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Still standin'

Although the ground has rumbled beneath the twin pillars of American civil liberties, judicial review and free speech are still intact

BY HARVEY A. SILVERGLATE
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DURING WORLD War II, when American citizens of Japanese ancestry challenged the president's authority to relocate them to camps for the duration of hostilities, the Supreme Court washed its hands of the matter and gave the president, Congress, and the military virtually unfettered authority to do what they felt necessary to prosecute the war. Justice Felix Frankfurter, the respected constitutional scholar and Harvard Law professor, concluded his opinion in one 1944 case with the rather dismissive observation that while the Supreme Court might disagree with the president and Congress, nevertheless "that is their business, not ours."

Since the September 11 terrorist attacks in New York and Washington, two fundamental questions have emerged that will determine whether our system of liberty will survive. The most immediate issue, often cast in shorthand as "liberty versus security," is whether whatever the president and his minions in the Justice and Defense Departments decide to do *to* us (while claiming to be acting *for* us) will be subject to judicial review. The second is whether Americans' right to free speech — essential to correcting abuses of official power that sometimes the courts themselves are hesitant to oppose — will survive reasonably intact, or whether speech, too, will be viewed as just another expendable obstacle to security.

Although the Bush administration, with the acquiescence of a supine Congress, has attacked civil liberties with breathtaking speed and scope, so far the prospects for these two crucial areas of the law — review by an independent judiciary and free speech — look fairly positive. And that's good not only for the survival of liberty, but also for winning ultimate victory over terrorism.

This sobering reality is often ignored by those who opt to restrict liberty in order to expand security. But our history demonstrates that it is precisely *because* we are free that we have been able to achieve the dynamism necessary to protect ourselves in a distressingly hostile world that so often disparages liberty and democracy. Such a point was made recently by Massachusetts Institute of Technology president Charles Vest, who implored the federal government not to impose draconian restrictions on the openness of scientific research and peer dialogue. Openness, he urged the administration, is essential for scientific progress, and the latter is essential for security.

IT MAY SEEM obvious that the courts should review the activities of the other branches of government, since we are accustomed to living under a system of divided governmental authority. Under the so-called separation of powers, the decisions of the federal courts, especially the Supreme Court, constitute "the law of the land" and, taken together, act as a guide to the executive and legislative branches, limiting their powers. But the principle has come under enormous strain in times of perceived national danger. This is such a time. And yet the federal judiciary has asserted itself in the face of executive (and sometimes legislative) claims to essentially unfettered power in the name of national security in a number of cases around the country.

One of the more important assertions of judicial authority over executive "anti-terror" actions took place here in Boston. In March, Chief Judge William Young of the United States District Court overruled a Department of Justice move to impose severe restrictions on the right of alleged "shoe bomber" Richard Reid and his lawyers to confer and prepare a defense. Young, a Reagan appointee and hardly a "liberal," demonstrated that protecting constitutional liberties is a nonpartisan obligation. His decision was therefore encouraging on two counts.

There have been other modest rebellions in the ranks of the lower and intermediate levels of the federal judiciary. (None of these cases has yet reached the Supreme Court.) Even the US Court of Appeals for the Fourth Circuit, sitting in Richmond, Virginia, known as the most conservative federal court of appeals, did not jump through all the hoops lined up by the Department of Justice in the case of Yaser Hamdi. Known as the American-born "Cajun Taliban," Hamdi had been caught by American troops in Afghanistan last November and moved to the prison camp at Guantánamo Bay, Cuba. Hamdi's lawyer asked that his client, an American citizen designated by the president as an "enemy combatant" and therefore supposedly stripped of constitutional rights, be allowed to confer with his lawyer. In an opinion by the court's ultra-conservative chief judge, J. Harvie Wilkinson III, the three-judge panel refused to throw out Hamdi's petition, despite its observation that the president's wartime decisions should be given "great deference from the court." "With no meaningful judicial review," wrote Judge Wilkinson, "any American citizen alleged to be an enemy combatant could be detained indefinitely without charge or counsel on the government's say-so." The crucial point made by the Fourth Circuit was that it was up to the courts to monitor such exercises of presidential power, even if the courts were loath to reverse an executive decision. The court pointedly retained jurisdiction to review the government's conduct.

Much the same point was made in an important decision handed down on December 5 by Judge Michael Mukasey of the federal district court in Manhattan. Over the dangerously inflated claims of President George W. Bush and Attorney General John Ashcroft, Judge Mukasey ruled that Jose Padilla, the man suspected of (but not criminally charged with) planning to explode a radioactive "dirty bomb" somewhere in the country, who has been held incommunicado in a Navy brig since June, does indeed have certain rights. He has the right, ruled the court, to meet with a lawyer and to contest the president's claim that he is associated with Al Qaeda, poses a threat to national security, and therefore can be held until the termination of hostilities in the war on terror. While Judge Mukasey said that the government would not have to offer *much* proof in order to hold Padilla — an American citizen captured on American soil and designated by Bush as an "enemy combatant" rather than a criminal defendant entitled to a trial — the judge affirmed that Padilla had a right to seek review by the courts. The administration's effort to avoid judicial review by refusing to charge Padilla with a crime had largely failed.

Thus, while the administration has enjoyed considerable success in detaining even citizens on far less evidence than is normally required to arrest and charge criminal defendants, it has not been able to act entirely without judicial oversight. While the failure of the courts to accord fuller constitutional rights to such detainees is troubling, it is at least heartening that the executive has not been allowed to operate entirely in secret and to hold citizens and non-citizens alike totally incommunicado. Testing the legality of one's incarceration through the courts — the so-called privilege of the writ of habeas corpus — has been guaranteed in Anglo-American law since the Magna Carta was promulgated in 1215 during the reign of King John of England. By and large, our courts have been ruling that this right did not die on September 11. There is some cause for modest consolation in that.

FREE-SPEECH RIGHTS have also remained more or less intact since September 11. The public debate over executive incursions into liberty has been vigorous — more so, it seems, than the debate in Congress. The administration now appears hesitant to exercise official power to quell dissent and criticism. Perhaps this reluctance stems from the firestorm caused when, in testimony before the Senate Judiciary Committee on December 6 of last year, Attorney General Ashcroft had the temerity to suggest that criticism of the administration's anti-terror initiatives should be equated with giving comfort to America's enemies — a thinly veiled accusation of treason: "To those who pit Americans against immigrants, citizens against noncitizens, those who scare peace-loving people with phantoms of lost liberty," he railed, "my message is clear: your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends." At first, Judiciary Committee members offered pitifully little criticism of these incendiary remarks, but public criticism, even ridicule, was profound. One wonders if Ashcroft, though dizzy with the arrogance of power, would dare repeat such words now.

This is not to say, of course, that the war on terrorism has not triggered calamitous assaults on civil liberties. Post–September 11 legislation, mainly the infamous USA Patriot Act, enacted only weeks after the terrorist attacks by stampeded congressmen (most of whom did not even read

the mammoth bill), does enormous damage to privacy and a wide swath of rights. Rights of privacy are in very serious danger. The government is asserting enormous power to snoop into the affairs of ordinary citizens without the normal safeguards that the Fourth Amendment, until recently, was thought to provide — namely, that a citizen's privacy was more or less protected unless the government could show "probable cause" to justify surveillance. Newly enacted secrecy provisions hide much current government activity from public and media view. The line that previously separated foreign intelligence gathering from domestic criminal law enforcement has been significantly blurred. Investigations into political activities, sharply curtailed after the Watergate scandal, are back in vogue. And after decades of steady progress against the pernicious, if uncodified, practice of racial profiling, ethnicity and skin hue have made a resurgence as a basis for suspicion, investigation, and even temporary detention by law-enforcement officers.

The future of liberty in this most free of all nations is hardly a sure bet. However, the two fundamental pillars of liberty, without which no other rights are secure, remain alive and fairly healthy: the separation of powers — with the judiciary refusing, so far, to defer entirely to the executive branch — and the freedom of the American people to voice dissent.

We have a huge and lengthy double-edged battle in front of us: fighting terrorism, while opposing the destruction of our free institutions in the process. The American people — that is, all of us — have ultimate power over the direction of our society. As Supreme Court justice Robert Jackson wrote in 1944, when he dissented in one of the Japanese-detention cases: "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." The Constitution gives the American people the tools to mold and restrain "the political judgments" of those in power. Those tools are a free court system and freedom of speech. It is our sacred obligation to use them.

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