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War on Terror: Assaulting Democracy at Home?

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On Sept. 20, 2001, President George W. Bush addressed a Congress and a nation still reeling in horror and disbelief from the unimaginable acts of cruelty that the world witnessed on Sept. 11, 2001. In his speech to a devastated nation, President Bush articulated the collective sentiment of most Americans when he said, "All of this was brought upon us in a single day, and night fell upon a different world." A different world indeed.

The tragic events of Sept. 11 will undoubtedly be permanently etched in the memories of all Americans who were old enough to struggle with comprehending and rationalizing actions that were, by design, incomprehensible and irrational. For several weeks, the surreal imagery of jetliners colliding with occupied skyscrapers on American soil played repeatedly to a stunned international audience. As with other acts of unspeakable violence throughout our nation's history, most Americans viewing the deadly imagery of Sept. 11 will forever recall where they were the moment they first became aware of the unprecedented terrorist onslaught that, without warning, indelibly marked yet

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

— Fourth Amendment

another day that will live in infamy. If the goal of these sudden and deliberate attacks was to instill fear and uncertainty in a seemingly invincible nation of people, then the attacks were an unmitigated

success. For in the immediate aftermath, not only did the attacks engender a sense of vulnerability "in our own backyard," but they also induced widespread skepticism concerning America's ability to anticipate and prevent terrorism inside its own borders and within its current political, legislative and judicial framework.

Indeed, in an effort to address the myriad concerns that arose in the wake of the terrorist attacks, the following fundamental changes to America's institutions have been proposed and/or implemented:

- ★ Congress enacted the USA Patriot Act in record time with little or no debate. Among other things, this far-reaching piece of legislation grants the government unprecedented authority to invade the privacy of American citizens with minimal judicial and congressional oversight.
- ★ President Bush issued a controversial military order establishing secret military tribunals to try detainees in the war on terror.
- ★ A cabinet-level Office of Homeland Security was created to coordinate U.S. national security efforts.

- ★ The FBI arrested and indefinitely detained hundreds of men of certain ethnic backgrounds while inviting hundreds more to “voluntary interrogations.”
- ★ The FBI was given broader authority to scour the Internet and other sources of public information for criminal activity — including entering public places (e.g., churches, schools and sporting events) for such law enforcement gathering purposes.
- ★ FBI rules have been relaxed to make it easier for federal agents to get secret terrorism wiretaps.
- ★ Attorney General John Ashcroft has proposed establishing a registry for foreigners who might be considered “international security concerns.” This means that men 18-35 years of age from approximately 20 Muslim and Middle Eastern countries could be fingerprinted, photographed and required to complete a lengthy form.
- ★ A program called TIPS (Terrorist Information and Prevention System) was proposed to allow citizens to “help” in the antiterrorism effort by using their common sense to identify and report unusual, suspicious and potentially terroristic activity. This idea was scrapped after a public outcry against it.
- ★ Ambiguous “high alert” warnings are issued periodically to serve as constant reminders that random terrorist violence is now a part of America’s daily existence.
- ★ Off American shores and presumably outside the jurisdiction of U.S. courts, hundreds of suspected Taliban and Al Qaeda terrorists have been captured, labeled “enemy combatants” and are currently being “detained” at Guantanamo Bay, Cuba, without any apparent plans for implementing any type of judicial process to determine their guilt or innocence.
- ★ Within the U.S. judicial system, American citizens suspected of or charged with terrorist-related crimes have endured differential treatment and, in the name of national security, have been denied some of the basic

protections afforded criminal defendants by our Constitution. For example, John Walker Lindh (the “American Taliban”) was processed through the federal court system, eventually pleaded guilty and is currently serving a 20-year sentence. Whereas, Jose Padilla, an American citizen accused of plotting to build and detonate radioactive “dirty bombs” on U.S. soil, was labeled an “unlawful combatant,” turned over to the military, and is now being indefinitely detained and denied most of the basic rights granted American citizens suspected of criminal activity.

- ★ The Pentagon is currently creating a computer system that would act as a vast electronic dragnet, searching for personal information to aid in rooting out terrorists around the globe — including within the United States. Overseeing this domestic spying initiative is former Reagan administration national security adviser, Vice Admiral John M. Poindexter, who left office in disgrace over the Iran-Contra scandal. Poindexter has touted the system as capable of providing intelligence analysts and law enforcement officials with instant access to a variety of information, including e-mail, telephone records, financial transactions and travel documents, all without the unnecessary burden of a search warrant.

- ★ The terrorist attacks have also spawned a renewed interest in the role of the military in domestic law enforcement, which portends a possible revocation of the long-standing Civil War-era doctrine of *posse comitatus*, a law that prohibits the use of Armed Forces in civil law enforcement.

As this illustrative, although by no means exhaustive, list indicates, sweeping reforms within U.S. political and judicial systems have been effected with very little debate, consultation or analysis. Because this unparalleled transformation affects, and in some cases, runs roughshod over fundamental principles inherent to a democratic society, America’s overall

response to the 9-11 terrorist attacks has brought into sharp focus basic notions of liberty, fairness and justice memorialized centuries ago with the ratification of the U.S. Constitution. That is, in the seemingly directionless quest to eradicate terrorism, foundational principles once considered inviolable are now being called into question or brushed aside altogether.

For example, in this new era of fear, suspicion and uncertainty, it is commonplace to question and debate whether America’s criminal justice system, with all of its flaws and foibles, is an appropriate venue for the terrorists who allegedly masterminded and perpetrated the worst terrorist attack in world history. Such debate often ignores the centuries of delicate give-and-take within the American constitutional form of government that facilitated the compromises so crucial to a justice system committed to principles of equality and fairness under the law. Why is this system suddenly so profoundly inadequate that it cannot be trusted to exact fair and just punishment for terrorist defendants? The answer certainly cannot be that the U.S. has never charged, convicted or punished terrorists who planned and committed deadly acts on American soil. For one only has to look at the court proceedings in the first World Trade Center bombing and the Timothy

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The proposition is this: that in a time of war the commander of an armed force ... has the power ... to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will. ... [I]f true, republican government is a failure, and there is an end of liberty regulated by law.

— Civil War-era
Supreme Court Justice David Davis,
from *Ex Parte Milligan* (1866)

(In *Ex Parte Milligan*, the Supreme Court ruled that an American citizen not connected with military service could not be tried by a military commission in a jurisdiction where the civil courts were open and unobstructed.)

McVeigh trial to dismiss that notion. So we are compelled to dig much deeper for a rationale that may, in the end, require confronting the unwarranted fears, suspicion and paranoia that have no legitimate place in shaping a system committed to fairness and equal justice under the law.

However, even allowing, for the sake of argument, that the American justice system requires alterations to fight (and presumably win) the war on terrorism, further questions remain, such as: What specific changes are necessary, and how should they be proposed and implemented? Because it appears that the current restructuring trend is in the direction of piecemeal, ad hoc pronouncements and determinations that have the potential to result in differential applications and outcomes, a number of other questions that take into account historical precedent and

consistency with America's guiding principles must also be considered. For example, how would this patchwork of changes comport with traditional notions of fair play and equal justice for all? Are there lessons from America's history of wartime treatment of citizens and non-citizens that may be instructive in the current circumstances? If the U.S. justice system framework is dramatically overhauled solely to address concerns arising from the 9-11 attacks, what message does this send at home and abroad? In short, the overarching question is this: Can America, a nation rooted in democracy, liberty and justice, remain true to its commitment to equal justice under the law while simultaneously taking a leadership role in eradicating terrorism throughout the world?

While these questions permit no easy answers, as history has demonstrated

time and again, 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 18th century through the Civil War of the 19th to the communist scare of the McCarthy era in the 20th century. The events of Sept. 11 have now thrust this dilemma on our generation in the 21st 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.

U.S. Presidents Abraham Lincoln and Woodrow Wilson recognized the temptation to tip the balance between law and security in favor of security during war. Lincoln noted, after he suspended *habeas corpus* and disregarded the Supreme Court's opinion during the Civil War, that "[t]he 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." And Wilson observed "[t]here 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."

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 those 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.

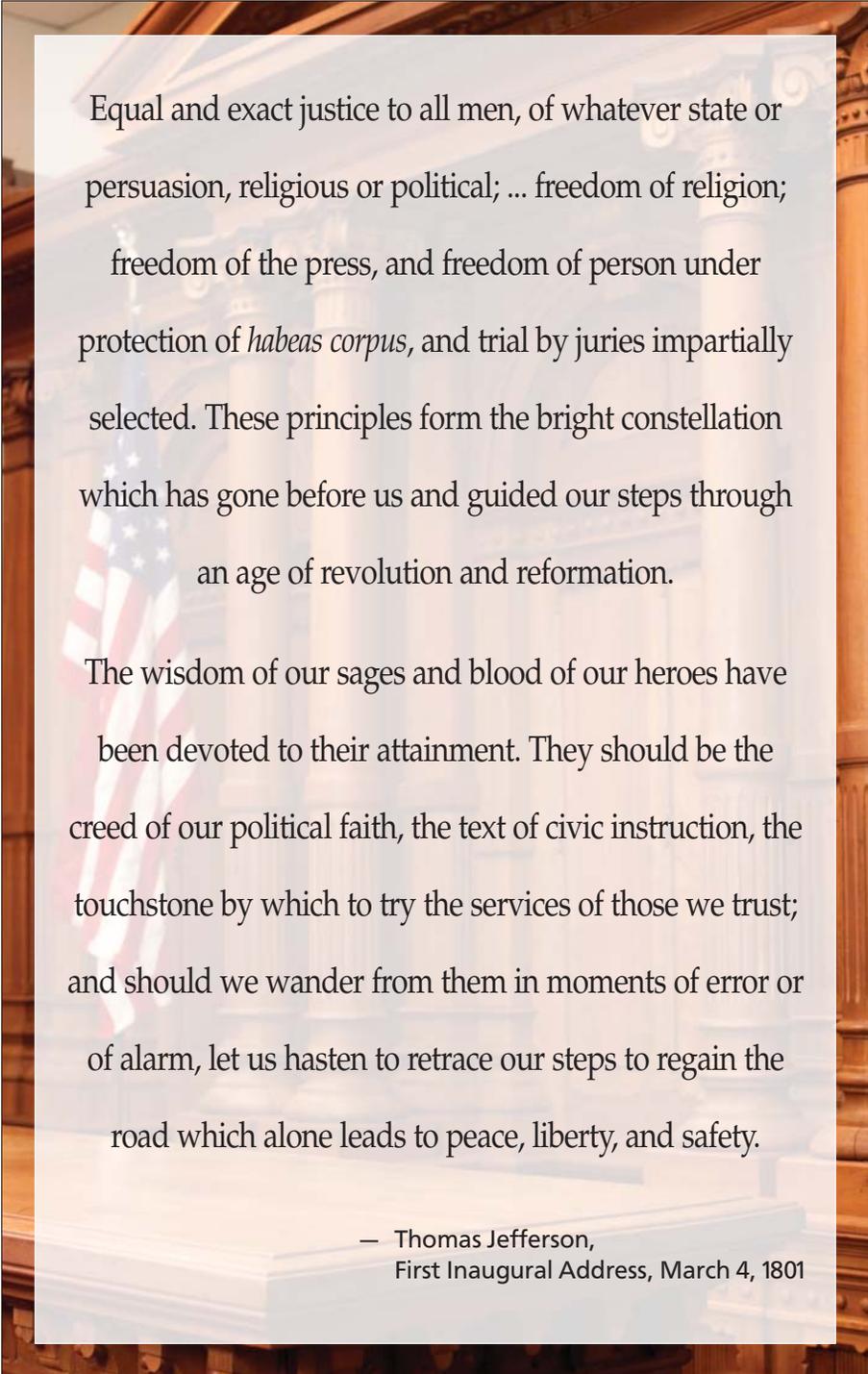
In the war on terror, there is not always a visible enemy, no one country

at which to direct our military might beyond Afghanistan or Iraq, and no pronouncement of war from the people's representatives. Indeed, statements by congressional representatives admitting their irresponsible reaction to Attorney General Ashcroft's scare tactics indicate that Congress was coerced into passing the USA Patriot Act, a piece of legislation fraught with possibilities for injustice. While many of those possibilities remain inchoate, others have risen to the level of probable, 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 — may encourage abuses which will never come to light. Indeed, those who are watched under its provisions may never even know they're being observed or their privacy probed.

Citizens can also now be detained as "material witnesses" indefinitely, without being charged, without access to counsel, incommunicado and in solitary confinement. When courts have challenged such detainments, Attorney General Ashcroft has substituted in the label of "enemy combatant" to justify handing Americans over to Secretary Donald Rumsfeld's Defense Department — which then confines them to military brigs, wrapping their detention in a shroud of secrecy. For example, Padilla (the alleged "dirty bomber") and Yaser Hamdi (who, like Lindh, was captured in fighting with the Taliban in Afghanistan and is now being detained as an "enemy combatant" at a Navy brig in Norfolk, Va.) are two Americans who have been subjected to this "parallel" system of "justice."

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 citizens 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



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

government's newfound power to use either of these labels — "material witness" or "enemy combatant" — Americans can now be snatched off planes, streets and even out of their own homes, secretly "processed" and thrown into prison or a military jail indefinitely without the benefit of legal representation.

Basic rights of non-citizen residents in the U.S. have also been infringed upon

wholesale. Protection against preventive or indefinite detention, privacy of the attorney-client relationship, the right to a jury trial, appeal and 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 non-citizens weighted in favor of the government to summarily deport people they deem undesirable.

Non-citizens outside the U.S. are not even accorded hearings guaranteed them under the Geneva Conventions. 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 Freedom of Information Act 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 from *USA Today* 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.

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

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

— From the 14th Amendment

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.

All Americans, indeed most people around the world, understand that there

is an inherent tension between the desire to have a free society and 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?

Law is the foundation of free societies. Observance of it by the government — and administration of it on the basis of equal justice — are essential to securing civil liberty. It is said that in wartime, “law falls silent” as the balance shifts to security. Bush administration policies in the post-9-11 war on terrorism have caused that balance to shift too far in the direction of national security, and away from upholding the constellation of basic rights the framers enshrined as inviolate in the American Constitution.

In a system of divided government, it is the executive’s job to secure the nation against external threats — and power naturally accrues to that branch during wartime. Even so, it is equally the legislature’s duty to oversee the executive’s administration of that power and the judiciary’s duty to mitigate its abuse — reducing it where needed to bring the system back into balance. In prosecuting America’s war on terror, this president has coerced Congress to abandon its oversight role and abdicate its power. Only the courts remain an obstacle to permanent fixture of these new prerogatives in the executive. Although some preliminary rulings give hope, it remains to be seen whether the courts will rise to function as guardians of civil liberty and equal justice during this crisis. ●

About the authors: Kelly and Mack are co-authors of a new book, Equal Justice in the Balance: Assessing America’s Legal Responses to the Emerging Terrorist Threat, which will be published this year by the University of Michigan Press.