

## Chapter 3

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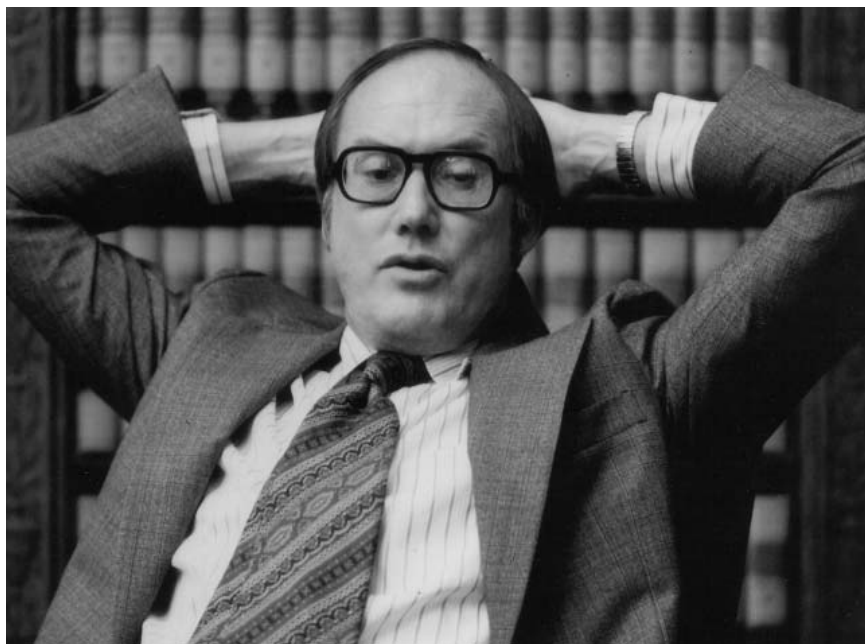
# Between Liberty and Order

**B**orn in 1924 in Milwaukee, Wisconsin, William Hubbs Rehnquist served in the Army Air Corps during World War II, witnessed the birth of the Cold War, was nominated by President Ronald Reagan to be Chief Justice of the United States at its nadir, and subsequently ruled on some of the first issues presented to the Supreme Court at the dawn of the war on global terrorism. A veteran of real wars and legal wars, Rehnquist thought hard about the challenges of the long war. He wrote:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being.<sup>1</sup>

Everyone does not share Chief Justice Rehnquist’s vision of the balance between liberty and order. To be sure, Americans sometimes misperceive the nature of danger and err in their efforts to both protect liberty and secure order. This was, perhaps, one of the Cold War’s most important lessons, a lesson taught by another famous judge from Wisconsin—”Red Hunter” Joe McCarthy.

When Joseph McCarthy, a former judge from Wisconsin’s 10th Judicial District, became a U.S. Senator, he launched his anti-communist crusade.



Supreme Court Justice William H. Rehnquist. (COURTESY OF THE NATIONAL ARCHIVES)

He was taking on an issue that was already in the forefront of concern for many Americans—the danger of Soviets spies and saboteurs freely walking American streets. Indeed, we know now that these fears were not unfounded. Soviet espionage and control over the American Communist Party were significant. These are facts confirmed by two sources: secret American Communist Party papers found in the Soviet archives after the Cold War, and the VENONA transcripts (decrypts of intercepts of KGB [the Soviets’ version of the CIA] cables that had been hidden away in the vaults of the National Security Agency until the end of the Cold War).<sup>2</sup>

The danger of Soviet spying was all too real. High-placed agents in the Departments of State and Treasury gave away some of America’s most precious secrets. Yet, as Ted Morgan writes, “McCarthy and his predecessors knew nothing of VENONA, and flayed about like blindfolded men in a room full of bats. The bats were there, but beyond their reach.”<sup>3</sup> In fact, many of the biggest bats had flown, been captured, or died before McCarthy chaired his first congressional hearings.

Controversy still swirls around McCarthy’s methods and motives and the controversial hearings he chaired about the alleged penetration of the Army by communist agents. What is incontrovertible is the hostility that erupted



Senator Joseph R. McCarthy of Wisconsin. (COURTESY OF THE NATIONAL ARCHIVES)

between Dwight D. Eisenhower and McCarthy. Eisenhower thought of McCarthy as little more than an ambitious fear-monger. “He wants to be president,” Eisenhower fumed. “He’s the last who’ll ever get there if I have anything to say.”<sup>4</sup> Ike was often taken to task for not criticizing McCarthy more openly, but the President considered dealing with McCarthy to be the Senate’s job. (See Appendix 6.) “All of us on the staff, including the president,” Press Secretary James Hagerty wrote, “will make it a point not to have any comment whatsoever on anything McCarthy says or does....The best treatment for McCarthy is to ignore him.”<sup>5</sup> Eisenhower rejected the basic premise of McCarthyism—that security trumped civil liberties. Eisenhower believed that both had to be preserved in the long war.

Censured by the Senate, McCarthy died in office on May 2, 1957. By that time, however, he had ceased to be an influential figure on the national scene and the worst red-hunting excesses had subsided. “It’s no longer McCarthyism,” Ike quipped. “It’s McCarthyism.”<sup>6</sup> Here, however, Eisenhower was wrong. While attacks on civil liberties and McCarthy’s controversial role in

them had come to an end, his name had lent itself to a fear. In American memory, McCarthyism will always be synonymous with the practice of making accusations without regard to evidence and using the power of government to suppress legitimate dissent and the right of free speech.

## The Ghost from Wisconsin

Today, cries of McCarthyism are frequently raised by those concerned about the state of American civil liberties—and with some cause. We face a similar problem. Once again, there is an internal threat to safety and security. This time it is the threat of violent, mass terrorism against unprotected domestic targets. Additionally, today we also face the potential for over-balancing, for affording government too great a power to combat the perceived threat. The U.S. is in danger of doing exactly what George Kennan warned us against. “The greatest danger that can befall us...is that we shall allow ourselves to become like those with whom we are coping.”

Much of the current debate’s focus lies in discussions about the USA Patriot Act,<sup>7</sup> a law passed with overwhelming support in Congress immediately following the September 11 terrorist attacks.<sup>8</sup> The critics argue that the law tips the balance between liberty and order in the wrong direction. Criticism of the anti-terrorist campaign is not, however, limited to the Patriot Act: Many other aspects of the domestic response to terrorism have come under fire. Yet, the Patriot Act has come to serve as a symbol for all of the domestic anti-terrorist law enforcement actions. Indeed, the Patriot Act has become the poster child for criticism, a convenient shorthand for all questions about the alterations in the balance between civil liberty and national security that have occurred since 9/11.

The furor over the Patriot Act surprised no one more than a 36-year-old professor from Georgetown University, Viet Dinh. A Harvard graduate who had clerked for Supreme Court Justice Sandra Day O’Connor, Dinh preferred life in the academy to life in the courtroom. He served on the faculty at Georgetown University Law Center in downtown Washington. In March 2001, he was asked to join the Attorney General’s office for two years to work on judicial nominations. After 9/11, he was drafted to work on the legislative reforms that became the Patriot Act.

War had stamped a lesson on Dinh’s childhood about the struggle between liberty and order. At the age of seven, he witnessed the invasion of

South Vietnam and his father's detention in a "re-education" camp. Immigrating to America with his mother and five brothers and sisters, Dinh chose as his path a profession dedicated to safeguarding freedom and security. As one of the principal architects of the Patriot Act, Dinh believed the law served to preserve both.

While work on the act (and the subsequent congressional debate) were brief by Washington standards, the legal issues surrounding the bill—from authorities for wiretaps to examining business records—were hardly new: There was little uncharted ground. The critical portrayal of the bill came as some surprise. Frustrated by the critics' response to the law, Dinh concluded, "There has been a lot of hue and cry regarding specific provisions with USA Patriot Act that is predicated upon a misunderstanding....[T]he act has been mischaracterized and misunderstood and has engendered a lot of well-meaning and genuine fear, even if that fear is unfounded. The issue is not one of substance but one of perception. But perception is also very important because we do not want the people, however many of them, to fear the government when that fear is unfounded."<sup>9</sup> Dinh understood that the problem was helping average Americans understand the difference between legitimate law enforcement tools and the excesses of McCarthyism. Looking at the complaints leveled at the Patriot Act (and other anti-terrorism tools), it is easy to understand why he saw it as a daunting challenge.

## Why We Worry

There are three factors animating fears about the anti-terrorism campaign. First, critics frequently decry the expansion of executive authority in its own right. They generically equate the potential for abuse of executive branch authority with the existence of actual abuse. They argue that the growth in presidential power is a threat, whether or not the power has, in fact, been misused. These critics come from a long tradition of limited government, which fears any expansion of executive authority.

The second kind of criticism is stimulated by the "Luddite response"—a fear of technology. As the government begins to explore ways of taking advantage of America's superior capacity to manage data through new information technologies, there are rising concerns that it will use these means to dig into our personnel lives. Information equals power. With great efficiency comes more effective use of power. And with more power comes more abuse.

A third theme underlying criticism is more blatantly political. The Patriot Act, regardless of its true merits or flaws, is a great tool for raising money and energizing constituencies that are predisposed to be critical of the Administration's response to terrorism. Brand labeling has become a part of the political process.<sup>10</sup>

## Fact and Fiction

Criticisms of the government's new anti-terrorism practices miss important distinctions and often blur potential and actuality. To be sure, many aspects of the Patriot Act (and other governmental initiatives) expand the power of the government to act. Americans should rightly be cautious about any expansion of government power. Yet, by and large, the potential for abuse of new executive powers has proven to be far less of a real danger than critics have presumed. For example, the Department of Justice's Inspector General (an independent investigative arm within the department) has reported that there have been no instances in which the Patriot Act has been used to infringe on civil rights or liberties.<sup>11</sup>

Where opponents of the Patriot Act are equally wrongheaded is that their belief in the potential for abuse stems from a misunderstanding of the new powers that the government has been given by Congress to combat terrorists. In many cases, provisions of the Patriot Act simply apply tools we have used to combat other crimes, such as drug trafficking, to fighting terrorism.

More fundamentally, those who fear the expansion of executive power in the war on terrorism offer a bad alternative: prohibition. While we could afford that solution in the face of traditional criminal conduct, we cannot accept that answer in combating terrorism. There is a better way. Vigilance and oversight (enforced through legal, organizational, and technical means) are the answer to deterring or preventing abuse. We must keep a watchful eye on controlling for the risk of excessive encroachment. Paying attention to the problem is the best way of preventing the erosion of civil liberties.

The answer to fighting terrorists while preserving civil liberties is simple. It is *not* debating which is more important: It is simply doing both. That, like in the other elements of fighting the long war, requires the lifeline of a guiding idea. As with the other elements of long-war strategy, the past can be prologue. It is no coincidence that the other judge from Wisconsin, William Rehnquist, is also a historian and that when he searched for answers to the

question of how to preserve liberty and order in the present day, he found the answers in the past.

## The Lessons of History

To a very real degree, how we think about the Patriot Act, and other instruments used in the war on terrorism, rests on context—how we view the history of American responses in times of war, the constitutional constraints imposed upon executive power, and whether, in the end, one believes the threat of terrorism should be treated as a law enforcement problem or a national security issue.

Discussions of history often begin with cautions against repeating past excesses. American history can be written as a series of painful lessons about over-reacting in the face of war. In this troubled story, responding to threats leads to a good faith, but overzealous response. McCarthyism is one example. There are other dark days as well.<sup>12</sup>

In 1798, the Napoleonic wars raged in Europe. President John Adams, a Federalist, effectively brought the United States (on the side of the British) into a state of undeclared war with France. Thomas Jefferson and the Democratic Republican party opposed these measures as being likely to provoke an unnecessary war. The Federalists, in turn, accused the Jeffersonians of treason.

To exacerbate the situation, the Federalist Congress enacted the Alien and Sedition Acts of 1798.<sup>13</sup> The Alien Act authorized the President to deport any non-citizen—without a hearing or the right to present evidence—that he judged dangerous to the peace and safety of the United States. The Sedition Act prohibited the publication of false, scandalous, and malicious writings against the government, the Congress, or the President with intent to bring them into contempt or disrepute. These were, in effect, aggressive efforts to suppress political criticism of Adams, his policies, and his Administration. After Jefferson succeeded Adams as President, he pardoned all those who were convicted under the act. Although never tested in the Supreme Court, these acts are widely regarded as having been unconstitutional and a stain on American liberty.

During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus on eight occasions. The broadest such suspension declared that “all persons...guilty of any disloyal practice...shall be subject to court martial.”<sup>14</sup> (See Appendix 7.) As many as 38,000 civilians were imprisoned by

the military in reliance on this authority.<sup>15</sup> In 1866, a year after the war ended, the Supreme Court ruled that the President was not constitutionally empowered to suspend the writ of habeas corpus, even in time of war, if the ordinary civil courts were functioning.<sup>16</sup> Here again, the suspension is remembered by some as an excessive response to a crisis and has come to be regarded as an unfortunate wartime error.

In 1917, the United States entered World War I. During the war, federal authorities acting under the aegis of the Espionage Act<sup>17</sup> prosecuted more than 2,000 people for their opposition to the war. As a result, virtually all dissent with respect to the war was suppressed. Although the Supreme Court initially approved most federal actions in support of the war,<sup>18</sup> over the next fifty years, the Court overruled every one of its World War I decisions—effectively repudiating the excess of that wartime era.<sup>19</sup>

Finally, and most notoriously, on February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066,<sup>20</sup> which authorized the Army to “designate military areas” from which “any persons may be excluded.” Over the next eight months, more than 110,000 people of Japanese descent were forced to leave their homes in California, Washington, Oregon, and Arizona. Although the Supreme Court upheld the President’s action,<sup>21</sup> it has come to be recognized as a grave error. In 1988, President Ronald Reagan offered an official presidential apology and reparations to each of the Japanese-American internees.<sup>22</sup>

Making history during troubled times can lead to very different lessons. Noted legal scholar Geoffrey Stone concludes the worst. “In time of war—or, more precisely, in time of national crisis,” he finds, “we respond too harshly in our restriction of civil liberties, and then, later regret our behavior.”<sup>23</sup> He is right, of course. We should never disregard that caution. Yet reading too much into this history is a mistake.

First, history also reminds us that you cannot deal with enemies by doing nothing. Sometimes there is a necessity to act. As the late Supreme Court Justice Arthur Goldberg so famously said, “While the Constitution protects against invasions of individual rights, it is not a suicide pact.”<sup>24</sup> Even though some of these reactions were plainly overreactions (nobody argues today that the internment of the Japanese served a useful military purpose)—others were not.

For example, Justice Rehnquist and others argue that Lincoln’s suspension of the writ of *habeas corpus* was necessary to the prosecution of the war.<sup>25</sup> Lincoln certainly felt the necessity, believing suspension allowed for additional security measures that helped protect the troops, save Maryland for the

Union, and secure the safety of Washington, D.C.<sup>26</sup> Later in the Civil War, the anti-draft riots in New York (made cinematically famous in the movie *Gangs of New York*) threatened to deprive the Union army of conscripts.<sup>27</sup> Had that occurred, Lincoln feared a premature end to the war—leaving the United States divided and slavery ongoing.<sup>28</sup> Using the authority granted him by Congress in the Habeas Corpus Act,<sup>29</sup> Lincoln directed the draft boards to ignore writs of habeas corpus issued to them by state courts seeking release of the conscripts.<sup>30</sup> It is not unreasonable to argue that, however *de jure* improper Lincoln's acts were, they were *de facto* a justified necessity that ought, in retrospect, to be praised.

Perhaps, the lesson that we should take from history is not to be too harsh in our retrospective judgments. Hindsight is always 20/20. Indeed, examining past excesses, both real and imagined, suggests that our history should actually give us some comfort. Many who are concerned with current activities think that we are on a downward spiral toward diminished civil liberties. However, a better view of this history shows that the balance between liberty and security is more like a pendulum (that gets pushed off center by significant events, such as 9/11) than a spiral. Over time—after Americans have recovered from the understandable human reaction to catastrophe and after the threat recedes—the pendulum returns to center.

We have to acknowledge the historical reality that when the wartime crisis passes, the balance swings back in favor of freedom and liberty. Ever since World War II, our society has matured to the point that the scope of the pendulum's swing is not nearly as great as it has been in the past.

For example, whatever one may think of the detention of three Americans as enemy combatants, there can be little disagreement that the detention of three individual Americans (whose detention is based upon a quantum of individualized suspicion), is sufficiently different in degree from the wholesale detention of more than 100,000 Japanese-Americans (whose detention was ordered in the absence of any individualized suspicion): These incidents are different in kind.<sup>31</sup> As Chief Justice Rehnquist wrote:

[T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will

be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty.<sup>32</sup>

Rehnquist's words are reassuring, as is the test of history. After all, there were many casualties in the Cold War, but the Constitution was not one of them.

## Times Have Changed

Looking to history for answers, however, is not enough. While we might look to George Kennan or Dwight Eisenhower to describe the principles for fighting a long war, we would not want to take their ideas about how technology, civil society, and government worked in the 1940s and apply them to running the war on terrorism in the twenty-first century.

The truth is that in some respects we may have less to fear from the power of government than in the times of Lincoln or McCarthy. Things have changed. Today, America has:

- **A more activist court.** The Supreme Court is far more willing to overturn executive branch action, acting as a limit on excessive power. Earlier times of crisis all occurred before the “rights revolution” of the 1960s and the growth of judicial power. Indeed, the current Rehnquist Court has invalidated more acts of Congress than any previous court,<sup>33</sup> exhibiting a high degree of involvement in curtailing authority.<sup>34</sup>
- **A more partisan Congress.** Though sometimes seen as a bad thing, the growth of partisanship has created at least one positive benefit—a growth in the “market” for oversight of the executive branch. Ever since the Watergate era, we have seen an increasing use of congressional investigative authority—sometimes for good, sometimes for ill. Yet the prospect of aggressive congressional oversight acts as a check on executive power, as even the prospect of public censure has the *in terrorem* effect of preventing abuse.
- **The “60 Minutes” factor.** Clearly, this is another change that has potential adverse consequences. Yet few can deny that the post-Watergate press serves an aggressively important public function: exposing activities that some might prefer to keep secret. No one can imagine a return to the days when the press

actively participated in concealing Roosevelt's injuries or Kennedy's dalliances. That means, equally, that the prospect of secret prosecutions and covert searches and seizures is—at best—minimal.

- **Public interest group proliferation.** At no other time in history did Americans organize themselves into public interest groups in the way they do now. No other era saw the existence, for example, of numerous public-interest litigation groups like the ACLU. These organizations, through their public information and litigation activities, act as an important check on the exercise of executive authority. They are, in effect, the “canary in the mineshaft,”<sup>35</sup> serving as an early warning system of abuse.
- **An enabled citizenry.** Although technology offers assuredly greater opportunity for our government to monitor our activities, that same technology holds the promise of greater public accountability by enhancing the transparency of government functions.<sup>36</sup>
- **A public that is far more educated about civil liberties today than at any time in the past.** With the rise of the Information Age and the Internet, we are far more able to gather information necessary to make decisions and to organize a response to government power if one is deemed necessary. From the Ozzie and Harriet quiet of suburbia in the 1950s, we have come to a point at which many Americans are vitally concerned about freedom, liberty, and government action. They exercise their franchise with those concerns in mind.<sup>37</sup>

All this is good news. At the dawn of the twenty-first century, we have strengthened substantially our ability to examine, oversee, and correct abuses of executive power. The public is in a stronger position today than it ever has been before. That power of oversight gives us freedom—freedom to grant the government powers when the need arises, secure in the knowledge that we can restrain. History is not our master. We should not be utterly unwilling to adjust our response to liberty and security in today's crisis of terrorism. We have the capacity to manage that adjustment, and to readjust as necessary.

## Crisis and the Constitution

Although a large portion of the debate about new law enforcement and intelligence measures focuses on perceived intrusions on civil liberties, Americans

should keep in mind that the Constitution weighs heavily on both sides of the debate. The President and congressional policymakers must respect and defend the individual civil liberties guaranteed in the Constitution when they act.

But, as the Preamble to the Constitution acknowledges, the United States' government was established, in part, to provide for the common defense. The war powers were granted to Congress and the President with the solemn expectation that they would be used. Congress was also granted the power to “punish...Offenses against the Law of Nations,” which include the international law of war, or terrorism.<sup>38</sup> In addition, serving as chief executive and commander in chief, the President has the duty to “take Care that the Laws be faithfully executed,” including vigorously enforcing the national security and immigration laws.

Thus, as we assess questions of civil liberty, we cannot lose sight of the dual purpose of government—protecting personal and national security. So how do we square the circle? Here, contemporary interpretations of constitutional limitations are not much help.<sup>39</sup> Under settled modern Fourth Amendment jurisprudence, law enforcement may secure, without a warrant (through a subpoena), an individual's bank records, telephone toll records, and credit card records—to name just three of many sources of data. Other information in government databases, such as arrest records, entries to (and exits from) the country, and driver's licenses, may be accessed directly without even the need for a subpoena.

In 1967, the Supreme Court ruled that the Fourth Amendment protects only those things in which someone has a “reasonable expectation of privacy,” and concurrently, that anything one exposes to the public (i.e., places in public view or gives to others outside of his own personal domain) is not something in which he has a “reasonable” expectation of privacy—that is, a legally enforceable right to prohibit others from accessing or using what one has exposed.<sup>40</sup> Therefore, federal agents need no warrant, subpoena, or court authorization to:

- have a cooperating witness tape a conversation with a third party (because the third party has exposed his words to the public);<sup>41</sup>
- attach a beeper to someone's car to track it (because the car's movements are exposed to the public);<sup>42</sup>
- fly a helicopter over a house to see what can be seen;<sup>43</sup> or
- search someone's garbage.<sup>44</sup>

The plain fact is that even before September 11, the government had the constitutional authority to do a lot of things already. Individuals' flight

itineraries and charitable donations constitute information that the government may access because the individual has voluntarily provided it to a third party.<sup>45</sup> According to the Supreme Court, no one has any constitutionally based and enforceable expectation of privacy in them. The individual who is the original source of this information cannot complain when another entity gives it to the government. Nor does he have a constitutional right to notice of the inquiry.<sup>46</sup> Some legal scholars have criticized this line of cases, but it has been fairly well settled for decades.<sup>47</sup>

Congress, of course, may augment the protections that the Constitution provides, and it has with respect to certain information. There are privacy laws restricting the dissemination of data held by banks, credit companies, and the like.<sup>48</sup> Yet in almost all of these laws (the Census being a notable exception),<sup>49</sup> the privacy protections are good only against other private parties. They do not provide barriers to criminal, national security, and foreign intelligence investigations. Therefore, while both the strictures of the Constitution and the weight of history help point us toward our ultimate destination—a strong and secure civil society—they are not much help in telling us where to take the next turn.

## The Reality of Terrorism

There are other reasons we have to deal with the world as it is, not as we might want it to be. The full extent of the terrorist threat to America is not fully known.<sup>50</sup> We do not even know how many terrorist operatives are in the United States.

The sad truth is that terrorism remains a potent threat to international security. The U.S. State Department has a list of over 100,000 names worldwide of suspected terrorists or people with contact to terrorists.<sup>51</sup> Before its camps in Afghanistan were shut down, al-Qaeda trained at least 70,000 people—and possibly tens of thousands more.<sup>52</sup> Al-Qaeda-linked Jemaah Islamiyah in Indonesia is estimated to have 3,000 members across Southeast Asia and is still growing.<sup>53</sup> Although the estimates of the number of al-Qaeda members, al-Qaeda wannabes, al-Qaeda look-alikes, and sons and daughters of al-Qaeda in the United States have varied since 9/11, the figure provided by the government in recent, supposedly confidential, briefings to policy-makers is about 5,000.<sup>54</sup> This estimate may include many who are engaged in fundraising for terrorist organizations and others who were trained in some

fashion to engage in a future attack, whether or not they are actively engaged in a terrorist cell.

All we know now is that no one can say with much certainty how many terrorists are in the United States. and that more may be coming, but we do not know how many. “[M]ore than 500 million people [are] admitted into the United States [annually], of which 330 million are non-citizens.”<sup>55</sup> Of these non-citizens:

- Tens of millions arrive by plane and pass through immigration control stations, often with little or no examination.<sup>56</sup>
- 11.2 million trucks enter the United States each year.<sup>57</sup> Many more cars do as well: More than 8.5 million cars cross the Buffalo–Niagara bridges each year alone, and only about 1 percent of them are inspected.<sup>58</sup>
- According to the Department of Commerce, approximately 51 million foreigners vacationed in the United States last year, and this figure is expected to increase to 61 million in three years.<sup>59</sup>
- There are currently approximately 11 million illegal aliens living in the United States. Roughly 5 million entered legally and simply overstayed their lawful visit.<sup>60</sup>
- Over half a million foreign students are enrolled in American colleges, representing roughly 3.9 percent of total enrollment, including: (1) 8,644 students from Pakistan; (2) a total of 38,545 students from the Middle East, including 2,216 from Iran, 5,579 from Saudi Arabia, and 2,435 from Lebanon—where Hezbollah and other terrorist organizations train; and (3) about 40,000 additional students from North African and Central and Southeast Asian nations in which al-Qaeda and other radical organizations have a strong presence.<sup>61</sup>

Now very, very few of these people are a risk to the U.S., but hidden in their vast numbers are people we do have to worry about.

Virtually every terrorism expert in and out of the government believes there is a significant risk of another attack. Unlike during the Cold War, the threat of such an attack is “asymmetric.” In the Cold War, threats were “symmetric.” They had nuclear weapons. We had nuclear weapons. War meant we both lost. Asymmetric warfare means the two sides threaten each other with dissimilar means that do not line up well against one another. We have divisions. They

have box cutters. What that means in practice is that it is difficult to deter attacks. Because of the terrorists' skillful use of low-tech capabilities, their capacity for harm is essentially limitless. Because they are dispersed, they are difficult to threaten with the preponderance of American power. The United States, therefore, faces the far more difficult task of discerning their intentions. Where the Soviets created "things" that could be observed, the terrorists create transactions that can only be sifted from the noise of everyday life with great difficulty. This is a different problem from the national security concerns we faced in the past. It reminds us, again, that the Cold War can teach us the principles of fighting the long war, but it cannot give us a "how to" manual. We are on our own.

The suppression of terrorism will not be accomplished by offense and defense alone. Rather, effective law enforcement and intelligence gathering are essential instruments. Recent events support this conclusion.<sup>62</sup> In fact, police have arrested more terrorists than military operations have captured or killed. Police in more than 100 countries have arrested more than 3,000 al-Qaeda-linked suspects,<sup>63</sup> while the military captured some 650 enemy combatants.<sup>64</sup> Equally important, it is policing of a different form—preventative rather than reactive, because there is less value in punishing terrorists after the fact when, in some instances, they are willing to perish in the attack.

An understanding of the nature of the terrorist threat helps to explain why the traditional law enforcement paradigm needs to be modified. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. All lawyers have heard some form of the maxim, "It is better that ten guilty persons go free than that one innocent person be mistakenly punished."<sup>65</sup> This embodies a fundamentally moral judgment that when it comes to enforcing criminal law, American society effectively hates Type I errors (false positives, or accepting that in the process of catching all the bad guys, errors might be made that result in a few innocents being wrongfully or inadvertently punished) and would rather allow many more Type II errors (false negatives, or errors that let a few guilty escape rather than punish the innocent) than it actually does.<sup>66</sup>

America's preference for protecting the innocent over punishing the guilty arises from two interrelated beliefs: One is the historical distrust of government that animates many persons concerned about civil liberty. The other is simply a deeply held belief in how the scales of justice should tip. We value liberty sufficiently highly that we will not accept a Type I error (i.e. convicting the innocent). Additionally, although we realize that Type II errors free the guilty to return to the general population—thereby imposing additional social

costs on society—we have a common sense understanding that those costs, while significant, are not so substantial that they threaten large numbers of citizens or core structural aspects of the American polity.

The post-9/11 world changes this calculus in two ways. First, and most obviously, it changes the “cost” of the Type II errors. Whatever the cost of freeing Mafia don John Gotti or Washington sniper John Muhammad might be, they are substantially less than the potentially horrific costs of failing to stop a terrorist assault that kills 3,000—or 3 million. The sad truth is that we simply cannot afford a rule that “better ten terrorists go free than that one innocent’s conduct be mistakenly examined.”<sup>67</sup>

We also need to rethink what kinds of Type I errors must be considered. In the traditional law enforcement paradigm, the liberty interest at stake is personal liberty—that is, freedom from the unjustified application of governmental force. The law focuses on things like arrests, the seizure of physical evidence, or searches. In the information age, in which we may employ new technologies to assist in tracking terrorists, the rules of the “physical world” (where we use the law to protect people and their homes from intrusion by the government) may not be as useful in helping us determine what kinds of law enforcement “mistakes” should be permissible.

We have to think about another conception of liberty: the liberty that comes from “anonymity.”<sup>68</sup> Anonymity is a different, and possibly weaker, form of liberty. By and large, Americans recognize that they are not entitled to all anonymity, all the time. Even people who have not committed any criminal offense can have information on them collected for legitimate governmental purposes, although they are entitled to expect that their information is handled and safeguarded appropriately. Census data are collected in the aggregate and never disclosed. IRS tax data are collected on an individual basis, reported publicly in the aggregate, and only disclosed outside of the IRS with the approval of a federal judge based upon a showing of need.<sup>69</sup>

What these examples demonstrate is not so much that our conception of liberty is based upon absolute privacy expectations,<sup>70</sup> but rather that government impingement upon our liberty will occur only with good cause. In the context of a criminal or terrorist investigation, we expect that the spotlight of scrutiny will not turn upon us individually without some very good reason.

Finally, it bears noting that not all solutions necessarily trade off between Type I and Type II errors, and certainly not in equal measure. Some novel approaches to combating terrorism might, through technology, actually reduce the incidence of both types of error.

Where many critics of the Patriot Act and other governmental initiatives go wrong is in their absolutism: They refuse to admit of the possibility that we might need to accept an increase in the number of Type I errors. Yet that simply cannot be right—liberty is not an absolute value; it depends upon security (both personal and national) for its exercise. As Thomas Powers has written: “In a liberal republic, liberty presupposes security; the point of security is liberty.”<sup>71</sup> The growth in danger from Type II errors necessitates altering our tolerance for Type I errors. More fundamentally, our goal should be to minimize both sorts of mistakes.

## Principles for Preserving Security and Civil Liberties

What we need for the war on terrorism is a set of principles that work for this long war, principles that are consistent with the Constitution, mindful of the lessons of history, and that give us the tools we need to get the terrorists before they get us. Here is what a useful set of “first” principles might look like.

- No fundamental liberty guaranteed by the Constitution can be breached or infringed upon.
- Any new intrusion must be justified by a demonstration of its effectiveness in diminishing the threat. If the new system works poorly by, for example, creating a large number of false positives, it is suspect. Conversely, if there is a close “fit” between the technology and the threat (that is, if it is accurate and useful in predicting or thwarting terrorism), the technology should be more willingly embraced.
- The full extent and nature of the intrusion worked by the system must be understood and appropriately limited. Not all intrusions are justified simply because they are effective. Strip searches at airports would prevent people from boarding planes with weapons, but at too high a cost.
- Whatever the justification for the intrusion, if there are less intrusive means of achieving the same end (at a reasonably comparable cost), the less intrusive means ought to be preferred. There is no reason to erode Americans’ privacy when equivalent results can be achieved without doing so.
- Any new system developed and implemented must be designed to be tolerable in the long term. The war against terrorism is one

with no immediately foreseeable end. Thus, excessive intrusions may not be justified as emergency measures that will lapse upon the termination of hostilities. Policymakers must be restrained in their actions; Americans might have to live with their consequences for a long time.

## Rules for New Technologies

Because technology is going to be an important part of any set of counterterrorism tools, and because our lives in the Information Age are so dependent on many of the systems and databases where these technologies will look for information about terrorists, we also need a set of rules to guide how we implement the basic principles of long-war fighting in the electronic world. This is what these principles should look like:

- No new system should alter or contravene existing legal restrictions on the government's ability to access data about private individuals. Any new system should mirror and implement existing legal limitations on domestic or foreign activity.
- Similarly, no new system should alter existing operational system limitations. Development of new technology is not a basis for authorizing new government powers or new government capabilities. Any such expansion should be independently justified.
- No new system that materially affects citizens' privacy should be developed without specific authorization by the American people's representatives in Congress and without provisions for oversight of the system's operation.
- Any new system should be, to the maximum extent practical, tamper proof. To the extent the prevention of abuse is impossible, any new system should have built-in safeguards to ensure that abuse is both evident and traceable.
- Similarly, any new system should, to the maximum extent practical, be developed in a manner that incorporates technological improvements in the protection of American civil liberties.
- Finally, no new system should be implemented without the full panoply of protections against its abuse. As James Madison told the Virginia ratifying convention: "There are more instances of

the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”<sup>72</sup>

## The Next Step

The fact that we can derive a set of principles and rules for the war on terrorism means they are more than just a set of guidelines for policies and programs. It means that the post-9/11 debates, which seem to offer a choice between security and civil liberties, are simply wrong. There are choices between McCarthyism and inaction. We can do better. It is not enough to condemn every governmental initiative. Nor is it wise to offer the government a blank check. We can have both liberty and order, but each program and proposal must be carefully assessed on its own individual merits.

Measured against these standards, the Patriot Act and related governmental programs hold up fairly well: By and large, they are of little practical threat to civil liberty and they hold the promise of significant benefit. The real question is: What should be next? What are the next steps that need to be taken to provide the right anti-terrorism tools for the long war? Can they be implemented within the guidelines and rules that demand both freedom and freedom from fear?