

17. LAND OF SWEET LIBERTIES

It was all but inevitable that on September 12 there would be outraged Americans willing, as Benjamin Franklin had feared over two centuries earlier, to “trade liberty for security.” A week after September 12, President Bush, speaking to a joint session of Congress, told Americans that the terrorists hated us because we stood for freedom. Federal authorities then began taking a series of steps in the name of security that restricted that freedom, and in doing so repeatedly stretched and violated domestic and international law.

The list of worrisome developments is long: electronic surveillance of Americans in the United States without court order; the order to use military tribunals to try U.S. citizens as enemy combatants; long-term, open-ended detention of captives; the use of torture techniques in interrogations of detainees; heavy reliance on secret renditions of suspects to the security services of foreign governments; and the creation of hermetically sealed virtual penal colonies like Guantanamo Bay. Many Americans also expressed concern with what they feared might be abuses related to government mining of data, ethnic profiling, video surveillance, the requisitioning of private data without court review, and the shielding of executive branch actions from congressional oversight.

Americans miss something important if they focus on these measures expanding federal power only as discrete affronts to civil liberties sensitivities. The problem with the way government authorities are now seeking to balance civil liberties and national security goes beyond the substantive objections we might have to a particular action or policy. Rather, we have not developed a considered framework for striking a balance when fundamental values collide—a balance, that is, between our desire for security and our dedication to a free society.

Without such a framework there cannot be broad public agreement on what actions are needed to increase our security from terrorism at

home. This lack of consensus has made it difficult for both the federal government and local jurisdictions to pursue a number of measures that would enhance security, such as:

- ◆ implementing the Real ID Act with state-of-the-art, foolproof driver's licenses issued only to users whose identity has been reliably confirmed;
- ◆ the creation of a trusted traveler program in which citizens voluntarily carry identity cards and submit to background investigations;
- ◆ a requirement for background investigation prior to employment in sensitive, critical infrastructures such as private security firms, chemical plants, railroads, biological laboratories, electric power systems, and others;
- ◆ the expansion of the use of smart, closed-circuit television cameras (intelligent CCTV) for surveillance of public spaces;
- ◆ the establishment or enhancement of intelligence capabilities within city or state police departments;
- ◆ the random screening of backpacks and other bags in subways and other mass transit systems; and
- ◆ the use of "tip" programs for citizens to provide information on suspicious activities that they believe might be related to terrorism.

These and other programs do have the potential to infringe on citizen rights and lead innocent people to fear government, but if they are accompanied by carefully devised safeguards, they could significantly enhance our security. Unfortunately, broad national backing for these measures is unlikely now, given the performance of the administration to date and the mistrust it has engendered among many citizens. The government's aggressive approach to counterterrorism at home has stiffened public resistance to otherwise reasonable security measures. A serious effort to recalibrate the balance between civil liberties and security is overdue.

WHERE IS THE DEBATE?

Americans appear broadly to agree that it is reasonable to strike an appropriate balance between security and freedom, and not simply sacrifice one for the other. Yet despite a general consensus that the events

of September 11 and afterward require us to weigh the competing values, understand the tradeoffs, and define the right balance, most of those engaged in public debate essentially deny that any real choices need to be made. This is true of both the administration and its critics, whenever one side or the other sorties out to defend or oppose a particular policy.

The administration, for example, will posit that many of the grants of new authority it has gained (or desires) are not actually being used, and therefore should be of no practical concern to civil liberties advocates. Consider only the legislative provision that would authorize the government to collect information from public institutions, such as libraries, without a warrant, if the government asserts that the information was necessary for a terrorism investigation.¹ The administration defended its call for the renewal of this provision not by discussing the contributions this substantive authority had made to the detection and prosecution of terrorists, but by claiming that the concerns of paranoid librarians were inconsequential, since the Justice Department had not yet used its new authority to gather such information. In this way, an important policy debate was sidestepped by the claim that there was, in fact, nothing really worth debating at all.

A second stratagem used by those supporting wider authority for the government might be called the “status quo” argument. According to this line of argument, the balance struck years, even decades, ago in other criminal justice contexts is intrinsically well suited to the new and different threat environment. In other words, the powers that the government is seeking are nothing new—just technical extension of prior practice—and therefore should not warrant any new concern. The administration’s congressional allies, for example, slipped into an intelligence authorization bill a provision that would expand the FBI’s power to demand financial records, without a judge’s approval, from car dealers, travel agents, pawnbrokers, and other businesses—a dramatic shift in the traditional obligations of businesses regarding financial transactions. Yet worries about the potential of this provision for abuse were waved off. The explanation of one senior congressional staff member was typical: “This is meant to provide agents with the same amount of flexibility in terrorism investigations that they have in other types of investigations . . . this was really just a technical change.”² This airy assertion was inaccurate and perhaps even somewhat disingenuous. The new legislation dramatically expands the potential subjects of such investigations. Its sponsors clearly

understood it to be a departure from previous practice, which is why they wanted the change in the law—and also why the change was hidden in an omnibus intelligence authorization bill. It was not merely a technical revision that did not warrant debate.

The debate surrounding the administration's highly controversial use of military tribunals provides a particularly vivid example of this political strategy. A Department of Defense Web site regarding the use of these tribunals asserts a long history and tradition within the United States of trying "enemy combatants" before military tribunals—without acknowledging that it is precisely the designation of the prisoners (including Americans) as "enemy combatants" that is a source of concern.³ Nor is there any discussion of whether a military tribunal is appropriate to the kind of enemy the United States is facing—irregular, non-uniformed personnel—especially since civilian courts have been used for previous cases. Nonetheless, federal authorities would have us believe that this momentous policy departure simply revives prior practice, has already been decided within the bowels of the executive branch, and does not warrant further debate outside.

In each of these examples, the administration used a variety of dismissive assertions—that its actions were "nothing new," signified only a "technical change," were "simply updating the law," had "long history," or reflected "controlling precedent"—to short-circuit debate on recalibrating the balance between security and liberty, and to suggest that the balance as codified pre-September 11 was unaffected by the administration's actions and new congressional grants of police power to federal authorities. This is hardly the way to engage the public in a frank and informed debate.

Many critics of administration policy are likewise culpable. Vigilant as they are to defend the inviolability of American freedom, they too tend to deny that any new balance need be struck—or even mooted. According to some on this side of the divide, new police powers would not materially assist the government in its fight against terrorism. Others argue that the powers in place before September 11 were adequate to counter the jihadists' new threat of terrorism. On the first argument, the champions of civil liberties who assert that the proponents of national security have created a false debate have it wrong. It may be true that some intrusive measures have been wholly irrelevant to security, including such highly contentious post-September 11

program failures as “voluntary interviews” of Arab immigrants that proved not only unsuccessful in eliciting useful information but also alienated an entire community; but some sacrifice of traditional privacy expectations can surely empower government to detect and thwart terrorist plots—in which case the “debate” between liberty and security is not “false.” The second argument is just as flawed and, perhaps like the administration’s assertions that nothing has changed, a touch disingenuous. It posits that federal law as understood on September 10, 2001, provided authorities with sufficient power to combat terrorism, and that it was a dysfunctional bureaucracy, stove-piping of intelligence, a prosecution-oriented FBI, and lack of leadership that left the door open to the terrorist attacks.⁴ There is in fact evidence to support this contention, but the argument ignores how the law compounded these problems, in part by drawing a line between the intelligence community and FBI that impeded the sharing of foreign intelligence.⁵ Arguably, the administration’s delay in deploying military forces to maintain order in New Orleans when Hurricane Katrina sent water crashing through the levees was due in part to the legal confusion arising from post-Reconstruction law circumscribing the appropriate role of the military in homeland security.⁶

The absence of any successful terrorist attack in the United States since 2001 has also drained the energy of the debate over the tradeoffs between civil liberties and expanded executive national security powers (although the current debate about the National Security Agency’s intercept program may yet be an exception). Citizens could reasonably conclude that the government’s actions had kept us safe and that it would be unwise to “mess with success.” Yet the counterterrorism agenda can hardly be seen as complete in the absence of serious discussion about these tradeoffs. The reprieve from jihadist attack that Americans have enjoyed on their national territory since late 2001 should make it easier to have this debate, since civil liberties advocates should be less vulnerable to the charge of undermining security when we are not actually under fire on our own soil.

This discussion—which is only beginning to gather momentum—must address three important questions.⁷

First, how are our democratic institutions faring, given the concession of new and exceptional powers to the executive branch? To a very real extent, this question hinges on the existence, or absence, of robust,

independent oversight by the judiciary and Congress. Even at its best, judicial oversight can be a long, drawn-out process. While it can protect individuals' constitutional rights against abusive exercise of governmental power, judicial review often results in vague definitions of principles. Such oversight is necessary, despite the judiciary's deference to executive assertions of power in the name of national security; but even in the best of circumstances, it is unlikely to offer comprehensive results in the near term.⁸ Congressional oversight, on the other hand, is often viewed as too dysfunctional and—when controlled by partisans of the executive authority—too docile and uninquisitive to be effective. The 9/11 Commission, for example, concluded that the diffusion among congressional committees of oversight and budgetary responsibility for issues of terrorism and homeland security made effective oversight unworkable; Congress, however, has proved incapable of reforming its own management in any significant way.⁹

Those responsible for oversight must assess, with some transparency, the extent to which security provisions—whether new, permanent, or subject to sunset clauses—are jeopardizing Americans' privacy and liberty, compared to how they demonstrably increase public safety. Furthermore, they must do so without inadvertently disclosing classified information or compromising ongoing investigations. In making their assessment, congressional overseers should consider:

- ◆ the degree to which the measure is actually used;
- ◆ assumptions, clearly delineated, that are invoked to justify the measure;
- ◆ the plausibility of such assumptions;
- ◆ the extent to which other countries, particularly democracies, have used, adopted, or debated such measures; and
- ◆ the degree and type of oversight appropriate to specific measures.

Such oversight may be conducted by a special commission, a special congressional committee, or a standing committee. Oversight panels need to recognize that changes in the government's legal powers have indeed occurred, that new ones may be necessary, and that they are not without consequences. In short, a functioning system of accountability is essential if the country is to honor its commitment to divided, shared powers and to our constitutional system of checks and balances.

The nation also needs to understand the content of and sources for the laws under which it is acting against terrorism. These include laws duly enacted by Congress; international treaty law negotiated by the executive branch and ratified with the consent of two-thirds of the Senate; and executive orders issued by the president under his authority to faithfully execute the laws. This leads to a series of questions that have always been considered fundamental to U.S. democracy.

LAW OR DECREE? Should the legislature adopt laws to provide for new powers, or, in a War on Terrorism, does the president have inherent authority to adopt a new measure?

Legislation is always the most desirable and the most certain course of lawmaking action, both on solid constitutional grounds and because the legislative process fosters political and public participation. Certainly the president still has authority within the parameters of congressional enactments to determine how best to implement the laws. And in a novel assertion of executive authority, the argument is advanced that in time of “war” (however determined) the president also has an inherent authority as “commander-in-chief” not only to direct the disposition of the armed forces, but also to provide for security more broadly. In the security versus liberties debate, the expansive reading of this “inherent” authority, which the administration has invoked to defend its warrantless domestic surveillance, leaves little room for effective oversight by the legislative branch. When executive powers can be created secretly, disclosed minimally, and insulated from public debate, a bypassed legislature can scarcely impose oversight. When executive measures threaten to undermine and even blatantly contravene legislated restraints, the dangers to democratic accountability and constitutionality are compounded. This is why the space for executive decree should be extremely narrow and subject to full disclosure to the appropriate committees of Congress. The security risks entailed by disclosure are low: While the disclosure of a specific undertaking or individual could handcuff a specific counterterrorism action, the disclosure of a general policy or procedure is most unlikely to have adverse consequences. Indeed, even if specific operations cannot always be transparent, the system can and should be transparent.

DOES THE PUBLIC NEED TO KNOW? To what extent ought new counterterrorist policies or measures be disclosed to the public? Even if executive and legislative decisionmakers agree that in a particular case public

disclosure is not warranted, to what extent will unauthorized disclosure of the policy or measure (a reasonable likelihood in a free society) undermine the policy and the authority on which it is based? A useful guide in answering these questions might well be found in an old intelligence community truism: If a policy or program cannot withstand unauthorized disclosure, then it may not be worth authorizing—or doing.

HOW LONG IS TOO LONG? Should the period of time that new powers are in force be limited? Given the nature of the jihadist threat, it is difficult to say when, if ever, this rhetorically, but not legally, declared “war” on terrorism will end. This uncertainty might be seen to justify permanent weaving of expansive police measures into America’s legal and constitutional order. But it is not idle speculation to argue that such powers could be turned against other “enemies of the state” (or of a future administration) long after the jihadist threat has faded. The dangers that this would pose for American democracy and Americans’ freedom make limits on the duration of these provisions vitally important. New authority should include a sunset or reauthorization provision that would allow enough time for the use of the new powers to respond to the jihadist emergency, with the presumption that the new powers will lapse unless an affirmative vote by lawmakers renews them. The burden should be on the executive branch to justify the renewal of such authorities to Congress. In a similar vein, new powers that a president asserts by executive order under existing statutory or constitutional authority should also be limited in duration, though as a practical matter reliable control over them will be almost impossible without some form of external oversight, for example, the annual executive branch review and reauthorization of covert action, which is reported to the congressional intelligence committees. Vigilant congressional oversight may be hardest to effect in these cases—arguably the cases where it is most needed; Congress needs to assert firmly its broader statutory and budgetary authority over the executive agencies to keep counterterrorism powers initiated within the executive branch inside appropriate bounds. Judicial review is the slowest but ultimately most authoritative curb on possible abuse of executive power.

Finally, Americans must consider how leaders and publics of other countries view the practices and policies the United States adopts to counter the threat of terrorism. International support is indispensable to

success in the suppression of Islamic terrorism: The United States must rely on other countries' intelligence services, their surveillance of suspects within their borders, their prosecutors indicting terrorist plotters, their judges extraditing terror suspects, and their political leaders allowing U.S. military forces to operate from bases on their territory.

America's international partners, in the democratic world most of all, care deeply about the rule of law and scrupulous adherence to international law. U.S. practices secretly sanctioned by executive decree that contravene international law create a popular backlash that makes many foreign governments' cooperation with Washington politically toxic. The secret rendition of suspects without judicial review, allegations of U.S. abduction of suspects on European territory, indefinite detentions without appeal at Guantanamo, and torture at Abu Ghraib have all taken a heavy toll on America's credibility and on other governments' willingness to collaborate with it.

In contemplating new legal authorities, much less any extra-legal actions, policymakers must consider whether their actions may contravene international treaty law or undermine international norms. Beyond alienating allies whose cooperation U.S. authorities need, American disregard for international law governing human rights and treatment of prisoners invites less democratic states—as well as jihadist adversaries—to justify abuses based on the policies that U.S. officials have embraced. The administration's condoning of torture, distilled in the widely distributed images of Abu Ghraib, and revelations rocking Europe about extraordinary renditions to Arab governments that are even less embarrassed about torture, have helped al Qaeda to recruit new waves of jihadist fighters and to justify its own targeting of civilians.

U.S. government agencies have warned that some actions, such as the executive's dismissal of the "quaint" Geneva Conventions in some instances, may well result in greater danger to Americans' own interests, especially jeopardizing the safety of military personnel. Our actions have also been used as an excuse by other states to avoid compliance with the obligations of international human rights law, or to stonewall Washington's insistence that they halt other abusive practices. The measures the United States employs can also be models for repressive regimes to intensify harsh controls, and also undermine long-term American goals of promoting political, religious, and economic freedoms abroad.¹⁰

RECOMMENDATIONS

Ultimately, Americans need to construct a new framework for assessing the cost and benefits of a range of specific security powers—from data-mining, profiling, eavesdropping, and sharing information among agencies, to listening in at religious or political institutions, detention and interrogation of “enemy combatants,” and rendition of suspects to foreign governments. Such a framework is the only way Americans, as a nation, can hope to strike a judicious balance between security and civil liberty. It is the only way Americans can have a real debate, despite the desire of some to deny the need for one or to avoid its occurrence. It is also the only way that we can honestly confront difficult balancing issues sure to arise in the future debate about long-term strategy against terrorism, issues that we have not even thought of today. If there is another significant terrorist attack in the United States, there will likely be a rush to adopt whatever measures, ill-conceived or not, that will sate a public demanding security. There will be, as after September 11, little time for real debate.

17.1. IT IS VITAL TO SPARK A STRUCTURED NATIONAL DISCUSSION NOW ABOUT THE TRADEOFF BETWEEN SECURITY AND LIBERTY.

The Civil Liberties Protection Board, created by executive order of the president in August of 2004, could lead the effort. Forums could be held online, on television, in newspapers, and in regional centers. This discussion should create support for appropriate congressional oversight and enhanced transparency, in order to reduce risks to civil liberties.

17.2. GOVERNORS AND BIG-CITY MAYORS SHOULD CONSIDER APPOINTING REGIONAL LIBERTY PROTECTION BOARDS TO WORK WITH STATE AND LOCAL LAW ENFORCEMENT AUTHORITIES.

This is appropriate because many of the recently enhanced security measures are often carried out at the state or city level. Moreover, the liberty protection boards can engage many more Americans in the national discussion. Local boards could share information and experiences with each other through a national coordinating forum. The boards should be asked to provide advice to state officials and regional offices of federal agencies about the implications for privacy and civil liberties of security programs; recommend safeguards; and perform civil liberties oversight of ongoing programs (with due regard for operational security).

17.3. LOCAL LIBERTY PROTECTION BOARDS SHOULD SPONSOR OUTREACH AND EDUCATIONAL ACTIVITIES IN SCHOOLS, CIVIC ORGANIZATIONS, PLACES OF WORSHIP, AND LOCAL MEDIA. The purpose of their outreach would be to combine messages about due vigilance with reminders to citizens of why America's founding fathers thought it so necessary to restrict government powers and to enshrine rights and liberties in the federal Constitution. It would also foster an atmosphere of civic trust regarding existing procedures and institutions as well as laws that might be used inappropriately to erode citizens' rights.

17.4. THE NATIONAL CIVIL LIBERTIES PROTECTION BOARD SHOULD ISSUE A YEARLY REPORT on its activities and on threats to American freedoms, brief Congress on the report (including classified annexes if necessary), and convene an annual national conference to review its report.

17.5. THE BOARD SHOULD FILE A CIVIL LIBERTIES IMPACT STATEMENT WITH THE EXECUTIVE BRANCH AND CONGRESS ON ANY PROPOSED MEASURE OR PROGRAM THAT MAY RAISE PUBLIC CONCERN ABOUT POTENTIAL ABUSES OF LIBERTY. Such statements should be unclassified, although they may, if necessary, have classified annexes. The chairmen and ranking minority members of the committees on the judiciary of the U.S. Senate and House of Representatives should each be authorized to initiate a review leading to an impact statement, upon their request to the board.



Such bold steps would create an ongoing process to shore up civil liberties when security threats in America raise doubts about protecting the rights of persons in suspect groups. Such steps are necessary, and not only because sweeping assertions of executive power have undermined confidence in federal authorities' willingness to defend civil liberties or even respect the courts. Without a renewed consensus on civil liberties, the American political community will become ever more polarized, shattering the national unity required to strengthen our security and defeat terrorism at home. Such steps are necessary because the infringement of the civil liberties of some Americans could begin a process leading to the erosion of values that underpin our unique nation.

