Cato Handbook for Policymakers

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27. Civil Liberties and Terrorism

Congress should

- stop authorizing secret subpoenas, secret arrests, and secret regulations; and
- repeal the Military Commissions Act and close the Guantánamo prison.

Free societies do not just happen. They must be deliberately created and deliberately maintained. Freedom in America rests on a sophisticated constitutional system of checks and balances. Unfortunately, since 9/11 freedom in America has been under assault by policymakers who repeatedly assert that the ''line between liberty and security'' must be redrawn. 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 includes ensuring accountability in government and a willingness to reverse wrongheaded policies. Al Qaeda terrorists do pose a security problem, but it is a problem that should be addressed from within the American constitutional framework.

Say No to the Surveillance State

If policymakers are serious about defending our freedom and our way of life, they must take a sober look at the risks posed by al Qaeda terrorists and wage this war without bypassing the American constitutional framework. Previous Congresses have authorized secret subpoenas, secret arrests, and secret regulations. These policies should be reversed.

Secret Subpoenas

The Fourth Amendment to 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.'' It is important to note that the Fourth Amendment does not ban all government efforts to search and seize private property, but it does limit the power of the police to seize whatever they want, whenever they want.

The warrant application process is the primary check on the power of the executive branch to intrude into people's homes and to seize property. If the police can persuade an impartial judge to issue a search warrant, the warrant will be executed. However, if the judge is unpersuaded, he will reject the application and no search will take place. In the event of a rejection, the police can either drop the case or continue the investigation, bolster their application with additional evidence, and reapply for a warrant. The Bush administration has tried to bypass this constitutional framework by championing the use of secret subpoenas called ''national security letters'' (NSLs).

An NSL is a document that empowers federal agents to demand certain records from businesspeople. Unlike the case with search warrants, executive branch agents do not need to apply to judges to obtain these letters. It is simply some agent's decision that he wants certain information. These letters also threaten citizens with jail should they tell anyone about the government's demands. The Bush administration did not create NSLs, but it pushed to expand the types of business and transactional records for which they could be employed and the frequency with which they are used. When a constitutional challenge was brought against NSLs, Bush's lawyers argued that they were fully consistent with the Bill of Rights. The federal court was not persuaded. Federal Judge Victor Marrero ruled that NSLs violated both the First Amendment and the Fourth Amendment. NSLs violate the First Amendment because they ''operate as an unconstitutional prior restraint on speech.'' NSLs violate the Fourth Amendment because they are written ''in tones sounding virtually as biblical commandments,'' thus making it ''highly unlikely that an NSL recipient would know that he may have a right to contest the NSL, and that a process to do so may exist through a judicial proceeding.'' The Federal Bureau of Investigation reportedly serves more than 30,000 NSLs a year. Congress should abolish NSLs and have the police conduct their searches within the American constitutional framework.

Secret Arrests

In the months following the 9/11 attacks, the federal government, quite properly, launched an aggressive investigation to determine if there were

other terrorist cells on U.S. soil. Hundreds of people in the United States were arrested, but the government refused to provide the most basic information regarding the people in its custody. Who were these detainees? Why were they being held? Where could their friends and families find them? We don't know how many of them were citizens—surely most were not—nor how many are still being held, precisely because of the extreme secrecy surrounding the whole operation.

At first, federal officials would release only an overall tally of the number of people arrested and jailed. After several weeks, the Department of Justice announced that it would no longer release even that information. News media organizations and civil rights attorneys subsequently sued the government under the Freedom of Information Act to compel the disclosure of the names, the charges, and other information. Attorneys representing the government insisted that the prisoners had access to counsel and were free to contact anyone they wished, including newspaper reporters. The problem was, of course, that there was no way to verify such assertions. As one federal judge observed, ''Just as the government has a compelling interest in ensuring citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail.''

In the FOIA litigation, federal officials repeatedly claimed that the information sought would harm ''national security.'' If that claim were valid, FOIA's disclosure requirements would not apply because it would qualify for an exemption. Unfortunately, a federal appellate court declined to ''second-guess'' the government's assertions to that effect. FOIA anticipates the government's legitimate interest in ongoing investigations. However, to qualify for that exemption, the government must provide an explanation for its stance. The fact that no explanation was supplied in the case of these secret arrests is deeply troubling. Now that the government can evade FOIA with bland assertions of ''national security,'' FOIA has lost much of its vitality. Thus, Congress should revise FOIA to make it crystal clear that the role of the judiciary is to insist that law enforcement agencies meet their disclosure responsibilities and not evade them. In a constitutional republic, the electorate must have information so that it can assess the performance of those in high office. If that information flow is blocked or distorted, the entire system can break down.

Secret Regulations

Under the Constitution, our laws are supposed to be made openly by our elected representatives in the legislative branch. That framework for

lawmaking has been bypassed in recent years. Unelected officials are now making secrets laws that they call ''security directives.'' Government officials claim that secrecy is necessary because they do not want to ''let the terrorists know what we are doing.'' Again, it is reasonable to keep some things secret, such as the identity of our spies and informers, but it is startling to behold the transformation of the process by which our laws are made.

When a legal challenge was brought against an aviation security directive concerning passenger identification checks, a government lawyer expressed his confidence in the constitutionality of the secret law—even as he told a federal judge that the judiciary could not see the law itself! Such sweeping claims for secrecy must be rejected. Thus far, these secret laws have mostly affected citizens using mass transit systems (airline and rail passengers), but it would be naive for anyone to believe that the trend will stop there. The prospect of Americans being held accountable for noncompliance with unknowable regulations is outrageous. Congress should reverse this pernicious practice immediately.

Revamp President Bush's Prisoner Policies

The Bush administration's handling of prisoners has been a mess: Guantánamo, secret Central Intelligence Agency prison camps, rendition, denial of habeas corpus, waterboarding and other ''alternative interrogation techniques,'' and military tribunals with special rules of procedure and evidence. With the departure of President Bush and Vice President Cheney, the time is now right to begin anew. The new Congress should begin by moving to restore the writ of habeas corpus and closing the prison facility at Guantánamo Bay.

Detention

The myriad issues surrounding the handling of prisoners can be divided into three subject areas: detention, treatment, and trials. ''Detention'' is akin to incarceration in a prisoner-of-war camp. There are no criminal charges or trial. POWs are incapacitated during the war and are released afterward. ''Treatment'' refers to the prisoners' living conditions and to interrogation practices. ''Trials'' refer to proceedings before military courts and, in this context, to ''war crime'' allegations. A comprehensive analysis of these issues is beyond the scope of this chapter, but each subject will be briefly addressed.

Perhaps the most important legal issue that has arisen since the 9/11 terrorist attacks has been President Bush's claim that he can arrest anyone in the world and incarcerate that person indefinitely in a POW-style camp. According to the legal papers that Bush's lawyers have filed in the courts, so long as the president has issued an ''enemy combatant'' order to his secretary of defense, instead of the attorney general, the president can ignore the ordinary constitutional safeguards and procedures.

To fully appreciate the implications of the administration's enemy combatant argument, one must first consider the constitutional procedure of habeas corpus. The Constitution provides, ''The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.'' Notably, the Bush administration has not urged Congress to suspend habeas corpus. Nor has President Bush asserted the claim that he can suspend the writ unilaterally. Bush's lawyers have instead tried to alter the way in which the writ operates when it is not suspended.

By way of background, the writ of habeas corpus is a venerable legal procedure that allows a prisoner to get a hearing before an impartial judge. If the jailer can supply a valid legal basis for the arrest and imprisonment at the hearing, the judge will simply order the prisoner's return to jail. But if the judge discovers that the imprisonment is illegal, he has the power to set the prisoner free. For that reason, the Framers of the U.S. Constitution routinely referred to this legal procedure as the ''Great Writ'' because it was considered one of the great safeguards of individual liberty.

The government has tried to bypass the writ of habeas corpus in several ways. First, American citizens designated ''enemy combatants'' were held in solitary confinement in a military brig in the United States. Access to attorneys was denied. According to the government's reasoning, the prisoners could be denied meetings with their attorneys because they were enemy combatants, not accused criminals (who are guaranteed certain constitutional rights). Note the circularity of that argument. The prisoners could not go to court to challenge their ''enemy combatant'' designation because they were being held in solitary confinement. And if the prisoners could not meet with an attorney to explain their side of the story, it would be virtually impossible for any attorney to rebut the government's enemy combatant allegations in a court hearing.

Second, government attorneys argued that even if an enemy combatant could meet with an attorney and even if a habeas corpus petition could be filed on the prisoner's behalf, the court should summarily throw such

petitions out of court. According to Bush's lawyers, the courts should not ''second-guess'' the president's ''battlefield'' decisions. But when the government attorneys were pressed about their definition of the term ''battlefield,'' they said they considered the entire world to be the battlefield, including every inch of U.S. territory. Every inch—from Disney World in Florida to Yellowstone Park in the Rockies to the sandy beaches of Hawaii and all the tiny towns in between. They are all on the ''battlefield.'' That is a profoundly disturbing claim because there are *no* legal rights on the battlefield. Military commanders simply exercise raw power. By twisting and redefining the term ''battlefield,'' government attorneys say that because the president is the commander in chief, he can essentially incarcerate whomever he wants.

Congress must repudiate the idea that America is a battlefield. The FBI should, of course, conduct terrorism investigations and surveil and search suspects as necessary and appropriate by following constitutional procedures. If an American is involved, the government can file criminal charges and prosecute.

With respect to non-Americans who are taken prisoner overseas, the legal issues are more complicated. The military has leeway to make the initial decision as to who may be taken into custody, but the military should not have the final word. When the writ of habeas corpus has not been suspended, it means prisoners should be afforded the opportunity to meet with counsel and to file a petition in the event that a mistake has been made. Access to the courts does not mean the judiciary will automatically discharge the prisoners. It means the government must present evidence and supply a good reason for locking up a particular person. If the military can supply a good reason, the court will reject the petition and order the prisoner back to his or her jail cell. If the government will not, or cannot, offer evidence, the court has the power to set the prisoner free. In *Boumediene v. United States*, the Supreme Court properly affirmed the proposition that prisoners can file habeas corpus petitions from the Guantánamo prison. The Court left unresolved whether prisoners from other facilities should have access to the writ. Such uncertainty provides intelligence and military officials with an incentive to hold prisoners elsewhere. The next Congress should move quickly to fully restore habeas corpus by establishing an orderly and transparent prison system. To begin anew, Congress should close the Guantánamo prison. All American prison facilities should fall within the exclusive jurisdiction of a single agency, the Pentagon. The government should not interfere with or eavesdrop on

attorney–client communications. And habeas corpus applications should be treated with respect, not disdain.

Treatment

There has been much public discussion about the Bush administration's handling of terror suspects. Although the administration has denied employing torture, it is now apparent that some ''new paradigm'' was put in place after 9/11. President Bush declared that the Geneva Convention did not apply to ''enemy combatants,'' and he would later admit that secret ''alternative interrogation techniques'' were used against certain prisoners. It is still hard to believe that the Red Cross was unable to check on the condition of all American prisoners because no complete list was made available. President Bush has admitted to the existence of secret CIA prisons.

Congress must move decisively and take responsibility for all American prisoners. Three steps are essential. First, there must be transparency. All prisoners should be registered with Congress and the Red Cross. A constitutional republic should never ''render'' individuals to third countries for torture or maintain secret prison facilities for ''ghost prisoners.''

Second, the chain of command must be clear. Only one government agency, the Pentagon, should be responsible for prisoners. Further, any and all contact with prisoners should be registered in a logbook. And such logbooks should be scrupulously maintained and shared with the defense and intelligence committees of Congress. Such procedures will help ensure prisoner safety and government accountability for mistreatment or other wrongdoing.

Third, until a competent tribunal rules otherwise, the Geneva Convention applies to all American prisoners. During the 1991 Gulf War, the American military held more than 1,000 hearings before such tribunals. Many of the prisoners were determined to be innocent civilians swept up in the fog of war. President Bush waved off this procedure in 2002 by simply declaring that all his prisoners were ''enemy combatants'' and that enemy combatants were ineligible for Geneva's safeguards. Until the Supreme Court intervened, the prisoners were not afforded any opportunity to contest their status as enemy combatants. Congress must affirm this screening procedure for all prisoners, not just the men presently held at Guantánamo.

If a competent tribunal finds certain prisoners ineligible for Geneva's protective umbrella, American interrogators should not be given carte blanche to employ physical brutality. Instead, various incentives should

be used to encourage cooperation and collect intelligence. For example, better food and living conditions can be made available to those who cooperate—while Spartan arrangements will be the rule for those who decline to disclose what they know. In all instances, American commanders should welcome the scrutiny of outside human rights organizations, such as the Red Cross.

Trials

The U.S. Constitution requires certain procedures when the government accuses someone of a crime. The Bill of Rights provides that the accused shall enjoy the right to a speedy and public trial before an impartial jury. The accused is also entitled to the assistance of counsel and must be permitted to confront witnesses against him or her. Shortly after 9/11, President Bush announced that he would personally decide who would receive a trial by jury in civilian court and who would face trial for war crimes before a military tribunal. And Bush would also decide the various rules and procedures that would be followed in the tribunal proceedings.

The Supreme Court struck down Bush's unilateral order establishing a tribunal system in *Hamdan v. Rumsfeld*. Regrettably, Congress subsequently rescued Bush's tribunal plans by enacting the Military Commissions Act. Congress ought to repeal the MCA for two reasons. First, such proceedings will blur the line between our civilian court system and the military court system. Second, such proceedings will set a precedent that other countries can use against the American military in a future conflict.

The U.S. Constitution is a legal charter that empowers and limits government in both peacetime and wartime. The Framers of the Constitution anticipated the necessity of wartime measures, but they were also keenly aware of the need for safeguards against the arbitrary exercise of government power. Article I, section 8, empowers Congress ''to define and punish . . . Offenses against the Law of Nations.'' That is, Congress may define the offense and prescribe the punishment for people who are convicted of such offenses. Note, however, that the mode of trial is not left to the discretion of the legislature. The Sixth Amendment says that civilian jury trials are guaranteed in ''all criminal prosecutions.'' There is no exception for ''war crimes.''

As a matter of history, military commissions have been used in some of our previous wars. Though such precedents were erroneous according to constitutional first principles, those proceedings could at least be cabined by some of the conventions of war between nation-states. Uniforms, for

example, made it possible to distinguish combatants from noncombatants. That legal model does not easily apply to terrorists. Since terrorists pose as civilians, the commission system will very likely see a steady influx of cases where the government will be leveling war crime charges against people who appear to be civilians. Except for a handful of cases where the defendant will be known by all to be a member of al Qaeda (Khalid Sheikh Mohammed), the problem of circularity will once again present itself. To take a concrete example, suppose the president accuses a man of aiding a terrorist cell. The 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 ''enemy combatants'' are not entitled to jury trials—whereupon the man is flown to a military prison for his trial.

Even if there was no constitutional problem, special tribunals for war crimes will create a dangerous international precedent. Other states will take note of how the United States deals with war crime allegations. In a future military conflict, U.S. military personnel could find themselves accused of war crimes—and then brought before some unique tribunal that does not operate under the ordinary legal rules of that country. The United States will be hard-pressed to lodge objections to such proceedings if that is how our system operates. Thus, the Military Commissions Act should be repealed.

Conclusion

American institutions tend to look for ''quick-fix'' solutions to problems. American policymakers must recognize, however, that the danger posed by al Qaeda is not a short-term crisis but a long-term security dilemma for the United States. If Congress rushes to enact anti-terrorism legislation in the aftermath of any terrorist incident, no one can deny that Americans will lose their liberty over the long term. Now that several years have passed since the shock and horror of 9/11, it is time for Congress to reassess the extent of the threat posed by al Qaeda and the powers that have been conferred on the intelligence and law enforcement agents in recent years. Policymakers should not make the mistake of underestimating the American people. Of course, the electorate wants safety, but it wants the federal government to secure that safety by attacking the terrorist base camps, not by using the third degree on disarmed men in secret prisons and not by turning America into a surveillance state.

Suggested Readings

Bovard, James. *Terrorism and Tyranny*. New York: Palgrave, 2003.

Dillard, Thomas W., Stephen R. Johnson, and Timothy Lynch. ''A Grand Façade: How the Grand Jury Was Captured by Government.'' Cato Institute Policy Analysis no. 476, May 13, 2003.

Fisher, Louis. *The Constitution and 9/11*. Lawrence: University of Kansas Press, 2008.

Healy, Gene. *The Cult of the Presidency*. Washington: Cato Institute, 2008.

Heymann, Philip B. *Terrorism, Freedom, and Security.* Cambridge, MA: MIT Press, 2003.

Lynch, Timothy. ''Breaking the Vicious Cycle: Preserving Our Liberties while Fighting Terrorism.'' Cato Institute Policy Analysis no. 443, June 26, 2002.

_____. ''Power and Liberty in Wartime.'' *Cato Supreme Court Review*, *2003–2004* 23 (2004).

_____. ''Doublespeak and the War on Terrorism.'' Cato Institute Briefing Paper no. 98, September 6, 2006.

Mueller, John. *Overblown: How Politicians and the Terrorism Industry Inflate National Security Threats and Why We Believe Them.* New York: Free Press, 2006.

Savage, Charlie. *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*. Boston: Little, Brown, 2007.

Schulhofer, Stephen J. *Rethinking the Patriot Act*. New York: Century Foundation Press, 2005.

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