3 of 2541 DOCUMENTS

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BODY:

Two hundred years ago today Chief Justice John Marshall delivered the judgment of the Supreme Court in the case of Marbury v. Madison. As a kindness to Justice Samuel Chase, who was ill, he announced the decision in the Capitol Hill rooming house where most of the justices lived. In that humble setting Marshall and his colleagues established the great principle that judges have the power to declare acts of Congress void because they conflict with the Constitution.

After 200 years Americans are so accustomed to judges having the last word that alternatives seem unthinkable. We rely on the courts to enforce what the Constitution promises us.

But in one area the courts have disappointed us. In time of war, actual or threatened, they have repeatedly abdicated their function, bowing to claims of national security. A dramatic example in the last century was the internment of Japanese–Americans during World War II; bowing to government claims that they were a security threat, the Supreme Court, in the Korematsu case, refused to interfere.

We are now headed for a profound test of our commitment to the Constitution in time of war: the war on terrorism, as President Bush has proclaimed it. His administration has taken steps that radically impinge on the right to counsel and other fundamental liberties. Will the courts, in the end the Supreme Court, subject those measures to real constitutional scrutiny, or give way to arguments of war emergency?

The war on terrorism is an especially dangerous occasion for judges to close their eyes to violations of our rights. In every other historical case of the courts yielding to wartime claims, the emergency ended before long and the country regretted the abandonment of constitutional values. It is extremely unlikely that the Supreme Court today would follow the Korematsu decision and uphold the internment of hundreds of thousands of Americans of a particular ethnic background.

But no one can imagine this war coming to an end any time soon. So every piece of judicial deference to the power of government in war may crimp the rights of citizens forever.

Aliens, both visitors and permanent residents, were harshly affected by Bush administration measures after 9/11. Attorney General John Ashcroft ordered more than 1,000 aliens detained, keeping their names and places of detention secret. He also ordered many deportation hearings held in secret. He required visitors from 25 countries, predominantly Muslim, to register with the government. Those who failed to do so within 40 days were subject to arrest, detention and deportation.

But the measure that most gravely menaces constitutional rights is the arrest and indefinite detention of Americans without trial and without access to a lawyer. The president has claimed the power to thus seize and hold any American whom he designates an "enemy combatant." And the basis of the designation, administration lawyers argue, is not subject to effective review in any court.

Two American citizens are now held in solitary confinement under this asserted presidential power. One, Yasser Hamdi, was found under unexplained circumstances on a battlefield in Afghanistan. The other, Jose Padilla, was arrested

on arrival at O'Hare International Airport in Chicago after spending time in Egypt and Pakistan. Both are totally isolated. They are not allowed to speak to a lawyer. They may not see their families.

Lawyers appointed to act for Mr. Hamdi and Mr. Padilla challenged their detention. The United States Court of Appeals for the Fourth Circuit, in Richmond, Va., made the first appellate ruling — against Mr. Hamdi. It held that the constitutional guarantee of the right to counsel "in all criminal prosecutions" did not apply because Mr. Hamdi was not being prosecuted.

That reasoning reduced constitutional law to sleight of hand: The government can impose solitary confinement, perhaps for life, if it simply avoids giving the prisoner a trial. If what was done to Mr. Hamdi did not technically violate the Sixth Amendment, it surely deprived him of liberty without due process of law. James Madison, the principal author of the Bill of Rights, would have been astounded at the notion. So would the average American today if told he could be taken off the street and imprisoned forever without being able to call a lawyer.

The Fourth Circuit also agreed with the government that courts must defer to the president in wartime. It held that the president can detain indefinitely anyone he calls an enemy combatant. And it said that judges could not look into the basis of that designation if the president produced any evidence for it, however slight and untested by cross-examination.

The last point, making it all but impossible to challenge the president's designation of anyone as an enemy, is crucial. Throughout American history the courts have accorded conclusive weight to claims of security threats — claims that turned out to be hollow after the crisis had passed.

The claim that people of Japanese descent were likely to commit sabotage or espionage on the West Coast in World War II is a signal example. In 1983 a government study found that the internments were the result of "race prejudice" and "war hysteria"; there was no threat. Congress paid survivors modest compensation. The country similarly regretted the Sedition Act of 1798, passed to deal with the threat — a phantom threat — of French revolutionary terror in America. Attorney General A. Mitchell Palmer's harsh roundup of assertedly radical aliens after World War I also came to be seen as an outrage.

Justice William J. Brennan Jr., looking back over the record of punitive actions justified by claimed threats to national security, said in 1987 that the claims were "so baseless that they would be comical if not for the serious hardship they caused." He made the point in a lecture at the Hebrew University in Jerusalem. Israel has had to cope with terrorism since its rebirth in 1948. Yet its Supreme Court has gradually — if not always consistently — developed a determination not to sacrifice the values of freedom in the fight against terrorists.

Aharon Barak, president of the Israeli Supreme Court, put his conclusions as follows: "The real test of judicial independence and impartiality comes in situations of war and terrorism. . . . Precisely in these times, we judges must hold fast to fundamental principles and values; we must embrace our supreme responsibility to protect democracy and the constitution."

American judges are not immune to the sense of vulnerability that Sept. 11 left in almost all Americans. That must help to explain the decision of the United States Court of Appeals for the Second Circuit upholding New York City's ban on a march to protest the planned war on Iraq. The decision's logic would have justified bans on marches led by Dr. Martin Luther King Jr. in the 1960's.

The terrorist threat in this country is real, and the government naturally wants a free hand to deal with it. The question is whether judges can treat that demand with respect without abandoning their highest calling: as guardians of freedom.

Marbury v. Madison was not a universally popular decision at the time. President Jefferson, Marshall's cousin and bitter critic, condemned the "twistifications in the case of Marbury." But the case has become part of the bedrock of our system.

"It is emphatically the province and duty of the judicial department to say what the law is," John Marshall wrote in Marbury v. Madison. It has never been more important for judges to perform that duty unflinchingly.

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GRAPHIC: Drawing (Elliott Banfield)

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