

CHRISTOPHER PETER LATIMER

CIVIL LIBERTIES AND THE STATE

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A Documentary and
Reference Guide



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Christopher Peter Latimer



Documentary and Reference Guides



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PREFACE

The discussion concerning civil liberties and arbitrary state action is an enduring issue in American politics and constitutional analysis. National debate over our civil liberties extends back to before the founding period and has intensified at various times throughout our nation's history. In particular, the protections of due process, equal protection, privacy, freedom of speech and press have been essential instruments for the safeguarding of individual freedom and liberty against arbitrary state action. In response to 9/11, Congress, the president, and the Supreme Court are continually deliberating about possible restrictions on these civil liberties.

The historic and complex decision of *Boumediene v. Bush* in June 2008 has also opened the door to reexamine these fundamental rights in relation to arbitrary state action and the war on terror. The purpose of this book is to compile a wide range of documents, organized by chronology and subject matter, to provide the reader with a more complete understanding of the history, evolution, scope, and consequences surrounding the relationship between our civil liberties and arbitrary state action. The selected documents will expose readers to the historical underpinnings of four critical constitutional guarantees that provide important protections against government intrusion. This proves to be of particular value to the reader because so much of the writing and commentary on arbitrary state action in relation to due process, equal protection, privacy, freedom of speech and press focuses on what the nation's founders achieved and thought, on laws, executive orders, court cases, and other commentaries that provide alternative points of view on the issues discussed.

Chapter 1 opens with documents from the founding era with a particular emphasis on the development of the aforementioned constitutional guarantees including the Fifth Amendment's due process clause, the Fourteenth Amendment's due process and equal protection clauses as well as the historical foundations of the First Amendment freedoms of speech and press and the right to privacy. This includes a number of treatises and early legislative enactments. Chapter 2 contains a number of early often overlooked Supreme Court rulings on due process, equal protection, the First Amendment, and privacy. Chapter 3 focuses on early statements, executive orders, and federal laws concerning equal protection, the First Amendment, and privacy. Chapter 4 contains a treasure trove of Supreme Court cases during the

20th century dealing with the four guaranteed rights during several periods when the United States was in a constitutionally declared state of war such as World War I and II and during times when Congress authorized engagement without a constitutional declaration such as Vietnam. Chapter 5 examines 21st-century federal resolutions, bills, and laws that were responses to the September 11, 2001, attacks and the continuing war on terror. Chapter 6 provides the texts of Supreme Court decisions and lower federal court decisions from the 21st century concerning the war on terror, due process, equal protection, the First Amendment, and the right to privacy. Chapter 7 concludes with an examination of the major two-party platforms concerning individual rights.

The style of presentation is uniform throughout this book. Every document is introduced with a brief outline giving the name of the document, the document's date, its location, and a brief summary of its significance to the topics discussed. The document is then reprinted, most likely in an edited form (a necessary step given the sheer length of the documented), and then followed by an analysis sections that summarizes its significance, context, and consequences. These edited versions will make it easier for the reader to understand the issues presented. Further readings are then offered for the individual seeking additional information. Each chapter also includes a number of sidebars that highlight important side issues related to the topic areas. The book also includes a listing of additional resources including pertinent government Web sites. A quick note about the language used in some of the older documents. In order to maintain accuracy to the original source material, the language and punctuation used were not updated to meet our current standards of modern writing conventions. As such, a number of legal opinions and legal writings predating the 20th century will contain phrases and arcane language that may be unfamiliar to the reader. The documents and sources offered in this book provide an opportunity for the reader to gain a better understanding of the debate surrounding civil liberties and arbitrary state action.

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INTRODUCTION

The terrorist attacks on September 11, 2001, served as a catalyst for federal government action, opening the door to federal and state legislation and presidential executive orders. Terrorists are murdering Americans and our allies, recruiting new members and spreading propaganda, utilizing wireless communication devices to detonate bombs, and using credit card scams and identity theft to raise millions of dollars for illegal activities. The government is compelled to respond, but to what extent? There is a deep-rooted association between our individual liberty interests and the use of government power during times of crisis. This dichotomy underlines an inherent tension in the United States:

[t]he choice is not between order and liberty, [but] 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.¹

Presiding over the Nuremberg trials, Justice Jackson's fears were based on witness testimony concerning genocide and terrorism. This experience shaped his views that civil liberties could only exist under governments with the power to protect those liberties from assault. It is not order per se that conflicts with individual rights but the government's approach to preserving security that may challenge civil rights in this country.

This type of response is often couched in terms of trade-offs—the extent to which civil liberties should be sacrificed for security. An examination of polling data right after 9/11 demonstrated that a majority of citizens would be willing to give up some civil liberties in order to combat terrorism.² Support for this position has steadily fallen as we move further away from 9/11 and as more stories of possible governmental abuse are reported by the media.³ The policy and legal debate concerning the appropriate balance between liberty and national security presents a paradox: government power is viewed both as a threat to and as a defender of our liberty. These documents will enhance our understanding of this debate as well as the relationship between our civil liberties and arbitrary state action.

COLONIAL AND FOUNDING DOCUMENTS (Chapter 1)

The first chapter begins with colonial-era documents that reference some antecedent to what influenced the structure and writing of the U.S. Constitution. Most agree that the wording from the Magna Carta, the British Habeas Corpus Act, the British Bill of Rights, and the Massachusetts Constitution found its way into the First and Fifth Amendments of the American Bill of Rights of 1791, the suspension clause of Article I, Section 9, Clause 2 as well as the equal protection and due process clauses of the Fourteenth Amendment. The Constitution was ratified in June 1788, but because ratification in many states was contingent on the promised addition of a Federal Bill of Rights, Congress proposed 12 amendments in September 1789. Ten of the amendments were ratified by the states, and their adoption was certified on December 15, 1791. The framers were also especially concerned with limiting the power of the government and securing the liberty of citizens. The Constitution's separation of the legislative, executive, and judicial branches of government, the checks and balances of each branch against the other, and the explicit guarantees of individual liberty were all designed to strike a balance between power and liberty. An understanding of the influences of the words, phrases, and structure of the U.S. Constitution will provide much needed context for why certain individual liberties and privileges were included.

EARLY COURT RULINGS ON DUE PROCESS, EQUAL PROTECTION, THE FIRST AMENDMENT, AND PRIVACY (Chapter 2)

The second chapter begins with a series of British court cases from the 17th and 18th centuries that provide several examples of individuals who were imprisoned for challenging and disobeying the British monarchy and parliament. These first documents demonstrate the importance of having a system which allowed individuals who were incarcerated an opportunity to be heard by a court. This did not always make a difference as often times the King's Court was just an extension of the monarchy and their views. However, there were several instances in which the mere process of a public trial led to the release of the prisoner. These early cases also led to the serious examination of slavery in both England and the United States. Finally, the last set of 19th-century court rulings include an assessment of the suspension clause, the writ of habeas corpus, the use of military tribunals, and the freedom of speech in relation to one's government during a time of war and the implications of executive and congressional powers with this regard.

20TH-CENTURY STATEMENTS AND ENACTMENTS (Chapter 3)

Chapter 3 includes a series of legislative acts and executive orders responding to World War I, World War II, the red scare of the early and later part of the 20th century, and the war on terrorism. During this time arbitrary state action was almost

entirely justified as necessary for protecting our national security. The consequence of this was a curtailment of our civil liberties at the hands of the federal government. During and after World War I, the Espionage Act and the Sedition Act were used in a number of prosecutions and convictions against individuals who other than being affiliated with the Communist and Socialist Party had no criminal record or affiliations with any saboteurs or subversives. While many of the laws were repealed in 1921, major portions of the Espionage Act remain part of U.S. law. This time also led to Japanese immigrants and Americans of Japanese descent living on the West Coast to be assembled, registered, and moved to internment camps during World War II. The second red scare continued through the later part of the 20th century, providing an opportunity to enact a loyalty order. Finally, starting with the Watergate scandal of the Nixon administration, the federal government began to enact laws that would protect our privacy. All of these examples will continue to contribute to our understanding of the relationship between arbitrary state action and liberty.

20TH-CENTURY COURT RULINGS (Chapter 4)

The fourth chapter provides court cases that respond to the legislative acts and executive orders that were enacted during World War I, World War II, the red scare of the early and later part of 20th century, and the war on terrorism. The results of these cases vary tremendously in terms of their analysis of the due process clause, equal protection clause, the freedom of speech, and the right to privacy. One unusual example is the case of *Korematsu*, concerning the constitutionality of Executive Order 9066, which ordered Japanese Americans into internment camps during World War II. This case is unusual because the ruling is significant both for being the first instance of the Supreme Court applying the strict scrutiny standard to a regulation based on a racial classification and for being one of only a small handful of cases in which the Court held that the government met that standard. These cases also dealt with whether noncitizens whose countries were engaged in hostilities against the United States could use our judicial system and apply for a writ of habeas corpus. The implications of these cases have far reaching effects on the current war on terror. This is also a time in which the Supreme Court begins to selectively incorporate the Federal Bill of Rights to the states through the Fourteenth Amendment. The cases start to include individuals challenging state laws based on the First Amendment and the right to privacy.

21ST-CENTURY ENACTMENTS CONCERNING THE WAR ON TERROR (Chapter 5)

The fifth chapter includes documents that were enacted as a direct response to the September 11, 2001, attacks on the United States. The terrorism which occurred on September 11 not only had political and international results, the events of that day also significantly impacted American society and culture. In the foreign policy arena, one of the first outcomes was Congress providing a grant of power to the Bush administration. The limits of this power would eventually be tested in the

courts. These federal laws provided a basis for many of the actions committed by the Bush administration. In particular, the Authorization for Use of Military Force (AUMF) was touted by the Bush administration for justifying the war in Iraq, for designating prisoners as enemy combatants, detaining these prisoners indefinitely without an attorney or a hearing as well as for justifying domestic surveillance of possible terrorists without obtaining authorization of the special court created by the Foreign Intelligence Surveillance Act (FISA) of 1978, as amended. In the policy arena was the enormous and controversial omnibus USA PATRIOT Act that was passed without much debate. Despite the almost unanimous congressional passage, the PATRIOT Act became controversial very quickly with many Americans greatly concerned about its far-reaching mandates. The enactments also help to discern the continuing power struggle between the executive and legislative branches of government and the importance of checks and balances for protecting our civil liberties from arbitrary state action.

21ST-CENTURY COURT RULINGS (Chapter 6)

Chapter 6 provides a series of significant cases regarding the war on terror and the actions by the Bush administration. This set of Supreme Court cases deals with controversial issues concerning the power of the executive and also Congress to set up military commissions, the ability of the executive and legislative branches of government to strip the jurisdiction of the federal courts to hear cases, the designation of prisoners as enemy combatants, the permanent detainment of enemy combatants without access to an attorney or a court to be formally charged, and the rights under the constitution for American citizens who are terrorists versus resident aliens versus noncitizens. These cases are sometimes confusing especially since the same issues seem to be adjudicated multiple times. Once it appears as if the Court has ruled on a particular legal issue, another case comes before the Court with a similar issue. These cases are extremely important because the Court not only revisits a number of previous and controversial decisions but the Court also begins to provide a framework for understanding our civil liberties in relation to the federal government. This chapter also includes a number of lower-court cases concerning the First Amendment and the curtailing of our speech and press access to certain hearings and events. Finally, there is an examination of our right to privacy in a world where technological advancements allow for greater surveillance by the government.

ARBITRARY STATE ACTION AND POLITICS (Chapter 7)

Chapter 7 concludes with an examination of the political part of the issues. The two main political parties have very different ideas about what types of rights should be protected and how the government should respond to national security threats. The political parties have an additional element to worry about as they solidify their positions about issues concerning our individual liberties; namely, the additional motive of getting reelected to public office. The party must balance this truism about

American politics with the positions they support especially regarding controversial subjects such as same-sex marriage and affirmative action. With this in mind, the broad scope of the national party platform is designed to attract a broad range of voters to that party, in the hopes of generating party loyalty and potentially creating voters who will automatically select candidates associated with that party. Interest groups also play an important part of the process. This is because these organizations look to influence political and policy decisions as well as promote their issues. They usually have both well-defined political agendas and the financial resources necessary to exert broad influence on the political and regulatory process. Understanding the politics will provide another important perspective about the relationship between our government and our individual liberties.

NOTES

1. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).
2. Humphrey Taylor, *The Harris Poll #49: Overwhelming public support for Increasing surveillance Powers and, in spite of many concerns about abuses, confidence that these powers would be used properly*. Retrieved August 2, 2009, from http://www.harrisinteractive.com/harris_poll/index.asp?PID=260; Pew Research Center for the People & the Press. American psyche reeling from terror attacks. Retrieved August 2, 2007, from <http://people-press.org/reports/display.php3?PageID=30>.
3. Jill Darling Richardson. Poll analysis: Concern growing over loss of civil liberties. Retrieved on August 2, 2009, from http://www.latimes.com/news/nationworld/timespoll/la-463pa3an,1,457920.story?coll=la-news-times_poll-nation.

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COLONIAL AND FOUNDING DOCUMENTS