The Evolving Judicial Response
to the War on Terrorism

Following the terrorist attacks on Sept. 11, 2001, does the United States need to relinquish some civil liberties to remain safe? If so, which liberties and who decides? Does the judicial branch take a back seat to the executive and legislative branches and their determinations on how the nation should fight terrorism? Or is this the time that the courts' scrutiny is most essential?

by Kendall W. Harrison

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."

* * *

September 11, 2001, changed the face of America. The horrific events of that tragic day have challenged the country's sense of security, its trust of those unlike us, and its faith in the future. But the long shadows of Sept. 11 stretch beyond any individual's sense of personal well-being. They have placed America's constitutional legacy under great strain as well.

The United States is waging an unprecedented and undefined "war" on terrorism. Congress has contributed to the war effort with its passage of the USA Patriot Act but otherwise has largely ceded control of the battle against terrorism to President George W. Bush. In the immediate aftermath of Sept. 11, Congress granted President Bush authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons." More recently, Congress gave President Bush authorization "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to - (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

The U.S. Justice Department, under the direction of Attorney General John Ashcroft, has largely tried to eliminate any judicial involvement in the war on terrorism, taking the position that federal judges have no jurisdiction to review executive branch
decisions on national security measures. But the courts are not sitting idle while the Justice Department independently draws the line between national security and individual liberty. Instead, federal judges are taking an increasingly active role in resolving questions of individual constitutional rights, rights that come under immense pressure during times of war. Decisions such as Korematsu v. United States, in which the U.S. Supreme Court upheld the World War II internment of Japanese-Americans, are reminders that the nation's sense of what national security requires during the heat of battle can look exaggerated through the lens of time. In making national security decisions, however, the executive branch must act without the benefit of hindsight.

No post-Sept. 11 terrorism cases have yet reached the U.S. Supreme Court. When they do, perhaps as early as the end of this current term, the difficulty of reconciling individual liberties with national security during times of war will not be lost on Chief Justice William H. Rehnquist, who, in 1998, wrote a book on the subject, All the Laws But One: Civil Liberties in Wartime. He has stated:

"While we would not want to subscribe to the full sweep of the Latin maxim inter arma silent leges - in time of war the laws are silent - perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice."5

Does the country need to relinquish some civil liberties to remain safe? If so, which liberties? The question of where to draw the appropriate line between national security and individual liberty is exceptionally difficult. Yet perhaps an even more complicated question is who should draw that line. Does the judicial branch necessarily take a back seat to Congress and President Bush and their determinations regarding how the nation should fight terrorism? Or is this the time when the courts' scrutiny is most essential?

This article briefly examines some of these questions in light of three specific areas in which the federal courts have faced the individual liberty/national security tension in the post-Sept. 11 world: closed immigration proceedings; secret detentions; and the definition of enemy combatants. (A fourth area, involving the U.S. Foreign Intelligence Surveillance Court's rejection of some of the attorney general's new guidelines for terrorism searches and wiretaps, is fascinating, but beyond the scope of this article.)

These cases cut to the core of American constitutional democracy. With a remarkable 88 percent of Wisconsin residents approving President Bush's performance in the war on terrorism, Wisconsin attorneys should keep a careful eye on the consequences of that war effort.6 The decisions made now about the appropriate division of power between the political and judicial branches of government regarding terrorism will remain long after al-Qaida is vanquished.

Closed Immigration Proceedings

On Sept. 21, 2001, less than two weeks after the terrorist attacks, Chief Immigration Judge Michael Creppy issued a directive to all U.S. immigration judges and court administrators, informing them that the attorney general had "implemented additional security procedures for certain cases in the Immigration Court."7 Under the "Creppy Directive," as it has become known, the attorney general has the authority to designate an immigration case as one of "special interest." Once the attorney general
makes that designation, all proceedings in the case become closed to the news media and the public (including the deportee's family members). Courts are forbidden from even "confirming or denying whether (a special interest case) is on the docket or scheduled for a hearing." The Creppy Directive does not require particularized reasons for closing a given deportation proceeding.

In the year that followed the Creppy Directive, the attorney general designated approximately 600 immigration matters as special interest cases. It did not take long for special interest designations to be challenged. Two of these challenges have already reached the federal courts of appeals. On Aug. 26, 2002, in Detroit Free Press v. Ashcroft, the U.S. Court of Appeals for the Sixth Circuit ruled that the blanket closing of deportation proceedings pursuant to the Creppy Directive was unconstitutional. Six weeks later, in Ashcroft v. North Jersey Media Group Inc., the U.S. Court of Appeals for the Third Circuit reached the opposite conclusion.

The Sixth Circuit opinion is replete with eloquent rhetoric, extolling the importance of open government:

- "A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution."
- "Democracies die behind closed doors."
- "By the simple assertion of 'national security,' the Government seeks a process where it may, without review, designate certain classes of cases as 'special interest cases' and, behind closed doors, adjudicate the merits of these cases to deprive noncitizens of their fundamental liberty interests."

Openness is especially critical in deportation proceedings, explained the court, because the political branches of government can deport noncitizens based on reasons as simple as their race or beliefs. The Bill of Rights, which protects American citizens from such treatment, does not apply to noncitizens. Thus, "[t]he only safeguard on this extraordinary governmental power [of deportation] is the public, deputizing the press as the guardians of their liberty."

The court readily acknowledged the government's compelling interest in preventing terrorism and agreed that the executive branch was much better positioned than the judicial branch to understand how to accomplish that goal. Nonetheless, the court found that the Justice Department had not sufficiently explained why national security concerns could not be addressed case by case. The Sixth Circuit saw no reason that the Justice Department could not seek to keep sensitive intelligence information confidential, as the need arose, in individual cases.

The Third Circuit ruled otherwise, in a decision far more circumspect about the role of openness in deportation proceedings. The court found that the principle of Richmond Newspapers Inc. v. Virginia, a case relied upon by the Sixth Circuit in Detroit Free Press that firmly established the public's right to attend criminal proceedings, did not extend to deportation proceedings. The history of deportation proceedings, said the Third Circuit in North Jersey Media Group, contained no long tradition of openness. Moreover, any positive role that public access might play in these proceedings did not outweigh the critical national security interests at stake. In a dissenting opinion, Judge Anthony J. Scirica agreed with his colleagues that the judiciary should give the executive branch considerable deference in these matters.
but sided with the Sixth Circuit in finding that national security interests could be protected case by case.24

With this clear circuit split on the first major post-Sept. 11 terrorism issue, U.S. Supreme Court review is highly likely. If the Court accepts review of one or both of these cases, its ultimate ruling will depend, in large part, on whether it views the "war" on terror as equivalent to more traditional wars during which it has accorded the political branches considerable leeway to take whatever measures they deem appropriate. If another large-scale terrorist attack occurs on American soil, or United States military forces become bogged down in prolonged conflict in Iraq, the Court will be hesitant to rule against the president. The fact that Congress has explicitly authorized President Bush to fight the war on terror also makes substantial judicial deference likely. Nonetheless, some justices may not want to simply rubber-stamp the president's and the attorney general's decisions about the constitutional sacrifices necessary to maintain national security.

**Secret Detentions**

One of the hallmarks of American democracy has long been its prohibition on secret arrests and detentions.25 The United States has avoided the midnight "disappearances" that have plagued Latin American and other countries. Generally, when the government arrests someone in this country, it enters his or her name in an arrest log open to the public and provides him or her an initial appearance or arraignment before a judge, which also is open to the public. People do not languish in prison without being charged and without their families knowing of their plight. Sept. 11 has raised questions about this simple, yet bedrock, concept.

Within six weeks of that fateful day, the Justice Department had "detained" many more than 1,000 people in connection with terrorism-related investigations - without making public the precise number of people arrested, their names, their attorneys' names, the reasons for their detention, or their location.26 Despite demands from some members of Congress, and civil liberties and media organizations, the Justice Department refused and still refuses to release all this information.

Accordingly, on Oct. 29, 2001, the Center for National Security Studies and other groups and individuals filed Freedom of Information Act requests with the FBI, the INS, and the Office of Information Privacy, asking for certain categories of information:

- the identities of each detainee, the circumstances of the detention or arrest, and the charges brought against the detainee;
- the identities of the detainees' attorneys; and
- the identities of the courts involved and any orders issued, along with the government's rationale for holding each individual.27

In response to these requests, the Justice Department eventually acknowledged that it had detained 751 individuals on immigration violations and 129 people on federal criminal charges.28 Only one individual had been charged specifically in connection with the Sept. 11 attacks.

For most of the individuals detained on immigration violations, the government disclosed their places of birth, their citizenship status, and the nature of the immigration charges.29 The government refused, however, to disclose their names,
the dates and locations of their arrests and detentions, the names of their attorneys, and the dates of release for those released.

With respect to the individuals charged criminally, the Department of Justice released their names, as well as the dates charges were filed, the nature of the charges filed, the dates any of them were released, and their lawyers' identities. It refused to disclose, however, the dates and locations of their arrests and subsequent detentions.\textsuperscript{30} The Department of Justice released no information regarding individuals held on material witness warrants.\textsuperscript{31}

Not satisfied, several public interest groups brought a lawsuit against the Department of Justice in the District Court of the District of Columbia seeking the rest of the information they had requested. The Justice Department asserted that any further disclosure would interfere with law enforcement proceedings and endanger national security. The court accepted that argument but only in part:

"The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."\textsuperscript{32}

Expressing considerable skepticism in response to the government's asserted need for blanket secrecy, the court ordered the disclosure of the identities of the immigration and criminal detainees and their attorneys. Nonetheless, it refused to force the Justice Department to provide the dates or locations of arrest or the locations of detention or release, accepting the government's contention that, with this information, terrorist organizations might be able to piece together a pattern of the government's investigation. This theory, known as the "mosaic theory," posits that terrorists might use seemingly innocuous, disparate pieces of information to build a picture of what the United States is doing to combat terrorism and thereby expose governmental weaknesses and possibly render detention facilities vulnerable to attack.

The district court has stayed its order pending appeal, recognizing that disclosure of the names would effectively moot any appeal.\textsuperscript{33} The U.S. Court of Appeals for the D.C. Circuit heard oral argument on the appeal on Nov. 18, 2002. The court's acceptance or rejection of the mosaic theory will directly affect other terrorism-related cases and will signal just how much secrecy the war on terror demands.

**Enemy Combatants**

Two American citizens, Yaser Hamdi and José Padilla, are presently being held, indefinitely and incommunicado, in United States military facilities. The government maintains that the men are "enemy combatants," and that despite their status as American citizens, they are entitled to none of the constitutional protections available to criminal defendants. Instead, they are subject to the laws of war and military detention. Accordingly, the government contends that there is no need to file charges against Hamdi or Padilla or to provide them the right to counsel.

Hamdi, who, like John Walker Lindh, apparently had "affiliated" himself with the Taliban, surrendered to Northern Alliance Forces in Afghanistan in late 2001 and eventually was transferred to the Norfolk Naval Station Brig in Virginia in April 2002.\textsuperscript{34} Padilla was arrested by FBI agents in Chicago on May 8, 2002, and
transferred to New York. The government maintains that Padilla was in Afghanistan and Pakistan after the Sept. 11 attacks, and that he met with senior al-Qaeda operatives to discuss plans to detonate a "dirty bomb" in the United States. On or about June 9, 2002, President Bush signed an order directing that Padilla be detained indefinitely for interrogation. Padilla then was transferred to the Consolidated Naval Brig in Charleston, South Carolina.

Both men have filed habeas corpus petitions through counsel with whom they are not permitted to communicate. When Hamdi's habeas action was filed in the Eastern District of Virginia, the judge issued an order providing Hamdi's appointed attorney unmonitored access to him. The court stayed its decision while the Justice Department appealed. In its appellate brief, the Justice Department argued that the federal judiciary could not even review the executive branch's designation of an American citizen as an enemy combatant: "[G]iven the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such."

The Fourth Circuit agreed in large part, but it refused to grant the executive branch blanket authority on enemy combatant designations. The court explained that although courts need to extend considerable deference to the executive branch on such designations, they do not have to cede all oversight. The court nevertheless reversed the district court's decision to allow Hamdi access to counsel and instructed it to give appropriate deference to the executive branch. The habeas petition remains pending, with the district court having ruled on remand, even after the Fourth Circuit's decision, that the sole authority the government has tendered to support Hamdi's continued detention - a two-page, nine-paragraph affidavit - is insufficient. The Fourth Circuit heard oral argument on the Justice Department's appeal of that decision on Oct. 28, 2002. Hamdi is supported by a coalition of 18 civil liberties groups and 139 law professors, as well as an American Bar Association task force.

Padilla's habeas petition, filed in the Southern District of New York, has not yet been the subject of any rulings. Nonetheless, the Justice Department and Padilla's counsel and amici have engaged in a heated brief-writing battle. The Justice Department has raised several procedural concerns - whether Padilla has named the proper respondents, for example, and whether the Southern District of New York has jurisdiction over Padilla, who now is held in South Carolina. In addition, the government has backed off slightly on its argument, articulated in Hamdi, that the courts have no role in reviewing enemy combatant designations. Now, the government maintains that the judicial branch owes "great deference in matters of national security and military affairs, and deference is particularly warranted in respect to the exceptionally sensitive and important determination at issue here."

The U.S. Supreme Court will, in all likelihood, review one or both of these cases. The separation of power stakes are simply too high to allow lower courts to have the final word. As with the closed immigration proceedings cases, moreover, the Court will almost certainly speak with multiple voices when it issues its final ruling.

**Conclusion**

The executive branch is engaged in a jurisdictional struggle with the judicial branch over the war on terrorism. Attorney General Ashcroft and other administration...
officials do not want the courts second-guessing their decisions about how best to preserve national security. Interestingly, the attorney general has expressed the belief that keeping the courts out of the terrorism battle will ultimately preserve civil liberties rather than endanger them: "The fight against terrorism is a fight to secure civil liberties. Security secures something and what we're securing is freedom .... Our effort is not to impair civil liberties but to save them."\(^{45}\)

The attorney general's comments echo those of former U.S. Supreme Court Justice Robert H. Jackson, set forth at the outset of this article. Are Ashcroft and Jackson correct? Do Americans risk the loss of all civil liberties if a few constitutional corners are not cut in this time of terror? Although there is no clear answer, Americans should at least acknowledge the gravity of this question, the resolution of which will leave an indelible mark on the nation's constitutional history.