

FOREWORD

JAMES E. COLEMAN, JR.* AND BARRY SULLIVAN**

We are an open society. But we are at war.¹

President George W. Bush

*Silent enim leges inter arma.*²

Cicero

On the occasion of the bicentennial of the Constitution, Chief Justice Warren Burger observed that “the Declaration of Independence was the promise; the Constitution was the fulfillment.”³ Of course, the Constitution was “the fulfillment” only in a limited and provisional sense. Justice Thurgood Marshall made exactly that point on the same occasion, when he suggested that the exclusive focus placed by the bicentennial celebration on the events of 1787 “invite[d] a complacent belief that the vision of those who debated and compromised in Philadelphia yielded ‘the more perfect union’ it is said we now enjoy.”⁴ That was unfortunate, in Justice Marshall’s view, because the work of the founders was far from perfect, and the story of ordered liberty would have been far different if it had ended in Philadelphia in 1787. With characteristic bluntness, Justice Marshall suggested that “the government [the founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and respect for the individual freedoms and the human rights, that we hold as fundamental today.”⁵

To be sure, the Constitution of 1787 is both a constitution that is familiar to us and one that is strange. The provisions pertaining to the structural features of the federal government are familiar enough, although one must admit that the federal administrative agencies, which play so important a role in our collective lives, are nowhere to be found. On the other hand, the compromise over slavery, which William Lloyd Garrison called “a covenant with death and an

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1. *Perspectives*, NEWSWEEK, Dec. 10, 2001, at 23.

2. Roughly translated, “in times of war, the law falls silent.” *Pro Milone* 11:10.

3. Charles Alan Wright, *In Memoriam: Warren Burger: A Younger Friend Remembers*, 74 TEX. L. REV. 213, 219 (1995).

4. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 1-2 (1987).

5. *Id.* at 2.

agreement with hell,”⁶ is so foreign to our values and experience as to seem incomprehensible, and the idea of a constitution without a bill of rights is inconceivable to us. So too is a constitutional order without the institution of judicial review.⁷

In any event, Justice Marshall was certainly correct in his view that closure was not reached in 1787. What followed has been a complicated constitutional history marked by many twists and turns, and some setbacks, to be sure, but moving largely in the direction of increased protection for inalienable rights and the “blessings of liberty” for expanding numbers of Americans. Indeed, it is worth emphasizing that the general direction of our history has been toward liberty. At the beginning of the third millennium, however, it seems appropriate to take stock, to attempt to tally up the accomplishments and the costs, and to try and see what the future holds.

In July 2000, the American Bar Association Section of Individual Rights and Responsibilities sponsored a series of programs on the Bill of Rights, under the title, “To Secure the Blessings of Liberty: The Bill of Rights and Core Constitutional Guarantees in the New Millennium.” The collection of articles that are published in this special issue of *Law and Contemporary Problems* grew out of those programs. In putting together that series, the Section intended to “prompt debate and to foster increased understanding of the challenge to lawyers and the profession of keeping alive the promise of the Bill of Rights as protection for individuals in the modern age.”⁸ That debate seems particularly appropriate now.

At the start of this project, we had in mind exploring how well the Constitution would continue to adapt to a rapidly changing world, powered by new issues, technological developments, and the challenges that come from the increasingly international orientation of business, civil society, and cultural life. As the country becomes more ethnically and racially diverse, the competing claims of civil rights and religious freedom sometimes challenge the durability of old constitutional doctrines. Demands for protection from hate crimes collide with notions of free speech, sometimes pitting civil rights groups against civil liberties groups.⁹ The Internet has provided increased access to information to millions of people, yet privacy rights are also threatened by the Internet and by new technologies that permit law enforcement officials to conduct

6. See 3 W. GARRISON & F. GARRISON, WILLIAM LLOYD GARRISON, 1805-1879, THE STORY OF HIS LIFE TOLD BY HIS CHILDREN 88 (1889) (quoting Massachusetts Anti-Slavery Resolution of January 27, 1843).

7. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“*Marbury v. Madison* . . . declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

8. James E. Coleman, Jr., Memorandum to Mary Cavalini, Dec. 3, 1999.

9. See, e.g., Louis Jacobson, *A Coalition with a Liberal-Leave Policy*, 31 NAT'L J. 3154 (1999) (discussing the breakup of a coalition of civil rights, gay rights, and religious freedom groups over the proposed Religious Liberty Protection Act), available at <http://nationaljournal.com/members/news/1999/10/1029nj4.htm>.

searches previously imaginable only in science fiction.¹⁰ Such dilemmas are not new. The progress of each successive generation has posed similar challenges, the inevitable product of change. And each generation has had to confront the task of how to relieve the societal tensions that ensue. In this country, more often than not, that process has involved the legal system and the Constitution.

Two years ago, when we began this effort, we could not have foreseen the events of September 11, 2001. Yet those terrorist attacks on the United States, and the fear and disorientation that they have engendered, present yet another challenge to the concepts of ordered liberty and individual freedom. Today, as in the past, the question that commands our attention is this: How do we strike the right balance between our legitimate concern for security and our commitment to individual liberty?

In the immediate wake of the terrorist attacks, two major developments occurred which suggest that, in the short run, the balance will be weighed heavily in favor of security. In October, 2001, at the request of the Bush Administration, Congress overwhelmingly passed the USA Patriot Act, legislation that gives the Executive Branch far-reaching authority to monitor, search, and detain individuals suspected of terrorism.¹¹ Shortly thereafter, in November, 2001, the President, invoking his authority as Commander-in-Chief, issued an executive order establishing special military commissions to try suspected foreign terrorists.¹² Because of the grave threat that foreign terrorists presented to the United States after September 11, the President declared that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”¹³

Although the USA Patriot Act of 2001 contained several provisions that implicated the protection of civil liberties,¹⁴ there was little initial opposition to the legislation.¹⁵ The response to the proposed special military commissions was different. When the President announced his intention to establish special tri-

10. See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (declaring use of thermal imaging device to scan the home of person suspected of growing marijuana plants an unreasonable search under the Fourth Amendment to the Constitution).

11. Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA Patriot Act of 2001 is an acronym for the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

12. Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

13. *Id.* at §1(f).

14. E.g., Pub. L. No. 107-56, tits. II, V, 115 Stat. 272, 278-296, 363-368 (2001) (giving the Attorney General expanded investigative and surveillance authority); Pub. L. No. 107-56, tit. VII 115 Stat. 272, 374 (2001) (blurring the line between foreign intelligence gathering and domestic law enforcement).

15. See, e.g., Susan Milligan, *Fighting Terror/National Concerns Keeping Quiet; So Far, Politicians' Dissent Left Out of the War*, BOSTON GLOBE, Dec. 3, 2001, at A17. One observer noted that, “[t]he country’s most fundamental civil liberty in the aftermath of Sept. 11 is protecting our lives from terrorists who want to kill us.” Alan Charles Raul, *Cheer Ashcroft On, With a Little Friendly Oversight; A Civil Liberties Panel Would Help Quell the Naysayers in the Fight Against Terrorism*, L.A. TIMES, Dec. 5, 2001, pt. 2, at 13. Both houses of Congress overwhelmingly voted in favor of the USA Patriot Act of 2001; in the Senate, only a single Senator voted against the bill.

bunals to try suspected foreign terrorists, he did not specify the circumstances in which these tribunals would be used nor the specific procedures that would govern their work. But officials in the Administration hinted at what those procedures might be. There were suggestions that the military tribunals would permit the use of secret evidence, operate pursuant to relaxed rules of evidence, place limits on the right to counsel, suspend the writ of habeas corpus, preclude judicial review, and generally function in ways that are foreign to American judicial proceedings, military or civilian.¹⁶ The response to what may have been trial balloons was swift and divided.

In this context, many Americans saw nothing wrong with the President establishing by decree military commissions to try *foreigners* suspected of terrorism against the United States. Others, however, including the organized bar, editorial and op-ed page writers, and some prominent members of Congress, were deeply distressed by the thought of an off-line criminal justice system established by the President and operating entirely within the Executive Branch. For example, William Safire, a former official in the Nixon Administration and conservative commentator for the New York Times, called the proposed military tribunals “kangaroo courts” and “Star Chamber tribunals.”¹⁷ The American Bar Association passed a resolution opposing such tribunals, unless they afforded the accused certain basic rights essential for due process, including the right to counsel, open trials, the right to confront witnesses, the presumption of innocence, and appellate review by civilian judges.¹⁸ Legal scholars also have expressed their concern about the proposed arrangements.¹⁹

The Administration responded to this criticism by denying that it ever considered many of the most controversial targets of criticism.²⁰ And, on March 21, 2002, the Department of Defense issued final regulations to govern military tribunals that appear to incorporate some of the features traditionally thought essential to the American criminal justice system.²¹ However, some controversial features were not abandoned. For example, the tribunals remained entirely within the purview of the Executive Branch, and no judicial review by civilian courts was to be made available.

16. See, e.g., Peter Slevin & George Lardner, Jr., *Bush Plan for Terrorism Trials Defended; Military Tribunals Appropriate in War, Ashcroft Says; Critics Cite Constitution*, WASH. POST, Nov. 15, 2001, at A28.

17. See William Safire, *Kangaroo Courts*, THE NEW YORK TIMES, Nov. 26, 2001, at A17. Safire called the proposal a “dismaying departure from due process.” *Id.*

18. American Bar Association, Resolution of the House of Delegates, Report No. 8C (February 4, 2002).

19. See, e.g., Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L. J. 1259 (2002).

20. Testimony of Michael Chertoff, Assistant Attorney General, Criminal Division, Panel I of a Hearing of the Senate Judiciary Committee, Federal News SERVICE, available at <http://www.senate.gov/hearing.cfm?id=126> (November 28, 2001).

21. Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, Department of Defense (March 21, 2002), available at <http://www.dod.gov/news/Mar2002/d2002032/ord.pdf>.

Instead of independent judicial review, the regulations establish three-person military review boards that can recommend the granting of relief from a conviction and sentence to the President or Secretary of Defense, or return a case to the Appointing Authority (the Secretary of Defense or his designee) for further proceedings when the board concludes that a “material error of law has occurred.”²² The final decision of the President or the Secretary is not subject to further review: “[A]ny sentence made final by action of the President or the Secretary of Defense shall be carried out promptly.”²³ Moreover, wholly apart from any final decision of a military tribunal, the Administration claims the authority to detain indefinitely any suspected terrorist, even if acquitted by a military tribunal, until the war on terrorism ends or the President decides that the person is no longer a threat to the United States.²⁴

The current debate about military tribunals and the curtailment of civil liberties during the war on terrorism undoubtedly will continue for some time into the future.²⁵ It is equally clear that many Americans already have concluded that many of our traditional values of due process and personal liberty must yield to the dangerous realities brought home by the terrorist acts of September 11. In this sense, the events of September 11 have lent new urgency and unexpected poignancy to the question that we set out to explore two years ago, namely, whether our Constitution, as modified and amended, can continue in the world of today and tomorrow to accomplish the purposes its framers put so powerfully, yet so simply: “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity” Or, as the articles in this special issue ask, how will the Bill of Rights hold up to the challenges of the third millennium?

Finally, we would like to acknowledge our great debt to Penny Wakefield, Executive Director of the ABA Section of Individual Rights and Responsibilities, and to her able assistant, Michael L. Pates. Without their tireless effort and unwavering commitment, this project would not have been possible.

22. *Id.* at Part 6, section H(6).

23. *Id.* at section H(2).

24. See John Mintz, *Some Detainees May Be Held Even If Acquitted*, WASH. POST, March 29, 2002, at A7.

25. Of course, questions of civil liberties are not limited to those mentioned here. For example, the Guardian reported in December 2001 on the targeting by conservative groups of American academics who had voiced opposition to American foreign policy since September 11. See Duncan Campbell, *Conservative ‘Patriots’ Target Liberal Academics*, GUARDIAN, Dec. 19, 2001. One group, founded by Lynne Cheney and Senator Joseph Lieberman, “published the names, colleges and statements of more than 100 academics who had made what were perceived to be part of a ‘blame America first’ tendency.” *Id.*