

P E R S P E

War or Peace Determines the Balance of Security and Civil Liberty

By Douglas W. Kmiec



The conflict between civil liberty and national security has been continually with us since 9/11. The recent disclosure on December

16, 2005, by the *New York Times* that the President has employed the National Security Agency to monitor the calls and e-mail transmissions of individuals inside the United States without warrants are only the latest entries onto the balance sheet that must be consulted to reweigh the nation's safety against intrusion into personal privacy. It should be obvious, however, that reports like that in the *Times* are a credit to responsible reporting and evidence of the resilience of the First Amendment, even in a war on terror.

As to administration arguments that the law gives the president all the power he needs for such surveillance of citizen and noncitizen alike, that is clearly aggressive lawyering in behalf of presidential prerogative. That said, Congress did authorize all "necessary and proper steps" to subdue those who engaged in an unprovoked attack on the United States on 9/11 (Authorization

for Use of Military Force, 115 Stat. 224, Public Law No. 107-243, October 16, 2002). *By my reckoning, that attack has yet to be fully answered.* We know more about our collective intelligence mistakes and oversights in the decade preceding the attack than we do about the ideology, motives, and methods of those associated with the dispersed, non-nation states that attacked us and still threaten and kill our citizens and those of other peaceful nations.

It should go without saying that any presidential action needs to be anchored in law—either the law of the Constitution or statute. It is well settled that presidents have authority to respond to sudden attack. Congress' go-ahead for military force bolsters and confirms that, and it would seem that the president has kept the intelligence leadership of Congress reasonably informed of even his most assertive steps. If congressional leadership had been left out entirely, that would have been far worse. It is not clear why the president thought that the Foreign Intelligence Surveillance Act (FISA) procedure was inadequate, other than perhaps, the occasional need to promptly track a treasure trove of al Qaeda computers and cell numbers found after a successful battle abroad. Nevertheless, it seems likely that the FISA probable cause standard for a warrant would have been

met had it been pursued. It is salutary for the relevant legislative committees to hold hearings to see what can be done to channel most, if not all, of these taps and searches into the established FISA court process. But there will always be a need for a few exceptions by virtue of exigency—that's why "hot pursuit" is a constitutional exception to the Fourth Amendment warrant requirement even for the local police.

How then is one to more generally apprise the security/liberty balance? Any speculation is naturally colored by the premises that one brings to the argument, the most important of which is whether one believes we are truly at war. This is a perplexing question. We tend to find it perplexing because of the peculiarities of terrorism—which may also be thought of as asymmetrical warfare. Most people, including the 9/11 Commission, contend that there is, after all, no dominant nation-state that has attacked us. There is no territorial dispute or even predominant locus of combat. There is no well-defined origin to the hostility, and while there are ideological and religious differences, there is not even a cogent list of specific ideological complaints that fully explains the breakdown of peace.

Domestically, we should think seriously about the question of whether we are at war because we have not been

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asked—as a nation—to make meaningful war-time sacrifice—or at least most of us have not. The troops who are courageously fighting (and dying) have not been mobilized with a draft or general conscription. Domestic goods have not been rerouted, by and large, to the war effort. Moreover, what economic and social dislocation that has been suffered is for an Iraqi military effort, which may or may not be part of the larger war on terror, but about which few deny the maleficence of intelligence mistakes. Apart from the congressional authorization of military force—which, of course, does not answer the question of whether in reality we are at war, it merely declares it so—we remain deeply troubled about our status.

We are troubled not just as a matter of abstract philosophy, but because, frankly, we continue to fear for our national safety. Statements and reports from our military commanders indicate that the possibility of another terror attack is very real—a fact made painfully plain by long security lines at airports. Though we may be chagrined by false terror alerts and the one-time need to leave nail clippers and scissors behind, we are told that those who think another attack is not likely have merely been lulled into complacency by an enemy that has great patience and savvy.

The uncertainty over whether we are at war or at peace is the analytical thread running through the Supreme Court's divided opinions on the citizen enemy combatant cases and the Guantánamo Bay alien detainee cases, as well as the related challenges to presidential authority to establish military tribunals. This ambivalence also permeates the debate over whether or not to renew controversial provisions of the PATRIOT

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Act. There is no escape from discerning whether we are at war or whether we are in some kind of regrettable, unavoidable police action against the equivalent of a new virulent form of organized crime that will always be with us.

If what our nation confronts is merely a variant of organized crime, then many of the arguments made for greater attention to civil liberty make perfect sense. However, if we are at war, then the president's national security obligations are much clearer, and the justices and judges who would presume to take military command are engaged

in behavior most unbecoming. The Constitution allocates the war power to a Commander in Chief who can act with energy and dispatch.

Press vigilance in favor of civil liberty is vital, but it should not lead Americans to assume illegality. Civil liberties are protected by relying upon warrants and judicial oversight, and as the war drags on in its perplexing, asymmetrical way, we should move cautiously to restore as much constitutional normalcy as the nation's security permits. I am confident that is a sentiment shared by the *New York Times'* editors and the President and Vice President.

Hard cases make bad law—and whether we like it or not, this is a hard case. As we assess the cost to civil liberty, we cannot afford to overlook the cost of importing criminal due process limits into contexts where they are ill-suited and constitutionally unwarranted. This may well leave us vulnerable when the enemy returns—assuming, that is, we are at war.

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Yes. The So-called War on Terror Unnecessarily Sacrifices Constitutional Liberties.

By Colleen Connell



My 16-year-old son frequently wears a black T-shirt to school with the inscription, “My buddies went to Iraq to search for weapons of mass destruction and all they found was this lousy T-shirt.” My 14-year-old daughter uses the Internet to research Egypt, including its radical Islamic movement and the Muslim Brotherhood. My husband, also a lawyer, is negotiating a contract with a British firm operating (with U.S. government approval) in Iraq.

Do the day-to-day academic and employment activities of my family expose us to the risk of government spies tapping our phones, listening to our conversations, and monitoring our e-mails and our text messages? Unfortunately, the answer is “Yes.”

Recent press disclosures confirm that Americans who make/receive telephone calls from abroad, especially from mid-eastern countries, and citizens who oppose U.S. war efforts in Iraq have had their speech and conduct spied upon by the Bush Administration, trampling the rights of these citizens and defiling the constitutional protections that are the lifeblood of the democracy that the Administration claims to be fighting for in Iraq.

The Bush Administration’s so-called War on Terror has targeted the Constitution of the United States and innocent American citizens caught in the ever-expanding net of government surveillance of communications. If you are a young person and you think that POS—parents-over-shoulder—limits your freedom of expression and action,

the presence of GOS—government over shoulder—will curtail your freedom in profound and chilling ways that ultimately threaten the essence of our democracy.

In pursuing its foreign and domestic agenda, the Bush Administration has disregarded the substantive protections of individual liberty contained in the Bill of Rights. It also has defied the checks on presidential power that the framers explicitly included in the Constitution to prevent U.S. presidents from abusing citizens with the arbitrary power similar to that held by the English monarchy that George Washington, John and Abigail Adams, Thomas Jefferson, and many others rebelled against.

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A Bill of Particulars reveals the broad reach of the Administration’s attack on civil liberties, including, first, in late December, it was disclosed that the Administration had been tapping the phones of American citizens, who made or received telephone calls from abroad, *without* seeking the warrant required by the Fourth Amendment and without complying with the Foreign Intelligence Surveillance Act (FISA). Congress enacted FISA in 1978 after the revelation that President Nixon had wiretapped his political enemies and through this law sought “to prevent any future President from carrying out warrantless eavesdropping on Americans.”

Second, further disclosure revealed that this phone and e-mail surveillance captured and monitored calls/e-mails that were both initiated and received within the boundaries of the United States.

Third, in December of 2005 and in August and September of 2005 we learned that the Administration had been spying on peaceful American citizens who were active in anti-war efforts. The First Amendment to the Constitution protects the rights of Americans to peaceably assemble and to freely express their opposition to government policy and action.

Fourth, the President has claimed that, as Commander in Chief, he has unlimited and unchecked power to wage war as he sees fit, including using torturous interrogation techniques that disregard specific laws enacted by Congress requiring the humane treatment of prisoners and the specific provision of Article I of the Constitution that assigns to Congress, NOT the President, the power to set the terms and conditions for prisoners captured at war.

Fifth, U.S. citizen Jose Padilla has been imprisoned for more than three years, and he has been denied access to his lawyer for much of that time, contrary to the Fifth Amendment. In December 2005 the government finally charged Mr. Padilla with conspiracy (rather than the plot to explode a “dirty” bomb) and backed away from its previous claims that Mr. Padilla was too dangerous and too much of a threat to national security to try in a federal court. This prolonged delay in charging Mr. Padilla with any offense deprived him his Sixth Amendment right to be apprised of the charges against him, to receive a speedy trial on those offenses, and to confront the witnesses against him. When lawyers asked the federal

Many Current Counterterrorism Policies Do Threaten Civil Liberties, but the Question Is Simplistic and Misleading.

By John E. Finn



It is not difficult to find analyses that conclude current anti-terrorism efforts do compromise civil liberties¹, and hardly any more trouble to find analyses that submit they do not.² I incline toward the view that they do. My primary aim here, however, is to suggest a framework for approaching the question by identifying what kinds of information we need to reach a conclusion grounded in analysis instead of partisanship. We must ask a series of focused questions. First, what counts as an anti-terrorism policy? Second, precisely how do these policies implicate civil liberties? Which liberties are at risk, and how? And third, when are such compromises defensible?

Before I take up these questions, however, let's consider a more fundamental question. Why should we care? When we ask if anti-terrorism policies compromise civil liberties or pose a threat to the Constitution itself, we assume the question matters. If it does, it matters either because it is politically unwise for officials to say it does not, or it matters because we genuinely believe our impulse to self-preservation is also, as President Bush said following 9/11, "a fight for our principles, and our first responsibility is to live by them."

I would argue that President Bush was wrong. In a serious crisis brought about by terrorist attacks, we might think our primary obligation is to preserve human life. If our other commitments to constitutional principles, such as the protection of civil liberty or the

separation of powers, encumber our security, then it is simply a question of rank-ordering values—and in this case, choosing between survival and the First or Fourth Amendment is not so difficult a choice. In the end, it is too easy to forget that terms like "survival" and "public safety" are not mere abstractions.

Sometimes, then, our concern about anti-terrorism efforts and their effect on civil liberties may be misplaced. Public safety, when it is genuinely at risk, must rank higher on the scale than freedom of speech or trial by jury. And it might be better just to say so, instead of arguing that the Constitution authorizes whatever must be done or that the President possesses the "inherent" constitutional authority to do whatever is necessary to protect us or to defend the rule of law.³ Both of these approaches, I have argued elsewhere, pose a more serious threat to our commitment to the rule of law than occasionally and ruefully admitting there are things that trump even the Constitution.⁴

There is, however, a good reason to ask the original question. Answering it tells us about the value of constitutional principles and hence about the true price of survival. It leads us also to ask, does the current war on terrorism present us with the stark choice between survival and constitutional integrity? Just as importantly, in a constitutional democracy we must ask: who should have the authority to answer the question?

What Is Counterterrorism?

To fully appreciate the effect of counterterrorism policies on civil liberties, we must identify what those policies are. The USA PATRIOT Act, passed in the immediate aftermath of 9/11, has created perhaps the best-known current policies. The Act enhanced the government's powers of surveillance by changing some fifteen different federal statutes.

For example, it gave law enforcement authorities broad new powers to conduct "sneak and peak" searches, and another section of the Act expanded the FBI's authority to gain access to personnel records. On the other hand, not every provision of the PATRIOT Act implicates civil liberties, so it would be a mistake to pose the issue as a conflict between the PATRIOT Act itself and civil liberties.

In addition to the policy changes wrought by the USA PATRIOT Act, the Bush administration has made some controversial policy decisions in the war on terrorism. The President authorized the creation of military tribunals to try noncitizen "suspected terrorists." The President also authorized NSA wiretaps on international communications, bypassing the strictures of the Foreign Intelligence Surveillance Act of 1978 (FISA), apparently after the FISA court began to review wiretap requests with increasing rigor.⁵

In addition to these obvious counterterrorism efforts, other less well-known policies implicate civil liberties. This counterterrorism "regime" includes changes in the rules governing communications between suspected terrorists and their attorneys, in the rules governing the detention and interrogation of suspects, in the rules governing when and where the FBI can monitor organizations and individuals, and in the rules governing racial and ethnic profiling, as well as new laws attacking the financial structures of suspected terrorist organizations. It includes, too, significant changes in the internal organization of the nation's intelligence agencies, as well as the establishment of the Department of Homeland Security. And the regime extends to the private sector as well. For example, the FBI and the Defense

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courts to intervene and to issue the writ of habeas corpus (again a specific constitutional protection that requires the government to either release a prisoner or justify his detention), the Bush Administration disregarded the explicit language of the Constitution and claimed that the courts had no power to protect the constitutional rights of Americans.

Sixth, the Bush Administration has used an “extraordinary renditions” to seize people, drug them, and then covertly fly these individuals to countries known to use torture while interrogating prisoners. On several occasions, including a recent case involving a German citizen, the individuals captured and tortured have been totally innocent, something the Bush Administration has reluctantly acknowledged even while denying the use of rendition and torture.

Seventh, the Bush Administration has used secret prisons in former soviet-bloc countries to detain ghost prisoners and

to interrogate them, in violation of international laws and treaties ratified by the U.S. Senate.

Eighth, the so-called PATRIOT Act has expanded use of surveillance powers, enforcing more than 30,000 requests for individual financial and medical records.

And ninth, again under the PATRIOT Act, “sneak and peak” warrants have been used extensively, allowing federal agents to break into a person’s home or office and collect evidence, including DNA evidence found on family toothbrushes, without giving the target of those warrants an opportunity to challenge the legitimacy of the warrant.

Tenth, the press and the public have been barred from all immigration deportation hearings under the guise of protecting national security. Thus, the Administration tried to close even hearings involving deportation of long-time but undocumented workers from neighbor and trading partner Mexico. (The federal courts rejected this unconstitutional effort, noting that there is no

“national security” exception to the First Amendment right of the public and the press to attend a legal proceeding.)

Eleventh, the Administration has repeatedly refused to report on its activities to the Congress, thus denying Congress its lawful constitutional oversight.

And, finally, immediately after 9/11 almost 1000 persons were detained in the United States in often abusive and filthy conditions. None of these individuals were charged with terrorism or even conspiracy; at most the individuals were charged with overstaying their visas in the United States.

In summary, the Bush Administration has used the so-called War on Terror to promote its goal of expanding the power of the Presidency while undermining the powers of the Congress and the federal judiciary and while also disregarding the specific rights guaranteed by the Constitution. All of us should beware of unchecked governmental power. The framers fought a revolution to secure these precious rights, recognizing that, as Lord Acton concluded: “Power tends to corrupt and absolute power tends to corrupt absolutely.”

The Case of Jose Padilla

In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the Supreme Court ruled that Jose Padilla had filed his habeas petition in the wrong district court. He refiled his case and the trial court judge granted his habeas petition and ordered the government to release or try him. The Fourth U.S. Circuit Court of Appeals reversed that lower court decision in September 2005. Padilla again petitioned the U.S. Supreme Court to review his case. Meanwhile, in November 2005, the government charged Padilla in federal court with conspiracy to com-

mit terrorist acts. The U.S. Supreme Court granted a request to transfer him to civilian from military custody on January 4, 2006. On April 3, Padilla received only three of the four votes necessary to receive a Supreme Court hearing. Justice Kennedy filed a statement explaining the decision denying Padilla’s petition, joined by Chief Justice Roberts and Justice Stevens. In the statement, the justices expressed concerns about how the government had handled the case and also affirmed Padilla’s constitutional rights as a criminal defendant.

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Department have paid private contractors for access to records databases that include detailed personal information on citizens and noncitizens.⁶

The first challenge, then, in assessing whether counterterrorism policies compromise our commitment to civil liberties is one of definition. What is a counterterrorism policy? A narrow definition, centering on the PATRIOT Act, for example, might lead us to conclude that threats to our civil liberties, although important, are nonetheless exceptional, localized, and primarily a function of statutory changes in the administration of justice. A more expansive definition might lead us to conclude that threats to liberty transcend temporary changes in criminal procedure and extend to systemic and structural changes to government, arguably a more serious challenge to civil liberty, the Constitution, and the rule of law.

Do Counterterrorism Policies Compromise Civil Liberties?

Parts of the current counterterrorism regime are unobjectionable or only modestly change preexisting law. No great harm is done, for example, by criminalizing the possession of sizeable quantities of chemicals that are easily converted into chemical or biological weapons.

Other policies, however, should give us all pause, such as statutory provisions that substantially expand the government's authority to engage in electronic surveillance, and executive orders that permit intelligence agencies to secure wiretaps without a warrant. Just as troubling are policies that allow the government to detain foreigners indefinitely and without charge during a "national emergency" or which permit deporta-

tion of suspected terrorists without presenting evidence in a court of law. These policies implicate basic precepts of due process, privacy, and the First, Fourth, and Fifth Amendments, as well as other constitutional principles, such as constitutional review and democratic accountability. When we strike a balance between liberty and security, we should understand that the changes identified as problematic pose more than potential threats to our civil liberty. These changes strike at the very heart of the rule of law. They allow the government to act without explanation or reason. They do not "compromise" basic constitutional principles. They violate them because they challenge the most fundamental constitutional value—our tradition of transparency and accountability in government. Our commitment to the Constitution sometimes permits compromises to constitutional values, including the protection of civil liberties, but it never allows such restrictions to be made arbitrarily, secretly, and without public scrutiny. Insofar as the current counterterrorism regime compromises those values—and in some places it does—it represents a failure to abide, as President Bush said, by "first principles."

End Notes

1 Among the best is David Cole and James X. Dempsey, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (New York: The New Press, 2002).

2 See Kevin Cronin, "Balancing Act: A Comparative Look at National Security and Civil Liberties," *Journal of International Relations*, pp. 8-17 (Spring 2004).

3 See, for example, John Schmidt, "President had legal authority to OK taps," *Chicago Tribune*, (December 21, 2005).

4 John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (New York: Oxford University Press, 1991).

For Further Reading

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5 See "Bush was denied wiretaps, bypassed them," UPI, (December 26, 2005), <http://www.upi.com/NewsTrack/view.php?StoryID=20051226-122526-7310r>

6 See Shane Harris, "Administration—The Private Spy Among Us," *National Journal* (11-05-2005).

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