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Civil liberties came under intense assault in 2005, but there was some pushback, too

BY HARVEY SILVERGLATE AND DUSTIN LEWIS

After surveying the past year — a generally dismal one for civil liberties — we welcome 2006 with trepidation but also with hope. There are signs, however imbalanced, to support both.

Much of 2005 followed a script composed in the wake of 9/11: freedom was sacrificed to illusory and ill-defined security and "family values." As US soldiers fought to liberate Iraqis from totalitarian government and to ward off theocratic rule, the Bush administration sought to redefine what it means to live in a free society — and it wasn't pretty. As the year wore on, news of the administration's gross abuse of the Patriot Act was joined by revelations of secret torture overseas and unfettered surveillance of American citizens at home. Federal prosecutors in the Bay State followed suit, harassing officials such as Suffolk County sheriff Andrea Cabral (See "Cabral's Sharp Aim," December 16) and citizens alike, and undermining the people's political will by meting out the death penalty in federal court despite its ban under state law.

In the midst of all this, Congress erupted into partisan — and ultimately, misdirected — clashes over vacancies on the Supreme Court; detained terror suspects languished uncharged for another year; and Massachusetts's "family values" proponents charged ahead with attempts to ban same-sex marriages.

THE SUPREME TEST

For the first time in 11 years, seats on the US Supreme Court opened up — two of them. Hysterical debate and media coverage ensued, with most vetters' concerned only with how nominees would vote on a single issue: abortion. The three nominees to date — John Roberts (now chief justice), Harriet Miers (who withdrew), and Samuel Alito (who faces Senate confirmation hearings in January) — were called everything from patron saints of constitutionalism to enemies of all things free and decent. The truth — big surprise — was more nuanced and complex.

Among the chief casualties of this partisan bickering was substantive discussion of the most important issue facing the Supreme Court for the foreseeable future: the administration's claim to virtually unlimited executive authority to protect national security. Overweening presidential

power — whether arguably conferred by statute or seized as "inherent" to the authority of the commander-in-chief — has enabled the government to snoop into our private lives and to detain citizens and noncitizens alike, all while invoking secrecy to shield itself from criticism. More concerned with being labeled "soft on terrorism" than with upholding the Constitution, members of Congress failed to take on the national-security establishment. The possible exception was Arizona Republican senator John McCain, who at the 11th hour exercised some of his moral authority as a former POW to force the administration to back down on torture. Still, the Bush administration — with Vice-President Dick Cheney snarling the most loudly — put up fierce resistance. As Freedom Watch argued in 2004, the legally absurd "torture memos" authored by Bush's chief counsel Alberto Gonzales and his staff expanded the president's power to authorize "extraordinary" measures in order to provide an "advice of legal counsel" defense in the event criminal charges were someday brought. That's why the White House spent the last few weeks of the year bargaining — ultimately unsuccessfully — with Senator McCain.

Meanwhile, the practice of "extraordinary rendition," through which our government ships detainees to foreign security services that have no qualms about inflicting extreme pain, permanent injury, and even death, continues despite evidence that torture often produces false information. In fact, we are now learning that false claims extracted through torture may have accounted for some of the "intelligence" that led to the rush into war in Iraq.

So why have President Bush's sweeping claims of executive power elicited so little debate during the Supreme Court nominations? It helped that Bush dropped the idea of nominating Gonzales; better to just hand him the helm of the Justice Department and move down the list. But it's also true that growing evidence demonstrates that Americans turn a blind eye to torture inflicted by their government if it is done under a cloak of secrecy — which is all the more reason Congress should demand that nominees to our highest court articulate their views on Bush's power grab.

Of course, it doesn't nurture the climate of debate that the administration's tactics for dealing with its increasingly unsuccessful and unpopular methods in the "war on terror" are improved versions of old standbys: maintain secrecy and shoot the messenger. Consider the response to Dana Priest's November report in the *Washington Post* that the CIA has been hiding, and likely torturing, captives in secret prisons scattered among friendly security agencies in Eastern Europe and elsewhere. Rather than target the actual gulags, the president and his congressional allies called for an investigation into how the existence of the gulags was made public. Weeks went by before some in Congress called for more oversight for the CIA-operated facilities. (Were Richard Nixon or Bill Clinton president, the calls for impeachment would have been deafening.)

And just last week, the *New York Times* reported that the White House has for nearly four years allowed the National Security Agency (NSA) — whose mandate is strictly limited to foreign-intelligence gathering — to eavesdrop, without obtaining a court warrant, on US citizens *at*

home. This is an astounding departure from settled law under every president since Harry Truman, who signed the NSA into law in 1952.

Bush's claims of executive authority to detain anyone without court review were seemingly rebuffed by the Supreme Court in the summer of 2004. At that time, the justices expressed concern over claims of presidential supremacy and insisted on a watered-down type of "enemy combatant" hearing, the precise nature of which was left to the president to determine. But so far, the high court's attempt to rein in Bush has been more theoretical than practical. Capriciously labeled "enemy combatants" detained in Guantánamo remain untried going on nearly *four years*. American citizen Jose Padilla, held as an enemy combatant in a naval brig in South Carolina, still has had no trial. The Department of Justice recently indicted Padilla, thus changing his status from "enemy combatant" to regular criminal defendant, after the Supreme Court agreed to revisit the "enemy combatant" designation, indicating the DOJ feels it can't afford another high-court rebuff.

The chicanery continues unabated, yet few are demanding to know where Supreme Court nominees draw the line on executive supremacy.

PATRIOTIC GORE

In 2005, the USA Patriot Act, passed hastily in the aftermath of 9/11, was on a roller coaster. In November, the *Washington Post* revealed that more than 30,000 National Security Letters (NSLs) have been issued every year since 2001. The letters, which allow federal agents to search business and personal records without alerting the person under surveillance, existed for very limited circumstances before the Patriot Act, but the act drastically expanded their scope. Now the FBI has the power to demand virtually unlimited records of people not necessarily suspected of wrongdoing. Despite the FBI's best efforts to keep the public in the dark, some citizens and civil libertarians have challenged various aspects of the NSL provision, which consequently has been ruled unconstitutional in two lower courts; last month the ACLU urged a federal-appeals court to sustain those rulings.

We might have placed hope in the fact that parts of the Patriot Act were scheduled to sunset at the end of 2005. But such hope has been all but abolished by our power-hungry president. Just this past weekend, President Bush engaged in disingenuous fear-mongering when he said national security would be gravely endangered if Congress didn't permanently extend all 16 sunset provisions immediately. Yet Congress, which wants more oversight over business records (better known as the "library provision") and "roving wiretaps," had already offered to extend all 16 provisions for an additional three months while it deliberated further. As Wisconsin Democratic senator Russ Feingold reportedly remarked on CNN: "It is only the president who is basically playing chicken with us."

There are signs that the public, too, hasn't completely kowtowed to the administration's abuses of the Patriot Act. In Florida, for example, a six-month trial that concluded this month exposed what happens when security-at-any-cost rhetoric and unlimited electronic surveillance meet

the reality of the jury system. Of 17 terrorism-related charges, not a single guilty verdict was rendered against a former University of South Florida professor known for his extreme pro-Palestine views. After deadlocking on nine of the charges against Sami al-Arian and acquitting on eight others, jurors remarked to reporters that the federal prosecutors hadn't proved that al-Arian had committed any crime. Rewind to the February 2003 indictment against al-Arian, when Attorney General John Ashcroft crowed that the case would be the first of many successful examples in which the Patriot Act would allow government agencies to work together, connect the dots, and convict terrorists.

Extraordinary concerns remain, however. The February conviction of New York attorney Lynne Stewart marks a dangerous development going to the heart of our legal system and affects all lawyers who represent unpopular clients. Stewart transmitted a message from her client, imprisoned Sheik Omar Abdel Rahman, to Reuters, in violation of a Department of Justice gag order prohibiting the lawyer from transmitting her client's statements to the world. Stewart violated her earlier agreement to abide by the gag order, but violating such an agreement normally is not a crime. At worst, Stewart should have been brought before a bar disciplinary hearing. Instead, convicted of various terrorism-related crimes, Stewart faces 20 to 26 years in prison. (She is scheduled to be sentenced March 10, 2006.) The message is clear: double-cross the administration's insistence on secrecy, and bear the consequences.

STATES' FIGHTS

Returning to the brighter side: to the distress of biblical literalists everywhere, Massachusetts experienced no earthquakes, floods, or swarming locusts in 2005, despite continuing to marry same-sex couples. It turns out that the extension of marriage rights to gay and lesbian couples has proven a stabilizing, conservative move. Yet much of the rest of the country, which claims to support states' rights, bows to the Bush administration's assertions of federal authority on issues of so-called family values as well as national security. In July, interim US Attorney Alex Acosta for the Southern District of Florida told FBI supervisors in Miami that one of the top law-enforcement priorities for him and Attorney General Gonzales was obscenity. It's as if any deviation from the Ozzie-and-Harriet missionary position is as much a threat to our social fabric as are acts of terrorism. Still, even same-sex-marriage rights could change. This month, enough signatures were gathered to put forward a ballot question seeking a state constitutional amendment prohibiting gay marriage. Attorney General Thomas Reilly certified it to go before the voters. Various groups, including Gay and Lesbian Advocates and Defenders, which pioneered marriage equality in Massachusetts, are challenging the whole procedure on grounds that state law prohibits referenda that in effect reverse judicial decisions. It's a knotty legal question with profound implications for the survival of equal marriage in Massachusetts — although it is far from clear that cultural conservatives have enough votes to put this genie back in the bottle.

Freedom Watch has had a busy year. And it's pretty clear that we have our work cut out for us in 2006.

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