

Courting Danger

How the War on Terror Has Sapped the Power of
Our Courts to Protect Our Constitutional Liberties

Second Edition

Including Patriot Act Revisions and the
NSA Wiretapping Debate



Justice at Stake
c a m p a i g n

Written by Bert Brandenburg and Amy Kay

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Justice at Stake is a nonpartisan national campaign of more than 40 partners working to keep our courts fair, impartial and independent. Justice at Stake Campaign partners educate the public and work for reforms to keep politics and special interests out of the courtroom—so judges can do their job protecting our Constitution, our rights and the rule of law. The positions and policies of Justice at Stake campaign partners are their own, and do not necessarily reflect those of other campaign partners.

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I. Introduction:

Has the War on Terror Become a War on the Courts?

In the months and years since the September 11 attacks, Americans and their leaders have grappled with a difficult question: what are the implications of a long term war against terror here at home? How do we preserve our constitutional liberties while stepping up efforts to prevent and punish future acts of terror? The renewal of the USA PATRIOT Act¹ has not resolved the national debate over liberty and security. The controversy over the National Security Agency's domestic warrantless electronic surveillance program, along with new government efforts to deny due process of law to detainees, have shown once again that Americans demand accountability from those to whom they entrust power. As Justice Sandra Day O'Connor wrote in *Hamdi v. Rumsfeld*, a "state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."²

The focus on any one of these issues should not obscure an even broader question: what has the war on terror done to the powers of our courts to protect our liberties? This is not a technical question. The framers of our Constitution understood that liberties do not enforce themselves. It is our courts that uphold our liberties—provided they are able to exercise the necessary authority to hold their own within our marvelous system of checks and balances. Indeed, for centuries, freedom-loving peoples around the world have sought to emulate America's heritage of strong and independent courts.

A state of war is not a blank check for the President.

But in the name of protecting us from terror, our courts are being deprived of the authority and independence they need to protect our Constitutional liberties and hold the government accountable. The PATRIOT Act and other post-September 11 policies dramatically weakened the historic power of the courts to protect our rights and check possible government abuses. These laws have expanded the ability of the federal government to investigate and incarcerate without meaningful review from a judge. In some cases, our judges' gavels have been replaced with virtual rubber stamps. In others, the government can now skip the courthouse altogether.

To be sure, times have changed. Americans want their leaders to do more to protect them. But a growing number of citizens and lawmakers, conservatives and liberals alike, are reminding us that Americans believe that safety and liberty are inseparable—indeed, that we are fighting to protect the Constitution that has seen us through more than two centuries of peace and war. Courts are not impediments to the war on terror. They are an indispensable partner in winning against terror. Americans and their leaders need to ask themselves: in this new era of long-term conflict, what are the consequences of putting our Constitutional liberties on emergency status by hobbling the power of the courts to enforce them?

Intelligence and law enforcement agencies are given tremendous power over people's lives. That is why their work is reviewed by independent courts. The issue is not whether investigators and prosecutors are bad people; they are not. The issue is whether we entrust our liberties to the Constitution's checks and balances, or whether we give the government new powers when it utters

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the words "trust me." Just as rights don't enforce themselves, accountability is meaningless without independent scrutiny. Congress needs to think long and hard every time it is asked to take the courts out of justice.

This Justice at Stake Issue Brief explains how the PATRIOT Act and other government actions have destabilized our system of checks and balances since September 11 by unnecessarily weakening the power of our courts to protect our rights. It shows how the courts have responded, approving many

Administration efforts but rejecting them when they violate the Constitution. It looks at the history of liberty during wartime, which shows that our courts have been quite deferential to national security concerns during times of conflict. It concludes by looking at how the PATRIOT Act and other post-September 11 laws are just part of a series of broader attacks on the independence, authority and legitimacy of our courts.

II. Checks and Balances Under Fire: How Our Courts Are Losing Their Powers to Protect Our Rights

The USA PATRIOT Act's Attack on the Courts

In the aftermath of September 11, Americans wanted the government to step up its fight against terror, abroad and here at home. Congress passed the USA PATRIOT Act, which included important reforms designed to help law enforcement and intelligence agencies keep up with changing times and better coordinate their counterterrorism efforts. For example, in response to the era of cell phones, high-mobility, and worldwide investigations, the Act expands the ability of law enforcement to conduct certain kinds of electronic surveillance in multiple jurisdictions by getting an order from a single judge. Additionally, to improve the flow of information among government officials, the law, for instance, sensibly allows State Department officials to access FBI criminal records when evaluating visa applications.

But in the course of rushing the 342-page bill into law, with few hearings and token debate, and renewing it in 2006 largely as drafted, Congress crossed a dangerous line. Much of the PATRIOT Act goes far beyond boosting law enforcement's power to investigate and prevent future acts of terror. Many of its provisions upset our Constitution's

checks and balances by allowing the government to investigate and incarcerate without any meaningful review from a judge. In many cases, thanks to the PATRIOT Act, the government can now bypass the courts altogether. As one analyst put it, “The USA PATRIOT Act misunderstands the role of the judicial branch of government; it treats the courts as an inconvenient obstacle to executive action rather than an essential instrument of accountability. . . . [I]t establishes toothless judicial review of [antiterrorism activities] or bypasses judges altogether.”³

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Because Americans are traditionally suspicious of unchecked government power, and of attempts to deny people their day in court, many of these “court-stripping” provisions had been gathering dust on prosecutor wish lists.⁴ But September 11 opened the door to many PATRIOT Act provisions that upended our Constitution’s checks and balances by removing or reducing judicial checks on federal investigators.

The PATRIOT Act, as renewed, stops, stalls, or stunts courts from reviewing law enforcement’s activities in several ways:

First, section 203 of the Act takes away from courts the power, in many circumstances, to decide whether sensitive data gathered by grand juries and wiretaps can be handed over to intelligence agencies.⁵ Previously, when information was discovered in a criminal investigation that related to foreign intelligence or counterintelligence, a judge had to sign off before the government could give it to intelligence officials.⁶ Now it can flow far more freely among a range of government officials without the government ever needing to justify it to a judge.⁷ Although the original Act



required that Congress reconsider this provision after four years, it is now the permanent law of the land.⁸ This may be a useful reform, but it is not clear that judicial review posed any risk to law enforcement.

Second, section 215 turns judges serving on the Foreign Intelligence Surveillance Act (“FISA”) Court into barely more than rubber stamps. Before 2001, in order to get permission to seek information under FISA, the government had to show probable cause that the target was linked to foreign espionage, and explain how the information sought related to foreign intelligence.⁹ But the PATRIOT Act required FISA judges, who already have a long history of deference to the Justice Department, to approve government demands



for books, records, or any other tangible items containing information about others—including American citizens—as long as the government merely asserted that the information sought was needed to protect against terrorism.¹⁰ A FISA judge wasn't even permitted to inquire into the underlying facts or turn down the request.¹¹ Moreover, the recipient of the demand couldn't tell anyone about the letter (except, possibly, persons who could help them obey it). The law provided no right to a day in court to challenge the government's demand.¹²

The renewed version of the PATRIOT Act took first steps toward restoring the balance. It now requires a FISA judge to grant section 215 demands if the government describes reasonable grounds for its belief that the information requested is relevant to an international terrorism investiga-

With fewer reviews from independent courts, Americans have fewer ways to know if abuses are even occurring.

tion, or shows that the materials pertain to foreign intelligence information not concerning a U.S. person.¹³ If these minimal requirements aren't met, the FISA judge can modify or decline the order.¹⁴ The recipient of a section 215 demand for information still must not tell anyone about the order (except an attorney and those necessary to comply with the order), and cannot have a day in

court to challenge it, until a full year has passed.¹⁵ Even then, the FISA judge must deny the challenge if the government simply asserts that the disclosure could harm national security or interfere with diplomatic relations¹⁶—a standard so low that the government should have little trouble invoking it routinely. Because section 215 orders are often issued to third parties that hold information about other individuals, these requirements mean that the individual may never know that their personal information has been searched, much less have a chance to contest it, since the recipient of the order has less incentive to go to the trouble of challenging the government.

Third, section 505 allows the FBI and others to circumvent the courts when they issue “national security letters” demanding information, including telephone logs and consumer credit records.¹⁷ Before the PATRIOT Act, such letters could be used only against people reasonably suspected of spying or other serious crimes.¹⁸ Now they can be issued against anyone, even if they're not suspected of espionage or any crime.¹⁹ And these letters can be issued based solely on law enforcement's unilateral claim that the information would be relevant to a terrorism investigation.²⁰ The 2001 Act also barred recipients from disclosing the receipt of the request to almost anyone, including their attorney, or challenging it in court.²¹ The Act, along with guidelines issued by the Department of Justice, led to an exponential increase in the use of national security letters: a recent estimate suggested that the FBI now issues more than 30,000



per year, compared with only about 300 just a few years ago.²²

Under the renewed PATRIOT Act, the recipient of a national security letter can inform an attorney and challenge the letter. But in order to modify or set it aside, a FISA judge must find it unreasonable, oppressive, or otherwise unlawful.²³ In addition, although recipients can challenge the nondisclosure provision of national security letters, a FISA judge must leave the gag order in place if the government asserts that the disclosure could endanger national security or hinder diplomatic relations,²⁴ making it virtually impossible for a recipient to ever successfully challenge the gag order.

Fourth, sections 214 and 216 require FISA judges to okay the bugging of someone's telephone or the monitoring of their Internet use for certain criminal investigations—even without a traditional showing of probable cause that a crime has been committed.²⁵ Before the PATRIOT Act, in most criminal investigations the government had to show probable cause to a court, and the judge could question the underlying facts and reject the request if it didn't measure up.²⁶ Now judges must okay requests as long as law enforcement merely states that the information likely to be gathered is "relevant to an ongoing investigation."²⁷ When Congress renewed the Act, section 214 became permanent. (Section 216 was already permanent.²⁸)

Fifth, section 218 lets the government skirt judicial checks that ensure adherence to the Constitution's Fourth Amendment. Before the PATRIOT Act, to obtain evidence in almost all criminal cases, the government had to get a war-

At times, some efforts to bypass the courts seem to have less to do with fighting terror than evading accountability.

rant by showing probable cause to believe a crime had been committed.²⁹ In a small number of cases, FISA permitted the government to conduct searches and other surveillance without a probable cause warrant—as long as it could show that the sole or primary purpose of the investigation was to collect foreign intelligence.³⁰ (This evidence couldn't be used in most criminal cases because it had not been collected in accordance with usual Fourth Amendment requirements.) But PATRIOT lowered this threshold by requiring the FISA court to approve government applications to collect evidence if a "significant purpose" is to obtain intelligence, which makes it easier for the government to introduce information gathered under this lower standard into the courtroom.³¹ By forcing courts to grant FISA requests under looser standards and then making it easier for the government to inject intelligence data into criminal investigations, the PATRIOT Act throws

open a back door to evidence that normally can't pass muster under the Bill of Rights. The original Act made this provision temporary, but Congress made it permanent when they renewed the Act.³²

Sixth, section 358 bypasses judicial oversight of the government's demands for financial records by giving the government unfettered powers to grab sensitive personal financial information.³³ Without ever notifying a court or explaining the reasons to a judge, law enforcement and intelligence agencies can seize financial records—even those having nothing to do with foreign intelligence information.³⁴ Before the PATRIOT Act, in most circumstances, the government could only get access to such records if it got permission from a court first.³⁵

Seventh, section 412 suspends judicial review of detentions by permitting the government to detain immigrants for a full week, without justifying their detention to a court or charging them with a crime, if they are suspected of endangering the United States.³⁶ During this scrutiny-free week, the government can deport the detainee without needing to prove to a court why he or she is a threat.³⁷ (The Administration's original proposal would have permitted unlimited detention of anyone the Attorney General claimed was a threat to national security—a determination that would not have been reviewable by any court.³⁸)

Eighth, sections 507 and 508 command courts to issue orders for the production of student records based on the government's mere certification that the records are relevant to a terrorism investigation.³⁹ The party holding the records has no statutory right to a day in court to contest the order.⁴⁰

The PATRIOT Act significantly weakened the power of our courts to check potential government abuse. Indeed, with fewer reviews from independent courts, Americans have fewer ways to know if abuses are even occurring. In 2004, responding

to allegations of potential abuse, Congress created a board within the executive branch to monitor possible violations of privacy rights and civil liberties.⁴¹ But as constructed, the board is no more than a token. It has no real power to check government abuses. It serves at the pleasure of the president, and must ask the Attorney General to intervene whenever an agency doesn't feel like cooperating. The chairmanship is not required to be a full-time job.⁴² Congress even stopped short of requiring that each department conducting the war on terror appoint a single person concerned with protecting constitutional liberties.⁴³ More than four years passed before the board had a chair and vice chair.⁴⁴ Even if it were given real powers, no board could or should attempt to replace independent courts and their Constitutional role in protecting American liberties. The same is true of Congress: even oversight of the executive branch's expanded powers is no substitute for independent courts designed to protect people's rights.

The PATRIOT AND FISA Sequels: Checks And Balances Under Siege

For some, the PATRIOT Act wasn't enough. Since its passage in 2001, the Administration and many of its allies have sought to further undermine the role of the courts in protecting people's rights by asking for even more latitude to exercise power without facing the checks and balances traditionally provided by the courts.

In 2003, a draft proposal, the Domestic Security Enhancement Act, leaked out of the Justice Department. Quickly dubbed "Patriot II," it contained even more shocking assaults on the power of judges to protect constitutional liberties. The government could obtain anyone's credit report or even a DNA sample without a court order.⁴⁵ The Attorney General would be permitted to wiretap phones without court permission for 15 days after an attack on the United States.⁴⁶ Court oversight of wiretaps would be further weakened.⁴⁷ Court-ordered limits on police spying imposed

after spying abuses would be scrapped.⁴⁸ And for the first time since the Civil War, habeas corpus review would be suspended, enabling the Attorney General to expel certain immigrants without letting courts question whether the government's actions were legal or not.⁴⁹

Patriot II was widely condemned, and the Administration quickly backpedaled, insisting that it was not a formal proposal.⁵⁰ But many of its elements, and others, were seriously considered by Congress as it debated extending and expanding the PATRIOT Act.

The failure of Patriot II didn't stop the executive branch from crafting new ways to bypass the courts that protect Americans' rights. In December, 2005, the Administration acknowledged that it authorized the National Security Agency ("NSA") to conduct a secret, ongoing program of electronic surveillance without obtaining warrants, outside the safeguards set up by the Foreign Intelligence Surveillance Act.⁵¹ FISA, which was passed to address the spying abuses of the Nixon era, requires the government to seek a warrant from the FISA Court within 72 hours of beginning surveillance.⁵²

The Administration asserted that their secret efforts were legal under the President's inherent Constitutional powers, and because of the Congressional resolution authorizing the President to use the armed forces against those responsible for the September 11 attacks.⁵³ But some even within the Department of Justice were skeptical.⁵⁴ And lawmakers and legal scholars of both parties raised concerns about the bypass of judicial review. They argued that FISA established clear rules that no President can ignore, and denied that the 2001 resolution containing broad language regarding the use of military force somehow trumped FISA's clear prohibition on warrantless spying in the United States.⁵⁵ The nonpartisan Congressional Research Service concluded, "It appears unlikely that a court would hold that Congress has express-

ly or impliedly authorized [these] NSA electronic surveillance operations."⁵⁶ Some legal scholars and commentators suggested that the FISA Court may have been misused in the process.⁵⁷ One of the FISA judges even resigned a few days after the program came to light.⁵⁸

Since FISA allows three days of electronic surveillance without a warrant in emergency situations, the Administration's large-scale effort to bypass the courts seems to have less to do with fighting ter-

Power without accountability is a recipe for more scandal.

ror than with evading accountability. Rather than asking Congress to lengthen the grace period or consider other reforms, the Administration chose to ignore the statute and, as the Congressional Research Service noted, provided only limited briefings to a few Members of Congress in a manner that "would appear to be inconsistent with the law."⁵⁹ Indeed, in 2002 the Administration itself rejected, as possibly unconstitutional, a proposal to give law enforcement more leeway in seeking electronic surveillance by lowering the legal threshold for court approval below the traditional "probable cause" standard.⁶⁰ And PATRIOT II, which the Administration disavowed, contained several proposals that, in retrospect, may have hinted at the wiretapping that seems to be part of the NSA program.⁶¹

The Administration has said that abuses are unlikely because the eavesdropping program is administered by career professionals and reviewed by lawyers at the NSA, and because the President reauthorizes the program every 45 days if intelligence professionals recommend it.⁶² But others aren't so sure. The American Civil Liberties Union, the Center for Constitutional Rights, and others (including prominent scholars and journalists like Christopher Hitchens, a supporter of the wars in Iraq and Afghanistan), have filed

suit, believing that communications like theirs may have been intercepted.⁶³ Legislators have demanded Congressional inquiries and legislation to bring the program under a framework of laws instead of leaving it to the discretion of the executive branch.⁶⁴

The debate over the NSA spying program shows how badly the courts are faring in the war on terror. Just a few years after winning the Cold War, America's leaders are using a fresh security threat to write the courts out of the Constitution. If courts can't check government abuses and preserve the rule of law, America is at risk of forfeiting its historic role as a global model for protecting freedom and safety.

Detainees and Military Tribunals

The Constitutional role of our courts has also been threatened by Administration claims that the President has unilateral authority over the detention and treatment of anyone, including American citizens, without due process, by simply declaring the person to be an enemy combatant. The Administration has even argued that these determinations and detentions should be immune from any review in a U.S. court.⁶⁵

The reach of executive branch authority in this context is still being sorted out in the courts (see Section III). But there's no shortage of attempts to cut the courts out of the process, even though most court decisions have given the administration great latitude by requiring it to adhere only to minimal due process requirements. In late 2005, Congress passed, and the President signed, a bill containing the Detainee Treatment Act, with a provision known as the Graham-Levin amendment.⁶⁶ The law strips the courts of jurisdiction to hear habeas corpus petitions from detainees being held at the Guantanamo Bay, Cuba naval base who are seeking to prevent and stop due process violations in their treatment and confinement.⁶⁷

It also severely limits the courts' ability to review whether the President's decisions to designate someone as an enemy combatant, and sentences imposed by military tribunal, have complied with American laws and standards of due process.⁶⁸ In effect, it denies detainees the right to go to U.S. Courts to prevent illegal torture.⁶⁹

Upon signing the law, the President asserted the theory of the "unitary executive," which claims that the Constitution affords the president a virtually unfettered power to interpret the laws that Congress passes.⁷⁰ Since then, the Administration has argued that the law scuttles cases pending in the courts before the law was passed.⁷¹ The Graham-Levin amendment was slipped in just days after the Supreme Court agreed to hear a case challenging the constitutionality and procedures of the military tribunals set up to try Guantanamo detainees—a case in which the appeals court sided with the Administration.

Efforts like these just beg the question: why not let the courts do their job? By systematically undercutting the accountability that courts are designed to provide, and eviscerating procedural protections for detainees, the executive branch undermines the rule of law and turns the Constitution on its head. Power without accountability is a recipe for more scandal, like Abu Ghraib.

Refugees & Immigrants:

No Day In Court?

The Constitution grants foreign nationals fewer rights than American citizens. They have no political clout, making it especially important that courts protect what rights they do have in the face of government pressure. But since September 11, courts have been losing their powers to guarantee refugees and immigrants procedures that are fair and treatment that is decent.

As mentioned above, section 412 of the PATRIOT Act suspends judicial review of detentions by permitting the government to detain immigrants

for a full week, without justifying their detention to a court or charging them with a crime, if they are suspected of endangering the United States. During this week, the government can deport the detainee without needing to prove to a court why he or she is a threat.⁷²

In the aftermath of September 11, as more than 1,200 non-citizens were detained, Immigration and Naturalization Service attorneys were instructed to exercise their power to override any ruling from an immigration judge granting bond to a detainee—even when there was no evidence suggesting the detainee was connected to terrorism.⁷³ Many INS attorneys complained about the policy, which was also criticized by the Justice Department's Inspector General.⁷⁴

Attorney General John Ashcroft also stripped power and capacity from the Justice Department's Board of Immigration Appeals, which has the last word in most immigration cases. He eliminated more than half of the judgeships (thereby sweeping out the five most "immigrant friendly" jurists), significantly reduced multi-judge reviews of lower court decisions, dramatically broadened the kinds of cases that can be affirmed without any opinion, and eliminated the Board's authority to review a decision on its own.⁷⁵ The new rules reduced immigrant victories to about 1 in 10 appeals, compared to 1 in 4 before the Ashcroft reforms. (The regulations also triggered a surge of appeals to the United States Courts of Appeals.)⁷⁶

Subsequently, the REAL ID Act was enacted into law.⁷⁷ Section 101(e) of the Act prohibits courts from reversing the decision of an immigration judge throwing out asylum claims for lack of corroborating evidence unless the court finds itself "compelled to conclude" that such corroborating evidence is unavailable⁷⁸—a strange and exacting standard for the review of any decision.

A range of new proposals currently under debate could further cut independent courts out of immigration cases. The House of Representatives

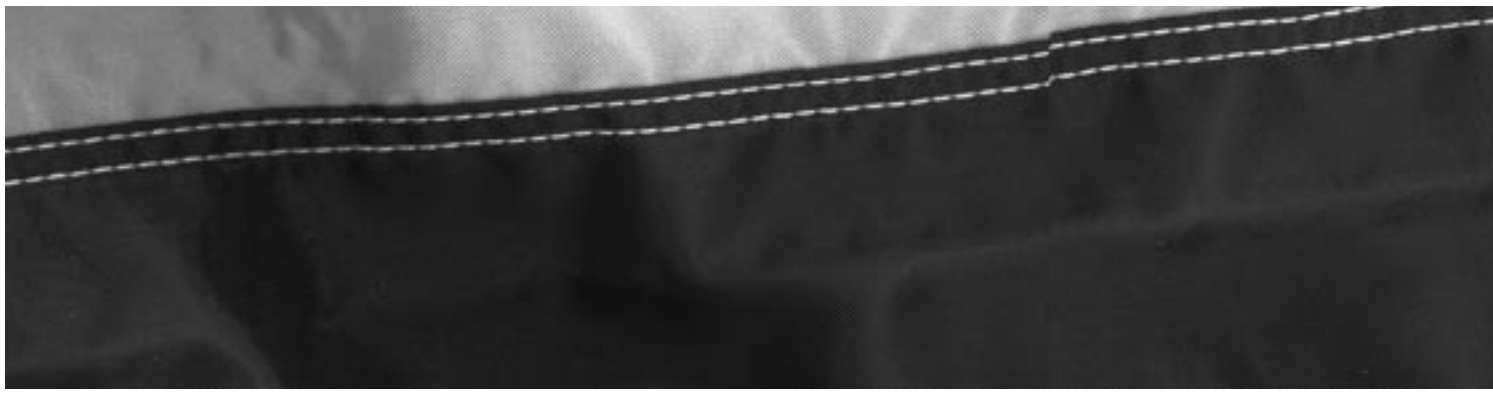
has passed a measure that would require applicants for nonimmigrant visas to waive their rights to any judicial review or appeal of an immigration officer's decision at the port of entry as to the alien's admissibility, and forfeit their rights to contest any action for removal unless the action is based on asylum.⁷⁹ This bill would also prohibit judicial review of removal orders for certain criminal aliens, and foreclose meaningful judicial review of many removal orders for other non-criminals.⁸⁰

III. How the Courts Have Performed

The irony is that when the war on terror has landed in the courtroom, the courts have shown themselves to be a responsible partner in counterterrorism efforts. Time and again, they have worked to protect liberty *and* safety, belying the myth that they will endanger national security. Indeed, in cases involving the detainees at Guantanamo Bay, challenges to the PATRIOT Act, and attempts to seek more information about the government's activities in investigating terrorism, the courts have been largely deferential to the arguments of the government.

The courts have shown themselves to be a responsible partner in counterterrorism efforts. Time and again, they have worked to protect liberty and safety.

In the most well-known series of cases, involving the government's detention of individuals allegedly involved in hostile activities, the courts have defended their jurisdiction to protect certain rights while permitting the government to conduct investigations, develop hearing procedures, and determine conditions of confinement that comply only minimally with established law. In



the matter of *Rasul et al. v. Bush*,⁸¹ for instance, the Supreme Court held that the federal courts can hear legal challenges to the detention of foreign nationals incarcerated at Guantanamo.⁸² (The court declined to address whether the detainees were being held illegally, or to provide standards for deciding such a question.)

In *Hamdi v. Rumsfeld*,⁸³ the Supreme Court ruled that the President had the authority, under the Congressional authorization to use military force in relation to the September 11 attacks, to detain a United States citizen captured abroad and held as an enemy combatant.⁸⁴ The Court also held that enemy combatants must be given a “meaningful opportunity to contest the factual basis for his detention before a neutral decisionmaker.”⁸⁵ But the court left open the possibility that a military tribunal could be substituted for a federal court,⁸⁶ providing significant leeway to the Administration to create a forum more advantageous to the interests of the government.

Subsequently, in *Hamdan v. Rumsfeld*,⁸⁷ a federal district court addressed the question of whether war crimes trials could be conducted in special military commissions fashioned after September 11 rather than before a court-martial convened under the Uniform Code of Military Justice.⁸⁸ In part to protect Americans captured in fighting abroad,⁸⁹ the court ruled that a Guantanamo Bay detainee captured during hostilities in Afghanistan and designated an “enemy combatant” by the Administration is entitled to a hearing to deter-

mine if he is a prisoner of war under the Geneva Convention.⁹⁰ This hearing, the court ruled, must provide fair notice of the evidence being used against the detainee and a fair opportunity to contest it—protections not provided by the Administration’s tribunals.⁹¹ The court further determined that the detainee is entitled to prisoner of war protections until such a hearing can be held.⁹² But on appeal, a federal appeals court reversed the lower court’s ruling, concluding that the Geneva Convention could not be judicially enforced (and that even if it could, Hamdan would not be entitled to its protections under either the language of the Convention or the President’s interpretation.⁹³) Further, the appeals court determined that the military commissions set up to try Hamdan (and others like him) were subject to few procedural requirements, that none of these requirements were implicated by Hamdan’s challenge, and that the military commissions were competent tribunals for purposes of determining his status.⁹⁴ The Supreme Court has agreed to hear the case; since the question of whether the federal courts can address such issues at all under the Graham-Levin Amendment has intervened, the high court will have to decide if it can even do its job of addressing important due process issues raised by cases like *Hamdan*.⁹⁵

In a ruling pertaining to many of the Guantanamo detainees’ cases, a federal district court held that due process rights under the Fifth Amendment to the U.S. Constitution apply to detainees who are being held as enemy combatants at Guantanamo



whether or not they have been charged with war crimes that would result in their appearance before military commissions.⁹⁶ The court ruled that the procedures of tribunals that review the President's decision to designate a detainee as an enemy combatant fail to comply with due process if they don't provide the detainees with access to the evidence used to make the determination, don't allow assistance of counsel, and with respect to at least some detainees, allow the reliance on evidence allegedly obtained through torture.⁹⁷ But the court also ruled that the Geneva Conventions do not apply to all detainees at Guantanamo.⁹⁸ Another federal district court disagreed with these rulings and sided with the government, and all the related cases have been appealed.⁹⁹ Of course, if the Graham-Levin Amendment is interpreted to bar courts from even hearing cases like these in which detainees seek to prevent or stop due process violations, then even those rulings that favor the government won't matter.

In *U.S. v. Moussaoui*,¹⁰⁰ the U.S. Court of Appeals for the Fourth Circuit agreed with the Administration that it need not turn over prisoners in military custody outside the United States when they are called as witnesses.¹⁰¹ Deferring to national security concerns, the Court allowed the government to provide written summaries of witness statements instead.¹⁰² On the other hand, the Court rejected arguments that the executive's war making powers preclude any judicial role in such matters.¹⁰³

In *Rumsfeld v. Padilla*,¹⁰⁴ the Supreme Court sided with the government in requiring lawyers for Jose Padilla to bring his petition—for a habeas corpus review challenging his detention—in the jurisdiction where Padilla was then being held.¹⁰⁵ Subsequently, in *Padilla v. Hanft*,¹⁰⁶ a Republican-appointed district court judge found that the Constitution required that Padilla, a U.S. citizen arrested in the United States and held as an enemy combatant, be charged with a crime or released.¹⁰⁷ But the U. S. Court of Appeals for the Fourth Circuit reversed that decision, ruling that the President had the power to hold Padilla as an enemy combatant pursuant to the President's power under the 2001 Congressional authorization to use military force.¹⁰⁸ After Padilla appealed to the Supreme Court, the Administration moved to charge Padilla with crimes, transfer him from military to criminal custody, and vacate the Court of Appeals opinion.¹⁰⁹ The Court of Appeals denied the government's requests, pointedly noting that the government's insistence over the three and a half year period of Padilla's confinement that his detention was imperative for national security purposes, and the court's decision that he could be held on the basis of those representations, did not square with the government's sudden choice to release Padilla and charge him with actions far less serious than those for which he was ostensibly being held in military custody.¹¹⁰ Citing the need for the Supreme Court to decide the important issues in the case, as well as the need to protect the appearance of regularity in the judicial pro-

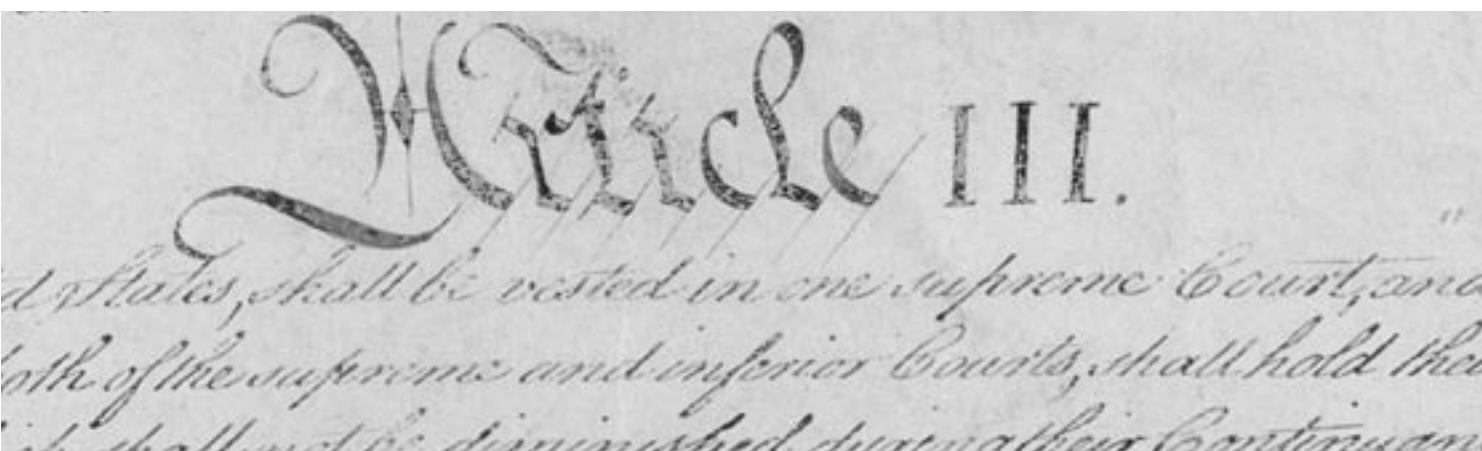
cess,¹¹¹ the court said that, if granted, the government's requests "would compound what is, in the absence of explanation, at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court"¹¹² The Supreme Court granted the government's request to transfer Padilla into criminal custody, but has promised to review the legality of his military detention.¹¹³ Regardless of the ultimate outcome, the *Padilla* decisions show how only courts can provide the kind of impartial review that our Constitution's framers desired.

In cases pertaining to the government's powers under the PATRIOT Act, the courts have balanced liberty and security interests. In *In re Sealed Case Nos. 02-011 and 02-002*,¹¹⁴ the U.S. Foreign Intelligence Surveillance Court of Review (the appeals body for the FISA Court), convening for the first time in its history, sided with the government by reversing the lower FISA Court's refusal to grant applications for surveillance under section 218 of the PATRIOT Act.¹¹⁵ The court ruled that evidence gained under FISA standards could be used to prosecute ordinary crimes as long as some purpose of the investigation was to gather foreign intelligence information, and as long as the crimes to be prosecuted were inextricably linked with foreign intelligence crimes.¹¹⁶ (The FISA Appeals Court found for the government despite evidence that the FBI had submitted more than 75 applications containing misstatements and omissions of materials facts to the FISA court since January 2000, when new Justice Department rules eased the standard for using intelligence information in criminal cases.¹¹⁷) The court also determined, however, that it would not be proper for the government to use the FISA process to gather information exclusively for a criminal investigation—even one linked to foreign intelligence.¹¹⁸

In *Doe v. Ashcroft*,¹¹⁹ a federal district court ruled that the government overstated its authority in issuing "national security letters" under section 505 of the PATRIOT Act (and other authorities)

in violation of the Constitution's First and Fourth Amendments.¹²⁰ The court noted that "times like these demand heightened vigilance."¹²¹ In balancing liberty concerns, however, the court ruled that to deny the judiciary a role in reviewing the issuance of such letters would violate the Constitution's protections against unreasonable searches.¹²² The court further struck down broad prohibitions on disclosing the receipt of such a letter as in impermissible content-based prior restraint on speech.¹²³ In *Doe v. Gonzales*,¹²⁴ another federal district court, similarly, emphasized it is often appropriate to defer to the government's expertise in the area of counter-terrorism, but in balancing that with the need for judicial review, determined that a permanent gag order on disclosing the existence of a particular national security letter constituted a broad content-based, prior restraint of speech in violation of the First Amendment.¹²⁵ Both cases have been appealed to the U.S. Court of Appeals for the Second Circuit.¹²⁶

The courts have shown considerable deference to government refusals to provide more information about its conduct of the war on terror. When the ACLU sued under the Freedom of Information Act to see records sought by the FBI in a terrorism investigation, a federal district court held that the government could withhold the information under the Act's national security exemption.¹²⁷ It added, however, that there was a compelling need to expedite processing of such requests, given concerns that the PATRIOT Act might be used to violate civil liberties.¹²⁸ Similarly, in *Center for National Security Studies v. U.S. Department of Justice*,¹²⁹ the U.S. Court of Appeals for the District of Columbia Circuit ruled that the names of people detained for investigation of major terrorist attacks, and the names of their attorneys, can be withheld under the law enforcement exemption of the Freedom of Information Act.¹³⁰



IV. The Historic Deference of Courts During Wartime

A broader review of American history supports the same conclusion: that the courts, carrying out their job defending the Constitution, have not undercut national security during times of conflict. Throughout history, courts have typically been quite deferential to the President and Congress during wartime. For example, the 1798 Alien and Sedition Acts, giving the President wider authorities to jail aliens and criminalize criticism, survived repeated challenges under the Constitution's First Amendment.¹³¹ "The courts," observed Chief Justice William Rehnquist, "have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over."¹³²

During the Civil War, the Supreme Court refused to review the Army's jailing of a former congressman for urging Lincoln's electoral defeat and for criticizing a military edict against "declaring sympathies for the enemy" in Ohio, where martial law had been declared.¹³³ It upheld the government's power to blockade Confederate ports without a Congressional authorization.¹³⁴ In two cases, however, the Court tried to curb government attempts to ignore the rules set out in the Constitution. In *Ex Parte Milligan*,¹³⁵ the Court ruled that military tribunals could not try civilians for disloyalty when civil courts were available to hear the case (like the Illinois

man whose crime was stating that "anyone who enlists is a God Damn fool"¹³⁶). When President Lincoln suspended the constitutional right of habeas corpus—the right to challenge a detention in court—the Supreme Court ruled that only Congress possessed such powers.¹³⁷

During World War I, the Court upheld the government's power to draft men into the army;¹³⁸ seize control of railroads,¹³⁹ telegraphs and telephones;¹⁴⁰ and even to prohibit the making and selling of alcohol during wartime.¹⁴¹ When the Wilson administration used the 1918 Espionage and Sedition Acts to jail more than a thousand dissenters, including former presidential candidate Eugene Debs, the courts did not protest.¹⁴² Chief Justice Rehnquist, who has written a book on American liberties during times of war, is more charitable: "Though the courts during this period gave little relief to civil liberties claimants, the very fact that the claims were being reviewed by the judiciary was a step in the right direction for proponents of civil liberties during wartime."¹⁴³ Indeed, shortly after the war ended, a federal court ordered the Justice Department to release aliens it sought to deport because they were members of the Communist Party.¹⁴⁴

During World War II, federal courts upheld the federal government's power to set wartime price controls,¹⁴⁵ the jailing of fascist critics of the government¹⁴⁶ and socialist strike instigators at defense plants,¹⁴⁷ and a state's power to refuse to



deny conscientious objectors a license to practice law.¹⁴⁸ The Supreme Court famously permitted the President to set curfews for¹⁴⁹ and imprison more than 110,000 Japanese-Americans and their Japanese-national parents.¹⁵⁰ And at the urging of the Justice Department, the Court also ignored the Civil War precedent it had established in *Ex Parte Milligan* and refused to grant Nazi saboteurs an opportunity for a civil trial.¹⁵¹

On other occasions, the Court was better able to protect civil liberties despite the political pressures of the “Good War.” It stopped some government efforts to jail war critics¹⁵² and to denaturalize fascist sympathizers and Communist party members.¹⁵³ It reversed itself and held that Jehovah’s Witnesses need not salute the flag or recite the Pledge of Allegiance in schools if it violated their religious conscience. “The very purpose of a Bill of Rights,” wrote the majority, “was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.”¹⁵⁴ On several occasions, the Court invoked Nazi Germany’s suppression of basic human rights as it upheld liberties here at home.¹⁵⁵

During the Vietnam War, the Court ducked repeated requests to declare military action unconstitutional (in part because Congress never formally declared war).¹⁵⁶ It refused to rule on army surveillance of civilian protestors,¹⁵⁷ and it upheld the army’s right to discipline dissidents within its ranks.¹⁵⁸ Although it broadened the definition of legal conscientious objection to the draft,¹⁵⁹ it refused to grant such a status to those who objected only to fighting in Vietnam. Even the famous 1971 “Pentagon Papers” decision, permitting the *New York Times* to publish a classified government history of the Vietnam War, was a close case: the two deciding votes, Justices Stewart and White, would have ruled to suppress publication if Congress had only authorized the President to do so beforehand.¹⁶⁰

V. Conclusion: The Growing War on the Courts

“Federal courts have no army or navy. . . .
At the end of the day, we’re saying the court
can’t enforce its opinions.”

—U.S. Rep. John Hostettler.¹⁶¹

The assault on our courts did not begin on September 12, 2001. For more than a decade, an increasingly aggressive band of lawmakers, pundits and special interest groups have been working to weaken the power of our courts and the legitimacy of our judges.

Congress periodically engages in waves of “court-stripping,” often to punish the courts for particular rulings on hot-button social issues. After the Supreme Court’s 1954 *Brown v. Board of Education* decision that school segregation violated the Constitution, furious lawmakers sought to exempt federal courts from ruling on public education laws.¹⁶² During the 1960s and 1970s, issues like the draft, Miranda warnings, busing, school prayer and abortion sparked efforts to cut the courts’ power to hold laws up to the standards of our Constitution.¹⁶³

The Big Bang for the latest round of assaults came in 1996, a presidential election year that saw three major court-stripping laws and a political assault on a sitting judge. In the wake of the Oklahoma City bombing, Congress passed an anti-terrorism bill that dramatically restricted federal judicial review for death row inmates and for many immigrants facing deportation.¹⁶⁴ The Illegal Immigration Reform and Immigrant Responsibility Act eliminated or severely restricted the ability of immigrants to seek a federal court review as they seek asylum from persecution or fight deportation efforts.¹⁶⁵ The Prison Litigation Reform Act drastically diminished the ability of prisoners to get a day in court to object to abusive prison conditions, and weakened the authority of

federal judges to craft remedies when those conditions actually break the law.¹⁶⁶

A new round of efforts began after the 2002 elections. The 2003 “Feeney Amendment”—protested strongly by Chief Justice William Rehnquist—sharply limited the ability of federal judges to issue sentences below federal guidelines in order to set punishments that fit the crime.¹⁶⁷ In 2004, the House of Representatives passed a measure to strip federal court jurisdiction to rule on challenges to the Pledge of Allegiance.¹⁶⁸ The House also passed the “Marriage Protection Act”, which singles out one law (the Defense of Marriage Act) for special treatment, exempting it from any review by the federal courts.¹⁶⁹

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With the 109th Congress, 2005 and 2006 are ushering in yet more court-stripping measures. One measure passed in 2005 gives the Secretary of Homeland Security unilateral power to waive any law on the books that might interfere with the building of border fences—including civil-rights and minimum-wage protections, and even criminal laws.¹⁷⁰ Government wrongdoing could only be redressed if it rose to the level of a Constitutional violation, and a contrary court decision could only be appealed to the Supreme Court, which hears far fewer appeals than traditional appeals courts.¹⁷¹ Of course, the effort to rig the Terri Schiavo case by sending it to federal court was so politically transparent that it generated a national backlash.¹⁷²

Congress is now considering a fresh round of court stripping efforts, many of which seem designed to energize activists who have been spoiling for a

fight with the courts. Proposed marriage amendments to the Constitution seek to take powers from state judges to rule on family law issues they have handled for centuries.¹⁷³ The “Constitution Restoration Act” would deny federal courts the power to hear any suit involving a governmental official’s “acknowledgment of God as the sovereign source of law, liberty, or government.”¹⁷⁴ (For good measure, any judge caught exceeding his or her jurisdiction could be impeached.¹⁷⁵) A separate House measure would allow Congress to reverse any Supreme Court decision that struck down a law on constitutional grounds, lowering the curtain on two centuries of judicial review.¹⁷⁶ Other pending legislation would encourage defendants to renege on promises they made in consent decrees—such as pledges to clean up pollution and dilapidated schools—by forcing judges to let certain defendants reopen the agreements every few years, or when a new governor or mayor is elected.¹⁷⁷

The last decade has also witnessed an escalating political intimidation campaign against judges. In 1996, presidential candidate Bob Dole called for the impeachment of federal judge Harold Baer after he disallowed certain evidence in a drug case.¹⁷⁸ President Clinton’s spokesman, eager to deflect Dole’s attack, suggested the Administration would consider asking the judge to resign unless he reversed his ruling.¹⁷⁹ In 1997, Congressman Tom DeLay announced that impeachment was a “proper solution” for “particularly egregious” rulings.¹⁸⁰ Congressional hearings on “judicial activism” and more impeachment threats soon followed.¹⁸¹ “We have a whole big file cabinet full” of names, said DeLay. “We are receiving nominations from all across the country of judges that could be prime candidates for the first impeachment.”¹⁸²

Tactics like these flow from a view of our courts as little more than enemy combatants. After court rulings that certain antiterrorism tactics violated the Bill of Rights, Attorney General Ashcroft accused

the judiciary of endangering national security.¹⁸³ During the Schiavo case, House Majority Leader DeLay warned that “no little judge sitting in a state district court in Florida is going to usurp the authority of Congress.”¹⁸⁴ Congressional leaders have bragged that they will “take no prisoners” in dealing with the courts¹⁸⁵ and that “judges need to be intimidated.”¹⁸⁶

This intimidation campaign is now well under way. A Reagan-appointed judge was recently hauled before a congressional committee to explain comments that weren’t, in the eyes of congressional investigators, properly supportive of sentencing guidelines.¹⁸⁷ There’s a new effort to make impeachment into a respectable, permissible punishment for federal judges who make controversial decisions, exceed their jurisdiction, or consult foreign law in their deliberations.¹⁸⁸ State judges have also seen a spike in impeachment threats: 48 from 2002 to 2005, almost double the previous four years.

Courts shouldn’t be immune from criticism and controversy. But our founders gave judges a special job—to protect the Constitution, and decide cases based on the facts and the law, not pressure and politics. Tearing down the courts that protect our rights can only weaken the American judicial system that Chief Justice Rehnquist called the “crown jewel” of our democracy.

If our long war against terrors results in a piecemeal weakening of the power of our courts, and a permanent weakening of the checks and balances that protect our freedoms, Americans will be right to wonder what exactly they’re fighting for. That’s why the PATRIOT Act debate offers Congress and all Americans an excellent opportunity to deliberate carefully and consider the cumulative effects of these measures. In the end, no matter how slowly one slides down a slippery slope, one still ends up at the bottom.

Appendix: Finding Out More

Justice At Stake Partners

American Bar Association Section of Individual Rights & Responsibilities
<http://www.abanet.org/irr/home.html>

Appleseed Foundation
<http://www.appleseeds.net/index.cfm>

The Constitution Project /
Liberty & Security Initiative
<http://constitutionproject.org/ls/>

The League of Women Voters–
Civil Liberties Project
http://www.lwv.org/AM/Template.cfm?Section=Civil_Liberties

Other Organizations

American Civil Liberties Union (ACLU)
<http://www.aclu.org/safefree/index.html>

American Immigration Lawyers Association
<http://aila.org>

Amnesty International USA
<http://www.amnestyusa.org>

Bill of Rights Defense Committee
<http://www.bordc.org>

The CATO Institute
<http://www.cato.org/current/terrorism>

Center for Constitutional Rights
<http://www.ccr-ny.org/v2/home.asp>

Center for Democracy and Technology
<http://www.cdt.org>

Electronic Frontier Foundation
<http://www EFF.org>

Electronic Privacy Information Center
<http://www.epic.org>

The Heritage Foundation
<http://www.heritage.org>

Human Rights First (Formerly the Lawyers Committee for Human Rights)
<http://humanrightsfirst.org>

Patriots to Restore Checks and Balances
<http://www.checksbalances.org>

Reporters Committee For Freedom of the Press
<http://www.rcfp.org/behindthehomefront>

U.S. Government

The National Commission on Terrorist Attacks Upon the United States (The 9-11 Commission)
<http://www.9-11commission.gov>

Department of Justice
USA PATRIOT Act resource page
<http://www.lifeandliberty.gov>

Financial Crimes Enforcement Network,
United States Department of the Treasury
http://www.fincen.gov/pa_main.html

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- 140 *Dakota Central Telephone v. South Dakota*, 250 U.S. 163 (1919).
- 141 *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).
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