

# The State of Justice

## “Congress is considering passing a “torture” bill..”

Last issue, we did a feature on the growing threats to TRIAL BY JURY GUARANTEED by the United States Constitution. But it is not the only Constitutional GUARANTEE at risk today. In the category of “Say, what?” Congress is considering passing a “torture” bill which, even apart from its disheartening encroachments on the Geneva Accords, disallows any court anywhere from challenging it or any proceedings under it.

Section 950j of the proposed Act provides,

“No court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or

judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.”

The person who taught me Constitutional law, the late Professor and ABA Journal columnist Arthur John Keeffe must be spinning in his grave. He thought, (rather quaintly, I suppose) that this issue was settled way back in *Marbury v. Madison*, the great decision on SEPARATION OF POWERS that upheld the right of the Supreme Court of the United States of JUDICIAL REVIEW.

Other provisions of the proposed Act reveal why judicial review may be necessary, not only to preserve other constitutional GUARANTEES, like FREEDOM OF SPEECH, but our very democracy itself.

Subsection 4(b)(26) of section 950v of HR 6166 which includes crimes triable by military commissions, provides as follows:

“Any person subject to this chapter, who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.”

Foreign radical Jihadists are not thought to have any allegiance or duty to the United States, so this language presumably allows trial of a U.S. Citizen for breaching their “allegiance” to the United States in such a way as to “aid an enemy of the United

States.” What constitutes a breach of “allegiance” to the United States? What gives aid to the enemy?

The Wall Street Journal printed this front page news blurb in its Oct 1, issue:

“Bush told a military group that asserting Iraq made the U.S. less safe swallows ‘the enemy’s propoganda...”

*Con’d on P.7*

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**Patrick S. Cassidy**

## Con'd from P. 6

Yet just weeks ago, the New York Times reported on a new National Intelligence Estimate, a consensus report of the U.S. intelligence agencies, that found that the Iraq war has become a “cause celebre” for radical Jihadists and that because of the war, radical Jihadists “are increasing in both number and geographic dispersion.”

Does this make our intelligence agencies “enemy propagandists?” Does reporting this information give “aid and comfort” to the “enemy?” Does it not cause you more than a little concern that congress has proposed that no courts are to consider these, and other issues related to this bill?

When our forefathers drafted the Constitution, they knew that no King, no President, no Congress, no Judge, would or should have a monopoly on wisdom or power. They did not believe that any one person (or group of persons) were so morally superior as to be able to differentiate between

the “good guys,” and the “others.” After all, George III had his own problem with people he defined as “terrorists” (and we called “patriots”). That’s why our forebears insisted on a nation of laws, not men. That’s why they built, with the Constitution, safeguards to the very fabric of our democracy by assuring such things as TRIAL BY JURY, SEPARATION OF POWERS, and FREEDOM OF SPEECH.

And what about our allegiance, as lawyers, as Judges, as elected officials of the United States? I was reminded recently that the “Pledge of Allegiance To the Flag is not part of the Constitution. But the constitution does require a “pledge.” It requires every federal and state official, every federal and state judge, to take an oath to uphold and support the Constitution of the United States. Lesser laws, but with the same noble intent, require lawyers, upon admission to the bar, to make a similar pledge— to uphold and defend the Constitution. It is the Constitution itself

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that makes many of us proud to recite that other, more ubiquitous “Pledge of Allegiance.”

Part of me feels foolish for having to write these words. To some, they may seem “clichés,”—truisms that we all know to be true, and not worthy of repeating. But we seem to be living in a time of “disconnect,” when our common shared values, and simple fundamental principals, get overlooked in favor of the purple rhetoric of partisan bickering.

Perhaps now, more than ever, we should take a breath, forget that we belong to one political party or the other, and reflect back on what we learned in Con Law 101, and consider the oath we took when entering into this profession. Perhaps then we will speak out, loud and clear, “in the place where we live.”

Then, perhaps too, our elected officials, be they Republicans or Democrats, legislators or judges, as well as our fellow lawyers, will heed the call, will hear the ubiquitous voice of our forebears, challenging us to go back to the basics, to remember the pledge of allegiance we all took, not as an unthinking chant, but “as a matter of law”— the one upon which our democracy, our country, rests. 

*Ed. Note - Since this article was written President Bush signed into law the Military Commissions Act of 2006 on Tuesday of this week.*