism Task Force to interview 5,000 men between 18 and 33 years old who had entered the United States on nonimmigrant visas during the past two years from countries believed to have a connection to al Qaeda. Critics have argued that these interviews, like the Sept. 11 detentions, are based on discriminatory profiling.

### **Tribunals and TIPS**

On Nov. 13, President George Bush issued a military order pursuant to his authority as commander in chief of the armed forces of the United States. The order addresses matters of detention, treatment and trial before military commissions of any individuals who are not U.S. citizens and who the president has reason to believe are suspected terrorists.

The order has no termination date. Any noncitizen, regardless of immigration status, can theoretically be tried before a military tribunal. This order and its implementation have been criticized primarily for two reasons.

First, some fear the military tribunals authorized by the order will not comport with rudimentary principles of due process such as the right to counsel, right of confrontation and right of appeal. Second, the order expressly authorizes the secretary of defense to detain persons under vague notions that a person may be

a terrorist or may be aiding suspected terrorists.

Much of the criticism directed at the fairness of the military tribunals largely dissipated when, on March 21, 2002, the department of defense promulgated Military Commission Order No. 1 dealing with the “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism.”

The government says the procedures satisfy all international standards including the Geneva Conventions and International Covenant On Civil and Political Rights. The major complaint about the military tribunals now seems to be that there is no appeal outside the military system. So far, no person has been tried before a military tribunal and no trials are scheduled. Debate over this issue has subsided.

On May 30, 2002, Ashcroft significantly changed guidelines issued to the FBI in connection with the conduct of criminal investigations. Critics claim the guidelines authorize the FBI to spy without any basis for doing so on domestic religious, civic and political groups, thus chilling rights of free association and privacy. The FBI probes of public libraries to determine who is getting particular books or accessing information on computers has already sparked concerns.

In late July, it was reported that the federal government was developing a program known as Operation TIPS (Terrorism Information and Prevention System). The goal of TIPS is to enlist millions of civilians to monitor and report to the government the identity of persons who are engaged in suspicious activity. Operation TIPS has been challenged by both conservatives and liberals as being akin to the creation of a national secret police force. This program is not yet functioning but, despite the criticism, still remains under consideration.

### **An Informed and Involved People**

Since Sept. 11, our federal government has significantly and, in most cases, effectively enhanced our security. All of us should be thankful for the efforts of our elected and appointed leaders who, when confronted with a national emergency for which few of them were prepared,

responded in a diligent and determined manner that has so far helped to successfully protect us from another Sept. 11 — or worse. They deserve a lot of credit for the hard work they have done and are doing.

But as we start year two of the war, having the experience of year one, the people are not wrong to question whether some of the means the federal government has used, or plans to use, to enhance our security are as narrowly tailored as they should be.

For example, while we all understand why the government detained nearly 1,200 men with middle eastern background, it is hard not to question one or more aspects of those detentions. Many of the detainees were innocent victims of circumstances guilty of nothing other than their race, religion or place of birth.

It is difficult not to inquire about the need in the future to intrude on attorney-client communications, or to be concerned about the potential implementation of Operation TIPS and the spectre of neighbor spying on neighbor, or to be wary that now or in the immediate future the FBI will spy on domestic civic, political or religious organizations without an adequate basis for doing so.

During year two of the war against terrorism there will be more time than there was during year one for reflection, debate and for the people’s voice to be heard. There will be more opportunity for better evaluation of the means used by the federal government to combat terrorism. We the People must be more informed and more involved during year two of the war than we were during year one. The involvement of an informed people should be encouraged by our government because it will lower the risk of repeating the mistakes that have punctuated our nation’s wartime history.

An informed and involved people will also ensure that, in the process of establishing the delicate balance between liberty and security, we will win the war against terrorism but not lose the battle to preserve those core freedoms that define who we are as a people and as a nation. In the final analysis, establishing the delicate balance between liberty and security is a right and responsibility that emanates from, and ultimately belongs to, We the People. ■