

Are Civil Liberties at Risk in the War on Terror?

What is conservative about President Bush's expansion of executive powers in the war on terror? Some conservatives blast the president's warrantless surveillance program, his designation of U.S. citizens as enemy combatants, and other recent controversies as attacks on limited government. Others defend those moves as necessary to protect Americans from violent attack. Bruce Fein, a deputy attorney general under Ronald Reagan and current chairman of the American Freedom Agenda, and Andrew McCarthy, director of the Center for Law and Counterterrorism at the Foundation for the Defense of Democracies, debated the question "Are Civil Liberties at Risk in the War on Terror?" at a Cato Policy Forum on May 24.

BRUCE FEIN: I submit that we stand at present at a constitutional crossroads. Why are we here? I think the answer is that, post-9/11, the changes in the Constitution's distribution of powers that have been urged by the president are not temporary, as in all previous crises and wars. Previously, we had always understood that there would be an end date to the war, whether it was the USS Missouri in Tokyo Bay or Appomattox.

But there is no defining endpoint to the so-called war against international terrorism. No one has even conceived of a standard by which a president would stand up and say that there was no risk that anywhere in the world is there a terrorist who wants to kill an American. And thus, we have to consider the issues that I will discuss with Andy today—issues that will be permanently on the American constitutional scene.

I take as the starting point of discussion the revolutionary ideas of the Founding Fathers. That is, that the primary and chief purpose of government is to make us free to develop our faculties and to pursue what Jefferson called happiness. That is the

major purpose of government as conceived in the U.S. Constitution.

It is not to aggrandize government. It is not to build world empires. With that being the standard, the Founding Fathers understood that freedom was the rule, and government intervention to protect security and safety was the exception. There had to be a standard of need or urgency required in order to encroach on freedoms.

The United States, post 9/11, has flipped that customary burden of proof. The basic discourse has been, in justifying these presidential initiatives, that unless it creates a police state that smells like Nazi Germany, let the government do it. And freedom takes a secondary role, creating an inverse of the vision of the Founding Fathers.

Take military commissions. They violate the customary rule that we have an independent judiciary and that one branch should not play judge, jury, and prosecutor. When you combine those three duties in one branch, the likelihood of error is very great. If you are prosecuting someone, you are probably going to decide that he is

guilty if you are also the one who is deciding on the facts and the law. That does not mean that there can never be a need for military commissions. You may need them on the battlefield, where you need evidence that is fresh and there would be chaos without an instant verdict. But there has never been a showing that the military commissions that the president has established—grievous departures from due process—are needed in order to get convictions of people involved in terrorism.

Let me move now to the National Security Agency's warrantless surveillance program. You may recall that after experiencing 40 years of unchecked executive power to gather foreign intelligence, the Church Committee, which published its reports in 1975 and 1976, concluded that secret and unchecked authority caused untold abuses—30 years of secret and illegal mail openings, 30 years of illegal interceptions of international telegraphs, and misuse of the National Security Agency to obtain information to use against political enemies. The committee also concluded that those abuses required some modest congressional check or regulation of the authority to gather foreign intelligence. The Foreign Intelligence Surveillance Act of 1978 was the result. The key to FISA is that when the president is going to target an American on American soil to gather foreign intelligence, under the belief that the U.S. citizen was acting as an agent of a foreign power or somehow in complicity with international terrorism, he has to go to an independent judge and convince the judge that there is serious reason to believe that terrorism was occurring and justified the encroachment on privacy.

Why should we care that there are restraints on the president's ability to search for and seize any conversation he wants? If the president can search everywhere, break and enter our homes, get all of

our e-mails, all of our telecommunications, conversations, then aren't we safer? Because the more information government agents have, the greater the likelihood that sometime, someplace, they will stumble upon some information relevant to thwarting terrorism.

Certainly there is something to that idea. If you have a police state, you can get more information. If you throw everybody in prison, no one is going to commit a crime. But the whole idea of a free society is that we make judgments about relative degrees of risks we take as a community in order to have freedom, not live in jails. That is why we have FISA and the Fourth Amendment.

The president, nonetheless, in the aftermath of 9/11, did not go to Congress and suggest that FISA was unworkable and needed amendment. He just said he was not going to comply with FISA, at least from what the public testimony suggests.

But ask again: What was the need for flouting a federal law directly and flagrantly, and continuing to flout it to this very day? Where was the evidence that, if the administration complied with this warrant requirement, it would not get the intelligence it needed to frustrate al-Qaeda? Nowhere.

So, again, we come back to a situation in which we have resorted to extraordinary methods of gathering intelligence outside of any judicial control or regulation as stipulated by Congress without any showing of need or justification. Now, you can imagine, if there was a great success story in obtaining intelligence that frustrated a terrorist attack because of the violation of FISA, it would be instantly leaked to and appear on the front pages of the *New York Times*, the *Washington Post*, and the *Wall Street Journal*.

Let me go to the next situation, which is the suspension of habeas corpus. What was this great writ all about? It emerged at the time of Magna Carta, when King John had the habit of throwing his political opponents into dungeons on his say-so alone.

The idea of habeas corpus is fundamental because it suggests that, when you have an executive detention, there ought to be

an opportunity for the individual detained to get an independent judicial assessment about whether the detention is legal. Remember, habeas does not create a single right. It just says you can have a judge examine the legality of your detention. It is one of the few rights that were enshrined in the Constitution itself without any bill of rights needed to amend the initial document. And yet, at the behest of the administration, the Congress of the United States has suspended habeas corpus for detainees at Guantanamo Bay.



Bruce Fein

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The Constitution acknowledges two situations in which the suspension is proper: in times of invasion or of insurrection or rebellion, neither of which obtains here.

What is the great fear of permitting someone at Guantanamo Bay to file a writ of habeas corpus with a judge and say, “Your Honor, I think I am being held here illegally. I am not an enemy combatant. I have not had involvement in active hostilities against the United States. All I want is a fair hearing.”?

I would have fewer qualms about the detention program without habeas corpus

if we were dealing with members of the Third Reich or people who were openly and notoriously captured by the United States on a battlefield. But 95 percent of the detainees in Guantanamo were not captured by the United States. They were captured by the Northern Alliance—people who had a vested interest in accusing their tribal rivals or ethnic rivals of being al-Qaeda.

That does not mean that everyone at Guantanamo is innocent. It does mean, however, that you have to have a serious process for distinguishing the people who are truly enemy combatants from those who are not. A former commandant of Guantanamo said most people do not belong there. A deputy said the same thing. We have the judicial process to ensure that we make a proper cut. After all, the difference between civilization and barbarism is that civilization cares about punishing only those who are guilty.

Yes, it is possible to reduce the risk of terrorism by creating a police state and eliminating all of our free speech and due process protections, but the price is the end of our Republic. And that is too high a price to pay.

ANDREW MCCARTHY: I want to start where Bruce started, because I think it is a valuable question. Why are we here? I think what we have glossed over is that the reason we are here is what happened before 9/11. By looking at the eight years from the time when the World Trade Center was first bombed until it was ultimately destroyed, we now know a few things as the result of not only the prosecutions that took place in that era but also investigations that have been done since 9/11.

We know that during that eight-year period the United States was struck again and again, on an average of about once a year, in attacks that became more audacious over time: the Trade Center bombing, a later plot to attack New York City landmarks, a plot to take out U.S. airliners over the Pacific, the Khobar Towers bombing, the 1998 destruction of our embassies in Kenya and Tanzania, the 2000 attack on the USS Cole, and finally 9/11.

During that time, the criminal justice system in the United States was not only the point of the counterterrorist spear, it was the entire spear. The counterterrorist strategy of the United States was prosecution in the criminal justice system, with all of the attendant protections that Bruce spoke about.

In nine trials, all in that eight-year period, at a time when the enemy was growing both larger and more audacious, we managed to take out exactly 29 terrorists. And for the most part, those 29, with maybe a handful of exceptions, were about the lowest-ranking players that existed in the jihadist network that carried out all of those attacks.

The system worked in the sense that all the people who were charged were successfully prosecuted and ultimately convicted and sentenced. So as a matter of due process, perhaps that was as a shining example. But as a national security strategy, it was a disaster. It was basically an invitation to be hit again and again. And as a result, of course, we were hit again and again.

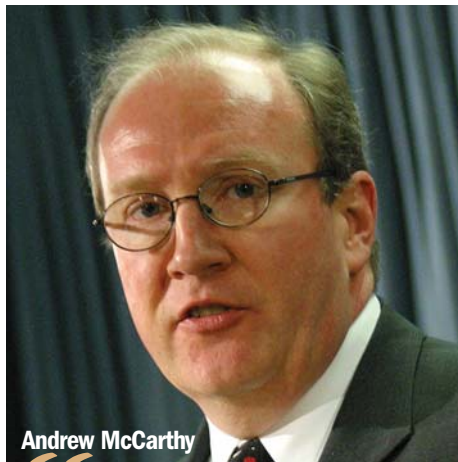
I think Bruce is conflating two things that are very different. There has always been a major difference in the way that our law regards the American body politic and the area of the world that is external to the American body politic.

Bruce started out talking about military commissions as if they were a great aberration. What is actually an aberration is having unlawful enemy combatants in wartime have access to the courts of the United States. The United States has taken in its history more than two million prisoners of war. There has never, until this war and until in fact very recently in this war, been systematic access to the courts of the United States for people who have been captured in wartime.

Now, Bruce says, and I think this is absolutely correct, that this war is a different kind of war and the enemy that we face is a different kind of enemy.

Yes, it is true, when we arrest somebody or we apprehend somebody in this type of a war, there is an issue about whether the person is an enemy combatant or not. But

the other thing that we cannot allow ourselves to forget is that, if you take these particular enemy combatants—and most of them are enemy combatants—and you give them all of the rights that criminal defendants have in the United States, something that has never been done for honorable combatants in the history of the United States, what you are doing necessarily is rewarding the barbarity that is behind al-Qaeda's methods. And rewarding that kind of behavior is a guarantee of getting more of that kind of behavior.



Andrew McCarthy

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The writ of habeas corpus is not suspended for a person unless that person has the right to it in the first place. It has always been the law of the United States that there is a difference between the application of the protections of the Constitution inside the United States to U.S. persons, both citizens and immigrants, and enemy combatants. U.S. persons get the full run of habeas corpus and they always have. But enemy combatants have never systematically been able to have access to our courts.

Each detainee is entitled to make whatever claims he can against his capture

before a combatant status review tribunal. I do not want to pretend that that is the model of due process that Bruce talked about before. It is a difficult proceeding for a combatant to win, although some have won. But it should be a difficult proceeding, because warfare is in essence an executive branch function. There is nothing that says that a court, rather than the executive branch, is a better source of authority for us to rely on in terms of who should be held and who should not be held in wartime.

The law specifically says that the prisoners will also be able to raise the question of whether those proceedings were a violation of the Constitution and the laws of the United States. Now, that does not mean that they will win. The fact that we give them the opportunity to make that challenge does not mean that they actually have rights under the laws and the Constitution of the United States. But the court will at least have a chance and an opportunity to hear that claim articulated and to make a reasoned decision about it.

Moving on to the NSA scandal: the idea of executive authority to overrule statutes or not to enforce statutes did not get invented with George Bush. When FISA was enacted, President Jimmy Carter's attorney general Griffin Bell testified that the president maintained authority to do warrantless surveillance, notwithstanding the statute. When the statute was amended in 1994, Deputy Attorney General Jamie Gorelick testified that the administration at the time maintained the authority to order warrantless searches in national security cases.

The Office of Legal Counsel, headed by Walter Dellinger during the Clinton administration, has elaborate memoranda in it about the duty of the president not to enforce statutes that he believes are unconstitutional. The Congress enacted a War Powers Resolution in 1973. Since then, every U.S. president has refused to enforce it because it is an unconstitutional infringement on his powers.

Has Bush pushed the envelope more than others? I guess that is the legacy. But I think the idea that he invented this issue, or this controversy, is one that just does not

hold up in the historical record.

FEIN: I think that Andy's forceful presentation corroborates my observation. He went into legal arguments and technical distinctions between aliens and U.S. citizens that did not go to the merits of whether departures from customary due process and freedom were warranted.

Notice that he did not try to cite a single instance in which, if you applied regular habeas corpus or FISA, suddenly it would handicap the executive in an improper way in fighting against terrorism. The greatest danger to our civil liberties is the argument that we do not have to think about whether

the customary processes work and we can assume 9/11 created a brave new world.

First of all, the distinctions that he has suggested are invariably there between citizen and noncitizen are not accurate. The president has claimed and asserted the authority to identify persons as illegal enemy combatants if they are U.S. citizens, specifically the famous Hamdi and Jose Padilla. They are U.S. citizens who customarily should enjoy all of the rights of U.S. citizens, including the right to habeas corpus.

Moreover, let's think about that distinction when it comes to the National Security Agency's warrantless surveillance program. As I explained, it does not apply when you are

targeting an alien abroad. Its application and what the administration is seeking to evade is an obligation to get a warrant when it is a U.S. citizen standing on American soil and he or she is suspected of wrongdoing.

It may be that we are starting at a higher plane of civil liberties because of statutes like FISA, which the president claims is unconstitutional, and Supreme Court rulings. But that means that we must, if we want to protect our freedoms, continue to fight and denounce any encroachment. As James Madison said, "We ought to be alarmed at the first encroachment on any of our civil liberties, not waiting until we are at the precipice."

CATO PUBLICATIONS

The Best-Laid Plans of Bureaucrats Go Wrong, Says New Book

Even people who generally accept markets think there are some areas of policy that are properly the realm of the state alone. Among those areas are transportation, land use, and environmental stewardship. Cato senior fellow Randal O'Toole seeks to change that conventional wisdom with his new book, *The Best-Laid Plans: How Government Planning Harms Your Quality of Life, Your Pocketbook, and Your Future*.

The famous line from the poem by Robert Burns partly inspired O'Toole: "The best-laid schemes of mice and men" tend to go awry. O'Toole begins with the idea that government planners are not somehow immune to the fallibility of human knowledge; indeed, they are in an especially bad position to comprehensively plan our infrastructure and land use because of a number of bad incentives. He then applies this theory to a number of case studies in which government planners stepped in with the best of intentions but ended up with terrible results. As O'Toole writes, with most government plans we can expect that "the costs will be far higher than anticipated, the benefits will prove far smaller, and various unintended consequences will turn out to be worse than even the plan's critics predicted."



Among the examples explored by O'Toole is the city of Portland in Oregon, his native state. Followers of New Urbanism, a school of urban design that promotes dense, walkable, public-transit-oriented developments, revere Portland as a model for "smart growth," as opposed to suburban sprawl. The regional government imposed "smart growth" policies on Portland that included an urban growth boundary that prevented new developments beyond a certain area, forcing the city to grow inward instead of outward. The intention of the policy was to create neighborhoods resembling Greenwich Village. O'Toole argues that the plan actually made Portland resemble Los Angeles, the densest metropolitan area in the United States with the fewest miles of freeway per capita. Portland now also has too

few roads, O'Toole writes, and the cars stuck in stop-and-go traffic have helped to make Oregon's air dirtier than New Jersey's.

O'Toole also investigates the supposed mass transit solution to the traffic congestion problems facing many American cities. Planners who push for more spending on light rail think they can shape people's lifestyles. They think they can bring people out of their suburban homes and cars and into transit-oriented communities. But a major theme of *The Best-Laid Plans* is that planners are on a fool's errand when they try to push the market in a direction it does not want to go. O'Toole explains that transit projects around the world are sops for public money but have little observed effect on people's driving habits and the growth of suburbia. Rail, in his view, is an expensive distraction from market-friendly solutions. He explores how highway tolls can be used to deal with traffic congestion.

Toll pricing is just one application of O'Toole's theory that government's role should not be to supplant the market with the whims of planners. Instead, it should provide the basic rules and framework that allow the market to address social and environmental problems.

The Best-Laid Plans is available at www.catostore.org for \$22.95.