

The Responsive Community

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FIRST WORDS

From the Editors

Balancing individual rights with responsibilities to the common good has been this quarterly's *raison d'être* since its founding in 1990. Following the assault on America, the tension between civil rights and public safety dominated public discourse, and we wondered how we could best contribute to this dialogue. We could quickly flag some of the most salient issues and urgent considerations, or we could allow time for the dust to settle, for considered deliberations, for the drawing of lasting conclusions. We decided to do both. This issue—put together in a week, drawing largely from pre-existing resources—is not our last word, not even an intermediary one, but reflects our first thoughts. We are too raw to draw conclusions; for now we merely seek to add resources and some preliminary thoughts to this vital, and very communitarian, dialogue.

*A.E. and J.M.
Washington, DC, October 2001*

Rights and Responsibilities, 2001

Amitai Etzioni

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 *un*reasonable 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.

RIGHTS AND SAFETY: AN OVERVIEW

“A Clear and Present Danger”

Attorney General John D. Ashcroft

The following is excerpted from Attorney General Ashcroft's testimony before the House Committee on the Judiciary on September 24, 2001.

Mr. Chairman and members of the committee, the American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist acts. The danger that darkened the United States of America and the civilized world on September 11th did not pass with the atrocities committed that day. They require that we provide law enforcement with the tools necessary to identify, dismantle, disrupt and punish terrorist organizations before they strike again.

Terrorism is a clear and present danger to Americans today. Intelligence information available to the FBI indicates a potential for additional terrorist incidents. As a result, the FBI has requested through the national threat warning system that all law enforcement agencies nationwide be on heightened alert.

When we have threat information about a specific target, we share that information with appropriate state and local authorities. We have contacted several city and state officials over the last 13 days to alert them to potential threats.

We also act on intelligence information to neutralize potential terrorist attacks using specific methods. Yesterday the FBI issued a

nationwide alert based on information they received indicating the possibility of attacks using crop-dusting aircraft. The FBI assesses the uses of this type of aircraft to distribute chemical or biological weapons of mass destruction as potential threats to Americans. We have no clear indication of the time or place of any such attack.

The FBI has confirmed that Mohammed Atta, one of the suspected hijackers, was acquiring knowledge of crop-dusting aircraft prior to the attacks on September 11. The search of computers, computer disks and personal baggage of another individual whom we have in custody revealed a significant amount of information downloaded from the Internet about aerial application of pesticides or crop-dusting.

At our request, the Federal Aviation Administration has grounded such aircraft until midnight tonight. In addition to its own preventative measures, the FBI has strongly recommended that state, local and other federal law enforcement organizations take steps to identify crop-dusting aircraft in their jurisdictions, and ensure that they are secured.

I also urge Americans to notify immediately the FBI of any suspicious circumstances that may come to their attention regarding crop-dusting aircraft, or any other possible terrorist threat. The FBI Web site is . . . www.ifccfbi.org. Our toll free telephone number is 866-483- 5137. . . .

The highly coordinated attacks of September 11 make it clear that terrorism is the activity of expertly organized, highly coordinated, and well financed organizations and networks. These organizations operate across borders to advance their ideological agendas. They benefit from the shelter and protection of like-minded regimes. They are undeterred by the threat of criminal sanctions, and they are willing to sacrifice the lives of their members in order to take the lives of innocent citizens of free nations.

This new terrorist threat to Americans on our soil is a turning point in American history. It's a new challenge for law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor. It is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and to take action.

The death tolls are too high, the consequences too great. We must prevent first—we must prosecute second.

The fight against terrorism is now the highest priority of the Department of Justice. As we do in each and every law enforcement mission we undertake, we are conducting this effort with a total commitment to protect the rights and privacy of all Americans and the constitutional protections we hold dear.

In the past when American law enforcement confronted challenges to our safety and security from espionage, drug trafficking and organized crime, we have met those challenges in ways that preserve our fundamental freedoms and civil liberties. Today we seek to meet the challenge of terrorism within our borders and targeted at our friends and neighbors with the same careful regard for the constitutional rights of Americans and respect for all human beings.

Just as American rights and freedoms have been preserved throughout previous law enforcement campaigns, they must be preserved throughout this war on terrorism.

This Justice Department will never waver in its defense of the Constitution, or relent in our defense of civil rights. The American spirit that rose from the rubble in New York knows no prejudice, and defies division by race, ethnicity or religion. A spirit which binds us and the values that define us will light Americans' path from this darkness.

At the Department of Justice, we are charged with defending Americans' lives and liberties. We are asked to wage war against terrorism within our own borders. Today we seek to enlist your assistance, for we seek new laws against America's enemies, foreign and domestic.

As the members of this committee understand, the deficiencies in our current laws on terrorism reflect two facts. First, our laws fail to make defeating terrorism a national priority. Indeed, we have tougher laws against organized crime and drug trafficking than terrorism. Second, technology has dramatically outpaced our statutes.

Law enforcement tools created decades ago were crafted for rotary telephone—not e-mail, the Internet, mobile communications

and voice mail. Every day that passes with outdated statutes and the old rules of engagement—each day that so passes is a day that terrorists have a competitive advantage. Until Congress makes these changes, we are fighting an unnecessarily uphill battle. Members of the committee, I regret to inform you that we are today sending our troops into the modern field of battle with antique weapons. It is not a prescription for victory.

The antiterrorism proposals that have been submitted by the administration represent carefully balanced, long-overdue improvements to our capacity to combat terrorism. It is not a wish list; it is a modest set of proposals—essential proposals focusing on five broad objectives, which I will briefly summarize.

First, law enforcement needs a strengthened and streamlined ability for our intelligence-gathering agencies to gather the information necessary to disrupt, weaken and eliminate the infrastructure of terrorist organizations. Critically we also need the authority for our law enforcement to share vital information with our national security agencies in order to prevent future terrorist attacks.

Terrorist organizations have increasingly used technology to facilitate their criminal acts and hide their communications from law enforcement. Intelligence-gathering laws that were written for an era of land-line telephone communications are ill-adapted for use in communications over multiple cell phones and computer networks—communications that are also carried by multiple telecommunications providers located in different jurisdictions.

Terrorists are trained to change cell phones frequently, to route e-mail through different Internet computers in order to defeat surveillance. Our proposal creates a more efficient technology neutral standard for intelligence-gathering, ensuring that law enforcement's ability to trace the communications of terrorists over cell phones, computer networks and the new technologies that may be developed in the years ahead. These changes would streamline intelligence-gathering procedures only. We do not seek changes in the underlying protections in the law for the privacy of law-abiding citizens. The information captured by the proposed technology-neutral standard would be limited to the kind of information you might find in a phone

bill, such as the phone numbers dialed by a particular telephone. The content of these communications in this setting would remain off-limits to monitoring by intelligence authorities, except under the current legal standards where content is available under the law which we now use.

Our proposal would allow a federal court to issue a single order that would apply to all providers in the communications chain, including those outside the region where the court is located. We need speed in identifying and tracking down terrorists. Time is of the essence. The ability of law enforcement to trace communications into jurisdictions without obtaining an additional court order can be the difference between life and death for American citizens.

We are not asking the law to expand; just to grow as technology grows. This information has historically been available when criminals used pre-digital technologies. This same information should be available to law enforcement officials today.

Second, we must make fighting terrorism a national priority in our criminal justice system. In his speech to the Congress, President Bush said that Osama bin Laden's terrorist group al Qaeda is to terror what the mafia is to organized crime. However, our current laws make it easier to prosecute members of organized crime than to crack down on terrorists who can kill thousands of Americans in a single day. The same is true of drug traffickers and individuals involved in espionage. Our laws treat these criminals, and those who aid and abet them, more severely than our laws treat terrorists.

We would make harboring a terrorist a crime. Currently, for instance, harboring persons engaged in espionage is a specific criminal offense, but harboring terrorists is not. Given the wide terrorist network suspected of participating in the September 11th attacks, both in the United States and in other countries, we must punish anyone who harbors a terrorist. Terrorists can run, but they should have no place to hide. Our proposal also increases the penalties for conspiracy to commit terrorist acts to a serious level, as we have done for many drug crimes.

Third, we seek to enhance the authority of the Immigration and Naturalization Service to detain or remove suspected alien terrorists

from within our borders. The ability of alien terrorists to move freely across our borders and operate within the United States is critical to their capacity to inflict damage on our citizens and facilities. Under current law, the existing grounds for removal of aliens for terrorism are limited to direct material support of an individual terrorist. We propose to expand these grounds for removal to include material support to terrorist organizations. We propose that any alien that provides material support to an organization that he or she knows or should know is a terrorist organization should be subject to removal from the United States.

Fourth, law enforcement must be able to follow the money in order to identify and neutralize terrorist networks. Sophisticated terrorist operations require substantial financial resources. On Sunday evening, President Bush signed a new executive order under the International Emergency Economic Powers Act, IEEPA, blocking the assets and the transactions of individuals and organizations with terrorist organizations and other business organizations that support terrorism. President Bush's new executive order will allow intelligence, law enforcement and financial regulatory agencies to follow the money trail to the terrorists and to freeze the money to disrupt their actions. This executive order means that the United States banks that have assets of these groups or individuals must freeze their accounts. And United States citizens or businesses are prohibited from doing businesses with those accounts.

At present, the president's powers are limited to freezing assets and blocking transactions with terrorist organizations. We need the capacity for more than a freeze. We must be able to seize. Doing business with terrorist organizations must be a losing proposition. Terrorist financiers must pay a price for their support of terrorism which kills innocent Americans.

Consistent with the president's action yesterday and his statements this morning, our proposal gives law enforcement the ability to seize the terrorists assets. Further, criminal liability is imposed on those who knowingly engage in financial transactions or money laundering involving the proceeds of terrorist acts.

Finally, we seek the ability for the president of the United States and the Department of Justice to provide swift emergency relief to the victims of terrorism and their families.

Mr. Chairman, I want you to know that the investigation into the acts of September 11 is ongoing, moving aggressively forward. To date the FBI and INS have arrested or detained 352 individuals . . . there are other individuals—392—who remain at large, because we think they have . . . information that could be helpful to the investigation.

The investigation has yielded 324 searches, 103 court orders, 3410 subpoenas, and the potential tips are still coming in to the Web site and the 1-800 hotline. The Web site has received almost 80,000 potential tips; the hotline, almost 15,000.

Now it falls to us, in the name of freedom and those who cherish it, to ensure our nation's capacity to defend ourselves from terrorists. Today I urge the Congress, I call upon the Congress to act, to strengthen our ability to fight this evil wherever it exists, and to ensure that the line between the civil and the savage, so brightly drawn on September 11, is never crossed again.

A Vision for Uniting and Strengthening America

Senator Patrick Leahy

The following is a summary of Senator Leahy's Uniting and Strengthening of America (USA) Act.

Strengthening Our Domestic Security Against Terrorist Acts

Authorize the Attorney General to establish an FBI Office for Counterterrorism and Homeland Security headed by a Senate-confirmed Deputy FBI Director to coordinate a National Strategy for Counterterrorism and Homeland Security;

Authorize the Director of OMB, in consultation with the Attorney General and the Assistant to the President for National Security Affairs, to prepare a single National Counterterrorism and Homeland Security Program Budget for submission to Congress;

Establish an FBI Security Officer Career Program;

Establish a Counterterrorism Fund in the Treasury of the United States to reimburse Justice Department components for any costs incurred in connection with providing support to counter, investigate, or prosecute domestic or international terrorism;

Sense of the Congress condemning hate crimes and violence against Arab-Americans, Muslim Americans, and Americans from South Asia.

Updating and Enhancing Surveillance Procedures Within Constitutional Bounds

Add to offense predicates for criminal wiretaps: terrorism crimes and felony violations of 18 U.S.C. §1030 (relating to computer fraud and abuse);

Clarify circumstances for sharing of information obtained from criminal wiretaps with intelligence community by amending 18 U.S.C. § 2517(1);

Update of pen register and trap and trace device provisions by allowing nationwide service of orders, clarifying application of such orders to computer and other electronic transmis-

sions, and enhancing judicial review of basis for issuance of order;

Authorize “roving wiretap” under FISA for surveillance of foreign agents, including suspected international terrorists;

Authorize the FBI Director to expedite employment of translators to support FBI counterterrorism investigations and operations;

Extend FISA electronic surveillance (not search) renewal period from 90 days to one year for non-US persons who are officers or employees of foreign governments;

Increase from seven to fourteen the number of federal judges designated by the Chief Justice to serve on the FISA Court;

Increase and fully fund the FBI’s Technical Support Center established in the Anti-Terrorism and Effective Death Penalty Act of 1996.

Stopping Financial Support For Terrorists by Strengthening Money Laundering Laws

Add terrorism, terrorism support, and foreign corruption offenses to offense predicates for money laundering;

Add anti-money laundering measures for United States bank accounts that are used by foreign persons;

Grant United States courts long arm jurisdiction over foreign persons in civil money laundering cases;

Add foreign banks to the definition of financial institutions under the money laundering statutes;

Require the Secretary of the Treasury to issue regulations to ensure that concentration accounts are not used to hide the identity of customers who transfer funds;

Allow the government to charge multiple money laundering transactions in a single count;

Provide for forfeiture of funds deposited in United States interbank accounts through foreign banks;

Allow the Secretary of the Treasury to impose special reporting requirements and other measures for jurisdictions, financial institutions or international transactions of primary money laundering concern;

Grant financial institutions civil immunity for reporting suspected money laundering activity to the government, and prohibit financial institutions and government officers from disclosing such reports to persons involved in suspicious transactions;

Grant financial institutions civil immunity for disclosing suspicions of criminal wrongdoing in a written employment reference on a current or former employee;

Create penalties for violations of geographic targeting orders and certain record-keeping requirements, and lengthen the effective period of geographic targeting orders;

Sense of the Congress that U.S. should encourage efforts by foreign governments to combat money laundering and official corruption.

Tightening Security On the Northern Border

Waive cap on personnel assigned to Immigration and Naturalization Service to address security needs along the Northern Border;

Authorize the tripling of the number of Border Patrol and U.S. Customs Service personnel assigned to each State along the Northern Border;

Allot additional funding for technological improvements and acquire additional equipment to enhance monitoring of cross-border traffic;

Provide the State Department and INS with access to the National Crime Information Center (NCIC) to determine whether visa applicants and applicants for admission to the United States have criminal history records.

Removing Obstacles to Investigating Terrorism

Clarify standards of professional conduct that govern attorneys for the Federal Government to ensure that Federal prosecutors and agents can engage in traditional covert activities without running afoul of State bar rules;

Direct the Judicial Conference of the United States to develop uniform national rules of professional conduct to govern areas in which local rules may interfere with effective Federal law enforcement;

Eliminate statute of limitations for certain international terrorism offenses;

Reimburse United States counterterrorism law enforcement and intelligence community personnel for professional liability insurance;

Provide special “danger pay” allowances for FBI agents in hazardous duty locations outside the United States, as is provided for agents of the Drug Enforcement Administration;

Permit the FBI to enter into cooperative projects with foreign countries to improve law enforcement or intelligence operations;

Authorize the Attorney General to offer rewards—payments to individuals who offer information pursuant to a public advertisement—to gather information to combat terrorism and defend the nation against terrorist acts.

Protecting Victims of Terrorism and Families of Public Safety Officers

Streamline the Public Safety Officers’ Benefits application process for family members of law enforcement officers, firefighters, and emergency personnel who perish or suffer great injury in connection with prevention, investigation, rescue or recovery efforts related to a terrorist attack;

Authorize the Office for Victims of Crime (OVC) to use up to 50 percent of the amounts remaining in the Crime Victims Fund in FY2002, after regular distributions, for the benefit of the victims of the September 11 attacks, and to replenish the

antiterrorism emergency reserve by setting aside up to \$50 million;

Give OVC the flexibility to deliver timely and critically-needed assistance to victims of terrorism and mass violence occurring within the United States and otherwise improve the manner in which the Crime Victims Fund is managed and preserved;

Provide enhanced retirement benefits to career law enforcement officers and Federal prosecutors, who may be involved in protecting against terrorist attacks and investigating and prosecuting terrorism cases.

Increase Information Sharing for Critical Infrastructure Protection

Expand DOJ Regional Information Sharing Systems (RISS) Program to facilitate information sharing among Federal, State and local law enforcement agencies to investigate and prosecute terrorist conspiracies and activities;

Limit disclosure of critical infrastructure information voluntarily submitted to government agencies under agreement of confidentiality if release would inhibit voluntary provision of such information in the future, and the information aids the government in responding to terrorist threats and fulfilling its national security mission;

Authorize establishment of cybersecurity working groups with Federal employees and outside organizations.

Strengthen Criminal Laws Against Terrorism and Regulate Biological Weapons

Add certain terrorism offenses to definition of racketeering activity under the RICO statute;

Prohibit crimes of terrorism and violence directed against mass transportation systems;

Expand criminal penalties for communication of false information concerning biological weapons attacks;

Clarify required reporting of and restriction on possession of biological agents and toxins.

We Can Strike a Balance on Civil Liberties

Laurence H. Tribe

The monstrous attack on America that took the lives of thousands on September 11, 2001 sent waves of anguish through the nation, setting in motion a response whose outlines we are just beginning to sketch. The way we complete that sketch will determine whether the terrorists will destroy, more than lives and towering structures, the very foundations of our freedom.

To watch Congress take up a complex set of antiterrorism measures with lightning speed, with the usually lumbering Senate passing the whole legislative package in under 30 minutes, is a refreshing change. But institutional checks against intemperate action are there for a reason. David Hume, in his “Enquiries,” said justice must be suspended in times of war. Our Constitution’s approach is different, specifying the few limited areas—like the quartering of soldiers in private homes—where a wartime exception is made, and treating constitutional principles as otherwise universally applicable. The Constitution is written mostly in measured rather than absolute terms. Witness the ban on “unreasonable” searches and seizures. As Chief Justice William Rehnquist wrote, “The laws will . . . not be silent in time of war, but they will speak with a somewhat different voice.” Given the Constitution’s flexibility, there can be no excuse for not subjecting all our wartime practices to its scrutiny.

That said, some proposals, being overdue and entirely constitutional responses to technological change, must be enacted promptly. Existing provisions dealing with biological threats have not kept pace with bioterrorism and should be broadened. Cell phones have made wiretap warrants limited to particular phone lines obsolete; wiretap authority applying to a suspect personally, and regardless of the phone he uses, is sensible and constitutional. So, too, if search warrants suffice to seize non-voicemail messages, they should suffice to seize stored voicemail.

New legislation need not be limited to measures that catch up with technology. Asset forfeiture and other provisions of our anti-racketeering laws should be extended to terrorist groups. Terrorist offenses should be subjected to enhanced penalties and denied the

shield of statutes of limitations. Congress should add preventive steps providing greater security, including federalizing airport check-ins, more armed federal marshals on airplanes and trains, tightening federal controls on crop dusters and other private aircraft, and enlarging the budget for hiring and training counterterrorism infiltrators fluent in the suspects' languages.

Other proposals should be enacted only after tightening safeguards against abuse. For instance, measures to increase sharing of wiretap and other surveillance information within the intelligence community need controls to prevent a recurrence of the FBI's infamous leaks about Martin Luther King's personal life.

But when asked to confer open-ended powers of a sort that governments crave, Congress should put on the brakes. The Anti-Terrorism Act of 2001 would, for example, give government sweeping authority to detain without bail, and for an indefinite time, any alien—even one whom there is no basis to deport—citing only “reason to believe” the alien “may” endanger national security.” That language is so vague that the existence of judicial review would seem to provide no meaningful safeguard against abuse.

In the same spirit, the act renders deportable any permanent resident alien who ever contributed to a domestic group, including one not then designated a terrorist organization, any subgroup of which ever threatened to use a weapon against person or property. That would make resident aliens deportable if they contributed to any of several pro-life organizations, for example. Those provisions endanger freedom of political association and must be narrowed.

In at least one crucial respect, the response to the terrorist attack shows a regard for human rights lacking in our response to Pearl Harbor, when we interned Americans of Japanese descent, none of whom had been accused of wrongdoing. How different was the sight of New York Mayor Rudolph Giuliani, soon followed by President Bush, appealing eloquently to Americans not to seek revenge on their fellow citizens who happen to be Muslims.

Grassroots reactions in this instance have lagged behind our political leaders, as vigilante attacks mount and increasing numbers call for ethnic profiling of Arabs and Arab-Americans. But there is no

sound law-enforcement rationale for detention by visual association, for there exists face-recognition software for picking individuals out of crowds far more efficiently and accurately than by the crude use of racial characteristics. Such face-recognition software can and should be deployed—and improved.

There is, of course, a built-in political check when stringent security measures affect us all equally. When Congress weighs the virtues of proposals that would enable the authorities to seize a suspect's voicemail messages or eavesdrop on e-mail communications, we can be reasonably confident the scales aren't unfairly tipped against individual privacy. But there is danger, far from trivial, that the laws we enact today, in response to yesterday's terrorist attack, will move the baseline of privacy expectations against which the tools proposed to deal with tomorrow's terrorist attack are assessed.

When the Supreme Court held in June that using infrared technology to measure heat emanating from a home to discover what is inside constitutes a search—and is thus in violation of the Fourth Amendment absent a valid warrant—it circumscribed the “power of technology to shrink the realm of guaranteed privacy.” But it also cautioned that, once any technology is “in general public use,” its employment by law enforcement agencies to pierce personal privacy might no longer count as a “search” at all. In fact, the public's tolerance for just a bit more government surveillance will grow as authority previously ceded sets an ever-moving precedent. Preventing this phenomenon altogether would be a tall order. At least, we should limit the momentum of measures adopted in an emergency by making all the powers we grant temporary, and designed to lapse unless re-enacted by Congress.

It's possible, of course, that what Congress fails to cut back, the Supreme Court will strike down. But even if we could count on the Rehnquist Court's misguided belief that it has all the answers, we should act on a theory of “better safe than sorry,” and resist the temptation to trust the judiciary to trim the excess. In any event, passing the buck to judges nurtures the undemocratic myth that courts are the sole custodians of constitutional truth.

It is “We the People” in whose name the Constitution was ordained and established; it is we who bear the responsibility to live by

it even when the temptation to set it aside seems irresistible. It might be nice if there were a mast to which we could tie ourselves—as Ulysses did to steel himself against the call of the Sirens—to assure the survival of liberty and equality, but there is none. With or without a Supreme Court steadfastly dedicated to civil rights and liberties, each of us must follow an inner compass that points to the Constitution’s true north.

SPECIFIC ISSUES

SURVEILLANCE

A Primer on Antiterrorism Technology

Thomas E. Weber

In the weeks and months ahead, as the shock waves from last month's horrific attacks continue to shake the world, one of the difficult questions will be this: How can terrorism be thwarted? Political and military approaches, obviously, will be brought to bear. But technology will be at issue too.

As technologies are scrutinized for their potential to defend lives, two separate threads are likely to emerge. One will involve technologies that can be used to identify aggressors. The other will include technologies that could conceivably assist attacks. Each of these technologies will raise difficult questions. Do they really work well, or is high-tech gadgetry distracting us from more effective tools? How much will they cost? How will shaken Americans balance privacy and security? And finally, how will decisions about these technologies change everyday life?

Here's a primer on some of the technologies you can expect to hear more about:

Carnivore. The ability to intercept communications has always been an important resource for law-enforcement and intelligence agencies. The rise of the Internet, with e-mail, instant messages and

more, has opened up gigantic pipelines for all to use, including criminals. The FBI has sought to ensure that it can monitor these communications with the Internet equivalent of phone taps. When news of its system, dubbed Carnivore, broke last year, it caused a sensation.

To use Carnivore, the FBI places a special computer at the site of an Internet service provider. The device monitors data flowing through the ISP, looking for traffic to and from a subject under surveillance. When it sees such traffic, Carnivore can record it. Depending on the type of warrant issued, the device can conduct a more limited “pen” register, in which e-mail addresses only are captured (the equivalent of monitoring which number someone calls without actually listening in), or it can perform a full intercept that saves the contents of all traffic.

The controversy over Carnivore stems from the fact that the Internet doesn’t work the same way as the phone system. In phone conversations a direct connection is made between two parties. Internet communication is broken up into tiny packets, meaning the pieces of many conversations are intermingled. Thus, extracting a suspect’s data often involves inspecting the data of many other people as well.

Encryption. This is the flip side of the Carnivore technology. An ordinary PC has enough power to encrypt messages with codes considered effectively unbreakable. That means that officials attempting to monitor a suspect’s online communications might come up with nothing but gibberish.

The most widely used online code systems rely on public-key encryption. A user distributes a public key that others can use to send the user a message, which can be decoded only with the user’s private key. Law-enforcement officials have long advocated regulating this software so that some kind of “back door” could be used to read a criminal’s encrypted e-mail or files. Critics have said that would endanger privacy. They also argue that weakening codes for legitimate uses would expose the Internet infrastructure to attacks by hackers, even as criminals turn to sources outside the U.S. for software without the back doors.

Face Recognition. It was big news earlier this year when Tampa, Florida police used a high-tech system to scan faces in the crowd at the Super Bowl for suspected terrorists. Some advocate using this approach to scan airport lobbies and check passengers' images against databases of suspected terrorists.

Visionics is among the companies that make these systems. It works by isolating faces in photographs, then identifying key facial structures to create a faceprint that can be compared with those in a database. It's an approach with huge potential, but one that could spur intensive monitoring of all public spaces.

Remote Searches. X-ray devices that can see through clothing to find weapons are now on the market. They could replace traditional metal detectors, giving people the virtual equivalent of a pat-down search. But work is under way to expand such capabilities even further. Earlier this year the National Institute of Standards and Technology reported that one of its labs was working on a system that could surreptitiously scan through clothing at a distance.

Decentralization. This isn't a specific technology, but instead an approach that proved its effectiveness last week. The Internet is decentralized, and online communications held up well, in contrast to phone systems, which had important nodes damaged or overwhelmed in the attacks. Making our own way out of lower Manhattan Tuesday morning, my wife and I were able to use my Blackberry pager to e-mail friends and family that we were safe, and scores of others did the same.

Urban areas are by definition centralized. Many companies based in cities have long since dispersed their computer systems, moving critical back-room functions to suburban areas. Will the new specter of terrorism prompt them to do the same with people? Technology increasingly gives us the means to work from anywhere. Working in groups, working in cities has always been a uniquely vital experience, but that vitality could turn out to be yet another victim of last month's violence.

Military Secrets and the First Amendment

C. Robert Zelnick

On June 26, 1993, the United States Navy launched 23 Tomahawk cruise missiles at Iraq's military intelligence headquarters in Al Mansour, an affluent suburb of Baghdad, to retaliate for Saddam Hussein's alleged plot to kill former President George Bush during the latter's visit to Kuwait. That afternoon the late Secretary of Defense Les Aspin joined President Clinton, National Security Advisor Anthony Lake, and others in the Oval Office. They hoped to get early confirmation that the missiles had struck the intended target. As might have been expected, television sets were tuned to CNN, but this time with an even greater sense of urgency because U.S. reconnaissance satellites were not favorably positioned to monitor the results of the attack.

When the intended time for the strike passed with no news reports of unusual activity, Secretary Aspin called General Colin Powell at the Pentagon command center. "Could the Tomahawks possibly have missed?" asked the worried secretary.

"Not all of them," replied Powell.

In "desperation," presidential assistant David Gergen called Tom Johnson, president of CNN News. Gergen informed Johnson about the launch and asked him to check with his man in Baghdad in case the reporter had slept through the attack.

The inquiry did not come at the most fortuitous moment for Johnson. His reporters had apprised him only a day or two earlier that

a military reprisal against Iraq was likely. However, CNN had not been able to get its own satellite up-link closer than Amman, Jordan and was relying solely on its radio stringer in the Iraqi capital. In addition, Johnson had a policy against providing the government with information not reported on the air. Like countless other Western journalists and news executives operating in nations with no tradition of political freedom, he knew officials in such nations tend to “mirror image” the relationship between the press and the government. They assume the former to be an adjunct of the latter as active intelligence services when operating abroad. While working in such countries, Johnson took extra care not to reinforce such perceptions.

Johnson had just received reports that missiles were striking the outskirts of Baghdad, some hitting the intelligence facility and others missing. With the information about to go on the air, Johnson bent his policy to the extent of apprising the White House what CNN was “reporting.” Moments later, a relieved White House watched as CNN confirmed the story.

The incident, related to me by Secretary Aspin some months later and recently confirmed by Johnson, reflects one small part of one small piece of a complex mosaic. The relationship between the national security apparatus, including the military, and the press is at times symbiotic, at times antagonistic. It is sometimes described as an “adversarial relationship,” but the description would only be accurate if the media and the military were aligned on opposite sides. This, of course, has never been the case. Rather, each has its own role to play, and while each is ultimately a guardian of national freedom and democratic values, their separate missions sometimes put them at cross purposes.

But we are not talking about a zero-sum game. The press seeks to acquire and disseminate as much relevant information as possible. The military regards information as one among many variables to use and control. Too often the issue is described simplistically as a conflict between First Amendment rights and national security. Both history and experience teach the error of this formulation. While it is certainly possible for a careless dispatch to jeopardize legitimate national security interests, military operations, and the lives of service person-

nel, the documented instances of such reporting are exceedingly few. In dozens of wars and military operations this century, representatives of the press have been privy to highly classified operational details or learned or observed things which could compromise legitimate security needs. In nearly all instances, they acted with restraint and responsibility.

Points of Conflict

Documented incidents of reporting that actually harmed the United States military or security interests are nonexistent, although there are a handful of instances where irresponsible press conduct could have produced serious harm. During World War II in the Pacific, for example, the *Chicago Tribune* published a report from one of its Pacific correspondents, Stanley Johnson, listing the names of the Japanese warships involved in the Battle of Midway. This information could only have come from coded Japanese communications intercepted and “cracked” by U.S. intelligence. Fortuitously, the Japanese failed to read the *Chicago Tribune* and did not alter their encryption regime.

During the Vietnam War, the *Baltimore Sun* ignored an embargo when it published information about a planned operation in what appears to have been an act of carelessness rather than malice. In any event, the timing of the mission was altered to avoid potential compromise.

Past efforts to control press coverage of military operations and related matters is a history of inconsistency often rooted more in the whims of individual commanders than logic. Prior to the Civil War, the press faced few, if any, restrictions on its coverage of military operations. The relatively few journalists covering combat and the primitive transportation and communications technologies were decisive checks on the potential to compromise operational details. The development of the telegraph during the 1850s changed that. During the Civil War, Union generals Ambrose Burnside and William T. Sherman either denied access completely to journalists or kept them at a considerable distance from the story. Meanwhile, an ad hoc censorship regime proved powerful enough to shut down the *Chicago Times* for its incessant attacks on President Lincoln.

When the United States entered the First World War in April, 1917, the State, Navy, and War Departments established the Committee on Public Information to provide information and enforce censorship regulations. Voluntarily accepted by the press, the regulations forbade publication of such information as “troop movements within the United States, ship sailings, and the identification of units dispatched overseas.” In addition, Congress passed the Espionage Act of 1917, which prohibited publication of information useful to the enemy or any interference with military operations or war production, and the Sedition Act of 1918, which banned critical remarks about the conduct of operations, the United States government, or its military forces, including the flag. In each case penalties could include imprisonment for up to 20 years and fines up to \$10,000. Press dispatches from the war zone were initially subjected to censorship by a single “former *New York Herald* reporter and Associated Press (AP) correspondent,” Frederick Palmer, and later by a committee of former journalists commissioned as reserve Army officers. The process functioned chaotically. The committee ultimately revoked the credentials of 5 of the 60 journalists assigned to cover the war. None of this prevented a United Press International reporter from prematurely breaking a story that the Armistice had been signed, a breach of security that resulted in the Committee temporarily blocking communication between the reporter and his New York headquarters.

Immediately after Pearl Harbor, Congress enacted the War Powers Act, which included the creation of an Office of Censorship. The new office quickly promulgated guidelines, later codified into the Code of Wartime Practices, which took effect January 15, 1942. This Code implemented essentially the same types of security restrictions applied during World War I, but without the Espionage and Sedition Acts. Throughout the war the Code governed journalists in most combat zones, including the European and North African theaters. In the Pacific, General Douglas MacArthur and the Navy’s Chief of Operations, Admiral Ernest J. King, imposed additional restraints on the press. In fact, the “Media at War” report explained that:

MacArthur required each correspondent’s copy to go through a multiple censorship review before being released, and pressured journalists to produce stories that burnished the image of the troops and their supreme commander. The Navy, for its

part, delayed the release of news, frequently waiting until a story of combat success could be paired with one describing a setback.

Turning Points: Vietnam

Vietnam marked a turning point in relations between the military and the press. It was the first military conflict subject to daily television coverage. Only a few hardy reporters initially covered the conflict, but by 1968 over 2,000 accredited reporters were involved. During the conflict, the press routinely applied the term “credibility gap” to military claims of progress. Many in the military blamed the press for loss of public support for the conflict and the resultant political restrictions on its conduct.

Throughout Vietnam, accredited journalists came and went as they pleased. They “hitch-hiked” on military transports and helicopters when available and made their own arrangements where necessary. There was virtually no censorship. Instead, the Military Assistance Command, Vietnam (MACV), headquarters for the U.S. effort, asked journalists to refrain from reporting items like planned offensives, troop movements, and the participation of allied forces in particular operations.

In a technical sense, the rules worked well. Of the thousands of correspondents covering the war, only a handful committed military guideline violations severe enough to result in the revocation of credentials, and only two violations seriously jeopardized operations or safety.

The problem in Vietnam was the deteriorating political relationship between the press and the military. This was partly a reflection and partly a cause of the mounting opposition to the war in the United States. For members of the press, the daily briefings at the Joint U.S. Public Affairs Office (JUSPAO), the office established by MACV to dispense information on the overall effort and supervise coverage by in-country members of the American and foreign media, became known as the “Five O’clock Follies.” This was because briefers often exaggerated political progress and manufactured military victories and enemy casualties. Facetiously, Western newsmen often said, “If it’s Vietnamese and it’s dead, JUSPAO calls it a Vietcong.” As the war

continued, reports on the “tactical evacuation” of Vietnamese civilians from their villages, the widespread use of napalm, “Agent Orange,” and other defoliants or herbicides, the occasional allied atrocity, the ability of the enemy to mount major operations like the 1968 Tet offensive, and the horrendous U.S. casualties undoubtedly had a profound impact on public opinion in the United States.

Grenada

In October, 1983, Ronald Reagan was president and the United States invaded Grenada. Platoon leaders and company commanders of Vietnam were now the bird colonels. The media’s standing had fallen precipitately. For example, a survey found that in 1966, 29 percent of respondents had “a great deal of confidence” in people running the media. That figure fell to 19 percent in 1983, the year of the Grenada invasion, and to 11 percent in 1995. The military took advantage of the fortuitous political circumstances virtually to bar press coverage of the operation, which, contrary to the first accounts of the Pentagon’s instant myth-makers, was characterized by spotty intelligence, logistical foul-ups, and bungled execution. As Major General Winant Sidle, U.S. Army (Ret.), who headed a committee that developed procedures governing press activities for military conflicts after Grenada, candidly acknowledged: “Although never admitted, the military’s distrust of the media at the time of the Grenada operation in 1983 had to be part of the reason the media were not permitted on Grenada for the first two days, and only a pool was allowed on the third day.”

In response, Joint Chiefs of Staff Chairman General John W. Vessey appointed the Sidle Commission, formally known as the “Chairman of the Joint Chiefs of Staff Media Military Relations Panel.” The Commission reviewed the Grenada experience and recommended a more appropriate way for dealing with future operations. Comments from the press were solicited. In his letter to General Sidle dated January 3, 1984, Roone Arledge, president of ABC News, noted:

On the day our troops landed on Grenada, I wrote to Secretary of Defense Weinberger, saying the practice of journalists accompanying American troops into action was as old as our republic. Now, for the first time in our history, the press was unreasonably excluded from going with American troops

into action. In my opinion, no convincing or compelling reason has yet been cited for this unprecedented departure from our tradition of independent press reporting.

On August 23, 1984, General Sidle's panel unanimously concluded that "it is essential that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces." The panel emphasized that the preferred method of coverage is open access for all journalists assigned to cover the story. The panel also recognized that the pool is necessary to handle atypical situations, as when operations are in remote or otherwise inaccessible areas.

The panel concluded that an adversary relationship between the press and the military "is healthy," but "mutual antagonism and distrust are not in the best interests of the media, the military, or the American people." Michael Burch, Assistant Secretary of Defense for Public Affairs, responded to the Sidle recommendations by saying, "We agree with them all." Secretary of Defense Caspar Weinberger and General Vessey formed a "public affairs cell" in the office of the Chairman of the Joint Chiefs of Staff to put the recommendations into practice.

Panama

The only test of the Pentagon's good faith in implementing the Sidle recommendations came during the Panama invasion of December 1989. By any reasonable standard, the military clearly flunked. The Pentagon operated the pool out of Washington and notified the media only a few hours before the commencement of the operation. About four hours before the Pentagon pool landed in Panama, United States forces started their attacks against priority targets.

Once the pool landed, its members were effectively kept from the action for at least 36 hours, longer than in Grenada. The delay left little of the story remaining except the search for the hiding Noriega. The military could have used helicopters to transport the press, but helicopters were appropriated for higher priority operations. This clearly indicated that plans to accommodate the pool and other journalists received inadequate attention prior to commencement of the operation. Sniper fire prevented ground transportation. The military failed

to provide pool reporters timely briefings on the operation's status. Instead, they were subjected to political backgrounders by U.S. Embassy officials. The military also prevented photographers from shooting pictures of closed caskets bearing the remains of U.S. servicemen killed in action as they were prepared for shipment home.

Interestingly, all the secrecy did not prevent the press from reporting a flurry of activity at U.S. bases prior to the start of the operation. And it did not prevent at least one CNN report that the operation may be underway. Years earlier, the Supreme Court had admonished in *Near v. Minnesota*, "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

Here, however, two observations are in order. First, with the exception of communications involved in activating the Pentagon pool, the government did not make any efforts, either in Panama or other recent operations, to alert publishers, executive producers, or senior press officials about imminent operations and to request editorial restraint. Although informal working level communications were present, the kind of high-level effort needed to ensure operational secrecy was never undertaken. Second, despite the breach in operational security, which in wars past would have been grounds for profound concern, no recent broadcasts or reports appear to have benefitted any U.S. enemy on the battlefield. Today's troop departures, whether by plane or ship, are so widely publicized, the very notion that "publication of the sailing dates of [troop] transports or the number and location of troops" might provide some advantage to any enemy sounds almost quaint.

The reason is that the United States today does not have enemies capable of interfering with its mastery of the high seas, or, for that matter, the skies. Tactical operations today are accompanied by efforts to suppress enemy air defenses, blind the enemy to advancing troops, impede its communications, and intercept its own troop movements. Coupled with the ability of the United States to strike from beyond the range of enemy interference, the likelihood of press leaks actually causing damage are, in the most likely contingencies, remote.

The Gulf War

Coverage of the Persian Gulf War involved efforts by at least 1,400 reporters trying to gain access to military personnel in the field. Some journalists were stationed in Baghdad, while others, the regular core of Pentagon, State Department, White House, and Washington journalists, remained in Washington and hoped to gain information or insight from there. Before the start of Desert Storm, Louis A. "Pete" Williams, the Department of Defense's Assistant Secretary for Public Affairs, issued guidelines for coverage with restrictions that fell into familiar and acceptable categories. The press could not provide coverage regarding: specific numbers of troops, aircraft, weapons systems; details of future plans, operations, or strikes; information on the specific location of military forces or security arrangements in effect; rules of engagement; intelligence collection activities; troop movements; identification of aircraft origin; effectiveness or ineffectiveness of enemy camouflage, cover, deception, targeting, etc.; specific information on downed aircraft or damaged ships while search-and-rescue missions were planned or underway; and information on operational or support vulnerabilities of U.S. and allied forces.

The media tried to get as much of the story as possible. Those who could assigned reporters to Baghdad. Many print reporters braved military resistance and operated unilaterally, as did such network correspondents as Forest Sawyer of ABC News, who finally linked up with advancing Egyptian units, and Bob McKeown of CBS, who became the first television correspondent to report live from liberated Kuwait City. Both Sawyer's and McKeown's work provided a hint of how difficult it will be for the military to exert a similar degree of control over the press in future wars given the instant capabilities of satellite communications. However, throughout this war most reporters on the scene were reduced to sitting through press briefings in Riyadh asking questions which reflected the silliness and hostility of the situation.

Post-Gulf War

It is interesting to compare the highly restricted coverage of Operation Desert Shield and Operation Desert Storm with the work of the press in reporting on the Shiite and Kurdish rebellions after the

war. With no pools, no escorts, no “restricted” areas, and no “Saudi sensibilities” to worry about, journalists, in the full exercise of their First Amendment rights, documented the horrors being perpetrated by Saddam Hussein and countenanced by the Bush Administration. The result was a prompt and substantial change in U.S. policy. For more than a year following the cessation of hostilities in the Gulf, Pentagon officials and a committee consisting mainly of the same individuals who had published the Independent Reporting document, reviewed the experience. They sought to reach an accord on new and more satisfactory procedures to govern future conflicts. Eventually, they agreed on nine principles—including the stipulations that “journalists will have access to all major military units” and “military public affairs officers should act as liaisons but should not interfere with the reporting process”—and “agreed to disagree” over the question of “prior security review,” or censorship.

A Minimal Threat

While conflicts between First Amendment values and national security needs are a long-running source of legal analysis and intellectual fascination, during the past generation it has become clear that such conflicts are truly aberrational. The press rarely poses any kind of danger to national security. The goal of defense officials, military or civilian, who seek to keep the press on a short leash is, in most instances, to control the editorial slant of what is reported rather than to protect tactical, strategic, or national security from the unauthorized disclosure of sensitive material.

As exhibited in operations as varied as Grenada, Panama, and the Persian Gulf, the method most often chosen by the military to control the press is to limit timely access to bases or combat operations. This practice is, as reemphasized by the post-Gulf War lawsuits, difficult to oppose through the mechanism of First Amendment litigation. By the time they reach the courts such First Amendment complaints may be held moot. Courts, moreover, are hesitant to substitute their judgment on matters of asserted security for that of base or field commanders. While media access to military bases and operations may be a First Amendment value, it has yet to be held a First Amendment right. Further, since both the Pentagon’s military and civilian leadership and the most powerful representatives of the media tend to form part

of the Washington Establishment, it is my sense that they dislike potentially damaging political or legal confrontations as well as other zero sum games. Thus, they generally choose to resolve their differences through such amicable mechanisms as panels and joint committees pointed toward the next conflict rather than seeking to redress grievances over the last one. Such was certainly the case following Grenada, the Persian Gulf War, and arguably after Panama.

One must recognize that most of the problems within the past dozen years trace back to the period of mutual contempt and suspicion that grew out of the Vietnam era. That legacy seems to be finally fading. While no specific post-Vietnam plan for coverage of combat operations has worked well to date, the hard work and spirit of mutual respect that characterized the adoption of the “nine principles” offers some hope for the future.

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A Privilege or a Right?

Mark Krikorian

Is immigration to the United States a privilege or a right? This is the question we need to address in considering the administration's new antiterrorism proposal, presented to Congress in the wake of the September 11 atrocities. The bill would give the Justice Department more flexibility in detaining foreign citizens suspected of involvement with terrorism and would facilitate their deportation.

Specifically, the provision would allow the INS commissioner, in consultation with the director of the FBI, to recommend the detention and deportation of any noncitizen if there was "reason to believe [the alien] may further or facilitate acts of terrorism" or "any other activity that endangers the national security of the United States."

The usual critics have made the usual objections. On the left, the American Civil Liberties Union said the bill "degrades our system of justice," while the head of the American Immigration Lawyers Association said the proposals "trample on the Constitution." On the right, the *Wall Street Journal* raised the specter of immigrants being "deported on the flimsiest of pretexts" by the "epic ineptitude" of the INS.

But limiting the number and nature of appeals available to guests whom we want to send home is entirely within our power as a nation. There is no entitlement for foreign citizens to enter or remain in the United States. In fact, at a time when many are suggesting curbs on the civil liberties of Americans, it would seem only prudent to first look at measures which do not impact the rights of Americans at all, but

instead merely change the terms under which we allow guests from overseas to remain here.

Until someone from overseas embraces America by becoming a citizen, he remains here at our discretion. He is protected by the criminal law, he may file civil lawsuits, he may buy and sell property—but his continued residence in the United States depends on the wishes of the American people, expressed through their elected representatives.

Ordinarily, we should welcome whichever legal immigrants and visitors we decide to admit. And, in fact, we take in close to a million legal immigrants per year, plus tens of millions of visitors. What's more, it's much easier for immigrants to become citizens in our country than in virtually any other—last year alone, almost 900,000 foreigners became Americans.

But in a time of national emergency, extraordinary measures may be appropriate. And the focus on immigration issues in the quest for homeland security is not some opportunistic attempt to achieve extraneous political ends under the cover of war. All 19 hijackers were, after all, foreign citizens, as are many, perhaps most, of those detained as possible accomplices or witnesses. This was also the case with the conspirators in the first World Trade Center attack, which resulted in incomplete reforms passed by Congress in 1996.

It would be unfortunate if, in our effort to prevent another 6,000 American deaths—or 60,000 or 600,000—we were inadvertently to deport some foreign citizens who pose no threat to us. But their presence here is a privilege we grant, not a right they have exercised, and we may withdraw that privilege for any reason.

Fighting Terrorism—Not the Constitution

David Cole

The following is adapted from testimony that Professor David Cole presented before the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee on October 3, 2001.

The deplorable attacks of September 11 have shocked and stunned us all, and have quite properly spurred renewed consideration of our capability to forestall future attacks. Yet in doing so, we must not rashly trample upon the very freedoms that we are fighting for. Nothing tests our commitments to principle like fear and terror. But precisely because the terrorists violated every principle of civilized society and human dignity, we must maintain our commitment to principle as we fashion a response.

Three principles in particular must guide our response to the threat of terrorism. First, we should not overreact in a time of fear, a mistake we have made all too often in the past. Second, we should not sacrifice the bedrock foundations of our constitutional democracy—political freedom and equal treatment. And third, in balancing liberty and security, we should not trade a vulnerable minority's liberties, namely the liberties of immigrants in general or Arab and Muslim immigrants in particular, for the security of the rest of us.

Unfortunately, the antiterrorism legislation under consideration in Congress violates all three of these principles. It overreacts in just the way that we have so often overreacted in the past—by substituting guilt by association for targeted measures directed at guilty conduct. It violates core constitutional principles, rendering immigrants deportable for their political association and excludable for pure speech. And by reserving its harshest measures for immigrants—in the immediately foreseeable future, Arab and Muslim immigrants—it sacri-

faces commitments to equality by trading a minority group's liberty for the majority's security. Finally, I fear that in addition to being unprincipled, our response will in all likelihood be ineffective. Painting with a broad brush is simply not a good law enforcement tool; it wastes resources on innocents, alienates communities, and makes it all the more difficult to distinguish the true threat from the innocent bystander.

The legislation's principal flaws are as follows: (1) it imposes guilt by association on immigrants, resurrecting a long-abandoned philosophy of the McCarthy era; (2) it authorizes executive detention on mere suspicion that an immigrant has at some point engaged in a violent crime or provided humanitarian aid to a proscribed organization; and (3) it resurrects ideological exclusion, denying admission to aliens for pure speech, resurrecting yet another long-interred relic of the McCarthy era.

History

Before turning to the specifics of the new antiterrorism legislation, it is worth reviewing a little history, and assessing what powers government already has in the fight against terrorism. Both assessments are critical to asking whether current proposals are measured and likely to be effective.

This is not the first time we have responded to fear by targeting immigrants and treating them as suspect because of their group identities rather than their individual conduct. In World War I, we imprisoned dissidents for merely speaking out against the war, most of them immigrants. In 1919, the federal government responded to a politically motivated bombing of Attorney General A. Mitchell Palmer's home in Washington, DC by rounding up 6,000 suspected immigrants in 33 cities across the country—not for their part in the bombings, but for their political affiliations. They were detained in overcrowded “bull pens,” and beaten into signing confessions. Many of those arrested turned out to be citizens. In the end, 556 were deported, but for their political affiliations, not for their part in the bombings.

In World War II, we interned over 100,000 persons, over two-thirds of whom were citizens of the United States, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry. And in the fight against Communism, which reached its height in the McCarthy era, we made it a crime even to be a member of the Communist Party, and passed the McCarran-Walter Act, which authorized the government to keep out and expel noncitizens who advocated Communism or other proscribed ideas, or who belonged to the Communist Party or other groups that advocated proscribed ideas. Under the McCarran-Walter Act, the United States denied visas to, among others, writers Gabriel Garcia Marquez and Carlos Fuentes, and to Nino Pasti, former Deputy Commander of NATO, because he was going to speak against the deployment of nuclear cruise missiles.

All of these past responses are now seen as mistakes. Yet while today's response does not yet match these historical overreactions, it is guided by some of the same mistakes of principle—namely targeting vulnerable groups not for illegal conduct, but because of their group identity or political affiliation.

In considering whether the legislative provisions directed at immigrants are necessary, it is also important to know what authority the government already has to deny admission to, detain, and deport aliens engaged in terrorist activity. Under current law, the government may detain without bond any alien with any visa violation if it has reason to believe that he poses a threat to national security or a risk of flight. It can deny admission to mere members of terrorist groups, and it can deport any alien who has in any way engaged in, furthered, or facilitated terrorist activity, expansively defined to include virtually any use or threat to use a firearm with intent to endanger person or property. Moreover, the INS maintains that it has the power to expel, detain, and deport aliens using secret evidence that the alien has no chance to confront or rebut.

In light of these expansive powers, many of which have been employed in the unprecedented attempt to identify the perpetrators of the September 11 attack, the innovations in the new law are unnecessary and very likely counterproductive.

Guilt by Association

The single most problematic feature of the antiterrorism legislation is its adoption of the philosophy of guilt by association, which the Supreme Court has condemned as “alien to the traditions of a free society and the First Amendment itself.” Under current law, aliens are deportable for engaging in or supporting terrorist *activity*. The proposed legislation would make aliens deportable for virtually any *association* with a “terrorist organization,” irrespective of any nexus between the alien’s support and any act of violence, much less terrorism. And because the legislation would define “terrorist activity” to include virtually any use or threat to use violence, and would define a “terrorist organization” as any group that has used or threatened to use violence, the proscription on political association potentially encompasses every organization that has ever been involved in a civil war or a crime of violence, from a pro-life group that once threatened workers at an abortion clinic, to the African National Congress, the Irish Republican Army, or the Northern Alliance in Afghanistan.

The legislation contains no requirement that the alien’s support have any connection whatsoever to a designated terrorist organization’s terrorist activity. Thus, an alien who sent coloring books to a day-care center run by an organization that was ever involved in armed struggle would be deportable as a terrorist, even if she could show that the coloring books were used only by three-year olds. Indeed, the law apparently extends even to those who seek to support a group in the interest of *countering* terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain and forestalling further violence could be deported as a terrorist.

Guilt by association, the Supreme Court has ruled, violates the First and the Fifth Amendments. It violates the First Amendment because people have a right to associate with groups that have lawful and unlawful ends, so long as they do not further the group’s illegal ends. And it violates the Fifth Amendment, because “in our jurisprudence guilt is personal.” To hold an alien responsible for the military acts of the ANC, for example, because he offered a donation to the ANC’s peaceful anti-apartheid efforts, or for providing peace negotiating training to the IRA, violates that principle. Without some con-

nection between the alien's support and terrorist activity, the Constitution is violated.

Some suggest that the threat from terrorist organizations abroad requires some compromise on the principle prohibiting guilt by association. But this principle was developed in connection with measures directed at the Communist Party, an organization that Congress found to be, and the Supreme Court accepted as, a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence.

Detention vs. Due Process

The second constitutionally objectionable measure in the proposed antiterrorist legislation would amend current INS detention authority to provide for "mandatory detention" of aliens certified by the attorney general as "suspected terrorists." Such persons would be detained, potentially indefinitely, without even an opportunity to respond to the government's charges against them. While "suspected terrorists" sounds like a class that perhaps ought to be locked up, the legislation defines the class so broadly that it includes virtually every immigrant who has been involved in a barroom brawl or domestic dispute, as well as aliens who have never committed an act of violence in their life, and whose only "crime" is to have provided humanitarian aid to an organization disfavored by the government. In one version of the legislation, such persons would be detained indefinitely, even if they are granted relief from removal—and therefore have a legal right to remain here—and even if they pose no current danger or risk of flight.

To appreciate the extraordinary breadth of this unprecedented power, one must recall that under current law, the INS already has authority to detain any alien in deportation or exclusion proceedings who presents either a threat to national security or a risk of flight. Thus, what the INS seeks now is the authority to detain aliens *not* in deportation or exclusion proceedings and who do *not* pose a current danger or flight risk.

This provision raises several constitutional concerns. First, it mandates preventive detention of persons *who pose no threat to national*

security or risk of flight. The Supreme Court has upheld preventive detention of accused criminals, but only where there is a specific reason for the detention—namely that they pose a danger to others or a risk of flight. In doing away with that minimal requirement, the legislation would vest the attorney general with unprecedented and unconstitutional authority.

Second, in the Senate version of the legislation, the law would allow the INS to detain aliens *indefinitely, even where they have prevailed in their removal proceedings*. This, too, is patently unconstitutional. Once an alien has prevailed in his removal proceeding, and has been granted relief from removal, he has a legal right to remain here. Yet the Senate bill provides that even aliens *granted* relief from removal would still be detained. This would be akin to detaining a prisoner even after he has been acquitted of the charges against him. Once an alien has prevailed in his immigration proceeding, the INS has no legitimate basis for detaining the individual.

Third, the standard for detention raises serious constitutional concerns. It is important to keep in mind that the bill proposes to authorize *mandatory* and potentially *indefinite* detention. That is a far more severe deprivation of liberty than holding a person for interrogation or trial. Yet the INS has in litigation argued that the “reason to believe” standard proposed in the legislation is essentially equivalent to the “reasonable suspicion” required for a brief stop and frisk under the Fourth Amendment. The Constitution would not permit the INS to detain an alien indefinitely on mere “reasonable suspicion,” a standard which does not even authorize a custodial arrest in criminal law enforcement.

Fourth, and most importantly, it is critical to the constitutionality of any executive detention provision that the person detained have a meaningful opportunity to contest his detention both administratively and in court. The bill affords an alien no opportunity to make a case that he should not be detained. It relegates him to the filing of a habeas corpus petition. But due process requires that the agency depriving a person of his liberty afford him a meaningful opportunity to be heard, and the availability of a lawsuit is not generally sufficient.

Finally, the legislation permits detention of certified aliens for up to seven days without the filing of any charges. Yet the Supreme Court

has ruled in the criminal setting that charges must be filed within 48 hours except in the most extraordinary circumstances. This legislation would extend blanket authority to detain an alien for seven days on mere certification that he or she was at one time involved in a barroom brawl. Such overbroad authority clearly does not meet the Supreme Court's requirement that any preventive detention authority be accompanied by heightened procedural protections and narrowly drawn laws.

Ideological Exclusion

The legislation would also indulge in ideological exclusion, denying entry to aliens for pure speech. It excludes aliens who "endorse or espouse terrorist activity," or who "persuade others to support terrorist activity or a terrorist organization," in ways that the secretary of state determines undermine U.S. efforts to combat terrorism. It also excludes aliens who are representatives of groups that "endorse acts of terrorist activity" in ways that similarly undermine U.S. efforts to combat terrorism.

Excluding people for their ideas is flatly contrary to the spirit of freedom for which the United States stands. It was for that reason that Congress repealed all such grounds in the Immigration and Nationality Act (INA) of 1990, after years of embarrassing visa denials for political reasons. We are a strong enough country, and our resolve against terrorism is strong enough, to make such censorship wholly unnecessary.

Conclusion

We must ensure that our responses to terrorism are measured and balanced. But is it measured to make deportable anyone who provides humanitarian aid to any organization engaged in a civil war? Is it measured to label any domestic dispute or barroom fight with a weapon an act of terrorism? Is it measured to subject anyone who might engage in such activity to mandatory detention, without any procedural protections, and without any showing that he poses any current danger? Is it measured to restore exclusion for ideas?

The overbreadth of the legislation reflects the overreaction that we have often indulged in when threatened. The expansive authori-

ties that the administration bill grants, moreover, are not likely to make us safer. To the contrary, by penalizing even wholly lawful, nonviolent, and counterterrorist associational activity, we are likely to waste valuable resources tracking innocent political activity, drive other activity underground, encourage extremists, and make the communities that will inevitably be targeted by such broad-brush measures far less likely to cooperate with law enforcement. As Justice Louis Brandeis wrote nearly 75 years ago, the Framers of our Constitution knew “that fear breeds repression; that repression breeds hate; and that hate menaces stable government.” In other words, freedom and security need not necessarily be traded off against one another; maintaining our freedoms is itself critical to maintaining our security.

The immigration provisions of the proposed antiterrorism legislation fails to live up to the very commitments to freedom that the president has said that we are fighting for. As the Supreme Court wrote in 1967, declaring invalid an anti-Communist law, “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”

After eleven years, the Communitarian Platform is again open for endorsements. The text of the platform, a list of previous endorsers (which includes John Anderson, Robert Bellah, Betty Friedan, Francis Fukuyama, and other leaders of society), and a form to sign the platform are available at www.communitariannetwork.org.

Confusing Freedom with License— Licenses Terrorism, Not Freedom

Douglas W. Kmiec

The events of September 11 remain ever-present in the minds of American citizens. For thousands of families, a husband or wife or child will never return home because of what happened that day. The diabolical events of that morning will be forever etched in our consciousness. And yet, along with those mental pictures, it is important to grasp fully what happened: it wasn't a political rally; it wasn't a nonviolent speech protest; it wasn't an example of urban street crime; and it wasn't even an attack by another sovereign state or nation. It was the deliberate murder of innocent men and women, not for high political purpose or cause—or even a base one—but simply the random manifestation of hate intended to spread panic and fracture the civil order and continuation of American society.

But as grievously wounded as we may be, American society and its principled understanding of freedom *with* responsibility does not fracture or panic that easily, but it does expect that justice will be done. It earnestly desires, along with our president, to see those who so mercilessly took sacred human life to be held to account—not in a local criminal court, but by the able men and women of the military and our law enforcement communities, working together, either to eliminate on a field of battle these “enemies of mankind,” as Blackstone called them, or to apprehend and punish them—presumably before the bar of a properly convened military tribunal, like those employed against Nazi saboteurs in World War II.

In considering this legislation it is useful to remember that our Founders' conception of freedom was not a freedom to do anything or associate for any purpose, but to do those things which do not harm

others and which, it was hoped, would advance the common good. Freedom separated from this truth is not freedom at all, but license. *Congress can no longer afford, if it ever could, to confuse freedom and license because doing so licenses terrorism, not freedom.* Those opposing the Anti-Terrorism Act of 2001 seem to have either a more extreme view of freedom or a less sober view of the threats we face, or both.

With due respect, such unrefined autonomy or complacency hides a basic confusion or under-appreciation for the war against terrorism that now must be fought. The objectors think of the mass destruction of the World Trade Center and the Pentagon as the equivalent of “[m]urder, kidnapping, or bank robbery.” They think the point is a criminal trial; it is not—it is the elimination of terrorism.

The primary authority for dealing with terrorist threat resides both in the president, as commander in chief, and Congress, as the architect of various specific legal authorities, under the Constitution, to meet that threat. The president has courageously told the nations of the world that all are either for the United States in this or with the terrorists. There is no middle ground. Similarly, the Congress by joint resolution has given President Bush authority not only to act against those wealthy and bloody hands that orchestrated the events of September 11, but all cooperators in those cowardly actions or “any future act” of international terrorism.

The president has not been rash in the use of our military might, even as he has made unmistakably plain that the “hour is coming when America will act.” However, for that hour to come, for the proportionate application of our military might to become successfully manifest, this Congress must equip our law enforcement and intelligence communities with adequate and constitutional legal authority to address a war crime on a scale that previously was not seen in this generation, or seen ever, in peace time.

With some minor refinement, the Anti-Terrorism Act of 2001 is just such a piece of legislation. The proposal gives due regard to the necessary balance between the civil liberties enjoyed by our citizens under the Constitution and the law enforcement authority needed. It advances two fundamental purposes: to subject terrorism to at least the same rigorous treatment as organized crime and prosecution of the drug trade, and to supply up-to-date law enforcement capabilities

that address the technology of the day, which no longer observes some of the lines previously drawn in existing statute. Terrorists don't stay in one place using only land-line telephones and postcards, and it is folly to have a legal investigation authority that still assumes that.

While the provisions are a bit arcane and complex, they incorporate the recommendations of virtually every commission in the last decade to study terrorism. Specifically, with respect to conducting intelligence gathering against a foreign power or their agents, the proposed legislation ensures that the insights of the specialized foreign intelligence court are available to superintend the investigative process. There is no reason to deny the Justice Department this authority even if a given investigation has a significant criminal purpose as well. So too, information gathered on the criminal justice side of an investigation or through a grand jury should, as it would under the proposal, be made available to those tasked with the difficult worldwide manhunt of shadowy and elusive terrorist cells. Such are matters of prudent legal reform and just plain common sense.

Widening the Net

Turning to the immigration proposals, the suggested, broadened definition of "terrorist" is necessary to meet the recent tragic events. Under current law, an alien is inadmissible and deportable for, among other reasons, engaging in a terrorist activity employing "explosives or firearms." The proposal adds the words "or other weapon or dangerous device" to the applicable section of the United States code.

Professor David Cole objects, arguing that expanding the term to include a residual category of other weapons trivializes terrorism. With respect to my fellow constitutional law colleague, this is not constitutional law, but opinion—and not likely one shared by the families of the innocent men and women who were killed with a "box cutter" en route to crashing into the World Trade Center or the Pentagon or in rural Pennsylvania. Perhaps, prior to September 11, we could be lulled into the notion that not even terrorists would conceive of using innocent human beings as a weapon against other innocent human beings on our own soil, but sadly that is no longer our reality. Hypothetical objections that the statute might be contorted to

apply to a barroom brawl or a domestic dispute are, in my judgment and the present context, too facetious to be credited as a legal objection.

Similarly, opponents of this legislation express a concern that aliens who associate with terrorist organizations may be deported even when they supposedly kept their association to the nonterrorist functions of the organization. Yet this objection, too, seems overstated. The proposed legislation does not punish those who innocently may support a front organization. Moreover, the draft statute even allows for giving support for an individual who had previously committed a terrorist act if the alien establishes “by clear and convincing evidence that such support was afforded only after that individual had permanently and publicly renounced and rejected the use of, and had ceased to commit or support, any terrorist activity.”

Reality tells us that terrorists unfortunately gain financial and other support hiding behind the facade of charity. Those opposing this new immigration authority seem undisturbed by this. That is again a policy choice; it is not a constitutional one. A statute, like proposed section 201, aimed at supplying a general prohibition against an alien contributing funds or other material support to a terrorist organization (as designated under current law by the secretary of state) or to any nondesignated organization that the alien “knows or reasonably should know” furthers terrorist activity, does not violate the Constitution. Loosely referencing older cases that wrongfully assigned criminal guilt to U.S. citizens for associating with the domestic cause of civil rights in the 1950s and 60s are simply inappropriate. Surely it is possible to draw distinction between nonviolent associations of American citizens, which are entitled to full First Amendment protection, and the fanatical planning of widespread mass destruction against innocents by noncitizens, which clearly is not.

Considering Intent

Still unpersuaded and want the fine print? Well, here it is: “engaging in terrorist activity” means committing a terrorist act or otherwise committing acts that “the actor knows, or reasonably should know, affords material support . . . to any organization that the actor knows, or reasonably should know, is a terrorist organization, or to any

individual whom the actor knows, or reasonably should know, has committed or plans to commit any terrorist activity.” The specific intent requirements are not only explicit, but multiple. This is not, as the objectors claim, “guilt by association,” but guilt for associating with terrorists for terrorism purposes.

The witnesses against the attorney general’s well-conceived proposal also mislead by mis-citation. They would have the committee believe that the First and Fifth Amendments apply without distinction to citizens and aliens residing in the United States. However, this cannot be said without qualification. American citizens have privileges and immunities that noncitizens do not. Americans, for example, travel freely in and out of our sovereign borders. That same freedom is obviously not afforded noncitizens. With regard to exclusion of immigrants, U.S. authority is plenary, and such authority may be exercised by the Congress to prohibit entry altogether. The Court has long held that “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”

Terrorists or those seeking association with them clearly can be excluded from our nation without offending the First Amendment or any other provision of the Constitution. While additional rights do attend an immigrant granted admission, such rights are not necessarily on par with those of citizens. In *U.S. v. Verdugo-Urquidez*, for example, the Court opined that “[Our] cases . . . establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.” Lower courts have thus upheld the deportation of an alien who associated with groups assisting Nazi persecution, even without proof that the alien himself engaged in the act of persecution.

More problematic is the question of how long those posing a terrorist threat can be detained by the attorney general. The detention provision has been the subject of much debate and as of this writing was still in flux. The Senate version of section 203 provides for this insofar as “[t]he Attorney General *may* certify [for detention] an alien to be an alien he has reason to believe may commit, further, or facilitate [terrorist] acts . . . or engage in any other activity that endangers the national security of the United States.” The objectors to

the legislation recite, erroneously, that the proposal mandates indefinite detention. As the quoted language above indicates, the attorney general's certification is permissive (may, not shall).

Yet is this detention based on certification unconstitutional? Not even the opponents claim this; instead, they opine it raises "constitutional concerns." They say, for example, that the Constitution would be transgressed if the detention power were used to detain those giving "peace training to the IRA." Any statute can be made to raise constitutional concerns if it is manipulated to apply against something other than its constitutional object. The Congress is not tasked with drafting against the absurd. It is tasked with addressing the very real dangers of those who wish to kill us for no reason other than we are American. The attorney general can be given authority to address such hatred. He can also be given the authority to address the risks posed by enemy aliens who may flee or who may seek to thwart our security by exchanging information or launching an additional attack.

But, claim the objectors, the attorney general cannot be given authority to detain persons he cannot deport. Perhaps, but that is not the question that needs to be answered. The attorney general has not asked for that authority. He seeks to detain those who have been found to be removable, but for various reasons (mostly related to international obligations to avoid repatriation to a country where torture is inevitable), cannot be removed immediately.

So then, for how long can a removable alien be detained? Existing law allows aliens to be removed not only when they were originally inadmissible or convicted of a crime or for violation of immigration status, but also for national security or foreign relations reasons, or as implied under the existing post-removal statute, when the alien is "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." This post-removal detention period authority was recently construed by the Supreme Court in *Zadvydas v. Davis*, and the Court suggested six months as a reasonable post-removal proceeding detention period.

Yet this case of statutory interpretation did not rule out indefinite detention where dangerousness is accompanied by special circumstance. The Court explicitly noted that in establishing a presumptive six-month period for detention, it was not denying the government

detention beyond this point under unique circumstances. Wrote Justice Breyer for the Court:

Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.

The detention by attorney general certification certainly does not raise the categorical constitutional limit suggested by the legislation's detractors. Moreover, even the opponents of this carefully-drawn legislation must and do concede that the proposal adequately provides for judicial review of the attorney general's determination.

It should be noted that the House version of Section 203 is a bit different; in addition to detention following a removal decision, it provides for short-term detention of a suspected terrorist for up to seven days *before* charging an alien with a crime or a basis for removal. If no charges are filed, the alien is released. The House version provides for habeas review in the U.S. District Court of the District of Columbia of any decision to charge an alien. Under current regulation, INS may detain an alien for 48 hours before charging a crime or removable offense. Extending this time of detention without charge may raise more legal questions than the Senate version, which as explained above and by its proponents, was only aimed at an alien who was already determined to be subject to removal. Whether a constitutional problem is presented by the House version likely depends upon the extent of due process protection afforded an individual alien in light of the degree of his or her substantial connection with this country.

Raising civil libertarian objections to new law enforcement provisions is a healthy sign of a vibrant democracy committed to human rights. America should be justly proud of its temperate actions in response to September 11, including this debate of civil liberties. Congress should proceed to enactment since no significant constitutional objection has been raised. Should Congress nevertheless fear that the power asked for might be abused, the prudent course would not be to deny the needed authority, but to draft a cause of action for damages to rectify possible misapplication, or to provide for a sunset

of the authority after a period of time sufficient to meet the present exigency. The possibility of abuse should not obscure the present need and the supposition of trust that one must have if our democratic order is to be safeguarded from those outside our borders who wish to subvert it.

"Defending civil liberties is at the heart of the baby-boomer self-image, a self-image that's been packaged and sold to adolescents ever since. However powerful and rich and snobbish we ex-teenagers become, we still see ourselves as rebels fighting a lonely battle against overweening authority. To make that myth work, we need an overweening authority to battle—preferably one that can't fight back. Intelligence agencies are perfect for that role."

Stewart Baker, former general counsel
of the National Security Agency, in
Slate, September 17, 2001.

Discrimination We're Afraid to Be Against

Michael Kinsley

When thugs menace someone because he looks Arabic, that's racism. When airport security officials single out Arabic-looking men for a more intrusive inspection, that's something else. What is the difference? The difference is that the airport security folks have a rational reason for what they do. An Arab-looking man heading toward a plane is statistically more likely to be a terrorist. That likelihood is infinitesimal, but the whole airport rigmarole is based on infinitesimal chances. If trying to catch terrorists this way makes sense at all, then Willie-Sutton logic says you should pay more attention to people who look like Arabs than to people who don't. This is true even if you are free of all ethnic prejudices. It's not racism.

But that doesn't make it OK. Much of the discrimination that is outlawed in this country—correctly outlawed, we (almost) all agree—could be justified, often sincerely, by reasons other than racial prejudice. Without the civil rights laws, employers with nothing personal against blacks might well decide that hiring whites is more cost-efficient than judging each job seeker on his or her individual merits. Universities could base their admissions policies on the valid assumption that whites, on average, are better prepared for college. Even though this white advantage is the result of past and present racism, these decisions themselves might be rational and not racially motivated.

All decisions about whom to hire, whom to admit, whose suitcase to ransack as he's rushing to catch a plane are based on generaliza-

tions from observable characteristics to unobservable ones. But even statistically valid generalizations are wrong in particular instances. (Many blacks are better prepared for college than many whites. Virtually every Arab hassled at an airport is not a terrorist.) Because even rational discrimination has victims, and because certain generalizations are especially poisonous, America has decided that these generalizations (about race, gender, religion, and so on) are morally wrong. They are wrong even if they are statistically valid, and even if not acting on them imposes a real cost.

Until recently, the term “racial profiling” referred to the police practice of pulling over black male drivers disproportionately, on the statistically valid but morally offensive assumption that black male drivers are more likely to be involved in crime. Now the term has become virtually a synonym for racial discrimination. But if “racial profiling” means anything specific at all, it means rational discrimination: racial discrimination with a nonracist rationale. The question is: When is that OK?

The tempting answer is never: Racial discrimination is wrong no matter what the rationale. Period. But today we’re at war with a terror network that just killed 6,000 innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact we know about them? That may be asking too much.

And there is another complication in the purist view: affirmative action. You can believe (as I do) that affirmative action is often a justifiable form of discrimination, but you cannot sensibly believe that it isn’t discrimination at all. Racial profiling and affirmative action are analytically the same thing. When the cops stop black drivers or companies make extra efforts to hire black employees, they are both giving certain individuals special treatment based on racial generalizations. The only difference is that in one case the special treatment is something bad and in the other it’s something good. Yet defenders of affirmative action tend to deplore racial profiling and vice versa.

The truth is that racial profiling and affirmative action are both dangerous medicines that are sometimes appropriate. So when is “sometimes”? It seems obvious to me, though not to many others, that discrimination in favor of historically oppressed groups is less offen-

sive than discrimination against them. Other than that, the considerations are practical. How much is at stake in forbidding a particular act of discrimination? How much is at stake in allowing it?

A generalization from stereotypes may be statistically rational, but is it necessary? When you're storming a plane looking for the person who has planted a bomb somewhere, there isn't time to avoid valid generalizations and treat each person as an individual. At less urgent moments, like airport check-in, the need to use ethnic identity as a shortcut is less obvious. And then there are those passengers in Minneapolis last week who insisted that three Arab men (who had cleared security) be removed from the plane. These people were making a cost, benefit, and probability analysis so skewed that it amounts to simple racism. (And Northwest Airlines' acquiescence was shameful.)

So what about singling out Arabs at airport security checkpoints? I am skeptical of the value of these check-in rituals in general, which leads me to suspect that the imposition on a minority is not worth it. But assuming these procedures do work, it's hard to argue that helping to avoid another September 11 is not worth the imposition, which is pretty small: inconvenience and embarrassment, as opposed to losing a job or getting lynched.

A colleague says that people singled out at airport security should be consoled with frequent flier miles. They're already getting an even better consolation: the huge increase in public sensitivity to anti-Muslim and anti-Arab prejudice, which President Bush—to his enormous credit—has made such a focal point of his response to September 11. And many victims of racial profiling at the airport may not need any consolation. After all, they don't want to be hijacked and blown up either.

A (Potentially) Useful Tool

John Derbyshire

One thing that is fast becoming clear is that Americans at large are much more tolerant of racial profiling than they were before the terrorists struck. This fact was illustrated on September 20, when three men “of Middle Eastern appearance” were removed from a Northwest Airlines flight because other passengers refused to fly with them. A Northwest spokesman explained that under FAA rules, “the airline has no choice but to re-accommodate a passenger or passengers if their actions or presence make a majority of passengers uncomfortable and threaten to disrupt normal operations of flight.”

Compare this incident with the experience of movie actor James Woods. Woods took a flight from Boston to Los Angeles one week before the World Trade Center attacks. The only other people in first class with him were four men “of Middle Eastern appearance” who acted very strangely. During the entire cross-country flight none of them had anything to eat or drink, nor did they read or sleep. They only sat upright in their seats, occasionally conversing with each other in low tones. Woods mentioned what he had noticed to a flight attendant, “who shrugged it off.” Arriving in Los Angeles, Woods told airport authorities, but they “seemed unwilling to become involved.” You can see the great change in our attitudes by imagining the consequences if the first incident had happened two weeks earlier, or the second two weeks later. The first would then have generated a nationwide storm of indignation about racial profiling, and stupendous lawsuits; the second, a huge police manhunt for the four men concerned. It seems very likely that Woods witnessed a dry run for the attack on the World Trade Center. One of the planes used in that attack was flying the same Boston-Los Angeles route that Woods flew. If the authorities had acted on his report—if, that is to say, they

had been willing to entertain a little straightforward racial profiling—6,000 lives might have been saved.

Civil libertarians are now warning us that in the current climate of crisis and national peril, our ancient liberties might be sacrificed to the general desire for greater security. They have a point. If truth is the first casualty in war, liberty is often the second. The reason that practically nobody can afford to live in Manhattan who isn't already living there is rent control, a World War II measure, never repealed, that removed a landlord's freedom to let his property at whatever rent the market would bear. But the moral to be drawn from that instance is only that, as legal scholar Bruce Ackerman has recently argued, emergency legislation must never be enacted without a clear "sunset provision": after some fixed period—Ackerman suggests two years—the law must lapse. The civil-liberties crowd does not, in any case, have a dazzling record on the liberties involved in private commercial transactions. What happened to a cabdriver's liberty to use his own judgment about which passengers to pick up? Gone, swept away in the racial-profiling panic of the 1990s, along with the lives of several cabbies.

It is in the matter of proactive law enforcement—the kinds of things that police agencies do to prevent crime or terrorism—that our liberties are most at risk in tense times. Whom should you wiretap? Whom should airport security take in for questioning? This is where racial profiling kicks in, with all its ambiguities. Just take a careful look, for example, at that phrase, "of Middle Eastern appearance," which I imagine security agencies are already abbreviating OMEA. The last time I wrote about this subject, I concentrated on the topics that were in the air at that time: the disproportionate attention police officers give to black and Hispanic persons as crime suspects, and the targeting of Wen Ho Lee in the nuclear-espionage case. I had nothing to say about terrorists from the Middle East, or people who might be thought to look like them. OMEA was not, at that point, an issue.

Now it is, and the problem is that OMEA is perhaps a more dubious description even than "black" or "Hispanic." You can see the difficulties by scanning the photographs of the September 11 hijackers published in our newspapers. A few are unmistakably OMEA. My reaction on seeing the photograph of the first to be identified, Mohamed

Atta, was that he looked exactly like my own mental conception of an Arab terrorist. On the other hand, one of his companions on AA Flight 11, Wail al-Shehri, is the spitting image of a boy I went to school with—a boy of entirely English origins, whose name was Hobson. Ahmed al-Nami (UA Flight 93) looks like a Welsh punk rocker. And so on.

Other visual markers offer similar opportunities for confusion. This fellow with a beard and a turban, coming down the road—he must surely be an Arab, or at least a Muslim? Well, maybe, but he is much more likely to be a Sikh—belonging, that is, to a religion that owes more to Hinduism than to Islam, practiced by non-Arab peoples who speak Indo-European languages, and with scriptures written with a Hindi-style script, not an Arabic one. Sikhism requires male adherents to keep an untrimmed beard and wear a turban; Islam does not.

Most other attempts at a “Middle Eastern” typology fail a lot of the time, too. Middle Easterners in the U.S. are mainly Arabs, right? That depends on where you live. In the state of California, better than half are Iranian or Afghan; in Maryland, practically all are Iranian. Even if you restrict your attention to Americans of Arab origin, stereotypes quickly collapse. You would think it could at least be said with safety that they are mainly Muslims. Not so: more than three-quarters of Arab Americans are Christians. The principal Middle Eastern presence in my own town is St. Mark’s Coptic Church. The Copts, who are Egyptian Christians, are certainly OMEA, and they speak Arabic for nonliturgical purposes, and have Arabic names. They have little reason to identify with Muslim terrorists, however, having been rudely persecuted by extremist Muslims in their homeland for decades. Misconceptions cut the other way, too. Care to guess what proportion of Muslim Americans are of Arab origins? Answer: around one in eight. Most American Muslims are black.

That we could impose any even halfway reasonable system of “racial profiling” on this chaos seems impossible. Yet we can, where it matters most, and I believe we should; certainly in airport security, which, as a matter of fact, is where OMEA profiling began, during the hijack scares of the early 1970s. When boarding a plane, documents need to be presented, names declared, words exchanged. This gives

security officials a much richer supply of data than a mere “eyeball” check. We return here to one of the points in my previous article on this subject, as affirmed by the U.S. Supreme Court: that “race”—which is to say, visible physical characteristics typical of, or at least frequent among, some group with a common origin—can be used as part of a suspect profile to identify targets for further investigation, provided there are other criteria in play.

We should profile at airports because, as the James Woods incident shows, profiling is an aid—very far from an infallible one, but still a useful one—to identifying those who want to harm us, in this as in any other area of law enforcement. To pretend that any person passing through airport security is as likely as any other to be a hijacker is absurd, just as it is absurd to pretend that any driver on the New Jersey Turnpike is as likely as any other to be transporting narcotics.

Crises like the present one can generate hysteria, it is true, but they can also have a clarifying effect on our outlook, sweeping away the wishful thinking of easier times, exposing the hollowness of relativism and moral equivalence, and forcing us to the main point. And peacetime has its own hysterias. I believe that when the long peace that ended on September 11 comes into perspective we shall see that the fuss about racial profiling was, ultimately, hysterical, driven by a dogmatic and unreasoned refusal to face up to group differences. So long as the authorities treat everyone with courtesy and apologize to the inconvenienced innocent, racial profiling is a practical and perfectly sensible tool for preventing crime and terrorism.

“If we allow our freedoms to be undermined, the terrorists will have won.”

Anthony Romero, executive director
of the ACLU. Quoted in *Newsweek*, October 1, 2001.

Fighting the Airline Lobby

Walter V. Robinson and Glen Johnson

Despite recurrent warnings from official watchdog agencies and presidential commissions that airport security lapses could have catastrophic consequences, government efforts to remedy the problems have been frustrated repeatedly by cost-conscious airlines. A new commission has now been empaneled to look at airport security after last month's devastating attacks with hijacked jetliners on New York and Washington.

But specialists wonder whether reform might be imperiled by the same political factors that have undermined security over the last two decades: airlines that have successfully resisted many critical, sometimes costly security improvements; ineffectual federal oversight; and politicians of both parties who, like their constituents, have been more concerned about flight delays than terrorism.

Major airlines often fail to deliver on-time performance. But in Washington, the *Boston Globe* has found, their lobbying record is the envy of other regulated industries. In 1990, when Congress sought to impose 10-year criminal background checks on all airport workers, the airlines hired former FBI and CIA director William H. Webster to lobby against the measure, which was later weakened substantially.

Five years ago this month, a presidential commission led by Vice President Al Gore backpedaled on a tough baggage-screening proposal, after a flood of airline contributions to the Democratic Party in the closing weeks of the 1996 presidential election. Just yesterday, the

FAA disclosed that later this month it will require new training and performance standards for the near minimum-wage workers who staff security checkpoints at airports as subcontractors to the airlines. The new standards were proposed by the White House in February, 1997.

“We’re going to spend over \$100 billion before this is over,” said Billie H. Vincent, a former FAA security chief. “We’re going to lose good military personnel, because of the stupidity of the [airline] industry.

“And now they’re on the doorstep of the president with their hands out, saying, ‘Help us, help us,’” Vincent said. “We wouldn’t have been in this situation at all if they hadn’t fought the things we were recommending in the first place.”

David Fuscus—a spokesman for the Air Transport Association, which represents the airlines—said the airlines have merely followed the rules set by the government. In areas where security measures have not been acceptable, Fuscus said, “it is up to the government to set the standards.” But now, he added, it is time for the government to take over the responsibility.

Despite the accusatory fingers now being pointed at airport managers in Boston and elsewhere, the security system that was breached so easily last month was not of their making. Instead, it is a leftover oddity of the 1970s, when a wave of hijackings prompted the government to order the airlines to keep weapons and bombs off airplanes.

Yet the airlines, who bear the responsibility and cost of most airport security procedures, have long used their political power to frustrate FAA regulators. Even when the FAA pushes back, the airlines often persuade key members of Congress to intervene on their behalf. The result is a national airport security system so vulnerable that, until last week, the FAA had permitted passengers to carry knives up to four inches long, simply because so many people carry them.

But the 19 hijackers armed with plain box cutters might well have slipped heavy weaponry aboard. Security systems at major airports are so porous that the government’s own agents routinely sneak

handguns and mock bombs through checkpoints staffed by lightly trained workers paid marginal wages with no benefits by companies who win contracts from airlines by submitting the lowest bid.

It is a system so hapless that expensive bomb-detecting machines are often of little value because the same pool of entry-level workers is inadequately trained to operate the sophisticated equipment. All too often, the same workers find better pay at airport fast-food concessions like Starbucks, which offers stock options and other benefits.

Government, airline, and airport officials have said that even the best of security systems might not have stymied the plans of terrorists intent on using large passenger planes as suicide bombs. But a growing number of experts say that security shortcomings at U.S. airports have been so serious and so obvious for so long that terrorists must have concluded that the daring takeover of four jetliners would have a high chance of succeeding.

Just 15 months ago, the General Accounting Office, the investigative arm of Congress, added an eerie warning to a report citing serious airport security flaws. “The trend in terrorism against U.S. targets is toward large-scale incidents designed for maximum destruction, terror, and media impact,” the GAO said.

Paul Hudson—executive director of the Aviation Consumer Action Project, a nonprofit watchdog group—said in an interview this week that he “can’t think of one thing that [the airlines] have proposed to enhance security, and I can think of many things they have done to inhibit it.” Hudson added: “When things occur that indicate a need for corrective action, [the proposals] are defused and delayed and watered down, to where the resulting measures have no effect.”

Little Consumer Patience

Yet it is not just airline intransigence and government complicity that have hamstrung efforts to improve airline security. Frustrated by an air travel system known for its chronic tardiness, air passengers had little patience with the security system that existed before September 11. At Logan and other airports, facility managers and airlines have pushed subcontractors to quicken the pace at security check-

points. Last February, for example, Logan's managers, the Massachusetts Port Authority, urged airlines to speed the movement of passengers through the system, to ensure that the wait at checkpoints not exceed five minutes.

Similar haste has been urged at other airports.

"We were constantly under pressure to move people through security more quickly," recalled Dan Boeschle, who until February was the manager of the security company at Dulles Airport, outside Washington. Passengers were often rude and abusive, he said in an interview. Some even threatened lawsuits if they missed their flights.

"We were under constant pressure from the airlines, too," Boeschle said. "If there were lines at security, we started getting visits from [airline] customer service managers saying, 'I want to talk to your boss.'" That kind of intervention, he said, "would make you feel like your job or contract was threatened."

Sonia Ramirez, who is paid \$9.24 per hour to screen passengers at a Los Angeles International Airport checkpoint overseen by Delta Air Lines, said there was often intense pressure to move passengers through security. Sometimes, she said, supervisors overseeing three passenger queues were forced to open a fourth X-ray machine and metal detector, with no additional staff.

At Logan, checkpoints were often so short-staffed that the on-site supervisor had no choice but to examine baggage, a violation of FAA rules, according to a former airline supervisor at the airport who asked that he not be identified. Morale is so low that the average employee at Logan, for example, stays on the job less than six months. The result was that airport security personnel, ill-trained to start with, often missed contraband items.

Brian Sullivan, who retired early this year as an FAA special agent, said that he and other agents frequently slipped handguns and dummy bombs through security at major airports. One team, Sullivan said, even managed to get a rifle through the system. For years, government agents like Sullivan have documented continuing serious lapses, but to no avail.

As recently as June 2000, the GAO rated the performance of airport security screeners as “unsatisfactory” in detecting contraband items like handguns. FAA reports, documented by the *Globe* in 1999, pinpointed Logan as one of many major airports with serious security flaws. During one two-year period in the late 1990s, Massport and the airlines paid \$178,000 in fines for security violations.

Those long-standing concerns prompted the Gore Commission, even in its watered-down final report in February 1997, to urge a substantial increase in standards, training, pay, and advancement opportunities for airport security personnel. But the airlines, which pay the security bill, have fought the change. Only now are the recommendations of the Gore Commission being seriously considered.

Small wonder, said Hudson, the consumer aviation advocate. “There is a virtual interlock between the [airline] industry and the Transportation Department and the FAA,” Hudson said. “The aviation industry spends over \$20 million a year to get their way in Washington, and they get their way. I’ve never seen a serious instance in which they haven’t.” Some of that money is spent to hire lobbyists with the capital’s most impressive resumes, as U.S. Representative James L. Oberstar, Democrat of Minnesota, discovered in 1990 when he championed legislation in the aftermath of the Pan Am 103 explosion over Lockerbie, Scotland.

Following through on recommendations from another presidential commission, Oberstar, then the chairman of a House aviation subcommittee, proposed a 10-year background investigation for all airport security workers. The airlines, he said, balked at the cost and wanted such a check triggered only when there was a year-long gap in employment.

To press their case, the airline trade group hired Webster, the former FBI and CIA director. Oberstar recalled in an interview this week that after hearing Webster’s objections, “I just leaned over and said, ‘If you were still director of the FBI, would you be making this argument to me?’”

“And he sort of stopped and just went back and said: ‘Look, that’s not the issue. The issue is cost and time and complexity and paperwork, and the same benefit can be achieved by other means.’”

Oberstar recalled. “I said: ‘I do not accept it. I’m appalled by the argument, and I won’t be party to it.’”

Webster did not dispute that recollection in an interview yesterday. He said his opposition to the criminal background checks stemmed from two points: the FAA was trying to make them mandatory when Congress had not offered that directive, and “only one employee at that time had ever been found to have breached his loyalty,” Webster said.

Asked whether he felt that his lobbying had done anything to undercut airport security, Webster replied: “I still feel it was sound. That was putting money in the wrong place. When you require them to spend money, it ought to be spent where it will do some good.”

In the end, Webster and the airlines prevailed. The proposal was delayed and then weakened. When Congress ultimately mandated the checks in 1996, existing employees were exempted. What’s more, airport security managers say the background check has little value, because the vast majority of new airport screeners are recent immigrants whose backgrounds are difficult or impossible to check.

Boeschle, who ran the Dulles security operation, said that nine out of ten security workers at that airport are foreign-born and that most of those have green cards. “That would lessen the effectiveness of any fingerprint check,” he said.

Presidential Commission

By some accounts, the Gore Commission represents the clearest recent public example of the success that airlines have long had in defeating calls for more oversight.

Formed in the summer of 1996, after the explosion that tore apart TWA Flight 800 off Long Island after it departed from Kennedy Airport in New York, the presidential commission eventually issued a report containing numerous recommendations for enhanced security and safety. But the airline industry has used its leverage at the

FAA to delay or dilute many recommendations, including the enhanced training for airport screeners.

To be sure, some of the commission's work has borne fruit in improvements such as more bomb-sniffing canine units and the use of sophisticated imaging equipment to detect bombs in luggage, although the GAO has found that the expensive machinery is often operated by security workers with insufficient training.

At the outset, the commission issued an ambitious set of proposals, announcing on September 5, 1996, that it favored measures that included baggage matching. Long used on international flights and on originating domestic flights, that provision would have required that no checked bag, even on a connecting flight, could be loaded unless the ticket holder boarded the flight. To the airlines, with domestic hub-and-spoke systems that rely on quick connections of both bags and passengers, the proposal meant costly delays and enraged passengers.

According to Vincent, the former FAA security chief, the airlines began a vigorous lobbying campaign aimed at the White House. Two weeks later, Gore retreated from the proposal in a letter to Carol B. Hallett, president of the industry's trade group, the Air Transport Association. "I want to make it very clear that it is not the intent of this administration or of the commission to create a hardship for the air transportation industry or to cause inconvenience to the traveling public," Gore wrote. To reassure Hallett, Gore added that the FAA would develop "a draft test concept . . . in full partnership with representatives of the airline industry."

The day after Gore's letter, Trans World Airlines donated \$40,000 to the Democratic National Committee. By the time of the presidential election, other airlines had poured large donations into Democratic Party committees: \$265,000 from American Airlines, \$120,000 from Delta Air Lines, \$115,000 from United Air Lines, \$87,000 from Northwest Airlines, according to an analysis done for the *Globe* by the Center for Responsive Politics, which tracks donations. In all, the airlines gave the Democratic Party \$585,000 in the election's closing weeks. Over the preceding 10-week period, the airlines gave the Democrats less than half that sum.

Elaine Kamarck, the Gore aide who worked with the commission, denied that there was any connection between the donations and the commission's decisions. "Everyone was giving us money," she said. "When you're winning, everyone gives."

Fuscus, who was then the Air Transport Association's vice president for communications, said the industry contributes because it is heavily regulated and wants to make sure that its voice is heard. "But the industry was not buying anything, and the administration was not selling anything," he said.

Others disagree. Mary Schiavo, the outspoken former FAA inspector general, said she believes that the contributions helped to ensure that the airlines avoided expensive new requirements, such as the baggage match. Vincent, the former FAA chief, holds the same view.

Two of the commission's members—Kathleen Flynn and Victoria Cummock, both relatives of victims of the Pan Am 103 terrorist attack—also said that they believe political contributions influenced the outcome. But Flynn also noted that "the same thing happened under the Republicans."

Cummock, alone among the commissioners, refused to endorse the final report. Instead, she filed a stinging dissent, charging that the report was tailored to the concerns of the airline industry.

The airlines may have found other pressure points within the commission, according to a January 1997 letter in which one member, Brian M. Jenkins, said he felt that his support for the baggage-matching requirements might hurt his business. Jenkins—a counterterrorism specialist who was then deputy chairman of Kroll International, a security firm—wrote the commission's staff director to say that he had learned that airline executives considered him "a hard-line foe of the aviation industry, because, according to their sources, I am the principal member of the commission who is driving the group to adopt unreasonable positions on baggage match and other security measures, and furthermore that this will weigh heavily against Kroll in any future business with the airline industry." According to the letter, which the *Globe* obtained this week, Jenkins

described himself instead as “determined but pragmatic” and “not wanting to disrupt the system.”

In an interview, Jenkins acknowledged that there was pressure on the commission from the airlines. But he said that the commission also had to deal with the disparate agendas of organizations representing large and small airlines; cargo carriers; unions representing pilots, flight attendants, and air traffic controllers; and even civil libertarians who successfully fought off what they considered intrusive proposals to use profiling to identify possible terrorists.

Jenkins, who was also involved with the 1990 commission, said that all Washington’s major players share responsibility for the airport security system that was so badly compromised on September 11. “I don’t think the airline industry delivered the security it should have,” he said. “I don’t think the government did enough or enforced the rules. And I don’t think the public demanded the level of security we should have had.

“But had we done better, would it have prevented the tragedy on September 11?” Jenkins said. “Not necessarily. I just don’t know.”

Special Interests Lose Their Grip

Jackson Diehl

Behind the dramatic changes in U.S. international relations since September 11 is a deeper shift in the way that policy is shaped and baked in Washington. Call it the renationalization of foreign affairs.

The switch can be seen in a host of incremental but remarkable congressional votes in the past three weeks, from the sudden passage of a free trade agreement for Jordan that had been stuck in the Senate for a year to the House's equally abrupt approval of a big dues payment to the United Nations. But it's also been evident in the executive branch: it could explain why a stubborn sticking point on China's accession to the World Trade Organization suddenly disappeared, and why the White House has said next to nothing about missile defense since September 11. Before last month those causes were pushed, or blocked, by relatively small interest groups, or sometimes single congressmen, who judged it worthwhile to hold U.S. foreign policy hostage to their single-issue agendas. Representative Tom DeLay was happy to curtail American participation in the United Nations until he won an argument about the International Criminal Court. Senator Phil Gramm was ready to thwart U.S. support for a vital Middle-Eastern ally in order to make a point to U.S. labor unions. The interest of a single U.S. company, insurance giant AIG, was stopping a final agreement on China's WTO membership.

Such lopsided use of leverage was not only normal before September 11, it had become the substitute for a post-Cold War foreign policy. In the absence of public interest or political consensus on a defining mission, large swaths of American foreign affairs were essentially privatized in the 1990s by special interests in Congress, the business world, or ideological missionaries of one stripe or another.

Congressional earmarks and sanctions proliferated; half of the 120-plus unilateral sanctions imposed by the United States since World War I were adopted between 1993 and 1998. Countries around the world became the subject not of American policy but of one American's policy. One small group of congressmen, catering to Christian conservatives, cornered U.S. policy toward Sudan; another, from Florida, got Cuba; a third, pandering to Los Angeles, took over Armenia.

By last year's presidential election, the trend was widely lamented among the foreign policy establishment, but regarded as probably irreversible. In a *Foreign Affairs* article last fall, Brookings scholar James M. Lindsay argued that voters' lack of interest in world events meant no punishment, and potentially substantial reward, for special-interest twisting of U.S. policy. Only a war or recession, he concluded, might turn things around.

Well, we may now have both—and as counterterrorism becomes the overriding theme of American politics, the speed with which the pendulum is swinging back is breathtaking. Last week some of the major architects of congressional foreign policy, such as Senators Patrick Leahy and Mitch McConnell, balked at an administration attempt to pass legislation allowing the suspension for counterterrorism of almost all sanctions and other restrictions on U.S. aid and military assistance abroad for five years. But the fact that such a sweeping shift of power from Congress to the administration was even proposed shows how much is likely to change.

"It's very likely that there are going to be changes in sanctions policies and debt-forgiveness policies with the emergence of foreign policy as an essential issue," says Representative Roy Blunt, a Missouri Republican close to the White House.

"We've been in a period where Congress was inclined to move toward the limits of constitutional responsibility," he adds. "A national crisis always tends to swing that power back to the president."

The change is wonderful news for once-beleaguered Cabinet members such as Trade Representative Robert Zoellick, who may have a chance of passing legislation giving the president trade negotiation authority; or Donald Rumsfeld, who got a base-closing resolution through the Senate last week; or Colin Powell, who may get a

significant increase in foreign aid after years of cuts. If it can be cast as part of the war against terrorism, it will pass.

But it's not clear that everyone in the administration will get his way. Consider missile defense. Before September 11 the hawks were pressing hard for a unilateral withdrawal this fall from the Anti-Ballistic Missile (ABM) Treaty, even if it meant souring relations with Europe and Russia. In the past two weeks, opposition in Congress to missile defense has melted away; but so has the notion that the United States can readily afford to present Russia's Vladimir Putin with a fait accompli on an issue unrelated to fighting terrorists in Afghanistan.

Perhaps the missile defense ideologues still will try to force a unilateral ABM withdrawal by November, amid the Afghan campaign. But in the world of renationalized foreign policy, that seems like a stretch.

"The law is clear: in a public place, we don't have a reasonable expectation of privacy."

Erwin Chemerinsky, law professor
at the University of Southern California.
Quoted in the *Los Angeles Times*, September 14, 2001.

THE ROLE OF THE STATE

Government to the Rescue

Albert R. Hunt

As America braces for a war on terrorism while celebrating heroism, especially our brave firemen, policemen, and emergency workers (public employees, one and all), it's time to declare a moratorium on government-bashing.

For a quarter-century, the dominant public culture has suggested government is more a problem than a solution. Even in the most prosperous of times pressures persisted to hold down spending; Democrats like Bill Clinton and Al Gore bragged about cutting bureaucrats and, until 16 days ago, regulation was a dirty word in the Bush administration. But, as during previous catastrophes, America turns to government in crisis. "We come to understand there are some things that only government can do," notes Senator John Kerry. "Our lives will be spent on a function a lot of people have made political meat out of cheapening and denigrating."

For the foreseeable future, the federal government is going to invest or spend more, regulate more and exercise more control over our lives.

That spending will change has been evident since the attack. As a percentage of the gross domestic product, federal spending has plummeted to 18.2 percent, the lowest level in 35 years. That trend will be dramatically reversed—some estimates put additional new spending

at more than \$1 trillion over the next several years—with vastly higher expenditures for the Pentagon, domestic security, failing industries and the struggles of ordinary citizens.

These are the big-ticket items. But there are countless other claims, ranging from belatedly following the recommendations of Admiral William Crowe to spend an additional \$1.4 billion a year to make American embassies safer, to hiring lots more Arabic language analysts and translators, to more money for public health.

But just as important as increased spending will be the need for more regulation. We will hear much less about the glories of privatization in areas like airport security. “Any debate about the federal role here is antique,” asserts California Rep. Jane Harman, the vice chair of the new House Committee on Terrorism. “We know airport security has to be primarily a federal function.”

(The argument for arming pilots is insane but the idea of armed air marshals is not. The government also needs to look at Vietnam-era technology that would permit pilots to automatically switch control of the plane to a ground controller in the event of an attempted hijacking.)

Top Bush administration officials will have to dramatically alter their views on regulation. The president this week moved to crack down on resources available to terrorists, freezing their assets and warning foreign banks to cooperate by providing necessary records.

Yet for all this, the Bush administration fought against tougher money laundering regulations pushed by its predecessors and by the Organization for Economic Cooperation and Development. Only two months ago Treasury Secretary Paul O’Neill opposed any assault on money laundering tax havens, questioning the United States’s “right to tell other countries” what to do. Larry Lindsey, the White House top economic official, privately met with lobbyists who were trying to kill any crackdown on money laundering.

A terrorist reliance on a system of informal, private transactions—called hawala—will enable them to escape some added scrutiny. The September 11 attacks may have been financed so cheaply—by some accounts it cost as little as \$200,000—that they didn’t even require the use of financial institutions and money laundering.

Yet, says Jack Blum, a Washington attorney and former congressional investigator who for years has warned about terrorism, “money laundering is a big factor with these groups. It is essential to use government resources to stop it.” Similarly, Senator Kerry notes that “hawala can never make up for all terrorists transfer through the (banking) system in money laundering.” A decade ago, the Massachusetts Democrat led a congressional probe of the outlaw BCCI bank, through which Osama bin Laden had laundered money.

Similarly, a left-right coalition has tried to deny access to U.S. capital markets to oil companies doing business with Sudan. That country has harbored terrorists, including Osama bin Laden, and used oil proceeds to wage genocide on dissidents, killing two million. But the Bush administration fought this measure as an unhealthy precedent for government intrusion. Any full-scale war on terrorism would be to cut off from U.S. financial markets any countries or companies that traffic with terrorists or support terrorists.

Moreover, more muscular authority must be given to the new Office of Homeland Security (a dreadful name), to be headed by Pennsylvania Governor Tom Ridge (a superb choice). But, as former Senator Gary Hart, who co-chaired the most comprehensive report on terrorism, notes, there needs to be a greater urgency and broader sense of mission.

“This must be a statutory agency with broader budget authority,” he says, and Mr. Ridge must be able to “command, not request, actions from the Coast Guard, Border Control, FEMA, parts of the CDC and others.” It is shortsighted, he argues, not to make this a confirmable post, which would help Mr. Ridge transcend the territorial fights of the past.

To be sure, there always are dangers in bigger government. Congress and the press must play a critical oversight role.

It’ll be easy to reach a consensus on denying capital markets to those who traffic with terrorists. But the concern posed earlier by Alan Greenspan and others of runaway controls against anyone indirectly associated with drug dealers, human-rights violators, or countries whose policies we simply don’t like, is substantive.

Tougher security measures at home are unavoidable. But liberals like Ralph Neas have justifiably questioned whether Attorney General John Ashcroft has overreached in seeking unlimited detention of non-citizens or expanded electronic surveillance in areas not related to terrorism. Before granting vastly expanded powers, conservatives should ask a simple question: Would they give such authority to Bill Clinton or Janet Reno?

But there is no real debate over expansion in general. September 11 has underscored the centrality of government in our lives.

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Responding to the Nightmare of Bioterrorism

Laurie Garrett

Consider this hypothetical scenario: the Red Army terrorist group successfully releases drug-resistant anthrax spores in the Bourse station of the Paris Metro at 8:00 AM on a warm Wednesday in June. What would be the role of the French military, Surete (the French intelligence service), the Paris police, or any number of high-tech sensory devices? None.

The most important responders would not be the military or law enforcement officials. They would be the doctors, epidemiologists, ambulance drivers, nurses, and bureaucrats of the Paris public health system. It is they who would note—days after the actual attack—that large numbers of Parisians appeared to be ill, suffering similar symptoms. With further questioning they would perhaps realize that all the ailing individuals routinely took the same Metro train or stopped at the same station. Whether or not anyone would ever discover that terrorists had sprayed a lethal biological mist in the Bourse Metro station, it would be the public health workers who would track down and treat the patients, dispense appropriate drugs, determine whether the outbreak was spreading from the Bourse source, and analyze the microorganism for any special attributes.

Yet military-like responses have dominated Western government thinking, sparking recent outcries among defenders of civil liberties. During role-playing episodes in 1998-99, the DOD claimed the right to seize command during a bioterrorist attack—a constitutionally shaky move. And on February 1, 1999, Defense Secretary William Cohen announced the creation of a special command within the DOD designed to coordinate responses to domestic bioterrorist attacks. Cohen's plans echoed the popular 1995 movie *Outbreak*, in which the U.S. Army declared martial law and took full control of an American city

to limit the spread of an airborne form of the Ebola virus. Civil-liberties advocates responded to Cohen's announcement with indignation: such a clear violation of the Constitution might be OK for Hollywood, they cried, but not for the real world.

President Clinton had tried to obviate such worries in his January 22, 1998, speech to the National Academy of Sciences. "We will be aggressive," he said, referring to his administration's response to the bioterrorist threat. "At the same time . . . we will remain committed to uphold privacy rights and other constitutional protections, as well as the proprietary rights of American businesses. It is essential that we do not undermine liberty in the name of liberty." That day Clinton requested congressional approval of a \$10 billion antiterrorism program, including \$86 million for improving public health surveillance, \$43 million for research on vaccines for anthrax, smallpox, and other potential bioweapons agents, and \$300 million for stockpiles of essential drugs and vaccines. The proposed expenditures doubled the previous year's bioterrorism budget.

The job of building the nation's drug and vaccine warehouse fell to Margaret Hamburg, assistant secretary for the U.S. Department of Health and Human Services. She had to race to catch up with the DOD and the FBI. Public health was a late entrant to the bioterrorism field, she said, and significant dangers lurked in the developing antiterrorist infrastructure. Beyond the civil liberties issues that had already been voiced, Hamburg warned, "we don't want public health to be identified with the CIA and FBI activities. . . . We in public health need to have public trust and confidence."

Already, local public health departments were having a hard time responding to fake bioterrorist attacks. Claiming to have dropped off or shipped an anthrax-containing device suddenly became chic at the turn of the millennium. Terrorism expert Jessica Stern counted 47 such hoaxes in the United States since 1992. In all 47 cases, local fire and police authorities reacted seriously, decontaminating thousands of people and appearing on the scenes dressed in full-body protection suits. And Stern's list was by no means comprehensive.

Secretary of the Navy Richard Danzig warned that panic, in and of itself, is becoming the new terrorist tool. "Only through a new

union of our public health, police, and military resources,” he said, “can we hope to deal with this dangerous threat.” But Hamburg worried that the police and FBI responses actually encourage such false alarms. It seems that bioterrorist hoaxes attract the type of individuals who enjoy watching fire departments douse buildings they have set afire. “When an envelope comes in saying ‘This is anthrax,’ we don’t need the fire department in full protective gear on site,” Hamburg insists. “What we need is to discreetly move the envelope to a public health laboratory for proper analysis. Mass decontamination and quarantine only [add] fuel to the fire of the hoax perpetrators, and it’s totally unnecessary in terms of public health.”

It is obvious that public health, law enforcement, and defense officials have very different priorities in the event of a bioterrorist attack. For public health workers, the paramount concerns are limiting the spread of infection, identifying the cause of the disease, and if possible, treating and vaccinating the public. Law enforcement agents, however, are in the business of stopping and solving crimes—and the scene of any bioterrorist incident is, first and foremost, a source of evidence. Managing a response to an outbreak thus poses a conflict of interest, since the police and the FBI would, by mandate, focus on detaining witnesses and obtaining evidence, even if those efforts ran counter to public health needs.

Even within the military itself, priorities blur when it comes to bioterrorism. The DOD’s primary mission is to protect the United States against military foes. A secondary concern is to defend the health of American troops. How those priorities square with intervening—and indeed, commanding—responses to domestic bioterrorist attacks is not at all clear.

What is even less clear is how a public health system can respond to bioterrorism without destroying the basis of its credibility. When a public health system needs to intrude on individuals’ lives to protect the larger community, it does so in limited ways and usually under the hard-and-fast promise of confidentiality. During an epidemic, for example, individuals may be asked to submit to blood tests and medical exams, and their medical charts may be scrutinized—but all under the promise of confidentiality. In the long term, a public health system protects the community by monitoring disease trends, which

requires tracking who has which diseases. Again, this information is generally stored under confidential or anonymous terms. On a global level, the WHO and a variety of other groups keep count of nations' diseases, monitoring for the emergence of new epidemics. After the 1995 Ebola outbreak in Zaire, for example, the WHO sought to create a more rigorous surveillance system and pushed countries to be more open about epidemics in their populations.

All of these functions, in all tiers of public health systems, require the maintenance of a crucial social contract: the individual or country agrees to openly disclose information for the sake of the larger community's health. In return, public health authorities promise never to abuse this trust, maintaining discretion and protecting patient privacy.

But the fear of bioterrorism threatens to destroy that vital social contract, which is not shared by law enforcement and defense officials. The closer a public health system draws to the other two systems, the greater the danger that it will lose credibility in the eyes of the public. Indeed, suspicions already run high in many American minority communities, prompting widespread belief that such microbes as the AIDS virus were created by the U.S. Public Health Service, the National Institutes of Health, or the CIA with the intention of obliterating key minority populations.

Some public health advocates are convinced that no marriage between their profession and law enforcement could ever work and have denounced all efforts to heighten concerns about bioterrorism. One prestigious group argues that "bioterrorist initiative programs are strongly reminiscent of the civil defense programs promoted by the U.S. government during the Cold War . . . [that fostered] the delusion that nuclear war was survivable."

For many older public health leaders, the bioterrorism scare evokes nasty memories of Cold War cover-ups and censorship. By adopting the bioterrorism issue, they warn, public health officials are buying into a similar framework of paranoid thinking. Indeed, in 1999, biologists working in national laboratories found, for the first time, their work facing censorship in the wake of allegations of Chinese espionage at the Los Alamos National Laboratory. The Department of Energy (DOE), which oversees the national labs, clamped

down so hard in 1999 that the National Academy of Sciences warned that the future of U.S. scientific enterprise could be imperiled. Although the DOE's primary concern was computer and nuclear secrecy, the threat of bioterrorism prompted the agency to broaden its new security restrictions to embrace basic biology research as well.

Many advocates argue that the public health system's role in the fight against bioterrorism can be comfortable only if it is an equal partner of the law enforcement and defense communities. One of the loudest voices speaking on behalf of public health in this regard is Michael Osterholm. In his new book, *Living Terrors*, Osterholm argues that "the overuse of the term 'weapons of mass destruction' (WMD) has done a great deal to stunt the necessary attention to the looming threat of biological terrorism." The WMD terminology places defense against bioterrorism in the hands of the military and the police, Osterholm insists. And that means, he says, "our priorities are really screwed up."

Osterholm's proposed solutions go to the heart of a larger public health agenda: to enhance the readiness and capacities of local, state, and federal health departments for responding to both natural and deliberately created epidemics. After all, Osterholm argues, it is impossible to tell at its outset whether an epidemic is a natural or ghoulishly unnatural event.

The new administration must work out these tensions among public health, law enforcement, and military authorities. The Clinton administration offered a broader definition of national security, bringing emerging infectious diseases and the AIDS pandemic under the security umbrella. That allowed agencies more traditionally concerned with terrorism, such as the National Security Council, the CIA, and the FBI, into the public health arena. A new administration may seek to redefine national security in more classic nation-state terms, or to sharpen the public health focus on diseases that directly affect terrorism and warfare. The future balance of authority and influence in the fight against bioterrorism will undoubtedly hinge on a new administration's larger view of national security.

Public health's role in the bioterrorism issue will also be better defined when its leaders come up with a clear consensus on what exactly they want. The issue is so new to most public health officials

and raises so many uncomfortable questions that the profession is currently unable to speak with a clear, united voice. In contrast, the law enforcement and military communities appear comparatively determined and direct in their views of the bioterrorism threat and their desired responses to it.

In a historic speech in Atlanta during the winter of 1998, D. A. Henderson, head of Johns Hopkins University's Working Group on Civilian Biodefense, beckoned public health officials to jump on board a train already in motion, conducted by the law enforcement and defense communities. Less than a year later, public health had boarded the train, but only as a passenger. The train was fueled by an \$ 8.4 billion budget in fiscal year 2000, yet public health was allotted a mere 3.7 percent of those funds, according to a recent study by the Stimson Center in Washington, D.C. With such comparatively paltry funding, it is no wonder that public health found itself sitting at the back of the train, watching the scenery race by as other government players steered the locomotive's course. Unless this changes, the train is going to crash.

THE COMMUNITY'S PULSE

A Global Privacy Checklist

What some Asian and European nations ask of their inhabitants.

	Are people required to carry ID cards?	Is closed-circuit TV used by the police to watch streets and others public places?	Do people need to register their home address with the local police station or other authorities?
Belgium	Yes	NA.	Yes
Britain	No	Yes	No
China	Yes	Yes	Yes
France	Yes	Yes	No
Germany	No	Yes	Yes
Japan	No	No	Yes
Netherlands	Yes	Yes	Yes
Spain	Yes	Yes	No

Note: In Japan foreigners are required to carry alien-registration cards; in Germany the police can require proof of identity in some cases.

Note: In Germany CCTV is used only in limited areas; in Japan, Tokyo police plan to use CCTV in certain areas starting next year; in Spain, CCTV is used only with court authorization and signs must be posted to inform passersby.

Source: *Wall Street Journal*,
September 14, 2001

Willing to Sacrifice

In order to curb terrorism in this country, do you think it will be necessary for the average person to give up some civil liberties?¹

Yes	61%
No	33%
Don't know	6%

What concerns you more right now: that the government will fail to enact strong, new anti-terrorism laws, or that the government will enact new anti-terrorism laws which excessively restrict the average person's civil liberties?²

Fail to enact strong laws	39%
Enact laws that restrict civil liberties	34%
Neither	10%
Don't know/refused	17%

Displaying Identity, Guarding Privacy

Would you favor or oppose the following measures to curb terrorism?²

	Favor	Oppose	DK/Refuse
Requiring that all citizens carry a national identity card at all times to show a police officer on request	70	26	4
Allowing the U.S. government to monitor your personal telephone calls and emails	26	70	4
Allowing the U.S. government to monitor your credit card purchases	40	55	5
Allowing law enforcement to randomly stop people who may fit the profile of suspected terrorists? ¹	68	29	3

Source: 1. *Los Angeles Times*, September 16, 2001, U.S. national sample of 1,561 adults
 2. The Pew Research Center for the People and the Press, September 14-17, 2001, U.S. national sample of 868 adults

Compiled by Jason Marsh

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