

FOREWORD

FREEDOM AND SECURITY AFTER
SEPTEMBER 11

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An oft-repeated refrain since the September 11 terrorist attacks is that Americans must now choose between a robust national defense and their vital civil liberties. Security versus freedom: the underlying assumption is that the two can coexist only uneasily in times of national crisis. The loss of certain freedoms, so goes the prevailing wisdom, is the price that must be paid for additional security. Some are eager to make that exchange, while others consider the price too dear. Both sides, however, seem to agree that freedom and security are competing virtues, and that the expansion of one necessarily entails the contraction of the other.

This is not a new dichotomy. In 1759, Benjamin Franklin reminded his fellow colonists that "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."¹ For Franklin, liberty is the supreme good, and a people capable of surrendering its freedoms in exchange for security is not fit for self-governance, or even "safety." A century later, Abraham Lincoln appeared before Congress to justify his unilateral decision to suspend the writ of habeas corpus. "[A]re all the laws, but one," the president asked, "to go unexecuted, and the government itself go to pieces, lest that one be violated?"² For Lincoln, the Great

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1. Benjamin Franklin, *Historical Review of Pennsylvania (1759)*, quoted in *THE OXFORD DICTIONARY OF POLITICAL QUOTATIONS* 141 (Anthony Jay ed., 1996).

2. Abraham Lincoln, *Message to Congress in Special Session (July 4, 1861)*, reprinted in *4 COLLECTED WORKS OF ABRAHAM LINCOLN* 421, 430 (Roy P. Basler ed., 1953).

Emancipator, liberty was an obstacle to the government's proper functioning and, worse, a threat to the government's very existence.

The dichotomy between freedom and security is not new, but it is false. For security and freedom are not rivals in the universe of possible goods; rather, they are interrelated, mutually reinforcing goods. Security is the very precondition of freedom. Edmund Burke teaches that civil liberties cannot exist unless a state exists to vindicate them: "[t]he only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them."³ In the same way that an individual's moral right to property would be meaningless unless the government establishes courts of law in which those rights can be declared and enforced, so too Americans' civil liberties would be a nullity unless they are protected from those who seek to destroy our way of life.

If much post-September 11 commentary mistakenly casts security as a rival to freedom, it also exhibits an unduly narrow understanding of freedom itself. "Freedom" does not refer simply to the absence of governmental restraint; it also refers, at a more fundamental level, to the absence of fear. Terrorists do not measure success with a body count. Their objective is to spread fear among all Americans, preventing our Nation from playing an active part on the world's stage and our citizens from living their lives in the manner to which they are accustomed. Without confidence in the safety of their persons and the security of their Nation, Americans will not be able to go about doing those ordinary things that make America an extraordinary nation.

As the Department of Justice prosecutes the war on terror, we have committed to protect Americans not just against unwarranted governmental intrusion, but also against the incapacitating fear that terrorists seek to engender. To ensure the safety of our citizens and the security of our Nation, the Department has fundamentally redefined our mission. The enemy we confront is a multinational network of evil that is

3. Edmund Burke, *Speech at His Arrival at Bristol Before the Election in That City (1774)*, quoted in ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 64 (1996).

fanatically committed to the slaughter of innocents. Unlike enemies that we have faced in past wars, this one operates cravenly, in disguise. It may operate through so-called "sleeper" cells, sending terrorist agents into potential target areas, where they may assume outwardly normal identities, waiting months, sometimes years, before springing into action to carry out or assist terrorist attacks.⁴ And unlike garden-variety criminals the Department has investigated and prosecuted in the past, terrorists are willing to give up their own lives to take the lives of thousands of innocent citizens. We cannot afford to wait for them to execute their plans; the death toll is too high; the consequences too great. We must neutralize terrorists *before* they strike.

To respond to this threat of terrorism, the Department has pursued an aggressive and systematic campaign that utilizes all available information, all authorized investigative techniques, and all legal authorities at our disposal. The overriding goal is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who violate the law and threaten our national security. In doing so, we take care to discharge fully our responsibility to uphold the laws and Constitution of the United States. All investigative techniques we employ are legally permissible under applicable constitutional, statutory, and regulatory standards. As the President and the Attorney General repeatedly have stated, we will not permit, and we have not permitted, our values to fall victim to the terrorist attacks of September 11.

The Department of Justice has taken a number of concrete steps to advance the goal of incapacitating terrorists before they are able to claim another innocent American life. First, the Department has detained a number of persons on immigration or federal criminal charges. Second, in cooperation with our colleagues in state and local law enforcement, the Department's Anti-Terrorism Task Forces have conducted voluntary interviews of individuals who may have information relating to our investigation. Third, the Bureau of Prisons has promulgated a regulation that permits the monitoring of communications between a limited class of detainees and their

4. See, e.g., Karen DeYoung, "*Sleeper Cells*" of Al Qaeda Are Next Target, WASH. POST, Dec. 3, 2001, at A1.

lawyers, after providing notice to the detainees. And fourth, the President has exercised his congressionally delegated authority to establish military commissions, which would try non-citizen terrorists for offenses against the laws of war.

With respect to detentions, the Department has taken several hundred persons into custody in connection with our investigation of the September 11 attacks. Every one of these detentions is consistent with established constitutional and statutory authority. Each of the detainees has been charged with a violation of either immigration law or criminal law, or is the subject of a material witness warrant issued by a court. The aim of the strategy is to reduce the risk of terrorist attacks on American soil, and the Department's detention policy already may have paid dividends. These detentions may have incapacitated an Al Qaeda sleeper cell that was planning to strike a target in Washington, DC—perhaps the Capitol building—soon after September 11.⁵

The detainees enjoy a variety of rights, both procedural and substantive. Each of them has the right of access to counsel. In the criminal cases and in the case of material witnesses, the person has the right to a lawyer at government expense if he cannot afford one. Persons detained on immigration violations also have a right of access to counsel, and the Immigration and Naturalization Service provides each person with information about available pro bono representation. Every person detained has access to telephones, which they may use to contact their family members or attorneys, during normal waking hours.

Once taken into INS custody, aliens are given a copy of the "Detainee Handbook," which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials. In addition, every alien is given a comprehensive medical assessment, including dental and mental-health screenings. Aliens are informed of their right to communicate with their nation's consular or diplomatic officers, and, for some countries, the INS will notify those officials that one of their nationals has been arrested or detained. Finally, Immigration Judges preside over legal

5. See Jeffrey Bartholet, *Al Qaeda Runs for the Hills*, NEWSWEEK, Dec. 17, 2001, at 21, 23.

proceedings involving aliens, and aliens have the right to appeal any adverse decision, first to the Board of Immigration Appeals, and then to the federal courts.

Second, the Department of Justice has conducted voluntary interviews of individuals who may have information relating to terrorist activity. On November 9, the Attorney General directed all United States Attorneys and members of the joint federal and state Anti-Terrorism Task Forces, or "ATTFs," to meet with certain noncitizens in their jurisdictions. That same day, the Deputy Attorney General issued a memorandum outlining the procedures and questions to be asked during those interviews. The names of approximately 5,000 individuals that were sent to the ATTFs as part of this effort are those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled using common-sense criteria that take into account the manner, according to our intelligence sources, in which Al Qaeda traditionally has operated. Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which Al Qaeda has operated or recruited; who entered the United States after January 1, 2000; and who are males between the ages of 18 and 33.

The President and Attorney General continually have emphasized that our war on terrorism will be fought not just by our soldiers abroad, but also by civilians here at home. The Department instituted a program that would enable our nation's guests to play a part in this campaign. Non-citizens are being asked, on a purely voluntary basis, to come forward with useful and reliable information about persons who have committed, or who are about to commit, terrorist attacks. Those who do so will qualify for the Responsible Cooperators Program. They may receive S visas or deferred action status that would allow them to remain in the United States for a period of time. Aliens who are granted S visas may later apply to become permanent residents and, ultimately, American citizens. The Responsible Cooperators Program enables us to extend America's promise of freedom to those who help us protect that promise.

Third, the Bureau of Prisons on October 31 promulgated a regulation permitting the monitoring of attorney-client

communications in very limited circumstances. Since 1996, BOP regulations have subjected a very small group of the most dangerous federal detainees to "special administrative measures," if the Attorney General determines that unrestricted communication with these detainees could result in death or serious bodily harm to others. Those measures include placing a detainee in administrative detention, limiting or monitoring his correspondence and telephone calls, restricting his opportunity to receive visitors, and limiting his access to members of the news media.⁶ The pre-existing regulations cut off all channels of communication through which detainees could plan or foment acts of terrorism, except one: communications through their attorneys. The new regulation closes this loophole. It permits the monitoring of attorney-client communications for these detainees only if the Attorney General, after having invoked the existing special administrative measures authority, makes the additional finding that reasonable suspicion exists to believe that a particular detainee may use communications with attorneys to further or facilitate acts of terrorism.⁷ Currently, only 12 of the approximately 158,000 inmates in federal custody would be eligible for monitoring.

The Department has taken steps to protect the attorney-client privilege and the detainees' Sixth Amendment right to the effective assistance of counsel. As an initial matter, not all communications between a lawyer and his client are protected by the attorney-client privilege; statements that are designed to facilitate crimes, including acts of terrorism, are not privileged. The "crime/fraud exception" applies even if the attorney is not aware that he is being used to facilitate crime,⁸ and even if the attorney takes no action to assist the client.⁹

Moreover, the monitoring regulation includes a number of procedural safeguards to protect privileged communications.¹⁰ First and foremost, the attorney and client would be given written advance notification that their communication will be monitored pursuant to the regulation. Second, the regulation

6. See generally 28 C.F.R. pt. 500 (2001).

7. See 28 C.F.R. § 501.3(d) (2001).

8. See *United States v. Soudan*, 812 F.2d 920, 927 (5th Cir. 1986).

9. See *In re Grand Jury Proceedings*, 87 F.3d 377, 382 (9th Cir. 1996).

10. See generally 28 C.F.R. § 501.3(d)(1), (2), (3) (2001).

erects a "firewall" between the team monitoring the communications and the outside world, including persons involved with any ongoing prosecution of the client. Third, absent imminent violence or terrorism, the government would have to obtain court approval before any information from monitored communications is used for any purpose, including for investigative purposes. And fourth, no privileged information would be retained by the monitoring team; only information that is not privileged may be retained.

Finally, the President has authorized military commissions to try members of Al Qaeda and other non-citizen terrorists for violations of the laws of war. Trying terrorists before military commissions offers a number of practical advantages over ordinary civilian trials. First, commissions enable the government to protect classified and other sensitive national-security information that would have to be disclosed publicly before an Article III court. Second, ordinary criminal trials would subject court personnel, jurors, and other civilians to the threat of terrorist reprisals; the military is better suited to coping with these dangers. And third, military commissions can operate with more flexible rules of evidence, which would allow the introduction all relevant evidence regardless of whether, for example, it has been properly authenticated.

The Supreme Court has unanimously upheld the constitutionality of military commissions,¹¹ and since its founding our Nation has used them to try war criminals, as have our international allies. During World War II, President Roosevelt ordered eight Nazi saboteurs tried by military commission. After the Civil War, a commission was used to try Confederate sympathizers who conspired to assassinate President Lincoln. And during the Revolutionary War, General Washington convened a military commission to try British Major Andre as a spy. Moreover, the President's authority to convene military commissions is confirmed by Article 21 of the Uniform Code of Military Justice.¹² In 1942, the Supreme Court interpreted identical language, then appearing in the Articles of War, as recognizing the President's power to try war crimes

11. See *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

12. See 10 U.S.C. § 821 (2001).

before military commissions.¹³ And America and her allies made liberal use of military commissions after World War II to try war criminals both in the European and Pacific theater.¹⁴

After September 11, Americans in their own ways have sought answers to the seemingly unfathomable question: why? Because Americans are somehow different from and better than the people of the world? I do not think so. We *are* the people of the world. We are not, as individuals, different from those who would rain terror upon us. But there is something special that defines us as Americans—the benefits and responsibilities of living in this nation. America gives to people who come to her shores the freedom to achieve extraordinary things. Our uniqueness lies in our ability as ordinary people to do extraordinary ordinary things as Americans. It was this foundation of freedom that was under attack.

America's tradition of freedom thus is not an obstacle to be overcome in our campaign to rid the world of individuals capable of the evil we saw on September 11. It is, rather, an integral objective of our campaign to defend and preserve the security of our nation and the safety of our citizens. Indeed, as the images of liberated Afghan men shaving their beards and freed Afghan women shedding their burquas eloquently testify, freedom is itself a weapon in our war on terror. Just as we unleash our armed forces abroad, and empower our law-enforcement officers here at home, America's campaign against terrorism will extend freedom for our citizens, as well as for the people of the world.

13. See *Quirin*, 317 U.S. at 27, 29.

14. See generally DEP'T OF ARMY, PAM. 27-161-2, INTERNATIONAL LAW, VOL. II, at 235 (1962); PHILIP R. PICCIGALLO, THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951 (1979).