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Defending Liberty Pursuing Justice

Balancing National Security and Civil Liberties

PART I: Wars and Changing Values

EDITOR (John Paul Ryan): Wars and other international conflicts highlight the tensions between national security and civil liberties. How, if at all, has the balance between them changed in the United States over time? Why?

WILLIAM BANKS (Syracuse University College of Law): Throughout our history, the courts have been central participants in shaping the limits of government authority and the resultant scope of civil liberties during wartime. Now that the courts are once again being tested in the wake of 9/11, some predict that a historical tendency for the courts to accede to government claims of authority in time of war will only be enhanced by the unprecedented war on terrorism.

Before reaching that conclusion, however, we must provide some perspective. The war on terrorism has not been our gravest crisis. Our nation was born through the cauldron of violent revolution, and the Civil War was the contemporary equivalent of a nuclear attack on the nation. In their times, the war with France soon after the founding and the two World Wars were potentially more calamitous. In each of these wars, the judicial branch was an active participant, sometimes generously deferent to the government's expansive interpretation of its wartime constitutional prerogatives, other times especially attentive to perceived, unchanging constitutional values. Today's war on terrorism likewise requires judges to make critical judgments about the Constitution and the institutional role of the judiciary in a time of war.

The American constitutionalist John Adams was influential in adapting European theories of separation of powers and balanced government to a new nation and its institutions. Adams' inclusion of the judicial branch in the balancing of government powers was a uniquely American contribution to separation of powers theory. Though unsure of the strength of the judiciary in relation to the legislature, Adams viewed the independence of the judiciary as central to preserving the governmental balance.

When the first Congress implemented Article III in the Judiciary Act of 1789, jurisdiction was conferred on the courts to decide a wide range of disputes that touch on national security and foreign affairs. The only exception anticipated for wartime conditions provided for suspension of the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."

In a trilogy of decisions (see, e.g., *Little v. Barreme,* 1804) upholding the legality of the undeclared war with France, the Supreme Court actively participated in affirming the principle that the executive discretion to conduct an undeclared or limited war was prescribed by those actions authorized by Congress. The judicial branch was also central to some of the most important actions of the government during the Civil War. President Lincoln first responded to the attack on Fort Sumter by blockading the southern ports, without going to Congress for a declaration of war. In *The Prize Cases* (1863), the Supreme Court sustained Lincoln's actions, ruling that the commander in chief had a constitutional duty to repel the attack on the United States without awaiting special legislative authority; the Court also held that Congress's ratification of the president's blockade compensated for the lack of prior authorization. However, when Lincoln unilaterally suspended the writ of habeas corpus and imposed military rule in Maryland, Chief Justice Taney ruled that the president lacked unilateral authority to suspend the writ.

During the World War I era, Congress joined with the executive branch to give the government wide-ranging powers to silence and sanction "subversive" speakers. Although individual judges such as Learned Hand, Louis Brandeis, and

Editor's Note *Six legal, social science, and humanities scholars exchange views on national security and civil liberties within the United States and internationally. They address historical perspectives, the impact of new laws, policies, and executive agencies on public safety since 9/11, and the conduct of modern wars, including new challenges posed by terrorist organizations. They conclude by assessing the implications for America's ever-increasing diversity on the protection of civil liberties in times of national crisis. Resources are listed on p. 19. To view or download copies of this dialogue, go to: www.abanet.org/publiced/focus/home.html*

IN THIS ISSUE

Oliver Wendell Holmes sought to protect free speech values against the charges of subversion, the Wilson administration had predilections to suppress criticism of the war similar to the Lincoln administration during the Civil War. In a series of decisions beginning in 1919, the Supreme Court deferred readily to the judgment of the elected branches that "subversive advocacy" could be stopped and subjected to criminal penalties.

From the start, World War II was more popular at home than World War I. In tandem with a more fulsome set of free speech protections that had developed by that time, civil liberties generally fared better, with one especially grievous exception–the detention and internment of Japanese Americans. A few weeks after the attack on Pearl Harbor, in February 1942, President Roosevelt promulgated an executive order leading to the internment of 120,000 Japanese Americans who were taken from their homes and placed in internment camps for the duration of the war. Although the Supreme Court exclaimed that the racial classification at issue in these appeals required "the most rigid" scrutiny, the Court accepted uncritically the judgment of the military authorities and of Congress that persons of Japanese ancestry presented a security risk to the United States. The Court thus endorsed the government's wholesale condemnation of the Japanese American population without any record of evidence of even a single instance of Japanese American disloyalty.

Although the Cold War and Vietnam War periods produced a mixed record of judicial protection of constitutional safeguards, perhaps the preeminent decision on national security law was rendered during the Korean War. In *Youngstown Sheet & Tube Co. v. Sawyer* (1952), the Supreme Court rejected President Truman's effort to seize the nation's steel mills to avert a likely strike that would compromise the war effort. Congress had considered but decided against expressly granting the president the seizure authority in the Taft-Hartley legislation.

In the 1980s and 1990s, the courts largely deferred to executive national security actions, either by finding disputes nonjusticiable (e.g., termination of the Taiwan defense treaty, the first Gulf War, and the Kosovo bombing campaign) or by a generous reading of governmental authority (e.g., the Iranian hostage deal and classification of national security information).

On multiple fronts the courts are now being asked to review national security justifications for measures taken to combat terrorism. Recent Supreme Court decisions (e.g., *Hamdan v. Rumsfeld,* 2006) have made clear, at the very least, that the president does not have a "blank check" to conduct an endless war on terrorism.

Over time and with varying degrees of conviction, the federal courts have served as a necessary counterweight to government overreaching in times of war, when passions and momentary impulses are most likely to affect policy. On the one hand, it is easy to underestimate the institutional problems confronting judges who are asked to make momentous decisions in times of national crisis–difficulties of fact-finding and assessing the risks of being wrong, among others. On the other hand, no other part of government is as well equipped as the judiciary to anchor the nation to its core values during a storm. The risks from judicial tolerance or abstinence are simply too great now, as they have been in other times of war.

Gordon Silverstein (University of California at Berkeley/Political Science): In his debate with Thomas Jefferson about the wisdom of adding a bill of rights to the Constitution, James Madison insisted that "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed." Madison–America's first and best political scientist–was on to something here. "Should a rebellion or insurrection alarm the people as well as the government, and a suspension of habeas corpus be dictated by the alarm," Madison added, "no written prohibitions on earth would prevent the measure" (James Madison, letter to Thomas Jefferson, October 17, 1788).

Madison believed that rights could survive stress only if they were deeply embedded in the political and social culture. And that would happen only over time and largely in times of peace and low stress. Only "as they become incorporated with the national sentiment," Madison added, could rights "counteract the impulses of interest and passion." If a written bill of rights contributed to that socialization process, Madison said, perhaps it was a worthwhile endeavor.

And that brings us to what may be different about our current circumstances. Once upon a time, crisis meant a turning point and it was temporary. Crises came, and crises passed. But here's our problem: Is the "global war on terror" simply our new state of equilibrium? If crisis is permanent, how and when will rights not only reassert themselves but more deeply embed themselves?

The Supreme Court provided one of its most thunderous endorsements for individual liberty in the case of *Ex Parte Milligan* (1866). Seized by the U.S. Army in Indiana in 1864, Milligan was tried, convicted, and sentenced to hang by a military tribunal. The problem was that Milligan was a civilian, and the federal courts were open and functioning in Indiana at the time. Milligan's appeal found its way to the U.S. Supreme Court, where his conviction was

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reversed. In his opinion for the Court, Justice David Davis proclaimed that the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." This doctrine is under stress again, but think how much greater that stress might be absent Davis' bold proclamation now embedded in American law for more than 100 years. It is important to note, however, that this decision was handed down two years after Milligan's arrest and more than a year after the Civil War came to a close. The doctrine was announced and enforced in the quiet aftermath of war, not in its midst. It was embedded over a period of relative calm.

So what happens to our socialization of rights when crisis is permanent? This isn't actually quite as new as it seems. September 11, 2001, was not the start of a permanent emergency but, rather, more of a confirmation and extension. The development of nuclear weapons at the end of World War II, and the prolonged Cold War in which the United States led an international coalition of countries in a bipolar struggle, combined to place us in a state of near-permanent emergency. The legislation that was passed–in areas ranging from emergency military provisions to civil defense, resource allocation, and financial regulation–was aimed at emergency, even though the Cold War emergency lasted more than 40 years.

Just when that emergency finally seemed to have come to a close, 9/11 put us right back in that state, perhaps even more dramatically. At least, the Cold War had clearly defined, uniformed antagonists and leaders with the authority and legitimacy to end it. Now, would we even know when this war is over and ordinary time has begun?

If we are in a state of permanent emergency and crisis, how and when can we pause to recommit to our regime of rights? Where is the pause that will allow another Justice Davis to deepen and expand our commitment to rights? It may be more likely that we will get decisions closer to *Korematsu v. United States* (1944), in which the Court's majority was unwilling to directly reject or challenge a claim of military necessity.

Some saw a glimmer of hope in the 2004 Supreme Court decision *Hamdi v. Rumsfeld,* which involved the question of the rights of American citizens seized as enemy combatants in the war on terror. Justice Sandra Day O'Connor's opinion made clear that the authorization for the use of military force was not a sufficient statutory foundation for the president to order Hamdi held without trial or formal judicial oversight. In her opinion for the Court, however, O'Connor signaled that this was not necessarily a question of rights trumping national security. "There remains the possibility," she wrote, "that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." And that is, of course, precisely what Congress put together in the Military Commissions Act of 2006.

As Madison noted, "however strongly marked on paper" guarantees of liberty "will never be regarded when opposed to the decided sense of the public." Or, as Justice Jackson stated in *Korematsu:* "The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries." Now, our challenge is to figure out how to embed and refresh these judgments, even if (particularly if) we are in a semi-permanent state of crisis.

Elizabeth Rindskopf Parker (University of the Pacific/Dean, McGeorge School of Law): The relationship between the government's authority to further our collective security and the limitations imposed on that power to protect our individual liberties is a fundamental tension in our nation's legal framework. The seven articles that comprise the Constitution serve to organize a federal government sufficiently strong to protect citizens and the nation. The amendments that follow strive to protect the individual liberties of our citizens from abuse by a strong central government. The precise balance in this relationship is constantly shifting, as our perceptions of security threats change. Over the long run, the two seek to reach equilibrium and to remain in balance, at least within the limits of the continuum defined by the Constitution and our shared values.

Without doubt, perceptions of liberty and security during peacetime have changed. The importance of individual liberty has increased gradually over time. Today, for example, a quarantine order enforced by the government's police power, which occurred in the early part of the 20th century, would not be acceptable to most Americans. The government excesses of the McCarthy period and the civil rights movement have both reinforced the importance of individual rights and liberties.

In contrast, throughout our history responses to specific threats to security from attacks or during times of war have affected the balance between security and liberty more radically. Our response to the terrorist attacks of 9/11 provides one example of how we respond to this tension in crisis and then, gradually over time, moderate our response to one that is more consistent with the balance we have established over time.

In the immediate aftermath of the 9/11 attacks, for example, military aircraft flew combat air patrols over our cities, and the national guard provided security in our civil airports. Whatever actual security benefit we received from these measures, their intent and effect unequivocally demonstrated to a people who had just suffered an attack that their government was doing all it could to prevent another one.

Today, more than five years later, the combat air patrols have been reduced, and the National Guard officers we see in airports are more likely traveling to or from deployment in Iraq. In contrast, other reactions to the attacks have been less visible but longer lasting. There is a real worry that some of these responses may threaten to alter the proper relationship between security and liberty on a permanent basis. For this reason, discussions such as this are vitally important to our nation's ability to achieve the healthiest balance of liberty and security. Our goal must be to protect both our liberty and security; one cannot exist without the other.

As our recent experience with 9/11 makes clear, this balance will move in response to immediate external events, such as an attack or wartime conditions. Once such events end, however, typically the

"balance" adjusts, returning to its original long-term equilibrium. I believe this is true because of the strength and vitality of our democratic institutions. But we cannot take for granted the strength of these institutions. The weakness and fear that led us to intern Japanese Americans in my lifetime can quickly manifest itself again in some other guise. The departures, however short in duration, have left lasting scars on the many individuals personally affected and on our collective sense of who we are as a nation. There is no more essential task in our democracy than ensuring that our citizenry is informed, engaged, and actively involved in defining the proper balance between liberty and security.

Today, we face a special challenge in this regard where the war on terror is concerned. Because this war is already more than five years in duration and some believe will continue indefinitely, we face the problem of a gradual acceptance of a balance between security and liberty that reflects a wartime situation, as Gordon Silverstein also points out. If, as a result, we lose our commitment to liberty, the traditional balance between our liberty and security may be threatened with a permanent change. This sobering thought should encourage us all to pay close attention.

JAMES LEBOVIC (George Washington University/Political Science & International Affairs): It

is hard to tell the story of the shift in priorities between national security and civil liberties without acknowledging that the government's reaction to threat was shaped by the fears, political needs, and ideological perspectives of particular political leaders. In fact, even to talk about a "balance" is deceptive. It implies that leaders sought actively to reconcile the civil liberties of citizens with the imperatives of national security. It suggests that decisions were functions of necessity or, at least, reasoned choices and understates the extent to which government leaders—caught up in the moment—made rash and self-serving choices, whether because of limited oversight and judicial deference or the political weakness of a determined opposition.

Thus, I hesitate to use the word "balance" to describe the changing priority given to national security relative to civil liberties in the U.S. in recent times or centuries past. "Balance" is one of those words that can mean many different things and more than it should. It suggests that (1) there is there is some natural logic at hand that tips the scales to favor one or the other set of considerations as exigencies require and (2) there is a shift in societal or governmental priorities that favors one set of considerations over the other. I prefer the latter conception, because it does not imply that there is some larger purpose served by the shift, and it leaves open the possibility that the balance is actually *restored* after an emergency has past.

There is little evidence that extensions of executive authority produced national security benefits.

[JAMES LEBOVIC]

The balance could well be what exists in normal times when the executive branch is bound by due process of law, an informed and active legislature, and a judiciary cognizant of the limits to presidential authority even in matters of national security.

In the abstract, it is always possible to make the case for abridging civil liberties to serve the nation—e.g., why the suspension of habeas corpus was necessary during the Civil War or why Truman was justified in seizing the steel industry during the war in Korea. In practical terms, however, there is little evidence that extensions of executive authority produced national security benefits, let alone benefits that justified the loss in civil liberties. We cannot assume that the powers that shift to the executive in time of war are necessary concessions or that these powers will be used wisely and for their ostensible purposes. Whether we are talking about the Alien and Sedition Acts of 1798 (used by political leaders to target their Republican opponents and stifle press freedom under a threat from France) or the race-based internment of Japanese-Americans during World War II, the changing balance favoring national security can mean only an increase in government excesses that are viewed eventually as a national disgrace. The U.S. government ultimately tried to undo the damage, through pardons, apologies, and/or financial redress, to those who suffered under the Sedition Act and the World War II internment. These measures would not have been necessary, had the government acted judiciously in response to threat.

The shift in national priorities can be so discomforting, as an assault on constitutional freedoms, that it cannot survive exposure even in times of foreign threat. The Church Committee of 1975–76 (the U.S. Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities) revealed the extent to which law enforcement and the intelligence community had been involved in domestic surveillance of dissidents and government critics. This led, in turn, to the 1978 Foreign Intelligence and Surveillance Act and a 1981 Executive Order (12333) signed by President Reagan that imposed limits on intelligence-gathering within the United States. Note that these prohibitions were enforced despite Soviet intervention in Afghanistan, rising fears of increased U.S. vulnerability to a Soviet nuclear attack and Soviet violations of arms control treaties, and increased concerns about the depth of hostility toward the United States by the Soviet government,whom Reagan called the "evil empire."

MICHAEL FREEMAN (Department of Defense Analysis/Naval Postgraduate School): In the ongo-

ing global war on terrorism, civil liberties have been eroded in ways that echo past infringements, as others have amply discussed. Faced with our current terrorist threat to national security, the Bush administration has designated citizens and noncitizens alike as enemy combatants, which enables the government essentially to intern them without trial. Also, the administration has attempted to reprise the use of military tribunals to try suspected terrorists and suc-

cessfully lobbied Congress for the adoption of the Patriot Act, which (among other things) has reduced our protection of privacy by enhancing the surveillance potential of the government.

These comparisons to past infringements of civil liberties, however, are more qualitatively than quantitatively similar. Only a handful of U.S. citizens have been declared enemy combatants, and even fewer have been tried by military tribunals. Likewise, we have seen nothing approaching the internment of 120,000 Japanese Americans. These comparisons are not meant to excuse what has happened. Rather, I make the point that how we have responded to the latest threat to national security has been much less severe than our response to earlier threats. At the end of the day, very few Americans can point to how their civil liberties have been diminished in any measurable way over the last five years. Undoubtedly, there have been unnecessary abuses, but there is a difference between thousands of Arabs detained as enemy combatants, immigration violators, or material witnesses and the fate of the Japanese Americans in World War II.

What explains this change in how we balance civil liberties and national security? One possibility is that we are simply better–we have learned our lessons. Over time, we have come to appreciate the intrinsic value of civil liberties and see that there is no need to sacrifice them in the name of national security. We have a stronger normative commitment to protecting our own liberties.

While this may be the case, I am far from sanguine. I wonder how comparable our current situation is with the past along one key dimension: the level of threat. When previous societies attempted to construct a balance between national security and civil liberties, they were doing so at a time when national security was truly at stake. Let us not forget that hundreds of thousands of Americans died in the Revolutionary War, the Civil War, World War I, and World War II. Moreover, many of these wars threatened the very existence of our country. In contrast, the attacks of 9/11 resulted in approximately 3,000 deaths, and the ongoing threat of terrorism does not threaten our very existence. Accordingly, the comparatively milder reaction to 9/11 would seem natural.

But what would happen if the level of threat is the real variable that explains how we manage the balance between national security and civil liberties in different times? What if we experienced terrorism at a level never seen before in this country–as Israel and Britain have in the past? While 9/11 was horrific, so far it has been a one-time event. But what if we faced weekly car bombings, or suicide attacks in malls, or repeated strikes on our transportation system? If these situations were to happen, I believe that our strong normative commitment to civil liberties would be quickly swamped by serious concerns for national security.

Anna Kasten Nelson (American University/History): When President Bush announced that he was declaring a "war on terrorism," it was not particularly clairvoyant to realize that the effects would include (1) an enlargement of the powers of the presidency, and (2) a new threat to civil liberties. That has been the traditional pattern of the American way of war since the 18th century. The president, of course, was declaring war on terrorists, not terrorism. Depending on the definition of choice, the United States has had its share of terrorists and assassinations. The operative word in the president's statement, however, was "war."

I am of the opinion that the balance has, indeed, changed. Others in this discussion have delved into our constitutional history, so there is no need to repeat this narrative. I would note, however, that while both the Alien and Sedition Acts and Lincoln's attack on habeas corpus sharply curtailed civil liberties, the acts were hardly enforced, and the end of the Civil War restored the diminished rights. The change came in the 20th century. With each war, civil liberties were further curtailed. During World War II, Japanese were put in camps, Germans who might become a fifth column in South America were also herded into camps, and broad new powers were given to the FBI.

The turning point came during the Cold War. The balance was upset by ideological wars. During the early years of the Cold War, this change was illustrated by the rampant investigations by Congress of "subversives"; generally described as McCarthyism, it preceded him by several years. During the early Cold War, the external danger from communism and the internal danger merged. The FBI kept its ever-lengthening dossier of subversives, while Truman and Eisenhower ruined careers and compromised the right of free speech. Technology helped, too. Agents no longer had to be present; they could just listen to the wiretaps. By the time the Berlin wall crumbled in 1989, a complicated apparatus was in place–presumably to ensure the safety of American democracy but, in fact, to protect American "security interests."

It was this sophisticated system that George W. Bush inherited and put to use after 9/11. Now, we are in another ideological war that interestingly carries the same rhetoric and dangers. When an enemy is perceived to be engaging in a war of subversion, the response is to ferret out the believers. How can civil liberties matter, now that the enemy is terrorism and the United States presumably faces the prospect of another attack from ideological fanatics?

Civil liberties may include the citizen's right to know. We tend to think of the constitutional underpinnings when we think of civil liberties, but is it not possible that secrecy about the workings of government impinges on individual liberty? Surely Madison would be the first to agree that a lack of knowledge–or transparency–also curtails speech, press, etc. No one thought of freedom of speech as a pleasant conversation with one's neighbor; instead, it was deemed necessary for holding the government responsible to its citizens. Can the government be responsible when it covers up so much of its policy-making?

Michael Freeman: Perhaps our comparisons to previous episodes in U.S. history might not be the best ones. A better comparison would be to other democratic states that have faced high levels of threat from terrorism. We see numerous examples of how other states have managed this balance. On the negative side of the ledger, we see states such as Uruguay and Peru. Both sacrificed civil liberties and even democracy itself in the name of fight-

ing terrorism. But the threat was real and severe; for example, in Peru, Shining Path terrorism in the 1980s led to 70,000 dead and $30 billion of damage, and by 1991 fully 32 percent of Peruvians believed that the terrorists would topple the government. We also have the more positive examples of the United Kingdom and Israel. Both countries have faced ongoing terrorist campaigns but protected their democratic values. Of course, there have been some unjustified abuses of power in both countries; nevertheless, they have done much better at simultaneously fighting terrorism, to protect their national security, while preserving civil liberties. Both countries, in fact, point to the possibility that this balance is a misleading concept. Although we tend to think of trading freedoms for security, or vice versa, it may be possible to have both. We would do well to study and learn the lessons from other countries that have successfully managed this balancing act.

The U.K. and Israel faced ongoing terrorism but have protected their democratic values.

[MICHAEL FREEMAN]

PART II: Post 9/11 Reforms and Their Impact

EDITOR: Since 9/11, the United States has implemented a set of new laws, policies, and agencies for fighting terrorism. In your view, which are the most important reforms? Have they been effective? Appropriate? What has been their impact on national safety and American life?

ELIZABETH RINDSKOPF PARKER: In response to the terrorist attacks of 9/11, the United States implemented fundamental changes to the governmental structures responsible for national security, creating a new organization responsible for homeland security and eliminating the sharp divide between foreign and domestic intelligence activities. Three new organizations were created to address the shortcomings in the wake of 9/11. A new executive department, the Department of Homeland Security, was created with overall responsibility for homeland security. An Office of the Director of National Intelligence was created to coordinate the activities of the intelligence community, where historically more than a dozen different agencies and departments made coordination difficult. And an operational military command was established and assigned the responsibility for defending the homeland, thereby bringing the military into the domestic arena in an unprecedented way. These changes have certainly improved the way we respond to the threat of terrorism on domestic soil, but their impact is overshadowed by the problems our activities abroad have created.

Department of Homeland Security. President Bush signed legislation creating the Department of Homeland Security (DHS) in November 2002. DHS merged 22 distinct agencies and organizations under a single department in order to centralize the development and execution of homeland security policies. The DHS mission includes protecting U.S. borders and infrastructure, enhancing the quality of intelligence and information-sharing, and coordinating the federal response to terrorist attacks and natural disasters. To accomplish this mission, DHS has a budget of more than $40 billion and 180,000 employees.

The challenges associated with transforming such a vast bureaucracy have been enormous. Merging organizations with distinctive cultures and processes would have been extremely difficult under any circumstance. However, the challenge was even more compelling because DHS became operational at the same time it was expected to respond to an ongoing threat of coordinated terror and a natural disaster of catastrophic proportions.

The potential rewards of consolidating federal homeland security authority into a single organization are great. Likewise, however, the risks to our security are compounded when that organization is unable to effectively manage that responsibility. Someday, DHS may legitimately be seen as an entity that enhances the safety and security of Americans, but that day has not yet arrived. Indeed, the events of Hurricane Katrina suggest that our focus on terrorism has eroded our ability to coordinate an effective governmental response to a catastrophic event. Moreover, more is required than coordination at the national level to deal with the domestic threat of terrorism. It is essential that agencies work together effectively from the local level through the state and regional levels to the national level. Even though we have averted additional terrorist attacks on our homeland, those who work homeland security at the state and local levels believe there is much more to be done to effectively prepare for such an event.

Office of the Director of National Intelligence. The intelligence community is a federation of the almost two dozen executive branch agencies that conduct intelligence activities necessary for the protection of U.S. national security. Prior to the recent creation of a Director of National Intelligence (DNI), the management structure fell under the multiple responsibilities of the Director of Central Intelligence (DCI). The DCI's statutory responsibilities were purposely vague, and its authority over the intelligence community was limited by the inevitable challenge of coordinating so many actors, the lack of budgetary control, and the absence of direct management control over the numerous agencies involved.

The 9/11 Commission determined that there was an urgent need to restructure the intelligence community. According to the commission, this need arose from the structural barriers that precluded joint intelligence work, the lack of common standards, an inability to effectively set priorities and allocate resources, and the fact that the DCI–who served simultaneously as the head of both the intelligence community and the Director of the CIA–was spread too thin. Actually, creating the position of a DNI who would control the entire intelligence community had been previously considered and rejected as unworkable. This view was eventually overridden by those who concluded that our surprise at the 9/11 attacks could have been prevented if our intelligence community were under a more unitary leadership. In particular, there was a widespread belief that the FBI needed a far more robust and better-prepared analytic capability to address the new generation of issues related to terrorism.

I believe we have learned an important lesson here. Over many years, we have created separate rules and duties for the differing organizations within the intelli-

gence community (e.g., the FBI, CIA, and NSA) that have both served to limit their power and foster loyalty and professionalism. Much of this is positive. However, the resulting separation has also contributed to serious difficulties when these agencies must work together. The solution to the problem of 9/11 may be less a change in bureaucratic structures than introducing leaders who can create a culture of cooperation and change internal employment incentives to promote learning the new skills needed to address the challenges of global terrorism.

U.S. Northern Command. On September 11, 2001, there was no single military officer ultimately responsible for defending the United States from an attack. Instead, this task was shared by several entities. The commander of the North American Aerospace Defense Command (NORAD) was responsible for detecting and responding to attacks against North America by missiles or aircraft. The commander of Joint Forces Command was responsible for executing plans focused on land and seaborne operations. The responsibility for civil support functions resided elsewhere.

To remedy this situation, the U.S. Northern Command (USNORTHCOM) was created on October 1, 2002. It is responsible for providing command and control of Department of Defense operations within the United States and coordinating military assistance to civil authorities. The establishment of a military command with the responsibility for conducting operations within the United States has caused concern about the implications for our individual liberties. Some have questioned whether this decision is a precursor to an overly intrusive role by the military in our domestic affairs. A renewed commitment to the principles that have minimized military involvement in certain domestic matters has also been urged. Prominent among these principles is the Posse Comitatus Act (1878), which sharply limits the involvement of military forces in law enforcement matters. Others have focused on the attributes of military organizations that permit them to respond effectively in a crisis situation, urging lawmakers to repeal or amend laws that might limit the authority of USNORTHCOM to act in an emergency.

The lack of a single military commander did not impair our response on 9/11. The commander of NORAD was responsible for deterring and responding to airborne threats such as those of 9/11, but he did not have adequate time or reliable information once the attacks were underway to direct an effective response. While NORAD had exercised against hijacks on flights originating outside of the United States, it did not foresee an attack of this nature. As a result, the infrastructure required to respond was not in place. The creation of USNORTHCOM is a prudent measure, but it will not help identify the next avenue of attack a terrorist organization may choose so we can prevent it or be poised to respond.

Catastrophic events test the mettle of our leadership. Over the course of American history, when we needed it most, we have been fortunate to have been led by strong, wise, and visionary leaders. Washington, Lincoln, and Roosevelt are among the leaders whose character measured up to the challenges that occurred on their watch. The political leadership of this nation in both of its political branches of government was caught by surprise on 9/11. So, too, the majority of our nation's citizens were caught off guard. In retrospect, we see that many of the immediate reactions to the attacks were both ineffective and inappropriate, in light of our need to balance rights and liberties.

The CIA was created to coordinate intelligence services but, instead, it created a vast bureaucracy.

[ANNA KASTEN NELSON]

ANNA KASTEN NELSON: I would like to follow up on the Department of Homeland Security and the office of the Director of National Intelligence (DNI). Establishing new bureaucracies, rather than facing up to the question of leadership that Elizabeth raises, seems to be in the American tradition, at least since the 20th century. The creation of both of these new agencies–and there is now a very large staff working for the DNI–is highly reminiscent of the new agencies created in the post–World War II period.

The National Security Act of 1947 created what was regarded as coordinating agencies. The new military establishment would coordinate defense, the new CIA would coordinate intelligence, and the National Security Council would oversee all national security concerns and report to the president. We forget that there was another agency created by that act, the National Security Resources Board (NSRB). As the Homeland Security Agency was being planned, the NSRB immediately came to mind. Its job was to make sure that in the next war the United States would have the resources to respond immediately. The problem was that ensuring adequate resources involved just about every cabinet agency. NSRB accumulated a sizeable staff and wrote many papers, but it was a complete failure and was disbanded after the Korean War. It was too big, too encompassing, and never achieved the coordination expected. None of the agencies involved wanted to change or cooperate. In many ways, Katrina indicated that the Department of Homeland Security suffers from the same problems. Each entity is preserving its own shop. Meanwhile, over all of these agencies resides a new bureaucracy serving the central office.

Similarly, the CIA was created to try to coordinate the intelligence services of the various military organizations and the State Department. Instead, the CIA itself established a new, enormous staff with its own bureaucracy. It did not coordinate, in spite of various attempts. Now, the Director of National Intelligence is duplicating that process. He has a large staff, has taken over briefing the president, and supposedly is overseeing coordinated intelligence to ensure that briefing is correct.

Will these new attempts at organization work? Are we safer because they have been created? Just a few years ago, I could tell students that we had 11 intelligence organizations. Now there are fifteen. Will the good on-the-scene intelligence that only had to filter up to the DCI make it all the way up to the DNI? I don't think reorganizing will make us any safer. Like the Defense Department since 1947, these agencies will be reorganized many times before getting close to being a coherent whole. We are probably safer than before 9/11, but because of individuals who are now paying more attention and getting to know their peers in other agencies. Cre-

ation of new agencies will not in and of itself make us safer, but it does signal that something is being done. You can point to new agencies in 2006, just as you could in 1947 at the beginning of another war that initially stymied the government.

JAMES LEBOVIC: The effectiveness and appropriateness of many of the Bush administration's post-9/11 policy innovations are subject to dispute, despite their breathtaking budgetary, economic, military, and political consequences at home and abroad. The administration has visibly departed from prior practice by adopting a decidedly offensive response to the terror threat. In implementing its bold strategy, the United States has attacked the terror leadership and incarcerated terror suspects around the world, confiscated assets linked to terror groups, worked extensively with foreign intelligence agencies and military units, and fought wars in Iraq and Afghanistan and attempted to rebuild these nations and bolster their new governments in the face of severe security challenges. Apart from the human toll, the direct costs amount to hundreds of billions of dollars, overstretched and depleted military forces, and a loss in U.S. standing worldwide.

The war in Iraq is an especially prominent and controversial aspect of Bush administration policy. Whether U.S. actions there are appropriate and effective depends on whether the battle for Iraq serves as a "lightning rod" for terror groups, by drawing in combatants who otherwise would have attacked the United States or its interests, or whether Iraq serves as a "breeding ground" for terrorists by providing them with skills, motivation, and justification for an anti-Western campaign. Indeed, one cost of the war could well be a diminution in homeland security, if the war has helped create a more insidious and purposeful terror adversary in our midst, as suggested by the London terror attacks. Whether these policies are effective also depends on whether it is actually possible to disrupt the operations of a global terror network, when much of it is concealed, elusive, diffuse, and resilient and the United States operates globally from a strategic disadvantage–most notably, in relying upon foreign governments with questionable motives for participating in the United States–sponsored effort. Unlike Israel, the United States is fighting its war at a distance without intensive intelligence resources, an understanding of local cultures and languages, an ability to bring force quickly to bear when threats are detected, and an adversary confined to a limited geographical area.

On the domestic front, the restructuring of government has been an obvious and visible part of the administration's post-9/11 response. The largest of these reforms centers on the new Department of Homeland Security and the reorganization of the intelligence community. These reorganizations have come with an increased budgetary commitment, as others have noted, and a mandate for responding to the terror threat. But it is not yet clear whether a consequence of these reforms is greater adeptness in identifying potential threats and effectively responding to them. For example, the centralization of the intelligence infrastructure has resulted in new layers of bureaucracy that could encumber the internal flow of information and the fostering of useful diversity in analytical opinions, without overcoming the territorial tendencies of government departments and agencies (pitting the Pentagon against the CIA, for instance). Another plausible consequence of such reforms is a reduction in preparedness for nonterrorist-related contingencies, as occurred with Hurricane Katrina, arguably in part because FEMA was submerged within the bureaucracy of Homeland Security.

Passenger is screened by airport security.

Among the more productive of the post-9/11 reforms has been increased protection of high-profile targets within the United States, and especially the U.S. transportation system. Although critics often assail efforts to protect any target at the expense of another, the reality is that terrorists do what they want to do, not what they could do. They have focused their attacks on buildings of great symbolic importance and transportation systems that are highly disruptive economically when attacked. That the United States and other countries have sought first and foremost to increase airline security has limited the ability of terrorists to achieve quick victories by turning aircraft into weapons or bringing airline traffic to a halt. It has also arguably had a strong deterrent effect on the planning and executing of such attacks.

These efforts have been combined with increased passive and active surveillance of potential terror operatives. The recent thwarting of attacks on U.S.-bound aircraft from London is an apparent success story for these surveillance efforts. Yet, it is hard to know from the outside how effective these efforts have been and whether they sometimes do more harm than good by causing members of a "suspect population" to retain useful information out of fear of incriminating themselves, family members, or members of their community. That the Bush administration has publicized only a few instances when attacks were foiled–and these were dated events and/or not far along in preparation–is reason not to attribute the lull in domestic terror attacks to the foiling of plots within the United States. Here, and elsewhere, it is important to avoid the temptation to attribute the absence of a terror attack to an existing policy. By that standard, all current policies have been successful. Then, it should be remembered that Al Qaeda attacks have had multi-year gestation periods.

MICHAEL FREEMAN: Faced with a heightened threat of terrorism after 9/11, the United States implemented many new policies to engage this threat. Federal bureaucracies were created and reorganized, potential targets hardened, borders secured, surveillance capacities enhanced, alliances with foreign governments strengthened, terrorist leaders and operatives tar-

geted, and the government of Afghanistan toppled for acting as a safe haven for Al Qaeda. But to what effect? Have these policies, strategies, and new organizations made us safer from terrorism?

Assessing whether we are safer, or even more problematically, *why* we might be safer, is a daunting task for ontological, epistemological, and causal reasons. Ontologically, what is a success? No attacks for five years? But what if we are attacked tomorrow? Would this mean our assessment of "success" was wrong? What does it mean to defeat terrorism? Terrorism is a form of political violence and, I would argue, as long as we have politics, we will have political violence to some degree. Of course, we can do things to minimize this level of violence, but terrorism will never end. Terrorist *groups,* however, can be defeated. Even then, though, groups frequently splinter, go underground, or simply change their names. Ontologically, what would a defeat of Al Qaeda look like? What if bin Laden surrenders but other Islamic radicals continue to attack us?

Epistemologically, there are difficulties in knowing what measures are effective. First, we do not have access to the records showing all the details of our efforts against terrorism. Successes usually remain unknown, while only failures make the news. This is more or less as it should be, if our methods and techniques for fighting terrorism are to remain secret and therefore effective. Even for someone with access to all classified information, however, there are epistemological issues in assessing what has been effective and why.

Let's say we overcome the ontological and epistemological issues and can confidently say we know that certain policies have led to successes. Causally, we still do not know why. We do not know whether it is because of us, them, or just luck (or some combination thereof). Of course, government officials will always argue that our successes are due to our efforts and vigilance. Al Qaeda has not attacked the U.S. homeland because of the noble efforts of the intelligence, diplomatic, military, and police communities in stopping potential attacks. But, what if it's them? As the political scientist John Mueller (2006) has argued, the absence of attacks since 9/11 may simply be due to the fact that Al Qaeda is not the threat many believe it to be. Perhaps it does not have sleeper cells all over the world or in the United States, or has not been able to recruit Americans to its cause, and/or is not a sufficiently capable organization to plan, train, and conduct future operations on our soil. In other words, it's them. Their weakness is responsible for the absence of attacks. Alternatively, we should not discount the role of luck; sometimes, a dose of humility is in order.

Despite these issues assessing the effectiveness of our current campaign against terrorism, one crucial lesson should be learned from the experiences of other countries. While there is no silver bullet for defeating terrorism, the closest thing to one is good intelligence. With good intelligence, we can understand who is being recruited into or volunteering for terrorist organizations, what operations are being planned, what targets might be hit, and who is responsible for the attacks. Some of the most notable successes against terrorist groups have occurred because of good intelligence work. For example, the Shining Path in Peru was defeated after standard police investigative work uncovered the location of leader Abimael Guzman's hideout in Lima. Upon capturing him, the security forces also obtained information on the organizational structure of the group and used the intelligence to roll up the organization. Likewise, the November 17 group in Greece operated with relative impunity for over 25 years until 2002, when the police captured a militant after his bomb malfunctioned and used the information gathered through interrogation to capture the majority of the organization's members. Israel, too, has minimized terrorist attacks from Gaza and the West Bank through a system of intelligence that allows the government to gather information, not at a citywide or even neighborhoodwide level but on a street-by-street and house-by-house level. Most recently, the plots coming out of Britain were foiled by good intelligence, where neighbors and community neighbors tipped off the authorities before the attacks.

Fighting terrorism is much like fighting against an unknown number of assailants in a dark room. We can strike back, but we don't know how bad we have hurt them. We can kill some, but we don't know how many there are to begin with. We don't even know if there is a door to the room with some assailants leaving and others coming in to fight. Good intelligence allows us to aim better, strike more precisely, and know whom we have hit and how hard it hurt.

William Banks: In the days and weeks after 9/11, it was widely reported that an investigative failure may have permitted a twentieth hijacker to escape pre-attack detection because of a concern that investigating agents lacked the necessary justification to undertake electronic surveillance of the suspect's phone and computer. Zacarias Moussaoui was arrested on immigration charges a few weeks before the attacks. Officials at a flight training school had grown suspicious when Moussaoui said that he wanted to learn to fly large jet aircraft but had no interest in becoming a commercial pilot. At about the same time, a French intelligence agency warned the FBI that Moussaoui had "Islamic extremist beliefs." When FBI field agents sought headquarters approval for surveillance pursuant to the Foreign Intelligence Surveillance Act (FISA), they were turned down, apparently because there was insufficient information that Moussaoui was an "agent of a foreign power," the designation required to merit secret surveillance under FISA. The field agents obtained a FISA order only after the September 11 attacks.

The belief that a full investigation of Moussaoui before September 11 might have led to exposure of the hijackers' plot helped spur enactment of the Patriot Act, and three years later, the lone-wolf provision of the Intelligence Reform Act in December 2004. The lone-wolf amendment to FISA, often referred to as "the Moussaoui fix," is one of the post-September 11 changes that is almost surely important, probably effective, yet highly problematic. In a nutshell, FISA permits secret surveillance of would-be terrorists, so long as officials can show probable cause that the target is an "agent of a foreign power." That formulation works fine for espionage investigations and for investigations of organized terrorist groups, large or small. But it does not permit investigation of the lone wolf, the unaffiliated terrorist. The 2004 amendment simply adds a category to those who may be subject to FISA surveillance, but it does so as part of defining who may be an "agent of a foreign power." Logically, a lone wolf cannot be an agent of a foreign power, leaving

FISA analytically incoherent, but practically more useful. As one of a string of amendments to FISA since September 11, the lone-wolf amendment is emblematic of a larger problem that threatens to render FISA a relic. After so many changes, FISA has become so complex that its original aim (to provide a way for an Article III judge to decide whether foreign intelligence might be gathered through intrusive electronic means) may be lost.

GORDON SILVERSTEIN: The most significant post-9/11 change is not the assertion of emergency power but the way in which a perceived emergency has been used to rationalize the permanent expansion of executive authority, discretion, and secrecy.

This is one area where the Bush administration's clear commitment to signing statements on legislation and statutes has been significant. In December 2005, Bush signed a law that passed 90-9 in a Republican Senate, which explicitly sought to limit and define the sorts of interrogation methods that would be allowed. But, when he signed the law, Bush announced: "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch … and the constitutional limitations on the judicial power."

In March 2007, we learned that when Bush signed the renewal of the Patriot Act, he added a very similar provision: "The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch … in a manner consistent with the president's constitutional authority to supervise the unitary executive branch and to withhold information, the disclosure of which could impair foreign relations, national security, the deliberative processes of the executive, or the performance of the executive's constitutional duties."

In the first example, Bush asserts that he will do only that which he believes to be "consistent with the constitutional authority" of the executive, and he will do so "consistent with the constitutional limitations on the judicial power." Thus, not only he is asserting that he could and would ignore Congress but, in the event the president believes a question to be covered by executive power, that he can and will ignore a judicial order as well. At the core of these statements is the assertion that the president alone has the legitimate power and authority to determine how, when, and what to do in areas the president alone has decided belong exclusively to the president.

This is dramatic departure from the sort of language we experienced in our own earlier crises. At the start of the Civil War, Lincoln delayed the recall of Congress and exercised extensive emergency powers, some of which clearly exceeded the president's constitutional mandate. But when Lincoln went to Congress on July 4, 1861, it was not to argue that his actions were above or beyond the Constitution, but rather to seek *post-hoc* approval or rejection from legislators in Congress, acknowledging that it was their constitutional prerogative to have the ultimate say in these matters. Lincoln's message to Congress was tortured, but he ultimately crafted a claim that the president might have to act in an emergency, but that this did not create, override, or substitute for the Constitution. Ultimately, the president would and should submit his action for ratification (or rejection) by Congress or the courts, a decision that he implied he would follow.

The Patriot Act has been overshadowed by much more controversial measures.

[MICHAEL FREEMAN]

Yes, Lincoln mused about the possibility of executive prerogative: "Are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?" But this was not an assertion, it was a question. "In full view of his great responsibility," Lincoln told Congress, the president "has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours" (Abraham Lincoln, Address to Congress, July 4, 1861).

We can debate the wisdom or even the constitutionality of what Lincoln did. But what he did not do is what the current administration has been doing with great regularity. He did not assert that there was some sort of prerogative power in the presidency. Lincoln did what he had to do; he did not say that he had the *right* or the constitutional power to do this–only the obligation. Once the emergency passed, he could and would leave the decision to Congress. If the Bush administration's interpretation holds, then not only do we have to worry about all the institutional reasons why Congress has such a hard time asserting itself, but perhaps more significantly, we have to worry whether the president would listen if ever Congress did assert itself.

If the balance of power tips in a long-lasting way toward executive secrecy and discretion and the foundation for executive prerogative hardens, this will be a far more dangerous result than any short-term infringements on individual rights, though these too are significant and have real long-term implications.

EDITOR: I find it interesting that the Patriot Act–a highly visible arena for debating tradeoffs between national security and civil liberties–received relatively little discussion. What's the reason? Is the Patriot Act largely symbolic, in your views? Why was there so much wrangling over it by Congress in the reauthorization stages?

MICHAEL FREEMAN: I would argue the Patriot Act has received little mention for several reasons. First, I think the act has been overshadowed by much more controversial measures. Much of our attention and criticism as a country has been focused on the use of enemy combatants, military tribunals, allegations of torture, illegal renditions, and secret surveillance programs (not to mention reckless foreign wars and cosmetic organizational restructuring in the name of fighting terrorism). These measures are controversial both in their scope and because they have been enacted by presidential fiat rather than by an act of Congress.

Second, I would argue that the Patriot Act did not do very much. It legislated many changes, from defining terrorism to allowing the government to get at terrorist funding, but perhaps the primary change was the categorization of suspected terrorists for surveillance purposes. Before the act, there were essentially two categories: criminals and spies. Surveillance of criminals was governed by the Fourth Amendment, several Supreme Court rulings, and Title III. For accessing the "content" of conversations, investigators needed a search warrant based on probable cause. For spies, or more properly agents of foreign governments, there was a lower standard, since investigations were not related to criminal proceedings. The investigator merely needed to show that the primary purpose of the surveillance was intelligence gathering; this was governed by FISA. The key contribution of the Patriot Act was to move suspected terrorists from the criminal category to the spy category. Additionally, many of the FISA restrictions were further modified; some of these were controversial, others were not.

Third, many of the changes were relatively minor, common sense, or simply codifications of previous statutes. As examples, sections 213 and 219 allowed delayed notifications of warrants (so called "sneak-and-peek") and for judges to issue warrants outside their jurisdiction; section 216 allowed judges to issue warrants against persons, rather than phones; and section 215 allowed investigators to subpoena business records. Many of these types of measures had already been allowed in criminal investigations but on a case-by-case basis. Likewise, allowing wiretaps against persons rather than phones is a common-sense update to surveillance laws that brings them into the age of disposable cell phones. Section 215 received a great deal of attention and criticism, because it allowed investigators to subpoena library records.

William Banks: The Patriot Act became a symbol of the Bush administration's war on terrorism. It was a positive symbol of the government taking appropriate steps to those who supported the administration, and it was a negative symbol to those who opposed those actions. But it was more symbolically important than substantively so. Its original 342 pages contained perhaps two dozen pages that made important changes in the law. As Michael says, many of those were in the nature of "catch up" amendments to equip investigators with some of the technological capabilities of the bad guys.

Much of the wrangling over reauthorization had to do with the sunsets–should they be removed or simply extended? Congress eventually removed nearly all of them. In addition, there was considerable controversy over the use of 215 authority at public libraries and over the use of National Security Letters (NSL). In both instances, Congress changed the Patriot Act provisions, in part in response to judicial decisions that would have declared the NSL authority unconstitutional. The changes to library records surveillance limited the number of FBI officials who could approve 215 applications for library records, removing some field agent discretion.

Elizabeth Rindskopf Parker: I think Michael and Bill are exactly right. We have not focused on the Patriot Act in our discussion, because there are so many other, more recent and compelling examples of choices our government has made with regard to the balance between liberty and security. Indeed, we have recently learned through an Inspector General (IG) Report that the FBI used the act for purposes well beyond what was intended, demonstrating that it is not the act itself, but its interpretations by various agencies, that may be the real concern. That said, the Patriot Act was a very significant event, whether because of what it actually did or our perceptions of what it did. I believe that many people conflate the act with other actions taken by the Bush administration–e.g., treatment of Guantanamo detainees–of which they are critical.

This tendency has become truer as time passes and the events of 9/11 are placed in historical context. There is reason for us to pause and consider whether the Patriot Act and the approach it symbolizes are consistent with protecting both our security and our liberty. To this end, our airwaves and op-ed pages have been filled with commentary on all sides of the issue. Fundamental to these discussions is whether the act is consistent with the Constitution and our values. Unfortunately, many of these discussions have confused rather than clarified. Perhaps this national discussion reflects the relatively healthy state of our democracy, but for want of a sophisticated understanding of the Patriot Act, it has not always brought us to the correct result.

On the one hand, there are new approaches we must consider if we are to defeat an enemy that knows neither rules nor borders and has the capacity to harm us in ways previously imagined possible only for nation states. On the other hand, we are not well served if we respond out of fear and a lack of preparation and ignore our traditional commitment to individual rights and liberties that has served us so well. It is ironic that the Patriot Act has something to offer both sides of this conversation, and relatively few people are sophisticated or patient enough to sort through the act's good and bad provisions. Thus, a shrill divide continues.

Most troubling is the urge of both sides of the discussion to look for positions that reflect a comfortable balance between liberty and security, according to individual preconceptions. Those of a more liberal perspective urge that the act be rejected completely as excessive; rightly, they point to certain disturbing excesses in its interpretation and application–e.g., the recent IG report on the FBI's use of investigative powers. On the other hand, there are those who believe that we must prepare for a new normalcy, where the balance between liberty and security should shift permanently to favor the latter.

Certainly, such a shift is appropriate in a time of war, as traditionally understood. But such wars are of short duration, thus allowing a course correction as a nation returns to its normal balance of security and liberty. In contrast, the war on terror differs as to its duration, nature, and the very battlefield on which it is fought. These critical distinctions raise real concerns. Ought we to think of this situation in the normal terms that govern our response to wartime conditions? What will happen if, in assuming that we are "at war" rather than in a prolonged state of civil unrest, we unwittingly change the relationship between our government and the governed, responding more to fear and lack of adequate preparation? This result would be good neither for our commitment to liberty nor our ability to insure security.

PART III: Law, Torture, and the Conduct of Wars

EDITOR: The subject of torture has been prominent in constitutional and political debates about the war on terror, both within the United States and in the international community. How much impact have laws, court decisions, and/or international conventions actually had on the conduct of wars? Are we any closer to eliminating torture, or "cruel, inhuman and degrading treatment," on the battlefield or in the custodial interrogation of enemy combatants?

JAMES LEBOVIC: International law has helped reduce the frequency and destructiveness of conflicts in the post–World War II period. The international legal (and organizational) framework that emerged from that war has made it harder for states to challenge the status quo through force and limited the military options that states can employ in war. The impact of accepted standards on the resort to violence is that much greater, because the media and Internet can quickly disseminate information about ongoing conflicts. This permits a vast Nongovernmental Organizations (NGO) and International Governmental Organizations (IGO) network to mobilize global support for remedial intervention. Increasingly, then, combatants have been placed on the defensive and made to account for their decisions to go to war and for their conduct in war. Thus, even as the Bush administration pushed its case that the president has virtually unlimited authority in the pursuit of U.S. national security, the administration still tried to legitimize U.S. intervention in Iraq by acquiring the support of the U.N. Security Council and, failing there, used prior U.N. Security Council resolutions to justify the 2003 intervention. It is no accident that wars are now fought with broad coalitions of participants, so as to give legitimacy to the operations.

A by-product of the delegitimizing of war and targeting of civilians is that wars have become less frequent and less costly in human terms. Although tens of thousands of Iraqi civilian deaths in the aftermath of the 2003 invasion and hundreds of thousands of civilian deaths in the Vietnam War suggest otherwise, these numbers pale in comparison to the devastation of prior wars. Sixty million people were killed during World War II, a war in which democratic countries (that pride themselves on respect for human life and dignity) deliberately targeted civilians to increase the death toll. Hundreds of thousands of Japanese died in the atomic bombings of Hiroshima and Nagasaki; one hundred thousand Japanese were killed by the United States in a single day in March 1945 in the fire-bombing of Tokyo.

It is harder to argue that international law and organizations have made similar progress globally in limiting torture and cruel, inhuman, and degrading treatment. Governments continue to commit these abuses because they escape detection and *promise* the disclosure of valuable information. In this, they are aided by ambiguities in international law. To legitimate harsh interrogation methods against terror suspects, the Bush administration has accepted an exceedingly narrow definition of torture. Consider the notorious internal memo, subsequently disavowed by the Bush administration, which defined torture to include only acts that result in "serious physical injury, such as organ failure, impairment of bodily function, or even death." The administration has also moved into the gray areas—or perhaps tried to create gray areas—in the law through the liberal use of euphemistic terms, such as "stress tactics," to sanction the new interrogation methods or selective interpretations of the law—e.g., by sending prisoners to countries that routinely engage in torture (a violation of the Convention against Torture) with the cover of assurances that the prisoners will not be tortured.

> *The Geneva Accords matter … because they are now so deeply engrained in our political consciousness.*
>
> *[GORDON SILVERSTEIN]*

Perhaps the most dramatic example of efforts to circumvent U.S. and international law is the holding of U.S. prisoners in Guantanamo and secret prisons around the world. Because prisoners are held off U.S. shores, the administration argues that detainees are not entitled to protections and rights under the U.S. Constitution. In turn, by employing the status of "enemy combatant," the administration has tried to circumvent the protections and rights granted military prisoners under the 3rd Geneva Convention and civilians under the 4th Geneva Convention. Taliban prisoners appear to qualify as military personnel under the 3rd Geneva Convention, inasmuch as the Taliban was the de facto government of Afghanistan and the Geneva Conventions do not except forces that operate in an irregular fashion. Even resistance fighters are protected under the 4th Convention granting civilian detainees basic legal rights and protections, as do other conventions such as the International Covenant on Civil and Political Rights, which the United States ratified in 1992. Turning these prisoners essentially into nonpersons under the law makes it easier to justify their harsh treatment.

GORDON SILVERSTEIN: There are three groups of nations to consider here: those that never renounced or rejected torture; those that did and have now begun to consider backing away from that commitment (the United States, in this case); and those that have deepened their commitment to reject torture (mostly in Northern Europe).

For those countries that have rejected torture at one time, and here I include the United States, the key is not the mere existence of written statutes and conventions, but the role statutes and conventions have played in embedding those principles and convictions. Harkening back to James Madison's defense of a written bill of rights, simply writing these down, he said, is meaningless in the face of crisis. But, he added, writing them down, repeating them, teaching them, embedding them in our culture in ordinary times—these might actually make a difference when the system is put under stress.

I would put written laws and conventions about torture in much the same role. With no laws, expediency or efficiency or "trust us" arguments from political and military leaders might be enough to convince people to step over to the dark side. Having solemnly pledged our sacred hon-

or, having signed a law, and more than that, having advocated, defended, and endorsed that law significantly raises the costs of moving away from those conventions. Having laws in place helps when the ultimate decision about whether or not to torture has to be made by each individual. With laws in place, and deeply embedded in our culture, the enlisted soldier asked to torture has some foundation for saying no. This provides not a barrier but at least a severe speed-bump in the process.

Have these embedded laws helped? This is nearly impossible to answer, since we can never know what would have happened in Abu Ghraib in the absence of the Geneva Accords and other legislation, which when added to movies, TV, public speeches, and the like, have deeply embedded these conventions in the popular mind, as well as in the minds of military and civilian leaders. My guess, however, is that the situation in Abu Ghraib would have been far, far worse without those laws, practices, and embedded convictions.

Statutes alone won't do the job. The Geneva Accords matter, but not simply because they are formal law. They matter because they are now so deeply engrained in our social and political consciousness. This is part of what is so disturbing about our current practice. It would be tragic (and dangerous for our own military) if we simply renounced these conventions and laws. But to argue that what we are doing actually is within the bounds of the rules is worse, since it devalues and dis-embeds these principles. It does the opposite of what written rules are supposed to do. It moves us from a society with a commitment to the concepts and values of the rule of law to a legalistic society in which law is purely instrumental. And once that has happened, once that genie is out of the bottle, it is awfully hard to put it back in again.

William Banks: From the late 19th century forward, laws began to have an important impact on the conduct of war. The Hague and Geneva Conventions, their protocols, and developing customary norms (sometimes lumped together as the laws of armed conflict) have greatly influenced how wars have been fought, how those detained are treated and interrogated, and how civilians are protected from the effects of battle. Yet as the Cold War ended and as conventional armed conflicts began to diminish in number and significance, new forms of asymmetric warfare, insurgent and guerilla campaigns, and terrorist attacks have called into question the efficacy of the traditional law of armed conflict.

Recent conflicts underscore the continuing shortcomings of international law and policy in responding to asymmetric warfare mounted by nonstate terrorist groups in the 21st century. Neither the Hague Rules, the customary law of war, nor the post-1949 law of armed conflict and accompanying international humanitarian law account for nonstate groups waging prolonged campaigns of terrorism–and, in some cases, more conventional military attacks–that leave the defending state with little choice but to respond in ways that inflict heavy civilian casualties. The result is that the defending state (and to a lesser extent the attackers) are criticized for violating norms that do not accommodate the nature of the conflict being waged. At the same time, the defending state lacks adequate guidance in shaping the parameters and details of its response. Apart from legal and normative understandings, the tendencies of terrorists or insurgent groups to operate from within civilian communities present significant and unanticipated strategic and tactical challenges for states and citizens that are the victims of such attacks.

Taliban and Al Qaeda detainees held at Guantanamo Bay (2002).

The specific issues surrounding torture and cruel, inhuman, and degrading (CID) treatment illustrate this historical trend, and they cry out for reconsideration of the norms and their enforcement. I agree with Gordon Silverstein that the existing understandings, such as those codified in the Geneva Conventions, or, in this instance, the Convention Against Torture, matter a great deal. In part, the current dismay over the apparent abuses of detainees is attributable to what Gordon calls our "backing away" from the commitment to honor the preemptory norm against torture. But, to the extent the U.S. is remiss, the excesses by our personnel have been in response to outrageous provocations from the enemy (insurgent or terrorist). Their tactics include using civilians as shields or decoys, launching rockets from inside mosques, and impersonating civilian police personnel while detonating suicide bombs.

We are not closer to eliminating torture and CID treatment. We may have traveled backwards from progress made in the decades after World War II. To the extent that the legal norms matter, and I believe they do, the changing nature of warfare requires that we develop the mechanisms to have a widely representative conversation among the interested constituents, so as to reshape international humanitarian law, human rights law, and the overarching laws of armed conflict to meet the new asymmetries we face.

Michael Freeman: There are a few possible recommendations floating around regarding the legality of torture and how states might manage this issue: (1) shift our definitions of torture to make some measures fall under the category of "harsh" interrogation rather than torture; (2) create what legal scholar Alan Dershowitz (2002) calls torture warrants, so that torture would still be illegal unless authorized in particular circumstances by a court; (3) keep torture illegal, unless the torturer can show that it was necessary and justified after the fact (ala the Israeli model?); and (4) make no changes.

I actually want to advocate the benefits of #4 (changing nothing) and argue that it is the best option along moral, legal, and strategic dimensions. First, by maintaining our legal prohibitions against torture, the legal deterrent would presumably ensure the best possible outcome for protecting

human rights. Additionally, this would enable us to maintain the moral high ground both domestically and internationally.

Second, while others might argue that allowing torture in certain circumstances is necessary for strategic reasons, I would argue that nothing is lost by the ban on torture. Assuming that torture is useful, engaging in it will help the authorities prevent future terrorist attacks. But just because torture remains illegal would not mean that security personnel would be unable to use it. In effect, I would ask (and even hope) that if the strategic logic is so overwhelming (perhaps that thousands would die unless someone is tortured), a police officer or soldier would be willing to essentially "fall on the grenade" personally and professionally. Someone in his or her position should be willing to undertake morally reprehensible actions, whether it is legal or not, in order to save countless lives, *even* if it comes at the expense of one's own moral standing, career, and sends one to prison. Knowing that it is illegal ensures that the legal and moral costs remain high, and so I expect that torture would be used only in the most dire and necessary of circumstances. As a result, we would minimize human rights abuses, maintain the moral high ground, and still gain the strategic benefits of torture when it is required.

ELIZABETH RINDSKOPF PARKER: As a technical legal matter the Geneva Conventions, which embody the modern law of war, are binding only on those parties—exclusively nation states—who are signatories to the conventions. As a result, the motivation to comply with these laws changes when the self-interest calculus involves both state and nonstate actors. Nonstate actors cannot be signatories to the conventions and may not be concerned about international sanctions or the loss of standing in the world community. Indeed, some terrorist organizations have chosen deliberately to inflict terror and suffering upon innocent civilians, notwithstanding international norms offended by such conduct. Al Qaeda, for example, justifies such actions based upon their long-term objectives.

This raises the question as to whether the laws of war need to be amended to encompass such terrorist operations, in order to guide how modern states that are signatories to the various Geneva Conventions respond to such acts of terrorism in a warlike setting. Of course, both domestic and international criminal laws prohibit acts of terrorism like those that occurred on 9/11, and so some argue that there is no need to amend the laws of war to specifically encompass terrorist actions. Indeed, to do so might grant such actions a legitimacy they do not deserve. The counterargument is that these domestic and international laws were not designed for the level of terrorist activity we see in Al Qaeda. The question raised is thus whether responses designed for traditional terrorism, where motivation stems from political objectives and a desire to be heard and included within political processes, are sufficient for the new breed of terrorists who seek annihilation of the nations, such as the United States they oppose.

Information obtained through torture is notoriously unreliable.

[JAMES LEBOVIC]

A related and equally important issue is whether the United States is right, as a policy matter, to rely on technical interpretations of the applicability of the laws of war, as justification for its failure to comply with the laws of war in the conflict with Al Qaeda. Has the United States actually harmed its own position as a world leader by ignoring modern norms of conduct under international humanitarian law? This question is distinct from the inevitable instances of misconduct by soldiers, sailors, air force, and marines that regrettably are a part of all armed conflict. Notwithstanding the rigorous training and meaningful discipline that characterizes the modern U.S. military, the nature of war may lead to the poor judgment associated with violations of U.S. domestic and international law regarding the treatment of noncombatants and prisoners of war. These instances will be infrequent only if the individuals who perpetrate these crimes are held accountable through a fair system of justice, one that has the full support of political leaders up to and including the president. Thus, prosecutions of relatively junior soldiers in accordance with the Uniform Code of Military Justice have their place. Holding such individuals accountable indicates a level of commitment by the United States to the laws of war. It should also give other military personnel the incentive to comply with their obligations under the laws of war to avoid similar punitive action. That said, senior leadership too must be accountable whether they are political or military.

JAMES LEBOVIC: It is tempting, of course, to argue that exceptional interrogation measures are made necessary by the exceptional threat that terrorists pose to the United States and the value of information that can be obtained through torture. Yet, information obtained through torture is notoriously unreliable and might not be all that informative. Many of the prisoners currently held by the United States have been incarcerated for years, which impugns the value of information they possess, or they have been released, extradited, or charged only with criminal offenses. Most who were imprisoned at Abu Ghraib were arrested for petty offenses or caught up in dragnets. Apart from the effectiveness of torture, its justification—based on *exceptional* threat—rings hollow here. The levels of destructiveness inflicted on 9/11 fall well short of the destructiveness that Russia can inflict on the United States with a single missile, let alone the monumental death toll of World War II (that, I add, was believed to necessitate the protections of civilians and military personnel found in the Geneva Conventions). If safeguarding the lives of national citizens is reason to engage in the widespread use of torture, Japan would have had a strong case for inflicting horrific treatment on all U.S. prisoners with the intent of gaining any information that could be used to forestall a U.S. attack, just as the North Vietnamese government could have justified torture of U.S. pilots to acquire information that could help the government to counter the U.S. bombing campaign.

ELIZABETH RINDSKOPF PARKER: Most troubling are the policy choices made by our political leadership, after pre-

sumably informed and deliberative consideration, which suggest that our national commitment to the rule of law is based only on convenience and thus open to manipulation. The decision to initiate armed conflict in Iraq was made on a strained argument that self-defense, in accordance with Article 51 of U.N. Charter, was involved and that our actions were justified by prior authorizations of the U.N. Security Council. This undermined respect for the principles governing both the decision to initiate armed conflict and those that apply to the actual conduct of war. Likewise, the failure to treat Al Qaeda operatives detained in Afghanistan and Iraq as prisoners of war without necessarily granting them that status diminished the legitimacy of our efforts in the conflict. The apparent initial decision that the principles underlying the laws of war did not apply in Guantanamo, even though later reversed, may also have created an environment that made the shocking actions at Abu Ghraib possible.

While most Guantanamo detainees were not legally entitled to prisoner-of-war status, failing to accord them such treatment was a dramatic change from past practice. The Standing Rules of Engagement for U.S. forces require compliance "with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law" and with "its principles and spirit during all other operations." In retrospect, it now seems clear that treating them in accord with such status would have served U.S. objectives far better, even though to do so would have required certain limitations in the manner of both interrogation and prosecution.

Clearly, this conflict presents unique challenges in terms of the precise legal framework that governs our actions. But our decisions about treatment of those in our custody were the result of flawed political leadership rather than inadequately considered military rules. Moreover, political choices driven by expediency (rather than experience and a commitment to the letter and the spirit of the laws of war) appear to have undermined the professional judgment of our military, those best prepared to respond to the challenges created in the war on terrorism. Hopefully, we have learned a lesson that will allow us to correct our approach as we go forward.

PART IV: Diversity and Its Implications

EDITOR: What kinds of special challenges does the ever-increasing diversity within the United States–national origin diversity, racial diversity, religious diversity–pose for the protection of civil liberties and/or national security today?

WILLIAM BANKS: Ian Johnston, Chief Constable of the British Transport Police, speaking after the London subway bombings in 2005, said that "we should not waste time searching old white ladies. It [surveillance] is going to be disproportionate … when it comes to ethnic groups" (Kirby, 2005). After New York City reacted to the London, Madrid, and Moscow train and subway bombings by adopting a random container inspection program to address the threat of an explosive device being taken into the subway in a carry-on container or backpack, journalist Charles Krauthammer (2005) called the random program an "obvious absurdity" and an "appalling waste of effort" since "jihadist terrorism has been carried out … by young Muslim men." He said, we should give "special scrutiny to young Muslim men."

The indignities of profiling cut sharply against human rights.

[WILLIAM BANKS]

These views are widely shared, but they are corrosive of human rights in our societies, and they happen to be misguided as a matter of policy. As New York City Police Commissioner Raymond Kelly noted, 40 percent of New Yorkers were born outside the United States. He asks, "Who are you going to profile?" Beyond the obvious and growing diversity of the cities in so many parts of the world, consider how you would explain to a subway security officer how to identify "Islamic men." Ask the same question about persons "of Middle Eastern appearance" or "Arab-looking?" It is a telling but common misconception that Arabs are identifiable by their darker skin. Arabs may have white, olive, or dark skin, as well as eye and hair color across a broad spectrum.

One of the inevitable and corrosive dangers of such vague classifications for profiling is that they give the screener or investigator too much discretion, leaving room for intentional or unconscious application of the screener's or investigator's own classifications. After September 11, the ACLU reported that 67 percent of airline passengers subjected to personal searches upon entering the United States were people of color; Black and Latino Americans were four to nine times as likely as white Americans to be x-rayed after being frisked or patted down; and black women were more likely than any other U.S. citizens to be strip-searched.

Empirically, even the fact that 19 of the 19 hijackers were apparently Muslims from the Middle East is of little significance, when you conclude, as we must, that the likelihood of any given Muslim man being a terrorist remains low. Moreover, recent research suggests that terrorists react to profiling by substituting different types of attacks and attackers than those profiled. In short, there is little evidence that policies based on profiling on racial or ethnic lines are effective, much less lawful. In instances where investigators have a description of a suspect that includes racial or ethnic information, then the focus on such persons is no longer profiling.

The United States, the United Kingdom, and many other nations have based their human rights traditions on respect for the individual. The indignities of profiling cut sharply and deeply against that tradition. All of us should focus on counterterrorism approaches that are effective and supportive of the rights of those among us.

GORDON SILVERSTEIN: The increasing diversity is a huge asset, ultimately, for civil liberties. It is precisely the reality of growing up together, working together, etc., that will begin to allow us to reembed our commitment to rights. Here I turn again to Madison and *Federalist 10*. The answer to the evils of faction is not to shrink the sphere and close ranks, but to expand the sphere. The deepest problems will arise where there is the least interaction. That's the civic perspective. But I think it is also a practical reality, whether

we like it or not. As William Banks notes, it is impossible to profile in New York City, and it makes no sense in a crude race-based way. The most effective profiles are behavioral. If it is our policy never to search white grandmothers in wheelchairs, guess who will be knowingly or unknowingly used in the next wave of bombs?

Random searching is effective, as are random breath-tests on the highways–but these are expensive. Israel uses Ph.D. candidates in psychology to do much of its airport screening, while we here in the United States do not. Expensive security has to be paid for, which means more taxes, not less–a real political problem.

What if George W. Bush, tempered by the fire of war and the attack of 9/11, were to join together with his father and Bill Clinton to make a bipartisan appeal for real investment in security that might make a real difference? It might actually have a chance, but it would need to be far more than just an investment in computers and well-trained screeners. We need finally and seriously to invest in changing some of the root conditions that help to nurture and fertilize terror movements. If those movements can be abated, then investing in the prevention of those that cannot so easily be stemmed will be far more effective.

JAMES LEBOVIC: Diversity is obviously a source of intractable conflict around the world. This is clear in the Balkans, the Middle East, much of Africa, and even Western European countries that must cope with the challenges of integrating immigrant populations. Assimilation is even harder when the majority population fears an enemy in its midst, when minority members are inspired by the exploits of terror groups operating abroad, and when the values of the immigrant community confront long-cherished values of openness and tolerance within a society. The hostility that spread from Denmark across the Islamic world with the publication of cartoons deemed offensive to Muslims, and the Western defense of the cartoons as an expression of free speech, is graphic testimony in this regard. As recent terror plots in the United Kingdom demonstrate, a large disenfranchised Islamic population could ease the logistical challenges for terror groups.

The United States is somewhat advantaged over Europe in addressing the national security challenges that diversity presents. Apart from its greater physical distance from the Middle East and North Africa, the United States benefits from a cultural image of itself as a nation of immigrants and a land of opportunity, as well as a purposeful effort within the United States to overcome its history of discrimination toward minorities. Still, the United States is not immune from Islamic terror attacks, which is reason to focus a counterterror effort on particular ethnic and religious groups. But the cure can be worse than the disease. Demographic profiling loses its effectiveness when the minority community is large, government agencies focus on demographics at the expense of other useful indicators, and when members of a target population fear the consequences of disclosing information. Profiling also provokes justifiable concerns about rights violations because discrimination is inherent in the approach. The dangers of such violations are that much greater when members of a minority community are targeted.

Here and elsewhere, the danger to the civil liberties of *all* U.S. citizens is real and pressing. This danger exists because the war on terrorism is widely viewed as a war without limits and without clear markers for determining policy success. The danger exists, too, because the general public is quick to concede constitutional rights–at least those of "other" people–for patriotic or security reasons. Americans were shocked by the pictures of Iraqi prisoner abuse that came out of Abu Ghraib, but that was the end of it. There was no public outcry for reform or holding the responsible parties accountable. A danger also exists because the machinery for determining national security threats is far better developed than the checks to prevent rights abuses. It should come as no surprise, then, that the FBI used the Patriot Act to obtain financial and others records on tens of thousands of people without meeting the legal conditions for acquiring the data, that the National Security Agency intercepted domestic telephone calls despite long-standing prohibitions on domestic spying by foreign intelligence agencies, that the military gathered information on peaceful protesters as a threat to base security, etc. On each occasion in which a new security system was put in place, it exceeded its original mandate–notwithstanding assurances that checks were adequate to prevent such abuses. The institutional challenges to protecting civil liberties are severe and far-reaching, because governmental agencies with a vested interest in promoting national security are also charged with protecting civil liberties, officials within the executive branch (including the president) voice the opinion that presidential authority on matters of national security is unbounded, and the executive controls the information that Congress employs to evaluate program success and encroachments.

MICHAEL FREEMAN: Consider the following demographic facts. The majority of Muslims in the United States are not Arab (they're black), and the majority of Arabs in this country are not Muslim (they're Christian). Thus, even if we focus on or profile Arabs and Muslims, how effective would that be (leaving aside the ethical and legal issues)? So far, this country has been remarkably adept at integrating immigrants. In terms of intermarriage, for example, across almost all ethnic groups, research has shown that first generation immigrants intermarry at a 10 percent rate, second generation at 50 percent, and third generation at 90 percent. Along with this intermarriage, identities also change. In other words, the grandchildren of Italian, Polish, Jewish, or even Japanese immigrants are no longer any of those ethnicities, but simply American. This trend, if it continues, will have enormous implications for identity politics in this country, especially in the integration of communities that might otherwise give rise to violent political dissent.

ANNA KASTEN NELSON: I don't think the ever-increasing diversity will matter much to our national security. Presumably, the danger could come from terrorists. Forgotten by those who see a terrorist behind every turban, veil, or prayer rug is that we have had plenty of our own terrorists. Indeed, March 2007 marks the 30th anniversary of a hostage crisis at the B'nai B'rith building in Washington D.C.

I am more concerned with the threat to our civil liberties. Most immigrants, while fleeing political oppression and economic disaster, are not culturally attuned to our idea of civil liberty. As a result, when we

face a situation where civil liberties are threatened, they may not sympathize or understand the threat. Yet we know that the only way to protect civil liberties is to mount strong campaigns through citizen groups, political organizations, and political parties.

This situation is not irreversible. Immigrants and their children from earlier periods in U.S. history, whether the Irish in the 1840s or the Eastern Europeans at the turn of the 20th century, are now often the strongest defenders of civil liberties. What influenced them was the American education system, including the "patriotism" that was inculcated into every student. The much-maligned "civics" class and the mandatory U.S. history class, both often currently abandoned for social studies, taught the rudiments of American democracy, including the importance of civil liberties and civil rights. Most of this is now missing from the social studies curriculum of public elementary and middle schools. New immigrants will be on their own.

Civil liberties always have to be defended. While some eras are worse than others, there is always a threat waiting in the wings. However diverse, new citizens should be encouraged to understand and adopt the principles behind the governing of their chosen country, including important civil liberties. Disparate cultures need not be wiped out. We have always been a country of hyphenated Americans. Through persuasion and education, rather than force, past immigrants of all origins have–within a generation–become Americans. It is critical to the unity of the country, to the support of our representative government, and to civil liberties that our newest, diverse group of immigrants follows this path.

ELIZABETH RINDSKOPF PARKER: Respect for civil liberties is possible only if our democratic institutions are vibrant and healthy. This, in turn, means that these institutions must be responsive and accountable to all Americans. For this to happen, all Americans must be involved in the democratic process.

This is not the case today, where, for example, our legal profession remains over 90 percent white. To address this problem and insure that our legal system reflects our population, we must insure that the economic and educational disparities in our society are seen as an issue of national security. They pose as clear and present a danger to our overall security as did any of Saddam Hussein's weapons programs.

Leadership also matters. Our leaders can divide us, or they can unite us. They can push agendas of short-term self-interest, but these only serve to pull us apart by highlighting our differences. Alternatively, leaders can remind us of our shared values and common aspirations and make choices that bring all of us closer to making these aspirations a reality.

Local law enforcement officials here in California have uniformly told me that they have benefited by reaching out to the minority populations in the communities they serve. By demonstrating respect for, and opening the channels of understanding and communication with, these populations, law enforcement officials eliminate the walls that prevent these previously insular groups from becoming a part of the larger community. In doing so, they have made the entire community stronger and more secure. We should be following their example at all levels of government.

Disparities in our society pose as clear a danger to our security as did any of Saddam Hussein's weapons.

[ELIZABETH RINDSKOPF PARKER]

Diversity will always be a weakness, if we choose to exploit it. If we choose to embrace it, diversity will always be a strength.■

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