

Breaking the Vicious Cycle Preserving Our Liberties While Fighting Terrorism

by Timothy Lynch

Executive Summary

When terrorists perpetrate atrocities against innocent American civilians, the public response is initially one of shock, which then quickly turns into anger. It is also common for people to experience a deep sense of anxiety in the aftermath of such attacks—especially as they hear poignant stories about fellow citizens who were so suddenly and unexpectedly killed. Such stories are a harsh reminder of one's own mortality and vulnerability.

Government officials typically respond to terrorist attacks by proposing and enacting "antiterrorism" legislation. To assuage the widespread anxiety of the populace, policymakers make the dubious claim that they can prevent terrorism by curtailing the privacy and civil liberties of the people. Because everyone wants to be safe and secure, such legislation is usually very popular and passes the legislative chambers of

Congress with lopsided majorities. As the president signs the antiterrorism bill into effect, too many people indulge in the assumption that they are now safe, since the police, with their newly acquired powers, will somehow be able to foil the terrorists before they can kill again. The plain truth, however, is that it is only a matter of time before the next attack.

This cycle of terrorist attack followed by government curtailment of civil liberties must be broken—or our society will eventually lose the key attribute that has made it great: freedom. The American people can accept the reality that the president and Congress are simply not capable of preventing terrorist attacks from occurring. Policymakers should stop pretending otherwise and focus their attention on combating terrorism *within the framework of a free society*.

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Introduction

When thousands of innocent civilians were murdered in a terrorist attack on September 11, 2001, President Bush declared, “Freedom has been attacked, but freedom will be defended.”¹ Within a matter of weeks, American military forces were hunting down the culprits by attacking terrorist base camps in Afghanistan. That decisive military action was a perfectly appropriate move to defend the lives, liberties, and property of the American people.

Here at home, however, President Bush and Attorney General John Ashcroft have done a poor job of “defending freedom.” The Bush administration has supported measures that are antithetical to freedom, such as secretive subpoenas, secretive arrests, secretive trials, and secretive deportations. A vigorous investigation into the worst attack on American civilians was necessary, but the administration, with the acquiescence of Congress, has disregarded vital constitutional principles.

If one examines the history of the federal government’s responses to terrorism, a disturbing pattern emerges. The federal government responds to terrorist attacks on U.S. soil—such as the Oklahoma City bombing in 1995—by rushing to restrict civil liberties. Rarely, if ever, do lawmakers examine whether prior civil liberties restrictions were enacted hastily—or even whether such restrictions have proven to be effective law enforcement measures. Rarely, if ever, do lawmakers fully investigate whether government employees were partly responsible for the tragedy because of their negligence or incompetence. Instead, without pausing for reflection, lawmakers have rushed to confer yet more power to government.

All indications are that the United States remains trapped in that same destructive cycle post-September 11. Too many of our policymakers seem to believe that the way to deal with terrorism is to pass more laws, spend more money, and sacrifice more civil liberties. But genuine leadership surely includes ensuring accountability in govern-

ment and a willingness to reverse longstanding, but wrongheaded, government policies. Unfortunately, such matters have been brushed aside in the wake of the September 11 attack. Congress made a dreadful mistake, for example, by rushing to enact a sweeping “antiterrorism” law before reaching a determination as to whether law enforcement and intelligence officials were negligent or incompetent in failing to prevent the calamity. Since the American homeland will remain vulnerable to terrorist attack for the foreseeable future, policymakers must come to grips with their responsibility to defend the people from foreign aggressors while maintaining a free society.

This paper will discuss the limited policy options that are available to the president and Congress with respect to the terrorism problem. The paper will conclude that the best defense against terrorism, as Secretary of Defense Donald Rumsfeld has noted, is a good offense.² That means sending our military to the terrorist base camps and killing the terrorist leadership. Here at home, it means resisting the establishment of a surveillance state.

The Cycle: Terrorist Attack and “Antiterrorism” Legislation

Recent experience has shown that policymakers in America invariably respond to terrorist incidents by proposing and enacting “antiterrorism” legislation. Even though every sort of harmful behavior—murder, attempted murder, bodily injury, destruction of property—is already prohibited by law and carries severe criminal penalties, antiterrorism proposals have proven to be very alluring. After all, the very fact that an atrocity has occurred is irrefutable proof that the police were not able to thwart the attack. Thus, policymakers reason that they must take action and “alter the balance between liberty and security.” With their newly acquired “tools,”

the argument runs, the police will be able to stop the terrorists before they can kill again. This cycle of terrorist attack followed by consideration of antiterrorism legislation has repeated itself many times in recent years.

The first major terrorist attack on American soil occurred on February 26, 1993. Islamic fundamentalists placed a car bomb in the parking garage beneath the World Trade Center. The explosion killed six people and injured more than one thousand individuals. A few weeks later, then New York congressman Charles Schumer (D-N.Y.) introduced the Terrorism Prevention and Protection Act of 1993.³ Among other things, the proposed bill would have federalized all violent offenses, allowed the use of secret evidence in deportation proceedings, and increased the surveillance powers of the Federal Bureau of Investigation.

On April 19, 1995, domestic terrorists conspired to detonate a truck bomb outside of the federal office building in Oklahoma City. The explosion killed 168 people and injured hundreds more. President Bill Clinton responded to the attack by urging Congress to pass antiterrorism legislation.⁴ Within weeks, Sen. Robert Dole (R-Kans.) and Senator Orrin Hatch (R-Utah) introduced the Comprehensive Terrorism Prevention Act of 1995.⁵ Among other things, the bill would spend \$1 billion on various antiterrorism efforts, place restrictions on the "Great Writ" of habeas corpus, and ban the sale of goods and services to countries that the president determines are not cooperating fully with U.S. terrorism efforts.⁶ When President Clinton signed a version of that bill into law, he proclaimed that "our law enforcement officials will [now] have tough new tools to stop terrorists before they strike."⁷

A few months later, the FBI's top terrorism official, Robert Blitzer, briefed senators about security precautions for the Summer Olympics in Atlanta, which was only a few weeks away. Blitzer told a Senate committee that the FBI had made "security for the upcoming Olympics a priority of the highest order."⁸ Blitzer observed that "there is hardly a government agency in public safety law

enforcement that is not somehow involved in ensuring that the 1996 Olympic Games are safe and secure. . . . The FBI, DEA, ATF, U.S. Secret Service, U.S. Customs Service, and the U.S. Coast Guard are handling federal law enforcement responsibilities."⁹ On July 27, 1996, however, a pipe bomb exploded at one of the outdoor exhibits, killing two people and injuring 111 others. President Clinton responded to the attack by demanding that Congress quickly pass another antiterrorism law. White House spokesperson Mary Ellen Glynn told the press, "He'd like to give the FBI more tools so there will be no more bombing like at the Olympics."¹⁰

On September 11, 2001, al-Qaeda terrorists hijacked four airplanes. The terrorists flew two planes into the World Trade Center, collapsing both office towers. The third plane crashed into the Pentagon. The fourth plane crashed in rural Pennsylvania, apparently after passengers attempted to wrest control of the aircraft from the hijackers. Those coordinated attacks killed more than 3,200 people and injured hundreds more. Two weeks later, President Bush and Attorney General John Ashcroft proposed the "Antiterrorism Act of 2001."¹¹ Among other things, the bill would give the government a freer hand to conduct searches, detain or deport suspects, eavesdrop on internet communication, and monitor financial transactions. Sen. Trent Lott welcomed the proposal, declaring "We cannot let what happened [on September 11] happen in the future."¹² When President Bush signed the bill into law in October, he said the legislation would enable the police "to identify, to dismantle, to disrupt, and to punish terrorists before they strike."¹³

In a matter of weeks, however, it became clear that the new antiterrorism law could not alter reality. On December 22, 2001, al-Qaeda terrorist Richard Reid boarded an American Airlines flight from Paris to Miami.¹⁴ In mid-flight, Reid tried to ignite explosives that were hidden in his shoes. By sheer happenstance, a flight attendant noticed that Reid had struck a match, so she

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immediately confronted him about what he was doing. When Reid assaulted the flight attendant, passengers intervened and overpowered Reid, tying him up until the plane could make an emergency landing in Boston. An FBI agent later testified in court that Reid could have blown a hole in the airplane, possibly killing all 197 persons on board the aircraft.¹⁵ The Reid incident and the anthrax-laden letters that have killed several people are the most powerful recent evidence that the president and his police agents are not capable of stopping terrorist attacks.

Breaking the Cycle

Defense and intelligence experts know that it is only a matter of time before the next terrorist attack. In fact, Secretary Rumsfeld warns that Americans should brace themselves for attacks “vastly more deadly” than the September 11 calamity.¹⁶ If recent experience is any guide, policymakers will respond to any such an attack by rushing to enact more antiterrorism legislation in a desperate attempt to give police and intelligence agencies additional powers to stop the killing. That would be a profound mistake. It is vitally important for policymakers to break the recurring cycle of enacting antiterrorism legislation before the pillars of our constitutional republic are completely undermined. When the next terrorist atrocity occurs—and it will occur—policymakers should refrain from legislation—at least until they have paused to deliberate four issues: (a) accountability, (b) history, (c) reality, and (d) liberty.

Deliberate Accountability before Legislating

Before policymakers come to the conclusion that there is too much freedom and privacy in America and that the police and intelligence agencies do not have enough power, they ought to thoroughly examine the question of how well the government has utilized the powers that it already wields. This is common sense. If the government cannot discipline itself for dereliction, negligence, incompetence,

poor performance, and corruption, why in the world should it be rewarded with additional funds and additional powers? Here are just a few of the issues that Congress should have investigated before it acquiesced to the president’s demand for antiterrorism legislation following the September 11 attack.

- Federal officials in both the intelligence and law enforcement community were repeatedly warned that terrorist attacks in the United States were likely. The respected Israeli journalist Ze’ev Schiff reported that when the former head of Israel’s Shin Bet security service warned Attorney General Janet Reno, FBI director Louis Freeh, and Central Intelligence Agency director George Tenet that terrorist cells were being set up on U.S. soil, “They looked at him forgivingly, and claimed that he was exaggerating.”¹⁷
- The Department of Justice and the FBI want to access and monitor the checking account activity and e-mail traffic of 200 million American citizens, but federal investigators inexcusably failed to monitor U.S. flight schools for potential terrorists. Shortly after the September 11 attack, FBI director Robert Mueller described news reports that the suicide hijackers had received flight training in the United States as “news, quite obviously,” adding, “If we had understood that to be the case, we would have—perhaps one could have averted this.” Mueller, who had only assumed the directorship of the FBI a week earlier, was apparently not yet aware that the bureau had known for years that suspected terrorists with ties to Osama bin Laden were receiving flight training at American schools.¹⁸
- Members of Congress recently heaped praise on FBI whistleblower Colleen Rowley and Enron whistleblower Sherron Watkins, but thus far no congressional committee has invited Mary Schneider to the nation’s capital to tell her story. Although it is now common knowledge

that al-Qaeda terrorists involved in the September 11 attack used Orlando, Florida, as a staging area, Schneider reportedly tried to blow the whistle on their activity months in advance of the attack. Schneider, a 20-year veteran of the Immigration and Naturalization Service, reportedly warned both the FBI and Attorney General John Ashcroft that aliens connected with bin Laden were illegally residing in the Orlando area. Schneider came to believe that terrorists were plotting an attack on an American target, but her pleas for an investigation fell on deaf ears. If her explosive allegations are true, one wonders how the Enron whistleblower could be called to testify before Congress, but not Schneider. After all, the collapse of the World Trade Center is far more serious than the financial collapse of an energy company.¹⁹

- After September 11, an invaluable lead on bin Laden's whereabouts was reportedly compromised when certain senators divulged highly classified information regarding an intercepted phone call by al-Qaeda terrorists. That lapse in judgment was both astonishing and unpardonable. Capturing or killing bin Laden is the key to destroying the al-Qaeda terrorist network. Tipping off the terrorists about our capability to intercept their phone conversations, and thus letting bin Laden slip through the fingers of the CIA, put scores of American lives at risk. One wonders what a senator has to do before his colleagues will institute formal expulsion proceedings or even a censure. To allow such irresponsible people to cast a vote on antiterrorism legislation, and to have them exercise their judgment on the possible necessity of curtailing the civil liberties of the American people, is nothing short of a travesty.²⁰

Columnist George Will once observed that when failures are not punished, failures proliferate.²¹ If our policymakers evade any of the

issues mentioned above, the future of America seems quite bleak. It is noteworthy that not a single employee in the federal government has lost his or her job in the wake of September 11.²² While it is possible that no one was truly at fault, a much more plausible explanation is that there is a general unwillingness to hold government officials accountable for failure.

Deliberate History before Legislating

History should matter. Before policymakers come to the conclusion that there is too much freedom and privacy in America and that the police and intelligence agencies do not have enough power, they should pause to consider how much respect the federal government has shown for individual American citizens, the law, and the Constitution. Here are just a few events that should not be soon forgotten.

- The FBI has used its surveillance powers to interfere in domestic politics. During the 1960s and 1970s, the bureau tried to undermine and disrupt the civil rights movement and the movement against the Vietnam war. In 1964, the bureau went so far as to attempt to blackmail Martin Luther King in the weeks preceding his ceremony to receive the Nobel Peace Prize. To thwart King's rising stature, the FBI threatened to give the news media evidence of King's adulterous affairs if he did not commit suicide.²³
- The FBI has given some of its informers a license to commit crime. The bureau has looked the other way while sociopaths committed murders and innocent people were jailed for those crimes.²⁴
- When an FBI sniper was indicted by a state prosecutor on manslaughter charges, the Department of Justice urged the court to dismiss the case because "federal law enforcement officials are privileged to do what would otherwise be unlawful if done by a private citizen." In other words, homicide statutes do not apply to federal police agents.²⁵
- In 1993, the FBI used tanks to demolish a building containing children. Attorney General Janet Reno told everyone that

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such an operation was necessary because “babies were being beaten” and the tanks were creating “escape routes.” However, a week later, the attorney general admitted that she had no evidence that children were being beaten.²⁶

- The Department of Justice has told the Supreme Court that it is perfectly legal for the government to take property away from a citizen who has done absolutely nothing wrong.²⁷
- In 2000, the Department of Justice maintained that the Second Amendment to the U.S. Constitution does not really guarantee the right of citizens to keep and bear arms. The government can, in its discretion, take guns away from the citizenry.²⁸
- The Tenth Amendment to the U.S. Constitution says that the powers that are not delegated to the federal government are reserved to the states, or to the people. The Department of Justice, however, has maintained that the federal government’s powers are essentially unlimited or “plenary.”²⁹

Lord Acton was correct when he observed that power tends to corrupt. All too often, government officials come to disdain any limitations on their power. Policymakers should carefully consider the lessons of history before they decide to confer more power on the government.

Deliberate Reality before Legislating

In a free society, the police maintain law and order primarily by *reacting* to citizen complaints, investigating crimes that have already occurred, and then apprehending the culprit. In America, the government is only rarely able to “prevent” a crime before the fact. Unlike, say, the secret police in China, our government cannot move against a person who has not yet broken the law. Thus, criminal predators can often bide their time for the most advantageous set of circumstances conducive to their success. That is, criminals can choose the time, place, and victim. Not surprisingly, to avoid detection,

criminals invariably decide to strike when the police are not on the scene.

Because terrorists enjoy the same key advantage against our intelligence and law enforcement agencies, policymakers must pause before they rush to the conclusion that more government power is the “solution.” Even though America has the most powerful military force in the history of humankind, defense and intelligence experts have been forced to acknowledge the relative ease with which Americans can be attacked. In 1997, Secretary of Defense William Cohen observed:

With advanced technology and a smaller world of porous borders, the ability to unleash mass sickness, death, and destruction today has reached a far greater order of magnitude. A lone madman or nest of fanatics with a bottle of chemicals, a batch of plaque-inducing bacteria . . . can threaten or kill tens of thousands of people in a single act of malevolence.³⁰

The harsh reality was summed up best in a Defense Department Task Force report: “While clearly it would be preferable to prevent incidents rather than mitigate them, the United States cannot count on prevention.”³¹ Unlike nuclear weapons, chemical and biological weapons can be fairly easily built, stored, and disseminated. A terrorist can spread biological or chemical agents with an aerosol sprayer from the rooftop of an apartment building or by leaving a suitcase in a busy train station or sports arena.

When Attorney General Ashcroft testified before Congress after September 11, he was asked whether the expanded powers that he was seeking would have given the FBI the ability to prevent the attack on the World Trade Center. Ashcroft conceded that it would be misleading for him to offer that kind of assurance.³² Sen. Patrick Leahy (D-Vt.) was even more blunt when he acknowledged:

No one can guarantee that Americans will be free from the threat of future

terrorist attacks, and to suggest that this legislation—or any legislation—would or could provide such a guarantee would be a false promise. I will not engage in such false promises, and those who make such assertions do a disservice to the American people.³³

True enough, but it would also be a grave disservice to the American people to curtail their privacy and liberties for nothing more than the illusion of increased security. Indeed, if actions speak louder than words, it is telling that President Bush moved essential government personnel into underground bunkers outside of Washington, D.C., to ensure the continuation of government services in the event of a terrorist attack.³⁴ Bush took that step because he knows that antiterrorism legislation does not invest him with supernatural powers that will somehow enable him to prevent an attack on the nation's capital.

Deliberate Liberty before Legislating

Freedom is the essence of America. Many people, including President Bush, believe that the al-Qaeda terrorists attacked America because of their disdain for our free society. Unfortunately, in the days and weeks following the September 11 calamity, President Bush pushed several initiatives that severely undermined freedom in America. Too many of the men and women who occupy public office only talk about the blessings of liberty. Very few have any deep appreciation for the conditions that are necessary for individual liberty to flourish. For most government officials, freedom is an abstraction that can be ignored in face of a concrete danger—such as a truck bomb. Because that worldview pervades Washington it will be useful to examine how certain antiterrorism provisions and related initiatives are having the real, though far less dramatic, effect of undermining the pillars of our constitutional republic.

Before addressing the specifics, one must first recognize both the short-term politics and the long-term legal implications that are

at work here. When terrorists are able to perpetrate a dramatic, surprise attack, elected officials spring into action because they want to help to solve the problem or, at the least, be seen as helping to solve the problem. As noted earlier, altering the “balance between liberty and security” is invariably viewed as the “solution” to the terrorist problem. Sen. Russ Feingold (D-Wis.) was the only senator to vote against President Bush's proposed Antiterrorism Act of 2001. Feingold had enough self-confidence to step back from the legislative details and to take cognizance of the long-term implications of continuously “rebalancing” liberty and security. He expressed his opposition to the proposed legislation in the following terms:

If we lived in a country that allowed the police to search your home at any time for any reason; if we lived in a country that allowed the government to open your mail; eavesdrop on your phone conversations, or intercept your email communications; if we lived in a country that allowed the government to hold people in jail indefinitely based on what they write or think, or based on mere suspicion that they are up to no good, then the government would no doubt discover and arrest more terrorists. But that probably would not be a country in which we would want to live. And that would not be a country for which we could, in good conscience, ask our young people to fight and die. In short, that would not be America.³⁵

After Feingold cast his lonely vote against the popular antiterrorism bill, several senators told him privately that they agreed with him, but that they were afraid of being perceived by the public as being “soft” on terrorism.³⁶ Whatever their motivations, it is the responsibility of elected officials to defend Americans from foreign aggressors without violating the safeguards set forth in the Constitution. Thus,

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President Bush's antiterrorism initiatives must be closely examined for their necessity, wisdom, and constitutionality.

Bush Seeks to Expand the Power to Arrest. The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. In many countries around the world, police agents can arrest people whenever they choose, but in America the Fourth Amendment shields the people from overzealous government agents by placing some limits on the powers of the police. The primary "check" is the warrant application process. This process requires police to apply for arrest warrants, allowing for impartial judges to exercise some independent judgment with respect to whether sufficient evidence has been gathered to meet the "probable cause" standard set forth in the Fourth Amendment.³⁷ When officers take a person into custody without an arrest warrant, the prisoner must be brought before a magistrate within 48 hours so that an impartial judicial officer can scrutinize the conduct of the police agent and release anyone who was illegally deprived of his or her liberty.³⁸

President Bush and his subordinates have undermined the Fourth Amendment's protections in two distinct ways. First, President Bush has asserted the authority to exclude the judiciary from the warrant application process by issuing his own arrest warrants. According to the controversial "military order" that Bush issued on November 13, 2001, once the president makes a determination that a noncitizen may be involved in certain illegal activities, federal police agents "shall" detain that person "at an appropriate location designated by the secretary of defense outside or within the United States."³⁹ According to the order, the person arrested cannot get into a court of law to

challenge the legality of the arrest.⁴⁰ The prisoner can only file appeals with the official who ordered his arrest in the first instance, namely, the president. The whole purpose of the Fourth Amendment is to make such a procedure impossible in America.

Some have defended the constitutionality of that presidential order because it applies only to noncitizens. That argument has some surface appeal, but it cannot withstand scrutiny. It should be noted that while some provisions of the Constitution employ the term "citizens," other provisions employ the term "persons." Thus, it is safe to say that when the Framers of the Constitution wanted to use the narrow or broad classification, they did so. The Supreme Court has always affirmed this plain reading of the constitutional text.⁴¹

Second, President Bush and the FBI have tried to dilute the "probable cause" standard for citizens and noncitizens alike. The Supreme Court has repeatedly noted that a person cannot be hauled out of his home on the mere suspicion of police agents—since that would place the liberty of every individual into the hands of any petty official.⁴² But in the days and weeks following September 11, the FBI arrested hundreds of people and euphemistically referred to the group as "detainees."⁴³

Many of those arrests were perfectly lawful, but it is also obvious that many were not. The FBI has tried to justify dozens of arrests with the following argument:

The business of counterterrorism intelligence gathering in the United States is akin to the construction of a mosaic. At this stage of the investigation, the FBI is gathering and processing thousands of bits and pieces of information that may seem innocuous at first glance. We must analyze all that information, however, to see if it can be fit into a picture that will reveal how the unseen whole operates. . . . What may seem trivial to some may appear of great moment to those within the FBI or

the intelligence community who have a broader context.⁴⁴

At bottom, this is an attempt to effect what Judge Richard Posner has aptly called “imprisonment on suspicion while the police look for evidence to confirm their suspicion.”⁴⁵ Since the Supreme Court has repeatedly rebuffed police and prosecutorial attempts to dilute the constitutional standard of probable cause, that gambit should not be tolerated.⁴⁶

Bush Seeks to Expand the Power to Prosecute and Imprison. Article III, section 2, of the Constitution provides, “The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.” The Sixth Amendment to the Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” To limit the awesome powers of government, the Framers of the Constitution designed a system in which citizen juries stand between the apparatus of the state and the accused. If the government prosecutor can convince a jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquittal by a jury is final and unreviewable by state functionaries.⁴⁷

President Bush would like to be able to deny the benefit of trial by jury to noncitizens accused of terrorist activities on U.S. soil. Under Bush’s military order, he will decide who can be tried before a jury and who can be tried before a military commission.⁴⁸ Conservative legal scholar Robert Bork, who is widely known for stressing the text of the Constitution and the original intent of the founders, not only came to the defense of Bush’s military order, but went further and maintained that that order could and should be revised and extended to American citizens as well.⁴⁹

The federal government did try people before military commissions during the Civil War. To facilitate that process, President

Abraham Lincoln suspended the writ of habeas corpus—so that the prisoners could not challenge the legality of their arrest or conviction in a civilian court.⁵⁰ The one case that did reach the Supreme Court, *Ex Parte Milligan* (1866), deserves careful attention.⁵¹

In *Milligan*, the attorney general of the United States maintained that the legal guarantees set forth in the Bill of Rights were “peace provisions.”⁵² During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes “the supreme legislator, supreme judge, and supreme executive.”⁵³ Under that legal theory, many American citizens were arrested, imprisoned, and executed without the benefit of the legal mode of procedure set forth in the Constitution—trial by jury.

The Supreme Court ultimately rejected the legal position advanced by the attorney general. Here is one passage from the *Milligan* ruling:

The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that ‘in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,’ language broad enough to embrace all persons and cases.⁵⁴

The *Milligan* ruling is sound. While the Constitution empowers Congress “To make

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Rules for the Government and Regulation of the land and naval Forces" and "To provide for organizing, arming, and disciplining, the Militia," the Supreme Court ruled that the jurisdiction of the military courts could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.

President Bush and his lawyers maintain that terrorists are "unlawful combatants" and that unlawful combatants are not entitled to the protections of the Bill of Rights. The defect in the president's claim is circularity. A primary function of the trial process is to sort through conflicting evidence in order to find the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an unlawful combatant, can understandably maintain that such a person is not entitled to the protection of our constitutional safeguards. The flaw, however, is that that argument begs the very question under consideration.

To take a concrete example, suppose that the president accuses a lawful permanent resident of the U.S. of aiding and abetting terrorism. The person accused responds by denying the charge and by insisting on a trial by jury so that he can establish his innocence. The president responds by saying that "terrorists are unlawful combatants and unlawful combatants are not entitled to jury trials." The president also says that the prisoner is not entitled to any access to the civilian court system to allege any violations of his constitutional rights.⁵⁵ With the writ of habeas corpus suspended, the prisoner and his attorney can only file legal appeals with the president—the very person who ordered the prisoner's arrest in the first instance!

The Constitution's jury trial clause is not a "peace provision" that can be suspended during wartime. Reasonable people can argue about how to prosecute war criminals who are captured overseas in a theater of war, but the president cannot make himself the policeman, prosecutor, and judge over people on U.S. soil. In America, the president's

power is "checked" by the judiciary and by citizen juries.⁵⁶

Bush Seeks to Expand the Power to Eavesdrop. In November, 2001, Attorney General Ashcroft announced that the Department of Justice would begin to monitor the conversations of lawyers with their clients in federal custody.⁵⁷ The new policy represents an abrupt change from existing practice. Up until now, prison facilities have had two sets of phones for prisoner use. One set is used by ordinary visitors to the jail, such as friends and relatives—and that set of phones is ordinarily monitored and recorded by government. The other set of phones is reserved for attorney-client conversations. That set of phones is not monitored—so that lawyers can confer with their clients in private. Under the president's new policy, the attorney-client privilege, one of the oldest privileges for communication known to the common law, will now have to make room for state eavesdroppers.⁵⁸

The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients. Sound legal advice depends upon a lawyer's being fully informed by a client. Limitations on the power of the state to compel disclosures by the attorney gives clients confidence that conversations with their lawyers will remain confidential. Note, however, that the attorney-client privilege is not absolute. The government already has the power to wiretap attorney-client conversations—provided that it has gathered enough evidence to persuade a judge to issue a wiretap order for an attorney who appears to be corrupt.⁵⁹

Although the Bush-Ashcroft eavesdropping initiative has a laudable purpose—to stop terrorists from using their attorneys to pass useful information to their confederates outside of the prison walls—the policy is disturbing nonetheless. First, it is noteworthy that the president did not include this initiative in the package of antiterrorism proposals that he submitted for congressional approval. Rather than defend the wisdom and necessity for this measure in the legislative chamber, the president chose to bypass Congress and issue a "rule" with respect

to the internal operations of federal prisons. The practical effect is that the onus is now upon the legislature to overturn the new policy by passing a new bill, a move that will undoubtedly be vetoed by the president.

Second, the new eavesdropping policy bypasses the judiciary. Like the power to arrest and search, the primary “check” on the power to wiretap is the warrant application process. By requiring the police to seek advance approval from a judicial officer, the process allows wiretap applications to be vetted by an impartial judge. In this way, meritorious applications can be separated from fishing expeditions. Under the president’s initiative, however, the attorney general retains exclusive decisionmaking authority to conduct monitoring without being subject to judicial approval, review, or oversight.⁶⁰

The plea of “necessity” to justify the policy simply does not stand up to scrutiny. Even in emergency circumstances outside prison walls, for example, the law does not dispense with judicial oversight. Federal law provides that when there is an emergency situation that involves “(i) immediate danger of death or serious bodily injury to any person, (ii) conspiratorial activities threatening the national security interest, or (iii) conspiratorial activities characteristic of organized crime,” the wire interception may be made without an order if there is probable cause and there is judicial approval of the interception within 48 hours after the interception has occurred, or begins to occur.⁶¹ If the order is denied by the judicial officer, then “the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter.”⁶² If the attorney general can abide by these strict rules in emergency circumstances for suspects outside prison walls, he can surely operate with judicial oversight for suspects who have already been captured and imprisoned.

Finally, when the new eavesdropping policy is viewed in combination with all of the other powers that the president has been seeking, its breadth is alarming. It should be noted that

the president would like to be able to monitor the attorney-client conversations of not only convicted prisoners, but of those who have been arrested and are awaiting trial. As discussed above, the president has also sought to lower the legal threshold by which people can be taken into custody by the police and intelligence agencies. Thus, while perhaps technically “legal,” the eavesdropping policy is alarming when it is seen as a part of concerted effort by the president and his lawyers to aggrandize power in the executive branch. The strategy is to augment the power to deprive individuals of their liberty, to allow no privacy whatsoever, and to make redress in the court system very difficult, if not impossible.

The president and his attorney general have tried to deflect criticism by stressing the fact that their eavesdropping initiative will be limited to a small group of prisoners and that certain protocols will be implemented to protect the rights of prisoners. Those assurances may be sincere, but they should not divert one’s attention from the fact that a legal precedent is being established here. The plain truth of the matter is that if the president can have a single prisoner’s conversation with his attorney monitored, the president can expand his policy tomorrow to include all prisoners in federal custody. Similarly, the safeguards that the president has instituted can be altered, modified, or completely removed should he (or any one of his successors) deem it appropriate.

President Bush’s eavesdropping initiative is, at best, wrongheaded. It should not be possible for a single person to strip apprehended suspects of such a longstanding legal privilege as attorney-client confidentiality.

Bush Seeks to Expand the Power to Deport. The Fifth Amendment to the Constitution provides that no person can be deprived of life, liberty, or property, without due process of law.” While no alien has a “right” to enter the United States, once an alien has already made an entry into our country, his constitutional status changes. Any person threatened with deportation has a constitutional right to be accorded due process in a fair hearing.⁶³

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President Bush would like to be able to seize and deport people without any hearing whatsoever.

President Bush would like to be able to seize and deport people without any hearing whatsoever. Under the controversial military order, Bush can have people arrested outside of the judicial process and held incommunicado at military bases. Another section of that order provides: "I reserve the authority to direct the secretary of defense, at anytime hereafter, to transfer to a governmental authority control of any individual subject to this order."⁶⁴ That means that any person arrested could be flown to another country at any time where he could possibly then be tortured by a foreign intelligence agency.⁶⁵ The prisoner is barred from filing a writ of habeas corpus, which would allow him his "day in court" to perhaps show that there has been a miscarriage of justice in his particular case.⁶⁶ This sweeping assertion of presidential power is worrisome because "no society is free where government makes one person's liberty depend upon the arbitrary will of another."⁶⁷

One should not forget that the power to deport has been abused. American citizens have been unlawfully deported.⁶⁸ Others have become pawns in political machinations. For example, six Iraqi men who fought *against* Saddam Hussein have been fighting bogus deportation charges that are tantamount to a death sentence should they be forced back to Iraqi territory.⁶⁹

The federal government has great leeway in establishing the various grounds for deportation, but the only check on possible arbitrary and capricious action is the due process guarantee of the Fifth Amendment. The president should respect, not nullify, that guarantee.

Bush and Congress Seek to Expand the Power to Compel Cooperation. Justice Louis Brandeis once described the right to be let alone as "the most comprehensive of rights and the right most valued by civilized men."⁷⁰ However, the men and women who serve in the federal government hold the opposite point of view. The federal government takes the position that it can coerce innocent people into cooperating with its investigations. Since September 11, the federal government has threatened more

than 4,000 business firms, organizations, and individuals with fines and jail if they do not give the Department of Justice the information it demands.⁷¹ What is worse is that the federal government is compelling every sector of American industry to assist police investigations by systemic surveillance of customers and employees.⁷² The American tradition of voluntary cooperation with law enforcement is being perverted into a system of compulsory cooperation.

This pernicious trend began with the Bank Secrecy Act of 1970. The Department of Justice and the Internal Revenue Service convinced Congress that they could launch a more effective attack on organized crime if domestic banks could be made to provide greater evidence of financial transactions. Under that act, banks must spy on their customers and report to the police any transaction involving more than \$10,000. Furthermore, every bank must keep a copy of every check drawn on it or presented to it for payment. In this way, the police could bolster their fight against money laundering.

The Supreme Court upheld the constitutionality of the Bank Secrecy Act in a six to three ruling in 1974.⁷³ The Court found no Fourth or Fifth Amendment violation and did not find the regulatory burden to be unreasonable. But Justice Thurgood Marshall took issue with the Court's Fourth Amendment analysis in a dissenting opinion: "By compelling an otherwise unwilling bank to photocopy the checks of its customers, the Government has as much a hand in seizing those checks as if it had forced a private person to break into the customer's home or office and photocopy the checks there."⁷⁴ Justice William O. Douglas expressed his discomfort with the act by extending the government's logic beyond banking: "It would be highly useful to government espionage to have like reports from all our bookstores, all our hardware and retail stores, all our drugstores. These records too might be 'useful' in criminal investigations."⁷⁵ Like Marshall, Douglas believed the act to be unconstitutional.

Unfortunately, Justice Douglas's dissenting opinion has proven to be prescient. Since

1974, the federal government has effectively deputized the telephone, airline, hotel, and credit card companies as well as internet service providers into its network of private informers and data gatherers.⁷⁶ The most recent antiterrorism legislation will allow the police to compel records from any business regarding any person—including medical records from hospitals, educational records from universities, and even records of books that have been checked out from the local library or purchased from the bookstore.⁷⁷

Shortly after the passage of the antiterrorism law, the Department of Justice started to lay plans to deputize lawyers and accountants. A working group of Justice Department and Treasury Department officials are formulating regulations that will require lawyers and accountants to file “suspicious activity reports” about their clients with various federal agencies.⁷⁸ Clearly, the federal government’s insatiable appetite for information is destroying the freedom and privacy that it was supposed to protect. The most recent antiterrorism law even tries to suppress the speech of businesspeople by prohibiting them from telling the press and the public about any of the government’s demands, a blatant violation of the free speech clause of the First Amendment.⁷⁹

There have been some extraordinary legal developments since the September 11 calamity: warrantless arrests, military trials, eavesdropping on attorney-client conversations, and using businesspeople to facilitate systemic surveillance of checking accounts and e-mail. Such expansion of government power has seriously undermined the civil liberties of Americans.⁸⁰ Before our policymakers enact additional antiterrorism legislation, they ought to carefully deliberate the extent to which liberty in America has already deteriorated and whether it is really necessary to surrender more liberty and privacy.⁸¹

The Road Ahead

Policymakers cannot guarantee the safety of Americans from terrorist attacks because

they cannot control the actions of terrorists. Policymakers do, however, retain complete control over the extent of government powers. The adoption of certain policies can limit the power and scope of government and consequently increase the sphere of individual freedom; other policies can expand the scope and power of government and thus decrease the sphere of individual freedom. Because additional attacks on the American homeland are virtually certain, a fundamental choice lies ahead with respect to how the ongoing terrorism problem is going to be addressed on the home front. One path will lead inexorably to government domination and authoritarianism. The other path will keep America free, if not completely safe.

The Road to Authoritarianism

If policymakers continue to respond to terrorist atrocities by “enhancing” the power of government, it is not terribly difficult to discern the trend lines for the next 20 years. Power has been flowing, and will continue to flow, to the federal government and executive branch in particular. If present trends continue, it is likely that America will drift toward national identification cards, a national police force, and more extensive military involvement in domestic affairs. That ought to give pause to people of goodwill from all across the political spectrum—since those are the telltale signs of societies that are unfree.⁸²

If any president were to propose the issuance of national ID cards, the dissolution of the state and local police in favor of a national police force, and much greater military involvement in law enforcement, the proposal would undoubtedly be rejected as un-American. And yet, the federal government has already been moving relentlessly toward the realization of those objectives without any meaningful political opposition.

With respect to national ID cards, attorney and economist Charlotte Twhight has documented a variety of federal data collection programs that compel the production, retention, and dissemination of personal information about every American citizen.⁸³ Linked through an individ-

If present trends continue, it is likely that America will drift toward national identification cards, a national police force, and more extensive military involvement in domestic affairs.

Once a national police force is established and has the power to investigate all manner of offenses, the state “will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies.”

ual’s Social Security number, these labor, medical, educational, and financial databases already empower federal employees to obtain a detailed portrait of any person: the checks he writes, the political causes he supports, and what he says “privately” to his doctor. Enacted in the name of “reducing fraud” and “increasing efficiency,” such programs have exposed most areas of American life to ongoing scrutiny. Since Americans already have Social Security numbers and use drivers’ licenses for purposes of identification, why not adopt a uniform counterfeit-proof card with biometric identifiers?

Twight warns that such a move would mean “metastasizing government control” over society, as individuals, knowing that they are being monitored, would start behaving as the government wants them to. Law professor Paul Schwartz has also noted the connection between a government’s capacity to collect information and the erosion of individual autonomy: “The effectiveness of [authoritarian] regimes in rendering adults as helpless as children is in large part a product of the uncertainty that they instill regarding their use of personal information.”⁸⁴

With respect to a national police force, the foundation has already been laid. First, Congress has already been funding local law enforcement and manipulating its priorities by attaching an endless number of “strings” to such appropriations.⁸⁵ Second, the Department of Justice already oversees hundreds of permanent “joint task forces” made up of teams of federal, state, and local police agents.⁸⁶ Why stop with half-measures? Why not end unnecessary duplication, streamline the bureaucracy, and centralize control?

Former attorney general and Supreme Court justice Robert Jackson, for one, vigorously opposed the idea of a national police force. Jackson prosecuted the Nazi war criminals at Nuremberg, and one of the lessons that he took away from that experience was the danger posed by a national police force: “I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized

police force.”⁸⁷ Once a national police force is established and has the power to investigate all manner of offenses, Jackson noted, “in the parlance of the street, [the state] will have enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies.”⁸⁸

With respect to the role of the military, the Posse Comitatus Act of 1878 has long been a symbol of America’s commitment to keeping the military out of domestic law enforcement.⁸⁹ Over the last 20 years, however, Congress has created so many exceptions to the Posse Comitatus Act that it has become a rather feeble limitation on the military. Why not repeal that law completely? After all, our military special forces are already training state and local SWAT teams; Army units are already conducting drug raids; and National Guard units have already been stationed in airport terminals. Why retain a law from the Civil War era when America is facing the possibility of a catastrophic attack from foreign terrorists?⁹⁰

One problem with tearing down the wall between the police and the military is the very nature of the terrorist threat. The terrorist problem is not a short-term crisis, but a long-term security dilemma. Thus, America would very likely witness more Waco-type disasters if the military becomes involved in routine policing activities. Policymakers should not forget that during a 1993 stand-off with a religious community near Waco, Texas, the FBI took the advice of Delta Force commanders, using tanks and grenade launchers against a building that harbored dozens of men, women, and children. It turned into the worst disaster in the history of modern law enforcement—leaving more than 80 people dead, including 27 children.⁹¹

The military mission is very different from the mission of law enforcement. The job of a police officer is to keep the peace while adhering to constitutional procedures. Soldiers, on the other hand, consider enemy personnel human targets. Confusing the police function with the military function often leads to dangerous and unintended

consequences—such as unnecessary shootings and killings.⁹²

Despite the dangerous implications noted above, America will likely continue to muddle along the road to national ID cards, a national police force, and more military involvement in domestic affairs. That is a safe prediction because thus far there has been no meaningful political opposition to those trends. There are at least two reasons for the absence of opposition. First, elected officials want to be perceived as “problem solvers” and do not want to be perceived as “soft” on terrorism. Second, the path of ID cards, additional federal controls, and involving the military has some allure to it. It is possible that Americans might find a good measure of safety by allowing the federal government to tightly control our society. But the price for that security would have come at the expense of America’s soul. Freedom could no longer be said to be the essence of America. America would instead have been transformed into something resembling a benevolent, authoritarian democracy—a regime not unlike the one found in today’s Singapore.

The Road to Freedom

Antiterrorism proposals will emerge in the wake of every terrorist attack. That much is certain. Conscientious policymakers will find themselves on the defensive in a climate that will be dominated by fear and anger. What can a friend of liberty and privacy do under such circumstances? It would, of course, be unreasonable for a policymaker to blindly defend every existing policy in place and never support any bill that might impinge upon the civil liberties of the American people. At the same time, however, there ought to be a strong presumption in favor of liberty—and that presumption should be overridden by policymakers only *after* they have carefully deliberated the issues of accountability, history, reality, and liberty. The central mission of federal government is to defend the lives, liberties, and property of the American people from foreign aggressors. If the government has a bona fide need

for additional power in order to reasonably accomplish that mission, so be it.

However, if recent experience is any guide, one can expect any debate in the aftermath of an attack to be framed immediately in terms of *which* civil liberties will have to be sacrificed in order to wage a more effective fight against the terrorists. In light of the relative ease with which terrorists can kill Americans, this is a dangerously misguided approach to the problem. Before policymakers rush to the conclusion that it is necessary to expand the power of government, they should critically examine government initiatives that may be unnecessary, wrongheaded, or counterproductive. Here are a few policies that could make America more secure without limiting freedom.

- The federal government should stop playing the role of world policeman. When U.S. troops are sent on missions that have little or nothing to do with our vital national security interests, the move invariably inflames foreign political factions that may then want vengeance. As Richard Betts, director of national security studies at the Council on Foreign Relations, has noted, “Playing Globocop feeds the urge of aggrieved groups to strike back.”⁹³
- The federal government’s civil defense programs are flawed and woefully underdeveloped. To take one example, instead of stockpiling the smallpox vaccine, the government should allow the vaccine to be made widely available to the public. That would allow Americans to take responsibility for their own health and safety and not leave them dependent on the public health authorities. Advance distribution might also deter an attack since the virus cannot spread as rapidly in a vaccinated population. Terrorists tend to probe for weak spots and strike at populations that are vulnerable.⁹⁴
- The federal government should abandon its counterproductive war on drugs. It is ludicrous to have federal police agents expending energy against marijuana

Before policymakers rush to the conclusion that it is necessary to expand the power of government, they should critically examine government initiatives that may be unnecessary, wrongheaded, or counterproductive.

Terrorists and criminals can strike anytime, anywhere. Gun control policies leave citizens dependent on government agents who cannot possibly protect everyone all the time.

clubs in California when terrorist sleeper cells may be on U.S. soil plotting additional attacks. The lesson of alcohol prohibition is that gangster organizations got rich from black market profits as people continued to drink. Similarly, the drug war is channeling billions of dollars of black market profits into a criminal underworld occupied by corrupt politicians, criminals, and, yes, terrorists.⁹⁵

- Federal and state governments should stop their inane practice of treating gun owners like hoodlums or loose cannons. For too many years, Americans have been told that they should not take an active part in their own personal safety. The government's advice to the citizenry has been a debilitating message of dependency: "If you are confronted by a criminal, try to call 911. Don't resist. Let the police handle it." The reality is that terrorists and criminals can strike anytime, anywhere. Gun control policies leave citizens dependent on government agents who cannot possibly protect everyone all the time. President Bush should emulate the tough love policy of Colorado sheriff Bill Masters, who tells the residents of his county, "It is your responsibility to protect yourself and your family from criminals. If you rely on the government for protection, you are going to be at least disappointed and at worst injured or killed."⁹⁶

Implementing the above policy agenda would not only enhance the freedom of the American people, it would also *dramatically* enhance their safety. If the president or members of Congress take such policy options off the table as somehow not worthy of consideration, friends of liberty and privacy will know that civil liberties are about to be sacrificed in the interest of political expediency, not security.

If sensible policy adjustments are shunted aside, conscientious legislators can take the offensive against bombast and ill-conceived proposals by insisting upon three procedural

safeguards. First, gigantic antiterrorism legislative "packages" should be rejected outright. Omnibus legislation vastly increases the chances of a bad proposal finding its way into the federal books. If a proposal cannot find legislative and executive support on its own merits, it should not become the law of the land.

Second, the final legislative vote on each bill should be postponed to ensure calm reflection and deliberation. Thomas Jefferson urged a delay of one year for any piece of legislation: "I think it would be well to provide . . . that there shall always be a twelve-month between the ingrossing a bill & passing it: that it should then be offered to it's passage without changing a word."⁹⁷ Anticipating the plea of "emergency," Jefferson stated that "if circumstances should be thought to require a speedier passage, it should take two thirds of both houses instead of a bare majority."⁹⁸ Before policymakers come to the conclusion that the American people have too much freedom and privacy and that the police and intelligence agencies do not have enough power, Jefferson's "twelve-month" seems more than appropriate.

Third, sunset provisions should be incorporated into each bill so that any bill that becomes law will expire after a specified time, say, three years. If new police powers are truly necessary, they presumably will win the continuing support of both the president and a majority of lawmakers after the passage of time.

If the proponents of antiterrorism legislation cannot abide by these three procedural safeguards for liberty and privacy, conscientious legislators and citizens will have more than sufficient grounds to oppose the legislation despite any high-minded rhetoric about the need to "protect the American people."

Conclusion

The president of the United States wields enormous power, but it is sheer folly for anyone to think that he can stop terrorists from attacking the American homeland. Since intelligence and defense experts fully expect

more atrocities in the foreseeable future, it is clear that Americans have a stark choice: We can either retain our freedom or we can throw it away in an attempt to make ourselves safe.

This choice must be confronted and not evaded. No one can deny the fact that if the cycle of terrorist attack followed by government curtailment of civil liberties continues, America will eventually lose the key attribute that has made it great, namely, freedom. As Secretary Rumsfeld has warned, we should be careful not to “allow terrorism to alter our way of life.”⁹⁹ It is therefore both wise and imperative to address the terrorist threat within the framework of a free society. That means taking the battle overseas to the terrorist base camps and killing the terrorist leadership. Here at home, it means resisting the implementation of a surveillance state. This course of action is, admittedly, fraught with danger. Innocent people at home and brave soldiers abroad will lose their lives to the barbaric forces of terrorism, but they will at least have died honorably as free people.

Everyone wants to be safe, secure, and free, but such a desire denies the reality of our circumstances. In this dangerous world, freedom is a precious thing that must be vigorously defended. Anyone who is not prepared to face down the enemies of freedom with steely determination should seek shelter in the wilderness or outside of America completely. Freedom is not, was not, and will never be, a free good. Anyone who wants it must be prepared to defend it. And defending it necessarily carries the risk of seriously bodily injury or death. A free and independent people must take responsibility for their own safety and deal with their vulnerability in a mature fashion. A free and independent people should not expect supernatural powers from their president.

Notes

The author wishes to acknowledge two works from which he has benefited greatly: Jeff Snyder's *Nation of Cowards: Essays on the Ethics of Gun Control* (St.

Louis: Accurate Press, 2001) and James Bovard's *Freedom in Chains: The Rise of the State and the Demise of the Citizen* (New York: St. Martin's, 1999). The author also thanks Elizabeth Wang for her research assistance on the section pertaining to government accountability (or the lack thereof).

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9. *Ibid.*

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2001; Todd Purdum and Alison Mitchell, "Bush, Angered by Leaks, Duels with Congress," *New York Times* October 10, 2001. Article I, section 5, of the Constitution provides, "Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour and, with the Concurrence of two thirds, expel a Member."

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37. See *McDonald v. United States* 335 U.S. 451, 455-56 (1948).
38. See *County of Riverside v. McLaughlin*, 500 U.S. 654 (1988).
39. Bush Military Order, November 13, 2001, Section 3(a).
40. Section 7(b)(2) of the Military Order provides, "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof."
41. See *Zadvydas v. Davis*, 121 S.Ct. 2941, 2500-2501 (2001); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wong Wing v. United States*, 163 U.S. 228 (1896). Noncitizens have always benefited from the safeguards of the Fourth Amendment. See *Au Yi Lau v. INS*, 445 F.2d 217 (1971); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (1976).
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51. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
52. Rehnquist, p. 121.
53. *Ibid.*
54. *Milligan*, pp. 122-23 (emphasis in original).
55. Because the president's military order immediately became mired in controversy, his lawyers have backed away from what that order actually says. For example, the Justice Department denies any attempt to suspend habeas corpus. That denial is not persuasive. See Section 7(b)(2) of the Bush military order.
56. See Timothy Lynch, "Testimony before the Senate Judiciary Committee on Military Tribunals," December 4, 2001.
57. See George Lardner Jr., "U.S. Will Monitor Calls to Lawyers," *Washington Post*, November 9, 2001.
58. See *Upjohn v. United States* 449 U.S. 383, 389 (1981). See also *State v. Quattlebaum*, 527 S.E.2d 105 (2000).
59. See 18 U.S.C. section 2518.
60. See Comments of the National Association of Criminal Defense Lawyers on the Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications.
61. See 18 U.S.C. section 2518.
62. *Ibid.*
63. See *Landon v. Plasencia*, 459 U.S. 21 (1982). See also *Ludecke v. Watkins* 335 U.S. 160 (1948) (Black, J., dissenting).
64. Bush Military Order, November 13, 2001, Section 7(e).
65. See Rajiv Chandrasekaran and Peter Finn,

- “U.S. Behind Secret Transfer of Terror Suspects,” *Washington Post*, March 11, 2002.
66. As noted previously, the Bush administration denies that it has attempted to suspend habeas corpus. The text of the military order, however, speaks for itself. See Section 7(b)(2).
67. *Shaughnessy v. Mezei*, 345 U.S. 206, 217 (1953) (Jackson, J., dissenting).
68. See, for example, “Born in the U.S.A.—But Deported,” *San Francisco Chronicle*, October 22, 1993.
69. See James Woolsey, “Iraqi Dissidents Railroaded—by U.S.,” *Wall Street Journal*, June 10, 1998.
70. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).
71. See Jim McGee, “In Federal Law Enforcement, ‘All the Walls Are Down,’” *Washington Post*, October 14, 2001.
72. See Timothy Lynch, “The Ominous Powers of Federal Law Enforcement,” *Cato Handbook for Congress* (Washington: Cato Institute, 1999), pp. 175–84.
73. *California Bankers Association v. Shultz*, 416 U.S. 21 (1974).
74. *Ibid.*, pp. 94–95 (Marshall, J., dissenting).
75. *Ibid.*, pp. 84–85 (Douglas, J., dissenting).
76. See Lynch, “Ominous Powers of Federal Law Enforcement.” See also Barry Steinhardt, “New Legislation Authorizes Wholesale Invasion of Privacy,” *St. Louis Post-Dispatch*, November 5, 1996.
77. *Patriot Act*, Title II, section 215.
78. “Justice Eyeing Attorneys, Accountants for New Anti-Money Laundering Duties,” *Criminal Law Reporter* 70 (February 6, 2002): 393.
79. See Nat Hentoff, “Big Brother in the Library,” *Washington Times*, February 25, 2002.
80. For a succinct summary, see “Justice Deformed: War and the Constitution,” editorial, *New York Times*, December 2, 2001.
81. Bovard. See also Paul Craig Roberts and Lawrence M. Stratton, *The Tyranny of Good Intentions* (Roseville, California: Prima Publishing, 2000).
82. See Roy C. Macridis, *Modern Political Regimes: Patterns and Institutions* (Little Brown, 1986), pp. 13–14. See also Testimony of David B. Kopel and Stephen Halbrook before the House Committee on the Judiciary, Subcommittee on Crime, October 5, 1994, on the use of the National Guard in Domestic Law Enforcement.
83. Charlotte Twight, *Dependent on D.C.: The Rise of Federal Control over the Lives of Ordinary Americans* (New York: St. Martin’s Press, 2002), pp. 235–76.
84. Quoted in *ibid.*, p. 236. See also William Safire, “Threat of National ID,” *New York Times*, December 24, 2001.
85. Journalist Ted Gest writes, “By the dawn of the twenty-first century, the Justice Department was handing out more than \$5 billion in aid each year. Lower levels of government came to depend on it for much of their justice system expansion and innovation.” *Crime and Politics: Big Government’s Erratic Campaign for Law and Order* (Oxford University Press, 2001), pp. 1, 250. See also *United States v. Nathan*, 1998 U.S. Dist. LEXIS 15124; and Gene Healy, “There Goes the Neighborhood,” Cato Institute Policy Analysis no 440, May 28, 2002 (describing federal program designed to bolster firearm offense prosecutions locally).
86. The FBI has more than 170 “Safe Street” task forces around the country; the DEA oversees a hundred of its own task forces with state and local police. See Gest, pp. 80–81; Jim McGee and Brian Duffy, *Main Justice* (New York: Simon and Schuster, 1996), p. 107. This trend is likely to accelerate in coming years. Shortly after the September 11 attacks, Assistant FBI Director Kathleen McChesney said the bureau was working with major police departments on 56 terrorism task forces throughout the country. See Bill Miller and Paul Duggan, “Security Worries Bring a Costly Shift in Priorities,” *Washington Post*, February 12, 2002; and Michael E. Ruane, “Attorneys Head Local Terrorism Task Forces,” *Washington Post*, September 23, 2001. Furthermore, Congress and four Supreme Court justices have already indicated support for the notion that the federal government can commandeer local police personnel. See *Printz v. United States*, 521 U.S. 898 (1997) (Stevens, Souter, Ginsburg, Breyer, JJ., dissenting).
87. Robert H. Jackson, *The Supreme Court in the American System of Government* (Cambridge: Harvard University Press, 1955), p. 70.
88. *Ibid.*, p. 71. Former Attorney General Edwin Meese has also decried the expanding role of the federal government in everyday law enforcement. See Edwin Meese III, “Big Brother on the Beat: The Expanding Federalization of Crime,” *Texas Review of Law and Politics* 1 (1997): 1. See also John S. Baker Jr., “Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?” *Rutgers Law Journal* 16 (1985): 495.

89. See Diane Cecilia Weber, "Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments," Cato Institute Briefing Paper no. 50, August 26, 1999.

90. See Vernon Loeb, "Review of Military's Domestic Role Urged," *Washington Post*, October 5, 2001.

91. See Timothy Lynch, "No Confidence: An Unofficial Account of the Waco Incident," Cato Institute Policy Analysis no. 395, April 9, 2001. See also David B. Kopel and Paul H. Blackman, *No More Wacos* (Amherst, New York: Prometheus, 1997), p. 86.

92. Weber.

93. Richard K. Betts, "The New Threat of Mass Destruction," *Foreign Affairs*, January/February 1998, p. 26. See also Ivan Eland, "Protecting the Homeland: The Best Defense Is to Give No Offense," Cato Institute Policy Analysis no. 306, May 5, 1998.

94. See Veronique de Rugy and Charles V. Peña, "Responding to the Threat of Smallpox Bioterrorism: An Ounce of Prevention," Cato Institute Policy Analysis no. 434, April 18, 2002; and Eric R. Taylor, "Are We Prepared for Terrorism Using Weapons of Mass Destruction?" Cato Institute Policy Analysis no. 387, November 27, 2000.

95. See "U.S. Raid Sets Off Protests," *New York Times*, February 13, 2002; Joseph D. McNamara, "The Defensive Front Line," *Regulation*, Winter 2001; Gary E. Johnson, "Another Prohibition,

Another Failure," *New York Times*, December 30, 2000; William F. Buckley, Jr., et al. "The War on Drugs is Lost," *National Review*, February 12, 1996. For book length treatment, see Timothy Lynch, ed., *After Prohibition* (Washington: Cato Institute, 2000); Steven Duke and Albert Gross, *America's Longest War* (New York: G.P. Putnam's Sons, 1994); and Bill Masters, *Drug War Addiction* (St. Louis: Accurate Press, 2002).

96. Masters, p. 119. The federal government should allow airline pilots to carry firearms and states should enact concealed carry laws. See John R. Lott Jr., "Only Guns Can Stop Terrorists," *Wall Street Journal*, September 28, 2001; Dave Kopel and Captain David Pelteys, "Making the Air Safe for Terror," *National Review Online*, September 14, 2001; Jeffrey R. Snyder, "Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun," Cato Institute Policy Analysis no. 284, October 22, 1997; and Daniel D. Polsby, "The False Promise of Gun Control," *Atlantic Monthly*, March, 1994.

97. Thomas Jefferson, Letter to James Madison, December 20, 1787, in *Thomas Jefferson: Writings* (New York: Library of America, 1984), p. 918.

98. Ibid. In 1994, House Republicans adopted a similar proposal, requiring a three-fifths vote to increase taxes. See "House GOP Caucus OKs 60% Rule to Raise Taxes," *Baltimore Sun*, December 8, 1994.

99. Quoted in Daniel Patrick Moynihan, "Ethnicity Now," *Washington Post*, September 16, 2001. See also Donald Devine, "Well-Timed Pentagon Briefing," *Washington Times*, September 25, 2001.

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