

Rights and Responsibilities, 2001

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Discussions of matters concerning public affairs are often couched in terms acquired from our legal culture. The implicit assumption is that both sides (rarely is there room for more) will state their position like lawyers in court, in the starkest possible way, drawing on whatever arguments they can marshal, even if these greatly distort the facts and vastly misrepresent the other side. In yesterday America, in the world before September 11, civil rights and public safety were often discussed in this way. On the one side, libertarians made strong, uncompromising cases for liberty. In effect, practically any suggestions made in the name of shoring up our safety, including the antiterrorism measures urged upon the country by a 1996 commission on national security, were severely criticized as unnecessary invasions of our freedoms. The government (aka Big Brother), not terror, was considered the main threat to liberty. On the other side, the political right characterized the ACLU and its sister organizations, liberal in general, as undermining the moral fabric of the country, destroying its social order, inviting terrorism.

In the weeks that followed September 11, the country pulled together. A strong spirit of community prevailed. Bipartisanship governed. Differences were not suppressed, but they were worked out. Posturing was largely replaced by a competition for who could do more and better for the nation by working with the other side.

Congress—working with the White House—sorted out where the new point of balance would be between our all too evident need to enhance public safety (especially facing the threat of terrorists using weapons of mass destruction) and our profound commitment to respect and uphold our rights. The old habits did not disappear. There were those who argued that practically any measure aimed at protecting the homeland was going to “shred the Constitution” and “do the terrorists’ work for them.” Others argued that Americans’ lifestyles had brought this crisis upon them. Jerry Falwell pointed a finger at “the pagans, and the abortionists, and the feminists, and the gays and the lesbians who are actively trying to make that an alternative lifestyle, the ACLU, People for the American Way, all of them who

have tried to secularize America.” But, as illustrated by the key documents that opened the public policy deliberations—the administration’s position outlined by Attorney General John Ashcroft and the counter-proposal by Democratic Senator Patrick Leahy (included below)—the main representatives of both sides lowered their voices and moved toward one another. Although differences continue to exist, as they ought to, they are couched in terms that leave the door open to civil dialogues, productive exchanges, and reasonable policies mindful of both safety and rights.

The Balance

A good place to start is to note that the Constitution has always been a living document and has been adapted to the changing needs of the times. This is evident if we recall that until the ACLU reinterpreted the First Amendment in the 1920s, it was hardly a steely protector of free speech. More dramatically, if we were to rely on the unchanging text of the Constitution, then of course we would have no right of privacy, which the Constitution does not even mention; we must recall that privacy is a right fashioned as recently as 1965! If we can create a whole new right out of the penumbra of the Constitution, we surely can refashion it some, not because we have just experienced the most devastating attack on our homeland ever, but because we face more and worse.

Even if we were to stick merely to the Founding Fathers’ text, the governing Fourth Amendment is not phrased in the absolute way the First is. It does not state that Congress “shall make no law allowing search and seizure” or anything remotely like it. It states that there be no *unreasonable* searches. It is one of only two rights-defining amendments that recognize, on the face of it, the importance of taking into account the public interest. Indeed, the courts have long recognized that our right to privacy must be weighed against our need for public safety (and public health).

The next step is to draw on this very general principle for more specific guidance as to when to give priority to privacy and when to public safety. Meeting major new challenges as they arise provides one criterion. Thus, when new privacy-invading technologies have been developed over recent years, we introduced massive new regu-

lations to protect medical privacy and some to enhance financial privacy. Now, there is a massive new threat to public safety that deserves new consideration.

Next, as we introduce new safety measures, we ought to focus on those that are minimally intrusive and highly productive in terms of public protection, and avoid those that have the opposite profile. It is perfectly reasonable to argue that if we allow public authorities—after they obtain a warrant—to tap phones and open mail, we shall also enable and allow them to monitor e-mail and read encrypted messages. As we allow police to scan crowds in public spaces, so we should allow computers. And we might consider retaining as spies agents who have an unsavory character.

Moreover, once we put our mind to it we can reduce the clash between the need for safety and the traditional formulation of our rights. Civil libertarians have opposed devices that allow authorities to pinpoint places from which people make cell phone calls. Rescuers find them very useful. Let's add an on/off switch. The ACLU opposed the introduction at airports of x-ray machines that can determine if people are carrying concealed weapons under their clothes. (Barry Steinhardt, associate director of the ACLU, stated that he fears custom agents could see you in your birthday suit—and put the pictures on the Internet.) Maybe now the ACLU will find these devices tolerable once it notes that in order to be scanned, people need to sign a consent form, and that the pictures are quite opaque.

At the same time, it is repugnant even to talk about detaining Arab Americans the way we did Japanese Americans during World War II. Requiring all Americans to carry government-issued ID cards at all times and stopping people at random to demand identification, common in Europe, is another measure that is both a gross violation of our basic rights and contributes very little to public safety.

Still other measures may require considerable deliberation. Stopping and questioning all Arab Americans constitutes a massive violation of privacy and does little for public safety other than squander police and FBI resources. However, paying special attention to young males with new flight licenses seeking to travel on a major airline who seem Middle-Eastern may be a kind of profiling that is justifiable. It

seems to meet the criteria often used by law: it is what a reasonable person would find, well, reasonable.

In all such deliberations, it is crucial to note that nations have not lost their liberty as a result of a small accumulation of increased safety measures that pushed them down a slippery slope to the unraveling of their constitutional rights; they lost their freedoms when public authorities failed to respond to urgent public needs. We face a major new challenge. To argue that most any strengthening of the devices and procedures used by public authorities to enhance public safety would “drive a stake through the heart of the Constitution” or “make us do the terrorists’ job for them by turning us into a people like them,” is going to stand in the way of engaging in carefully reasoned deliberations about how far we should go—and where no terrorists should make us dare to tread. (Harvard law professor Laurence Tribe discusses these issues below.)

The Specifics

Reasonable people can differ on the specific issues that are at stake. Sometimes there is room for true alarm. When it was suggested that immigrants should be able to be detained, without being charged or tried, for “indefinite” periods of time, this seemed to set a very worrisome precedent for dealing with people in a free society. At the same time, it makes sense to allow judges to extend the period suspects are detained if evidence is presented to a judge that indicates their release will endanger the public. And most people might have trouble understanding why the FBI is still not allowed to receive information the CIA collects overseas (on the grounds that it would violate our privacy law). Imagine that the CIA intercepts a conversation in a Middle Eastern country that indicates that bin Laden has just given the green light for the next attack, this one with a small nuclear device, to his American associates. It seems difficult to comprehend that this information will be kept from our domestic law enforcement authorities. The Constitution is not a suicide pact.

As these lines go to press, much attention has been paid, as it ought to have been, to the balance between public safety and rights such as the right to privacy, anonymity, due process, and freedom of movement. Much less attention has been given to military violations

of the First Amendment. For decades now (as Boston University professor and longtime journalist Robert Zelnick details in this issue), based largely on the way the press helped generate opposition to the war in Vietnam, the armed forces have drawn the lesson that the military is better off if the public is informed as little as possible about its plans and actions. We have early indications that the same will be true for the war against terrorism. This tough issue deserves more attention. Here too we must find a better point of balance, which most likely requires more access for and disclosure to the media. Many disastrous operations—concocted by planners with little understanding of the cultures and societies involved, trained on computer war games—would gain a healthy reality check if they were dissected by the fourth estate. I am not arguing for disclosing everything. Naming CIA agents who work covertly in other countries is criminal, and I would ban the publication of how to make nuclear weapons in one's basement. But there is much more room for disclosure without violating such taboos.

Immigration rights bring up a complex set of issues that deserve airing well beyond the issues concerning public safety (see essays by Mark Krikorian of the Center for Immigration Studies, Douglas Kmiec from the Columbus School of Law at Catholic University, and the Georgetown University Law Center's David Cole). The difficulties start with the observations that everyone who is in the United States (or for that matter, any place) has some inalienable rights, say those enumerated in the UN Universal Declaration of Human Rights. At the same time, few disagree that immigrants do not have all the rights of American citizens—for instance, they cannot vote. (In some other countries they are accorded these rights in local elections.) Where to draw the line has been a difficult and highly charged matter. It seems to require especially urgent attention not merely because practically all those who attacked us were foreigners, but also because we seem to mix harsh measures (deporting immigrants who committed a minor crime even if married to Americans and if they have American-born children) with very lax ones (often allowing illegal immigrants who have been granted a hearing to roam free until the hearing and not acting when they simply do not show up, in the many thousands). Possible future deliberations have to draw a much sharper line between legal immigrants and illegal “immigrants.” The former have

come to these shores after being relatively carefully reviewed (including their criminal record), often after having waited for many years for their turn, with the understanding that they will become full-fledged Americans in due process. Illegal “immigrants” are foreigners who first entered the U.S. by violating the law or who stayed beyond their allotted time, often without any or only minimal preliminary screening, jumping the long queue of their own countrymen and women, and to whom no promise of citizenship was ever made. Treating immigrants and law-violating aliens quite differently seems to make sense. (It might be said that we need the millions of illegal “immigrants” for the work Americans do not wish to do. In that case, we should increase the level of legal, scrutinized, immigration rather than allow those who came here only on a tourist or student visa to make that decision for us.)

The discussion of racial profiling has been especially troubling, starting with the term itself. Whatever group one has in mind—Muslim Americans, Arab Americans, or Middle Easterners—does not constitute a race (the United States census counts them as whites). Any way one looks at these groups, they are either a religious or ethnic group, but not a race. By referring to the matter at hand as one that concerns racial rather than ethnic profiling, one plays on the strong emotion the abuse of African Americans invokes, which has no equivalent in our history. Next, in the tradition of extreme advocacy, reference is frequently made in this context to the mass detention of Japanese Americans during World War II—warning us that we should not treat our Middle-Eastern citizens this way—and in the process disregarding the fact that we have made great progress in this matter, to the point that nobody—not even on the extreme right—as much as mentioned anything remotely resembling such acts. It would have been unacceptable even if public authorities merely asked a few questions of the millions of Muslim Americans, despite the fact that all the terrorists, as far as we knew in the days following September 11, were members of this group.

However, given that there were strong indications that other hijackings or chemical or biological attacks (using crop dusters) might well be about to strike, it would have been extremely unreasonable not to ask a few extra questions of Middle Eastern young male pilots

with recent licenses about to mount long-distance flights. Just think: if this marker had not been used and authorities had to question all young males or even merely all pilots, the screening would have taken a hundred times longer—allowing ample time for the terrorists lying in wait to act. The law has long recognized the reasonable person rule, permitting that which a reasonable person would do. If using the ethnic marker under the said circumstances was unreasonable, it sure is hard to understand what reasonable is. (These are some of the issues that *Slate*'s Michael Kinsley and John Derbyshire of the *National Review* confront in their essays.)

Special Interests

In the recent intensive debate over which laws to enact, little attention has been paid to the fact that enacting them is at best half the story. Passing laws that are supposed to enhance our safety turns into a bitter illusion when special interests (to the extent that they dared not block their enactment) prevent their enforcement. If the enforcement of civil rights needs to mind public safety, surely profits ought to yield to national security.

In 1996 Congress enacted an immigration act aimed at preventing terrorism. The act responded to the finding that about 3.5 million foreigners who came to this country on temporary visas simply stayed once these expired. These illegal immigrants included 16 out of 19 of the terrorists directly involved in the September 11 attack on America. The law called for setting up a computerized entry-exit system to provide information on aliens entering and leaving the country, and required educational institutions to provide the INS with up-to-date information on foreign students. However, after objections by border towns' Chambers of Commerce, the legislation was gutted to remove the provision providing for the computerized tracking system. What is now needed is more than verifying whether those whose visas expired left the country (as this is written, the U.S., unlike many other free societies, has no record of who is leaving). If such temporary visitors don't depart, they must be located and deported. These recommended measures do not reflect an anti-immigration sentiment; it is grossly unfair that those who have often been waiting for many years to gain the right to immigrate to the U.S. remain in queue while those who stay in the U.S. illegally become de

facto immigrants. One could readily imagine increasing substantially the number of legal immigrants if desired and still deport those who violated the law.

Also, temporary visas are granted for specific purposes, say for a period of study. Better enforcement is needed to ensure that educational institutions comply with the requirement to report to the INS when those who came here on such a visa do not show up at their doors. They are in the U.S. on false pretenses from day one. At least we need to learn what they are up to. Given the new reality, one hopes that both business and educational institutions would now fully support such new measures and cease to lobby against them.

The airlines have effectively blocked or diluted numerous security measures recommended by various commissions and public authorities, not because they are callous but because of the costs they impose on the strapped industry. In 1990, Congress wanted to introduce background checks on all airport employees, but as Walter V. Robinson and Glen Johnson of the *Boston Globe* report, the airlines hired former director of the FBI and CIA William H. Webster to lobby against these safety measures. As a result, they were much curtailed. In 1996, a measure that would have made for a much tighter screening of baggage was greatly scaled back following major campaign contributions by the airlines.

Furthermore, the airlines relegated airport security to small profit-hungry companies that hired the cheapest labor they could find, barely checked their backgrounds, and gave them minimal training and slight supervision. When these guardians of our security failed practically all objective tests of their surveillance, the airlines pressured the Federal Aviation Administration to rely only on what in effect are sham tests. (From then on, the FAA used in its tests the same device, a huge make-believe bomb, and often sent the same tester through the same screening spots.) The airline industry might well be unable to foot the bill for the kind of security we now require. It should hence insist that the federal government take over airport safety rather than participate in the con game that has been much of airline security before September 11, 2001.

The federal government long feared that terrorists' communications would become impenetrable once they got their hands on top-of-the-line encryption systems. It is widely believed, although this obviously cannot be proven, that even our all-powerful National Security Agency is unable to crack these coded messages. In any event, the FBI and CIA strongly favored either not exporting such powerful encryption software or including in it a "back door" that would allow authorities to penetrate these systems. However, the software industry pressured Congress time and again to scale back whatever export limitations were in place and successfully prevented the introduction of back doors.

The industry did not rest its case on its desire for fatter profits. It, along with civil libertarians, argued that Big Brother wanted to snoop on innocent people, ignoring that the government was seeking the same powers in cyberspace that it already had in the world of phones and mail (e.g., eavesdropping on communications only after a warrant was granted by a court). The industry also maintained that if it did not sell top-of-the-line encryption systems overseas, some other country would, refusing to take into account that several other nations have introduced back doors into their systems or could not be trusted to have refrained from doing so. Anyhow, the industry did not much rely on the strength of its arguments; to ensure that it had its way, it made substantial campaign contributions. The last export control to be removed, in 1999, was announced on a day before a major fundraiser was to take place in Silicon Valley. One reason we had no warning before September 11 is that terrorists can now use top-of-the-line encryption.

But all this was before. Perhaps, as Jackson Diehl of the *Washington Post* claims later in this issue, special interests will begin to lose their political clout in this new era. Hopefully, the business community will now fully support the introduction of new security measures (which, after all, protect their workers, managers, and customers). And to the extent that these measures are beyond what an industry can afford, they will lobby for the government to cover the costs rather than dilute the measures. And members of Congress, if they cannot find it in their hearts to drastically reform campaign financing, at least will continue to do for all measures that concern public safety what

they did in the first weeks after the assault: refuse to accept donations or solicit any.

The Three-Legged Society

Communitarians have long been interested in the proper division of labor, resources, and authority among the government, the private sector, and the community (voluntary associations and religious institutions included). Over the last few years, much has been made about the need to steer more services to the private sector and to communities. Whether we leaned too far in this direction was an issue some of us have been concerned about, even before the assault on America. Privatization of prisons raised numerous issues, as did the ways we privatized the purchase of plutonium from Russia and removed export controls on high power technologies of great interest to foreign powers to accommodate business (see *Next: The Road to the Good Society* for more documentation). Albert R. Hunt of the *Wall Street Journal* has some wise words on how we're now turning back to the public sector for guidance in the wake of September 11.

In addition to security, public health is a communitarian service of the highest order. It concerns itself with those matters that affect all of us rather than just certain individuals. When individual desires conflict with the needs of the community, say if parents neglect the immunization of their children, or libertarians argue that each person, rather than the city, should fluoridate their water (even though the public is stuck with many of the costs of dental care), public health is there to speak for the rest of us. And of course it deals with infectious diseases and the threat of biological warfare. As Pulitzer Prize-winning journalist Laurie Garrett shows in this issue, the time has come to accord much more standing, resources, and authority to public health.

Homeland Security Starts Overseas

When all is said and done, there is something profoundly wrong about separating these domestic deliberations from discussions about how we are going to try to prevent terrorism from rising (rather than "hardening" the targets they seek to strike). Here the most telling observation is that free societies rear or sponsor few international terrorists; authoritarian and totalitarian nations are their primary

homes. If we try to deal with terrorist attacks mainly by heightening our defenses, we shall need to curb even more of our freedoms of movement, of assembly, of commerce. Ultimately we shall turn into a garrison state and still not be safe. Britain enacted all kinds of laws limiting rights to protect itself from Irish terrorists, and they still shot a missile at their White House and planted a bomb next to their CIA headquarters. Israelis fear going to malls, bus stops, and movies despite all the measures they have taken. Most importantly, if we succeed in effectively blocking one form of attack—by putting armed marshals on airlines, for example—we shall shift the terrorists' efforts to other avenues of attack. (This is what happened when we made it more difficult to place car bombs; they took to the air.) The only way to cut off all the heads of the terrorism Hydra is to strike at its heart.

The way to greatly curtail international terrorism is to do for more countries what we did for Japan after 1945 and Serbia most recently: foster freedom. In the process we may have to enter these countries and remove their tyrants (and disable their most dangerous facilities for weapons of mass destruction). We would, of course, in the process serve not merely our safety but also do well by the oppressed people of these countries.

It is argued that if we remove a Saddam, or Qaddafi, or the Taliban junta, they are merely going to be replaced by another terrorist-harboring tyrant. This may well be true. We will then need to replace these, until the new group that reflects the people of these nations, and is willing to open up these countries, arises, maybe only after two or three rounds. I do not mean that we should occupy these countries and hold them until they democratize, but that we ought to change our policy of not attacking their heads and their facilities. To put it more bluntly, taking out tyrants is a hell of a lot more ethical than killing hordes of civilians, even if only as "collateral" damage. And it is true that we cannot make them into full blown democracies. However, if they could be merely opened up to a free flow of ideas, people, and commerce, conditions under which democracy may evolve—and international terrorism minimized— would have been achieved. We must combine prevention overseas with stronger protection of our homeland, or we shall lose both some of our rights and much of our safety.