

The War on Terrorism and the Rule of Law

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Roxbury Publishing Company
Los Angeles, California

Library of Congress Cataloging-in-Publication Data

Pious, Richard M., 1944—

The war on terrorism and the rule of law / Richard M. Pious.—1st ed.

p. cm.

Includes bibliographical references and index.

ISBN 1-933220-19-8 (alk. paper)

1. War on Terrorism, 2001—Law and legislation—United States. 2. Due process of law—United States. 3. United States. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. I. Title.

KF9430.P56 2006

347.73'5—dc22

2005026187

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THE WAR ON TERRORISM AND THE RULE OF LAW

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Publisher: Claude Teweles

Managing Editor: Dawn VanDercreek

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Indexing: Kate Shaffar

Cover Design: Marnie Kenney

Typography: Abe Hendin / AtYourSpeed Consulting

Printed on acid-free paper in the United States of America. This book meets the standards of recycling of the Environmental Protection Agency.

ISBN 1-933220-19-8

ROXBURY PUBLISHING COMPANY

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Los Angeles, California 90049-9044

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Chapter 1

Homeland Security: Must We Trade Civil Liberties for National Security?

“We will protect America,” President George W. Bush promised the American people on the first anniversary of the 9/11 attacks, “but we will do so within the guidelines of the Constitution . . . the American people got to understand that the Constitution is sacred as far as I’m concerned.”¹ Yet President Bush had also warned Americans “The enemy has declared war on us and we must not let foreign enemies use the forums of liberty to destroy liberty itself.”² Are the “forums of liberty” vulnerable to destruction by terrorists in the way President Bush suggests? Or are they just as vulnerable because of the ways in which the war on terrorism is being waged? The cases and materials in this volume are designed to help us answer the fundamental questions that citizens must consider whenever their government acts against an external or internal threat to their security: Are we starting down a slippery slope that will lead to erosion of our civil liberties and diminished adherence to international norms of human rights? Or is the Bush administration’s response to terrorism a rational and effective response to the enormity of the terrorist threat that faces us? Is there a role for courts and Congress in providing oversight in the war on terror? Or should the administration be entrusted by the American people with the responsibility of taking whatever action it deems necessary for national security?

On September 11, 2001, more than 3,000 Americans and citizens of other nations were killed at the World Trade Center in New York City, the Pentagon in Washington, D.C., and in a field in Pennsylvania.

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These deaths were caused by terrorists who were able to exploit the openness of American society. By hijacking passenger jets and using them against skyscrapers, they succeeded in perpetrating a horrific feat of “technological jiu-jitsu,” turning an advanced civilization’s technology against itself. These acts—and the potential for follow-up activities—may involve treason (when an American citizen is involved with a group in combat against American forces), or sabotage or espionage (if they involve stealing military or nuclear secrets or cyber-crimes), or acts of terrorism. By *terrorism* I mean the use (or threat of the use) of force against noncombatant (i.e., innocent) civilians with means that violate criminal laws or the laws and customs of war, often on a random basis, with the goal of terrorizing and immobilizing the population in its economic, social, and cultural activities. Terrorists try to change the domestic and/or foreign policies of their government and other governments. Their acts terrorize the population because of the scope of destruction, because of the cruelty and inhumane treatment inflicted, and because of the randomness of the events. No one can hide, nor can anyone assure personal safety in a society under siege. The actions of terrorists may be considered criminal acts, to be prosecuted in the courts, or may alternatively be seen as acts of war, to be dealt with through military action and military justice, even though the actions are sporadic and not continuous and are not committed by the armed forces of a sovereign nation.

Those who commit these acts on American soil may be American citizens, people holding dual citizenship, legally admitted aliens, or illegal aliens, and those acting against U.S. citizens or property abroad may be any of these, citizens of the state in which the activity occurs, or third-party nationals. Intelligence officials estimate that about 5,000 people within the United States may have a connection to foreign terrorist groups, with only a few hundred or even fewer actually involved in planning terrorist acts.³ These people are described by the government as unlawful combatants, spies, saboteurs, members of covert underground support units, members of sleeper operational combat cells, or conspirators who give “material support” to terrorist organizations.

In the future, terrorists are likely to commit new acts of horrific destruction.⁴ The greatest danger would be their use of nuclear materials: striking against nuclear waste dumps and spent core storage facilities, which could release sufficient cesium-137 into the air to leave a 50-square-mile area surrounding the site uninhabitable; damaging the reactor core at nuclear power plants to produce a meltdown resulting in release of radioactivity in the atmosphere; mounting a nuclear strike against one or more American cities (a 10-kiloton weapon made from 50 kilograms of bomb-grade uranium exploded in Times Square

would result in a half million deaths from the explosion, flattening of buildings within a mile, and 1 million dead within a week); exploding a strontium or cesium “suitcase bomb” or “truck bomb” to contaminate a central business district; or using a nonexplosive dispersal of radiological materials for contamination. A bomb equivalent to the one dropped on Hiroshima could fit into a box about the size of a one-gallon water jug and would weight about 220 pounds—which means it could be transported by an SUV or brought close to a port and detonated in the harbor.⁵ (Nuclear Emergency Support Teams, consisting of scientists and technicians with nuclear expertise, have been on call and deployed a number of times with radiation detectors to respond to threats of nuclear weapons in cities. So far all have been false alarms.)

There are other threats with other weapons: sabotaging oil refineries and fuel storage tanks, dams and reservoirs, and chemical plants or chlorine tanks; destroying freight trains transporting 83 million tons each year of hazardous materials such as chlorine; and attacking one or more of 15,000 chemical plants in ways that could release toxic clouds.⁶ Terrorists could release small amounts of biotoxins such as botulism or pneumonic plague, or bacteria such as salmonella against large urban populations by contaminating reservoirs or beverage bottlers; contaminating the food supply with *E. coli* or listeria bacteria, particularly with food imports (less than 6 percent of meat and 1 percent of produce entering the United States is inspected); or contaminating domestic feedlots.⁷ Terrorists might weaponize a multidrug-resistant anthrax strain and release airborne spores against a downwind population, or unleash a smallpox epidemic.⁸

They could significantly damage the economy by engaging in cyberwarfare against e-infrastructure that controls physical facilities such as transportation or electrical power transmission in ways that could destroy generators or rolling stock, or they could destroy information in banking clearinghouses and stock exchanges.⁹ Other acts of destruction that could destroy whole industries include targeting civilian airliners with SA-7 Strella or other ground-to-air missiles or lasers; recruiting terrorists to commit martyrdom acts with powerful HMX and RDX explosives at shopping malls; and spraying sarin or other gases in underground subway cars and stations.¹⁰ Terrorism can lead to panic, with a “third day” scenario in which Americans would be stampeding out of cities or away from nuclear reactors, so that the impact of a single act committed by a handful of terrorists could be leveraged into a threat against all our population centers, since it would be reasonable to assume that the terrorists had a “reload” capacity to strike a second or third time in several days.¹¹

The numbers of conspirators needed to pull off such attacks are small, the operations can be financed on a shoestring, and the technol-

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ologies and supplies required are widely available.¹² Many of the conspirators are highly educated, mostly in the natural sciences, engineering, or computer science, so they can harness advanced technologies, especially those such as bioweaponry in which complex processes can be completed using equipment and handbooks sold by catalog from commercial supply houses. Terrorists are loosely linked and dispersed throughout the world, making it difficult to monitor them.¹³ American borders are porous, and hostile individuals and weapons might make it through.¹⁴

The supplies terrorists need are readily available. It is possible that some of the 22,000 Soviet tactical nuclear weapons may become available on the nuclear black market. Weapons and radioactive materials from the arsenals of the laboratories and stockpiles of the former Soviet Union may be stolen or sold to terrorists. Al Qaeda operatives already have attempted to purchase uranium in South Africa and weapons-grade nuclear materials from Central Asia to fabricate suitcase bombs. A senior al Qaeda operative, Sharif al-Masri, captured along the Afghanistan-Pakistan border, talked about "al Qaeda's interest in moving nuclear materials from Europe to either the United States or Mexico," according to the Department of Homeland Security in guidance to state and local law enforcement agencies in November 2004. "The possibility of nuclear material falling into the wrong hands may be small, but it would have devastating consequences," according to Representative Heather Wilson, a New Mexico Republican who has called for increased monitoring efforts along the borders.¹⁵ In May 2003 the leader of al Qaeda, Osama bin Laden, received a "fatwa" (a religious ruling) from a Saudi cleric approving the use of a nuclear bomb against the United States. Bin Laden has also given warning of future attacks and has told the American people that they should convert to Islam under his guidance—all actions required by any believer in Islamic law prior to entering into hostilities against nonbelievers. Although most experts in and out of government believe it would be a difficult feat, even a low probability of such an attack is a cause for concern.¹⁶

Worldwide at least 181 incidents of smuggling of radioactive material across international borders occurred between 1994 and 2004, and it would not be that difficult to smuggle radiological material into the United States: of 7 million or so cargo containers delivered to the United States each year, only 5 percent are inspected.¹⁷ (It would be easier to smuggle enriched uranium than plutonium, which is more likely to be detected by current sensors.) Shortly after the 9/11 attacks, a team of radiologists was dispatched to New York City because the Bush administration believed that terrorists might attempt a nuclear strike. In January 2005 Boston was put on alert for a few days over intelligence

information (later proven false) indicating a radiological attack might occur. Threats of reprisal are meaningless and deterrent factors are limited. Almost always the advantage lies with attackers rather than defenders.¹⁸

Upon leaving office in 2005, departing Secretary of Homeland Security Tom Ridge said, "I have accepted the inevitability of another attack or attacks."¹⁹ Although in any given year the likelihood of such attacks may be low, over any decade low possibilities multiply into a high probability.²⁰ If there is a one in ten chance of an attack succeeding in a given year, in a little more than five years there would be a 50 percent chance of such success, and by the end of the decade the odds would predict 67 percent chance of success. And so, looking decades into the future, it is possible that there will again be significant and horrific terrorist attacks on American soil.²¹

The Bush administration has long been aware of these dangers. Even prior to the 9/11 attacks, it had received memoranda that specified the history of terrorist threats and the present dangers. What follows are excerpts from a background paper prepared in December 2000, submitted by the administration's top terrorism expert in the National Security Council staff, Richard A. Clarke, to President Bush's national security adviser, Condoleezza Rice.

Box 1.1

Strategy for Eliminating the Threat From the Jihadist Networks of Al-Qida: Status and Prospects

Summary

The Al-Qida terrorist organization led by Usama bin Laden has stitched together a network of terrorist cells and groups to wage jihad. Al-Qida seeks to drive the United States out of the Arabian Peninsula and elsewhere in the Muslim world. It also seeks to overthrow moderate governments and establish theocracies similar to the Taliban regime in Afghanistan. The Al-Qida network is well financed, has trained tens of thousands of jihadists, and has a cell structure in over 40 nations. It also is actively seeking to develop and acquire weapons of mass destruction. The United States' goal is to reduce the Al-Qida network to a point where it no longer poses a serious threat to our security or that of any other governments. That goal can be achieved over a three- to five-year period, if adequate resources and policy attention are devoted to it. Toward that end, the United States has developed a comprehensive and coordinated strategy that employs a variety of tools including: diplomacy, covert action, public

information and media, law enforcement, intelligence collection, foreign assistance, financial regulation enforcement, and military means to affect al-Qida to its core.

The Threat

Al-Qida (“the base” or “the foundation”) is both an independent terrorist organization and a sponsor and coordinator of a network of other semi-independent terrorist groups. The Al-Qida network provides its members as well as its affiliates with a broad range of support: sophisticated media propaganda, through use of Internet sites, videos, magazines, brochures, and speakers throughout the world; substantial funding from its own investments and from a fund-raising network throughout the world; global recruitment and covert transportation of trainees through safe houses with false documentation; advanced training in espionage, sabotage, weapons, and explosives at a series of al-Qida camps in Afghanistan; a multinational pool of trained terrorists and jihad fighters available to support jihad in countries other than their own; a global cell structure available to assist transport of terrorists, acquisition of materials, attack operations, and provide safe havens. . . .

Al-Qida has recently increased its contacts with the Palestinian rejectionist groups, including Hizbollah, Hamas and Palestine Islamic Jihad. There are substantial cells of Moroccans, Tunisians, Saudis, Pakistanis, and Algerians operating on a global basis supported by al-Qida. In addition to the Arab and Central Asian nations, al-Qida supports cells in the United States, Canada, Ireland, England, Israel, Italy, Turkey, Germany, Spain, Belgium and Thailand. The cells include “sleeper agents” who marry into the local community, find local employment, and engage in criminal activity to raise funds. . . .

Direct Attacks on U.S.

In retrospect, we have discovered ties between what we now understand to be the al-Qida network and a series of high-profile attacks on the U.S. in the early 1990’s. Al-Qida played a role in the attempted attack on U.S. Air Force personnel in Yemen in 1992. There are indications that al-Qida played a role in the World Trade Center bombing and the attack on U.S. forces in Mogadishu, both in 1993. Sheik Rahman and the cell arrested in New York and New Jersey for planning to destroy the N.Y.-N.J. tunnels were also linked to al-Qida. In fact, that sheik’s son is now a major al-Qida network commander. . . . In 1998, Osama bin Laden publicly declared war on the United States. In August 1998, al-Qida launched attacks on U.S. embassies in Kenya and Tanzania. Attacks were also planned on U.S. embassies in Albania and Uganda that year, but were disrupted.

During 1998–1999, al-Qida cells were disrupted in several countries. Intelligence indicated that the al-Qida network planned these attacks around the first of January, 2000, including: an al-Qida network cell in Jordan where three attacks were to occur at sites where U.S. citizens would be present; an al-Qida network cell in Yemen was to attack a U.S. Navy ship; and in December, a Canadian-based al-Qida cell aligned with former G.I.A. members was engaged in smuggling of bombs into the United States. All three sets of attacks were disrupted or failed, but the attack on a U.S. Navy ship in Yemen was attempted again, successfully, in October 2000.

Presence in the U.S.

Al-Qida is present in the United States. Al-Qida has been linked to terrorist operations in the U.S. while also conducting recruiting and fund-raising activities. U.S. citizens have also been linked to al-Qida. Two al-Qida members key to the planned multisite attacks on Americans in Jordan (December 1999) were naturalized American citizens who had lived in Los Angeles and Boston. The plot to smuggle bombs from Canada to the U.S. in 1999 revealed connections to al-Qida supporters in several states. The 1993 World Trade Center and N.Y.-N.J. tunnels conspiracies revealed an extensive terrorist presence, which we now understand was an early manifestation of al-Qida in the U.S. A suspect in the East Africa bombings (former U.S. Army Sgt. Ali Muhammad) has informed U.S. that an extensive network of al-Qida “sleeper” agents currently exists in the U.S.

Weapons of Mass Destruction

Numerous sources have reported that al-Qida is attempting to develop or acquire chemical or radiological weapons. The al-Qida acquisition network in Europe and the former Soviet Union have repeatedly attempted to obtain WMD components. Al-Qida’s Derunta camp near Jalalabad in Afghanistan has been identified as a development and testing facility for poisons and chemical weapons and poisons. References to [several words here removed at the request of the CIA] nerve gases have been founded (sic) on captured computers. ♦

How can the government best combat the terrorist threat? One approach is to consider terrorism a form of warfare, and terrorists a group of “unlawful combatants” not entitled to due process of law or the protection of international conventions regarding the treatment of prisoners of war.²² Those captured are treated according to their value as sources of intelligence. The idea of terrorism as war against America leads to enhanced surveillance of suspected terrorists, infiltration of

terrorist groups by double agents, preventive detention of suspected terrorists, and aggressive interrogation (such as sleep deprivation and psychological manipulation of detainees) to trace back the operatives who are planning new attacks in order to disrupt their operations.²³

To proponents of this approach, the key question is: What can we do differently that will increase the probability of preventing successful future attacks? What kinds of searches and surveillance will put us on the trail of terrorists? What methods of interrogation will increase the likelihood of obtaining valid information from suspects or detainees? Trying perpetrators or conspirators in courts of law and imposing sentences on them is not nearly as important as gaining the information necessary to prevent catastrophic events.²⁴ Since deterrence and punishment are less important, and retribution for an act of mass destruction cannot possibly return the scales to balance, it follows that trials to prove suspects guilty are somewhat beside the point. It is apprehension of suspects before the next act of terrorism, and their utility in providing intelligence about their accomplices and organizations, that counts. This approach may even mean transferring detainees from the civilian court system (after dismissal of charges) into military brigades for indefinite confinement and interrogation as "enemy combatants."²⁵ The data on court cases prosecuted by the government is consistent with this militarized approach: Only 39 people have been convicted in federal courts of crimes related to terrorism, and their median sentence was just 11 months (with only two receiving life sentences). Only 14 people with links to al Qaeda have been convicted in the United States as of summer 2005.²⁶

* * *

To legitimize this approach the government relies in part on the war powers of the president as commander in chief, along with delegations of war powers from Congress.²⁷ Consider the first response of the Bush administration immediately after 9/11. Within a day the president asked Congress for a resolution authorizing the use of military force against those who "planned, authorized, committed or aided the terrorist attacks . . . or harbored such organizations or persons. . . ."²⁸ Legislators at the time thought the resolution was limited to al Qaeda conspirators and terrorists, and to the Taliban regime in Afghanistan that harbored and supported them. Nevertheless, the administration has relied on this law as an expression of continuing congressional authorization for almost all actions it takes against those it deems to be terrorist threats, even when there is no al Qaeda connection.

A different approach to terrorism is to see it as a criminal activity, which is best dealt with through cooperation with other nations in in-

Box 1.2***Public Law 107-40 107th Congress (Excerpts)*****Joint Resolution**

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

(1) (a) That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. . . .

—Approved September 18, 2001. ♦

ternational law enforcement efforts based on the rule of law. This approach, too, relies on infiltration, surveillance, and use of databases to gain intelligence necessary to arrest conspirators, but it assumes that these activities must be authorized by the courts, which issue warrants setting forth conditions and limits on these activities. Those apprehended are dealt with through the criminal justice system with guarantees of due process of law.²⁹ This approach upholds the premise—

essential in criminal justice proceedings—that when a person (whether a citizen or not) is under surveillance or an investigation focuses on a suspect who may have committed a criminal act, that person must be accorded full constitutional rights to due process. These rights limit intrusions on privacy to investigations focusing on criminal acts and prevent generalized “sweeps” for information when there is no reasonable suspicion; they protect freedom of expression and association, even for groups that may be taking unpopular positions. They guarantee due process of law in criminal proceedings, as well as other human rights based on conventions to which the United States is a signatory. The assumption is that adhering to the rule of law will result in domestic and international support for the government’s efforts. These due process guarantees are particularly important when cases rely on informants and tipsters, since people with shady backgrounds and motives are likely to take advantage of opportunities to accuse others and provide false information in exchange for immunity from prosecution or a reduction in their own sentences.

What are these due process rights? Based on the provisions of the Constitution, they begin with the privilege of the writ of habeas corpus. A “next friend” of a person arrested may petition for such a writ from a court, which then requires those holding someone in detention to produce the person and justify the detention before a judge. This is a crucial guarantee against secret police and death squads acting “extrajudicially” against people and organizations they view as enemies of the state. Due process includes protections against unreasonable searches or seizures in obtaining evidence. A search must specify what is being sought. There can be no general warrants against large groups of people, but only individual warrants against specific suspects. This prevents fishing expeditions designed to harass individuals and groups. From the time the police focus an investigation on a suspect, that person is entitled to counsel, and counsel must be provided if an individual cannot afford to hire a lawyer. Anyone arrested must have charges brought against him or her within a reasonable period of time or else be freed. The individual arrested has a right to know the charges, and these charges may not include bills of attainder (a charge against an individual brought by the legislature) or *ex post facto* charges (a law making an act a crime after it was committed). An arrested person has a right to reasonable bail (except for capital offenses) once charged. He or she has a right to a speedy trial (before a jury in capital offenses) and a right to a jury of one’s peers. At the trial the accused has a right to confront witnesses and cross-examine them, a right to call witnesses and present evidence, and a right against self-incrimination (which extends to testimony from spouses). The accused has a right to examine evidence and question its authenticity. The ac-

cused may call for the exclusion of evidence if it was illegally or unconstitutionally obtained. The accused has a right to an unbiased judge, a right to a verdict and sentence defined by law, and a sentence if found guilty that does not involve excessive fines or cruel and unusual punishment. If found guilty, the defendant has a right to appeal to a higher tribunal on matters of law and on matters involving police, prosecutorial, or judicial misconduct, and a right to obtain a transcript of the trial so that it can be submitted to a higher court. If found innocent, the former defendant is protected against double jeopardy (i.e., a new trial).

All of these rights not only protect common criminal defendants but also are essential to guarantee the integrity of a democracy. They inhibit the creation and use of a secret police force, protect against arbitrary arrest and indefinite detention, prevent torture and the “softening up” of prisoners, inhibit the creation of a class of brutal interrogators who may later be mobilized into death squads, protect against trumped-up political prosecutions, and prevent a “chilling effect” against dissident political movements. Without due process of law in criminal proceedings, the First Amendment guarantees of freedom of speech, petition, press, and even religion might not amount to much.

News accounts of the “war on terror” are filled with yellow and orange alerts, along with statements by top administration officials warning of imminent attacks and the ultimate danger of nuclear weapons in American cities. Yet in cases involving individuals charged with terrorist acts, the federal courts often rule against the prosecution, even at times dismissing cases against suspected terrorists. This situation occurs in other countries as well: In the United Kingdom a panel of judges in the Law Lords ruled 8 to 1 to overturn the indefinite detention of suspected terrorists, calling the process a violation of human rights in the European Community. The prime minister, Tony Blair, apologized to the “Guildford Four” for their imprisonment on charges of terrorist activities (Irish Republican Army bombings in bars) three decades ago—an imprisonment that was a gross miscarriage of justice. In Germany suspected terrorists in the 9/11 conspiracy were freed by courts because of a lack of evidence. In an Italian case involving individuals accused by prosecutors of terrorism because they were sending weapons to Iraqis fighting U.S. forces, the judge ruled that the charges would have to be redefined, because aiding a resistance group against an occupation is not a terrorist act according to Italian law. Are these and other rulings issued because the judges are “soft” on crime and terrorism? Because they prefer to free those guilty of heinous crimes on what hard-line critics refer to as “legal technicalities,” rather than protect their citizens against grave dangers? Do they care more about due process protections than about stopping terrorism? Have

courts and prosecutors traded national security away to protect individual rights of the accused?

These are fair questions, and subsequent chapters, which deal with cases in this country, will attempt to provide answers. But even before reaching these cases, we might want to consider whether the issue has been framed correctly. Terrorism experts often tell the American people that they must accept tradeoffs between national security and due process of law. Richard Posner, a distinguished jurist and legal scholar, has argued that

the safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty.³⁰

Posner argues that all that can reasonably be asked by judges considering the constitutionality of government action is that political institutions weigh the costs as well as the benefits in curtailing liberties.³¹ And so the government argues that the due process guarantees must be redefined in terrorism cases because the potential costs of actions of terrorists using weapons of mass destruction would be so catastrophic.³² And it argues that courts should give great deference to the government's weighing of these competing interests.

Yet the "balancing" test may well be wrongheaded. To understand why, it may be helpful to borrow from the "model of choice" approach to decision making. When you value two things, you may encounter a tradeoff situation in which you must give up some of one to get some of the other. The question then becomes: How much of the first and how much of the second can I obtain? For example, if you are a student, you might value free time and good grades, but if in order to get the good grades you have to sacrifice some free time, you'll want to sacrifice as little free time as you can to get the good grades. It turns out that some tradeoffs don't make good sense, because they provide less of both valued things than other possible tradeoffs. No student would accept a tradeoff involving getting a B+ for doing 10 hours of weekly homework if another way of studying was available whereby he or she could receive an A- for doing seven hours of weekly homework. The first combination of values is said to be "dominated" by the second combination, because the second gives you more of both values—a higher grade *and* more free time. When you act in ways that provide the maximum of one value and the maximum of another, you are said by decision theorists and economists to be on the "possibility frontier," a term that defines the maximum it is possible to obtain. (If you settle for less, you are said to be inside the frontier; it is by definition impossible to be on the outside of the frontier—except in your

dreams.) Ultimately, it is irrational to accept any combination of things you value that are not on that frontier.³³

In fighting terrorism we want the best combination of guarantees of due process of law that protect our personal freedom and our privacy, and of strong government action that protects national security and our own personal security as we travel on buses, trains, and airplanes. In other words, in analyzing the best public policy to combat terror, we want to be *on* the possibility frontier and not *inside* it. If we believe that we are already on the possibility frontier, there is nothing left but to accept some tradeoffs, involving more use of the intelligence approach and less of the due process approach in times of greatest danger, as Posner argues. But if we believe that the government is not yet at the possibility frontier, we can argue for an approach that gives us—simultaneously—greater protection for the country as well as continued protections of our individual civil rights and liberties.³⁴

A good case can be made for the idea that protecting due process rights is actually *necessary* to maximize intelligence about terrorism. Why? Because due process of law works within an adversarial system. A prisoner's counsel from start to finish will develop a case and in doing so will gather documentation, organize the testimony of the accused, and obtain testimony of witnesses. The defendant or his or her family and friends will have to find the money to pay for legal assistance, and that behavior can provide the government with some insights. Counsel may well advise the client to plead to a lesser crime, turn state's evidence, and cooperate for leniency. Whether a trial occurs or a plea bargain is struck, the government will benefit from all the evidence and argumentation developed by defendant's counsel, therefore obtaining new intelligence not just through its own efforts but also through the efforts of defendant's counsel to mount a defense. The information brought out during a trial may be of considerable use to the government, providing it with leads to witnesses or other members of a terrorist network and enabling the government to better understand the nature of the threat.

Due process of law protects the innocent, and that too has a bearing on reaching the possibility frontier in combating terrorists. When innocent people are set free, the government no longer has to divert resources to combat nonexistent terrorist threats, and it can more efficiently target its efforts.

Consider the case of Abdallah Higazy, an Egyptian student held for a month in solitary confinement after the World Trade Center attack because a shortwave radio had been found in his room's safe by a security guard. Federal district judge Jed S. Rakoff relied on FBI representations that Higazy had confessed to ownership. Higazy had in fact given the FBI three separate and conflicting versions of how he ob-

tained the radio, but he may have done so as a result of FBI threats against his younger brother, who was attending school in the United States. Once he was given access to a lawyer, he retracted the confession. When the guard's story was investigated, the government case unraveled: The security guard admitted making up the story about finding the radio in the room. Thereafter interest lessened in following up on potential espionage out of hotel rooms near airports, allowing the FBI to concentrate on more promising leads.

Similarly, consider the case of three Muslim medical students who were stopped on a Florida highway in Collier County after a waitress at a rest stop overheard them talking about the anniversary of the September 11 attack and thought that they were talking about planning a terrorist action. They were charged with running a tollbooth and were held 18 hours for investigation, as trained dogs and a robot searched their car for evidence of explosives. The men were released after nothing was found and after a videotape revealed that they had not run the tollbooth; had the men not had access to counsel, or had they been detained indefinitely without access to lawyers by federal officials convinced that they were terrorists, they could have languished in jail indefinitely, and highway patrols around the country would have continued to look for terrorists on the roads, raising anxieties but doing nothing to allocate local law enforcement resources effectively.

In other cases the due process model has proven its value, as initial determinations or evidence turned out to be worthless when challenged by lawyers. Brandon Mayfield, 37, a respected immigration lawyer (and a former lieutenant in the Army) in Oregon who was a convert to the Muslim religion, was taken away from his Portland law office on a material witness warrant by FBI agents on May 6, 2004, after his fingerprint was incorrectly matched by agents to a digital copy of one fingerprint found on a bag of detonators near a Madrid train station. (A material witness is someone who there is probable cause to believe has evidence of the commission of a criminal act.) A few months earlier, horrific terrorist train bombings in Spain had killed 191 people and injured about 2,000. Spanish police had collected a fingerprint and sent "Latent Fingerprint No. 17" to the FBI, whose Latent Print Unit matched it against its Automated Fingerprint Identification System database. Of 20 possible matches, a senior fingerprint examiner found a "100 percent" match with the fourth-ranked print on the list, Brandon Mayfield. Other FBI examiners concurred. The FBI sent a letter to the Spanish authorities informing them of the identification of Mayfield, but the Forensic Science Division of the Spanish National Police responded to the FBI that the purported match was "conclusively negative." So sure were FBI investigators, they didn't look at the original fingerprints when they went to Spain to meet with Spanish investiga-

tors. After arresting Mayfield, FBI agents went into his home in Aloha, Oregon, and seized computers, a modem, a safe deposit key, and assorted papers, as well as copies of the Quran and “Spanish documents”—later determined to be his son’s Spanish homework. The FBI admitted its mistake after agents returned to Madrid and viewed the original fingerprint, which turned out to match with an Algerian man in Spain. They then released Mayfield, but indicated he remained a material witness. A week later a court reviewed that determination and lifted the restrictions.³⁵

Yet another example of prosecutorial zeal resulting in false information about terrorist activities is provided by the prosecution of Captain James J. Yee, a Muslim chaplain at Guantanamo Bay who ministered to many of the terrorists captured in Afghanistan. Put under surveillance by Army counterintelligence and the FBI, Yee’s car was found at the home of a Muslim “activist” in Seattle who years earlier had hosted a visit from Omar Abdel Rahman, the Egyptian cleric convicted in the 1993 plot to blow up the World Trade Center in Manhattan. (Yee was not in Seattle at the time.) Yee was linked to various other Muslim militants and was arrested, held for 76 days in solitary confinement, and charged with six criminal counts of mishandling classified information.

Yee was under surveillance because of the suspicions of several intelligence officers at Guantanamo: They thought that he spent too much time talking to the detainees and seemed to be sympathetic to them. He also seemed to be skeptical of the effectiveness of their interrogations. Their supervisors in Puerto Rico instructed the local agents to drop the allegations against Yee, but the local agents bypassed them and sent a report accusing Yee of terrorist activities to the Army Central Control Office. Investigators alleged that Yee and a subordinate were disseminating radical Islamic literature to detainees—charges that proved unfounded. Then they claimed that Yee had classified information in his notebooks, but they later had to retract that claim because the names and addresses of detainees, which the chaplain carried with him on leave, were not classified information. They characterized Yee’s seminary in Syria, the Abu Nour Institute, as a center for Islamic terrorism, based solely on the fact that some graduates of the Institute had shown up on terrorism watch lists. Ultimately none of the charges amounted to anything, though in the course of the investigation it was determined that Yee had committed adultery and had downloaded pornography onto his computer—neither of which had much to do with terrorist activities. Eventually Yee was released from confinement and transferred to other duties. He was later prosecuted for the minor offenses, then the charges were dropped, and finally he

was given an honorable discharge. Nothing in the Yee investigation advanced efforts to contain the terrorist threat.

Adhering to due process of law not only protects the accused but also helps guard against prosecutorial zeal that sends false signals about who is a terrorist and what terrorists might be doing. The issue of prosecutorial zeal surfaced in a case involving Karim Koubriti and Abdel Ilah-Elmardoudi, two Moroccan men who were in custody for three years, charged with terrorist activities, and convicted in June 2003 of conspiring to provide material support to terrorists by casing targets in Las Vegas and at Disneyland. Six days after the September 11 attacks, seven FBI agents raided an apartment on Norman Street in southwest Detroit, hoping to find Nabil al-Marabh, number 27 on the FBI's terrorist watch list. At the apartment they found Koubriti. The raid also uncovered 28 passport pictures and forged immigration and identification papers, including employee badges for the Detroit Metropolitan Airport. Also found were expired security badges from a Detroit Metropolitan Airport caterer. The key piece of evidence against Koubriti was a day planner with two sketches prosecutors claimed were of military airplanes at an American air base in Turkey and a military hospital in Jordan, as well as tapes and sketches of the New York Times building and the MGM Grand Hotel in Las Vegas. An alleged accomplice, Ilah-Elmardoudi, was arrested about year later in connection with the alleged plot and for credit card fraud.

The arrests, the first terrorism case after 9/11, were hailed by the Department of Justice as a major blow in the war on terrorism through the unraveling of a "sleeper operational cell." Attorney General John Ashcroft claimed the men had knowledge of the 9/11 attacks, a claim made in violation of a "gag order" issued by Judge Gerald Rosen to prevent pretrial publicity in the case. (Ashcroft was sanctioned by the judge and apologized to the court.) Justice Department officials, however, understood that the case was weak but felt that going ahead with a prosecution might pressure the defendants into giving up some useful information, perhaps on the whereabouts of al-Marabh.

In the nine-week jury trial, the prosecutors claimed that these two men were part of an operational "sleeper cell" engaged in planning terrorist attacks. Witnesses from the FBI, Air Force, and State Department concurred. A Moroccan informant named Hmimssa claimed that the men used a code involving the names of Moroccan soccer players, tried to obtain Stinger missiles, and were thinking of shooting down passenger jets or staging a raid at a casino in Las Vegas. After the conviction, Attorney General Ashcroft called the conviction of two of the men "a clear message" that the government would "work diligently to detect, disrupt and dismantle the activities of terrorist cells."

A subsequent investigation of the case by the *Detroit Daily News* found that prosecutors ignored rules intended to ensure a fair trial and withheld more than 100 documents (over 1,000 pages) from defense attorneys, as well as e-mails, lineup pictures, and interviews with witnesses. Prosecutors arranged for the deportation of two witnesses who would have testified for the defense. An FBI witness testified that evidence seized from the defendant's apartment was "operational casing material," but expert analysts at the CIA and Air Force had concluded that there was no basis for that claim, that the sketches provided no useful information, and that they did not appear to be the handiwork of terrorists—but their statements were not provided to the defense. The Las Vegas FBI submitted a report indicating that the sketch did not appear to be for surveillance, and a Tunisian student with the group said under FBI questioning that the men had been on a vacation to Las Vegas when they made the videotape. The lead prosecutor altered his notes of interviews of a witness before giving them to the court and did not inform defense attorneys. The government's key witness, Youssef Hmimssa, told fellow prisoner Butch Jones that he had fooled the FBI and Secret Service, but this conversation, after Jones revealed it to the prosecution, wasn't shared with the defense attorneys. Hmimssa had previously lied to investigators and had a record as a con artist and involvement with drug dealers, and so Hmimssa might have concocted a story implicating "the sleepers" so that he could win a favorable plea agreement in his own case.

Judge Rosen criticized the prosecutor for not turning over evidence and ordered the Justice Department to conduct a review of the trial. The Justice Department eventually submitted a report to the judge criticizing its own prosecutors for withholding evidence from the defense. "In its best light," the report stated,

the record would show that the prosecution committed a pattern of mistakes and oversights that deprived the defendants of discoverable evidence . . . and created a record filled with misleading inferences that such material did not exist.

The information was subsequently submitted in a 60-page filing to Judge Rosen, with a recommendation that the prosecution be dropped because the defendants were convicted unfairly. The government indicated that it would petition the court to retry them only on document fraud involving immigration papers—charges not related to terrorist activities. The memo also charged the government's prosecutor, Richard Convertino, of conspiring with government witnesses, and subsequently the Department of Justice opened a criminal investigation into the conduct of the prosecutors. Convertino himself might well have been made into a scapegoat, since there were Justice Department

memos indicating that top officials were aware of the flimsy nature of the evidence and that some wanted the prosecution to proceed; Convertino later sued the Department of Justice regarding his firing.

On October 13, 2004, after spending more than three years in jail, Koubriti was released from prison and sent to a halfway house. Free on bond, he had to wear an electronic tether equipped with a global positioning device so the government would know his whereabouts. Judge Rosen indicated that at some point he would be permitted to work. Koubriti could still be tried on charges of document fraud and also faced deportation if convicted of that charge.

The reaction to the dropping of the case within the FBI bureau in Detroit provides an illustration of how intelligence concerns trump due process. Following are excerpts (nothing substantive has been edited out) from a memorandum sent by the principal agent of the Detroit Bureau to FBI officials after the Justice Department decided to drop the case.

Box 1.3

FBI Memorandum on the Koubriti Case

From: ROBERTS, DANIEL D. . . . Wednesday, September 01, 2004
9:03 AM.

To: FBI Employees.

Subject: News Stories, terrorism case. . . .

Good Morning: You all may have read in today's newspaper a story about three terrorism subjects who had been convicted in a previous trial, namely Karim Koubriti, Abdel Ilah-Elmarouidi and Ahmad Hannan. All three of these defendants had appealed their convictions. Late yesterday the Department of Justice and U.S. Attorney Craig Morford made a legal decision not to pursue Count I of the Indictment (Material Support to Terrorism) and they requested a new trial on Count II (Document Fraud). This decision not to go forward on Count I was strictly a legal decision based on a number of factors, mostly relating to discovery problems involving the former Assistant U.S. Attorney who had been assigned the case during the original trial. I believe our Detroit JTTF members acted aggressively and worked very hard on this case in an effort to prevent a terrorist attack. You should be proud of the excellent investigative work conducted by the JTTF Detroit, and everyone should recognize that their efforts may have prevented another attack. The decision not to go forward with Count I was simply a legal determination based largely on prosecutorial errors made during the first trial. The FBI's

new terrorism mission requires that we work as hard as possible to prevent another terrorist attack. If we happen to obtain a prosecution in addition to preventing an attack, then that's just icing on the proverbial cake. The most important goal is to prevent the loss of life through our aggressive involvement in terrorist cases and, I believe, we accomplished that in the Koubriti case. . . . ♦

Proponents of the due process of law approach have taken strong exception to efforts made by the Bush administration to weaken due process guarantees. What follows are the comments of Senator Patrick Leahy, the ranking Democratic member of the Senate Judiciary Committee, at hearings the committee held on terrorism on June 8, 2004. The first witness at the hearings was then-Attorney General John Ashcroft. Before Ashcroft testified, Senator Leahy confronted him with charges that his conduct in the war on terrorism had violated the civil liberties of Americans without making them safer against the threat of terrorist attacks.

Box 1.4

Leahy's Opening Comments, June 8, 2004

Mr. Attorney General, welcome . . . the terrorist threat to our nation did not begin in September 2001. But the preliminary findings of the 9/11 commission suggest that counterterrorism simply was not a priority of your Justice Department prior to September 11th. . . . Just one day before the attacks, on September 10th, you rejected the FBI's request to include more money for counterterrorism in your budget proposal. And while you have recently been critical of the so-called wall between criminal investigators and intelligence agencies, you did nothing to lower it during your first seven full months in office. In fact, you put up exactly the same wall in your administration.

The president is fond of saying that September 11th changed everything, as if to wipe out all missteps and misplaced priorities of the first year of this administration. After the attacks, you promised a stunned nation that its government would expend every effort and devote all necessary resources to bring the people responsible for these crimes to justice. Certainly the American people would expect no less. So a thousand days later and it is time to ask for the fulfillment of the promise you made.

Mr. Attorney General, your statement lists accomplishments of the Department of Justice since 9/11, but you leave out a number of things. For example, of course the obvious, Osama bin Laden

remains at large. At least three senior Al Qaida operatives who helped plan the 9/11 attacks are in U.S. custody, but there has been no attempt to bring them to justice. The Moussaoui prosecution has bogged down before any trial.

A German court acquitted two 9/11 co-conspirators, in part because the U.S. government and Justice Department and others refused to provide evidence to them. Three defendants who you said had knowledge of the 9/11 attacks did not have such knowledge. The department retracted your statement and then you had to apologize to the court because you violated a gag order in the case. The man you claimed was about to explode a dirty bomb in the U.S. had no such intention or capability, and because he's been held for two years without access to counsel, any crimes he did commit might never be prosecuted. Terrorist attacks on Capitol Hill and elsewhere involving the deadly bioterror agent anthrax have yet to be solved, and the department is defending itself in a civil rights action brought by a man who you probably identified as a person of interest in the anthrax investigation.

U.S. citizens with no connection to terrorism have been in prison as material witnesses for chunks of time, and then, "Oops, I'm sorry," when what the Justice Department announced was a 100 percent positive fingerprint match turned out to be 100 percent wrong. Noncitizens with no connection to terrorism have been rounded up seemingly on the basis of their religion or ethnicity, held for months without charges, and in some cases physically abused. Interrogation techniques approved by the Department of Justice have led to abuses that have tarnished our nation's reputation and driven hundreds, if not thousands, of new recruits to our enemies to terrorism. Your department turned a Canadian citizen over to Syria to be tortured. And then your department deported another individual to Syria over the objection of experienced prosecutors and agents who thought he was a terrorist and wanted to prosecute him. . . .

Mr. Attorney General, you spent much of the past two years increasing secrecy, lessening accountability and touting the government's intelligence-gathering powers. The threshold issue, of course, is—and I believe you would agree with me on this—what good is having intelligence if we can't use it intelligently. Identifying suspected terrorists is only a first step. To be safer we have to follow through. Instead of declining tough prosecutions, we need to bring the people who are seeking to harm us to justice. That's how our system works. Instead, your practices seem to be built on secret detentions and overblown press releases. Our country is made no safer through the self-congratulatory press conferences when we're facing serious security threats. The government agency that bears the name of justice has yet to deliver the justice for the victims of the worst

mass murder in this nation's history. The 9/11 commission is working hard to answer important questions about the attacks and how the vulnerabilities in our system that allowed them to occur, but it can't mete out justice to those involved. Neither the 9/11 commission nor this committee can do the work of your Department of Justice.

Mr. Attorney General, since September 11th, you blamed former administration officials for intelligence failures that happened on your watch. You've used a tar brush to attack the patriotism of the Americans who dared to express legitimate concerns about constitutional freedoms. You refused to acknowledge serious problems, even after the Justice Department's own inspector general exposed widespread violations of the civil liberties of immigrants caught up in your post-September 11th dragnets. Secretary Rumsfeld recently went before the Armed Services Committee to say that he, he Secretary Rumsfeld, should be held responsible for the abuses of Iraqi prisoners on his watch. Director Tenet is resigning from the Central Intelligence Agency. Richard Clark went before the 9/11 commission and began with his admission of the failure that this administration bears for the tragedy that consumed us on 9/11. . . . We need checks and balances. As much as gone wrong that you stubbornly refuse to admit. For this democratic republic to work, we need openness and accountability.

. . . [T]alk plainly with us and with the American people, about not only what's going right in the war on terrorism—and there are those things that are going right—but also about the growing list of things that are going wrong, so we can work together to fix them. Let's get about the business of working together to do our job, a better job of protecting the American people and making sure that the wrongdoers are brought to justice, are brought to trial and are given the justice that this country can mete out. ♦

In the summer of 2005, faced with continued insurgencies in Afghanistan and Iraq and a rise in terrorist incidents around the world, culminating with two suicide bombing operations in London, the White House decided once again to explain the Bush administration's strategy, which continued to be an emphasis on *militarizing* the fight against terrorists, as evidenced in the president's insistence that the correct term for U.S. efforts was a "war on terror." In speeches at the Naval Academy Commencement and at the FBI Academy Commencement, President Bush outlined the key components of this war. Following are excerpts from the speech he delivered at the FBI Academy on July 11, 2005.

Box 1.5

President Discusses War on Terror at FBI Academy

The President: . . . Today we are fighting a global war on terror, and here at Quantico you're training and retraining for a critical mission, and that's to defend our homeland. (Applause.) You're fighting the terrorists who wish to harm us; you're breaking up their cells; you're disrupting their financing. You are stopping them before they can strike our country and kill our citizens. Your work is difficult; it is dangerous. I want you to know how much your country appreciates you, and so do I. (Applause.) I thank the FBI folks who have welcomed me here. I also want to thank the DEA agents who are with us here today. By working to keep drug money from financing terror, you're playing an important part in this world—in this war. I want to thank the U.S. and international police officers who are training here. I want to thank the local first responders who have joined us. You protect us in times of emergency. I want to thank you for being on the front lines of fighting these terrorists. (Applause.)

. . . In London last Thursday terrorists killed dozens of commuters and wounded hundreds more. Americans know what it's like to be attacked on our own soil. Our hearts go out to the many innocent people in London who suffered terrible injuries, and we pray for the families mourning the loss of loved ones. In this difficult hour, the people of Great Britain can know the American people stand with you. I was with the Prime Minister, Prime Minister Tony Blair, at the G8 summit in Scotland when the terrorists struck his homeland. The contrast could not have been more vivid. We were there to discuss ways to make the world a better and more compassionate place; and in London, the terrorists were killing innocent men and women in cold blood. These attacks were barbaric, and they provide a clear window into the evil we face. We don't know who committed the attacks in London, but we do know that terrorists celebrate the suffering of the innocent. We do know that terrorists murder in the name of a totalitarian ideology that hates freedom, rejects tolerance and despises all dissent. Their aim—the aim of the terrorists is to remake the Middle East in their own grim image of tyranny and oppression by toppling governments, by exporting terror, by forcing free nations to retreat and withdraw. To achieve these aims, they attacked our country on September the 11th, 2001. They've continued to kill—in Bali, in Casablanca, Riyadh, Jakarta, Istanbul, Madrid and elsewhere. These kind of people who blow up subways and buses are not people you can negotiate with, or reason with, or appease. In the face of such adversaries there is only one course of action: We will

continue to take the fight to the enemy, and we will fight until this enemy is defeated. (Applause.)

The terrorists want to attack our country and harm our citizens. They believe that the world's democracies are weak, and that by killing innocent civilians they can break our will. They're mistaken. America will not retreat in the face of terrorists and murderers. (Applause.) And neither will the free world. As Prime Minister Blair said after the attacks in London, "Our determination to defend our values and our way of life is greater than their determination to cause death and destruction to innocent people." The attack in London was an attack on the civilized world. And the civilized world is united in its resolve: We will not yield. We will defend our freedom. (Applause.)

Our nation has no greater mission than stopping the terrorists from launching new and more deadly attacks. And whether you're fighting the terrorists in Afghanistan or Iraq, or routing out terrorists here at home, America is counting on you to stop them. To accomplish this vital mission, we have a comprehensive strategy in place. We're working to protect the homeland. We're working to improve our intelligence so we can uncover terrorist plots before they unfold. And we're staying on the offensive. We're fighting the enemy in Iraq and Afghanistan and across the world so we do not have to face them here at home. And we are spreading the hope of freedom across the broader Middle East. By offering an alternative to the terrorists' dark vision of hatred and fear, we are laying the foundation of peace for our children and our grandchildren. (Applause.)

To protect the American people, we continue to take extraordinary measures to defend the homeland. We created a new Department of Homeland Security. We're posting Homeland Security personnel at foreign ports and strengthening airport and seaport security. We're instituting better visa screening for those entering the United States. We're working to prevent potential terrorists from coming across our borders and violating our immigration laws. We're protecting our nation's critical infrastructure—our bridges and tunnels, our transportation systems, our nuclear power plants and water treatment facilities, and the cyber networks that keep our government and our economy running. We've provided more than \$14 billion over the last four years to train and equip local first responders. In all, we've more than tripled funding for homeland security since 2001. We're working tirelessly to protect the American people and to prevent new terrorist attacks. In an age of new dangers, we're doing everything in our power to do our jobs. And I want to thank you for your hard work. (Applause.)

To defend our homeland, we need the best possible intelligence. We face a new kind of enemy. This enemy hides in caves and plots in shadows, and then emerges to strike and kill in cold blood in our cities and communities. Staying a step ahead of this enemy and disrupting their plans is an unprecedented challenge for our intelligence community. We're reforming our intelligence agencies to meet the new threats. We've established a new National Counterterrorism Center where we are bringing together all the available intelligence on terrorist threats. We're sharing intelligence across all levels of government—the federal level, the state level, and the local level. We're working with our allies to share information, and to prevent terrorists from obtaining weapons of mass destruction. Thanks to the hard work of hundreds in our intelligence community, we have stopped a number of grave threats to the American people. Together with our allies, we uncovered and dismantled Libya's nuclear program. We worked with Pakistan and other nations to shut down the world's most dangerous nuclear trading network. And since September the 11th, our coalition has disrupted a number of al Qaeda terrorist plots, arrested al Qaeda operatives here to case specific U.S. targets, and caught others trying to sneak into our country.

One of the new steps we're taking is the creation of the National Security Service within the FBI, to more completely integrate the Bureau's work with the intelligence community. The purpose of this change is to strengthen the FBI, so it not only investigates terrorist crimes after they happen, but the FBI can be more capable to stop the terrorist acts before they happen. The FBI is in the fight. The FBI has deployed its personnel across the world, in Iraq and Afghanistan and other fronts in the war on terror. FBI agents are questioning captured terrorists and uncovering information that will help prevent new attacks on our homeland. Here in America, the FBI has helped break up terrorist cells and financing networks in California, in Oregon, Illinois, North Carolina, New York, New Jersey, Virginia, Florida and other states. And one of the important tools federal agents have used to protect America is the *Patriot Act*. I call on Congress to reauthorize the 16 critical provisions of this act that are scheduled to expire at the end of this year. The terrorist threats against us will not expire at the end of this year, and neither should the protections of the *Patriot Act*. (Applause.)

. . . We know that there is no such thing as perfect security, and that in a free and open society it is impossible to protect against every threat. As we saw in London last week, the terrorists need to be right only once. Free nations need to be right a hundred percent of the time. The best way to defend America is to stay on the offense. When terrorists spread their—spend their days and nights struggling to avoid death or capture, they are less capable of arming and

training and plotting new attacks. So, together with our allies, we're on the offense, and we will stay on the offense. We have damaged the al Qaeda network across the world. In the Persian Gulf, al Qaeda's chief of operations has been captured. In Southeast Asia, a top strategist for al Qaeda's associate group was captured. In Pakistan, top al Qaeda leaders have been captured, including one of bin Laden's senior terrorist facilitators. We captured the mastermind of the September the 11th attacks. We captured a terrorist involved in the bombings of the U.S. embassies in Kenya and Tanzania, and a key planner in the attack on the USS Cole. Our ally, Pakistan, has killed or captured more than 600 terrorists, including bin Laden's chief of operations, a man named al-Libbi. Saudi Arabia has killed or captured more than two dozen of its most wanted terrorists. The terrorists remain dangerous, but from the mountains of Afghanistan to the border regions of Pakistan, to the Horn of Africa, and to the islands of the Philippines, our coalition is bringing our enemies to justice, and bringing justice to our enemies. (Applause.) We will keep the terrorists on the run until they have no place left to hide.

. . . . As Iraqis take . . . steps toward political and military reform, they are building a free nation that will be a beacon—a beacon of liberty in the Middle East. The success of democracy in Iraq is sending forth the news from Damascus to Tehran that freedom can be the future of every nation. The Palestinian people have gone to the polls and have chosen a leader committed to negotiation instead of violence. In Lebanon, people took to the streets to demand the restoration of their sovereignty, and they have now gone to the polls and voted in free elections. And as freedom spreads in these countries, it is inspiring democratic reformers in places like Egypt and Saudi Arabia.

. . . . The heart of our strategy is this: Free societies are peaceful societies. So in the long run, the only way to defeat the ideologies of hatred and fear, the only way to make sure our country is secure in the long run, is to advance the cause of freedom. We have seen freedom conquer evil and secure the peace before. In World War II, free nations came together to fight the ideology of fascism, and freedom prevailed. And today Germany and Japan are allies in securing the peace. In the Cold War, freedom defeated the ideology of communism and led to a Europe whole, free and at peace. Today in the Middle East freedom is once again contending with an ideology that seeks to sow anger and hatred and despair. And like fascism and communism before, the hateful ideologies that use terror will be defeated by the unstoppable power of freedom and democracy. (Applause.)

. . . . This week there's great suffering in the city of London, but Londoners are resilient. They have faced brutal enemies before. A

city that survived the Nazi blitz will not yield in the face of thugs and assassins. And just as America and Great Britain stood together to defeat the totalitarian ideologies of the 20th century, we now stand together against the murderous ideologies of the 21st century. History teaches us that we can be confident in the future because the darkness of tyranny is no match for the shining power of freedom. There will be tough fighting ahead; there will be difficult moments along the path to victory. The terrorists know they can't defeat us on the battlefield. The only way the terrorists can win is if we lose our nerve. This isn't going to happen on my watch. (Applause.) America and its allies will continue to act decisively, and the cause of freedom will prevail. ♦

Questions and Comments

1. *International standards for responding to terrorism.*

On October 10, 2003, an International Bar Association task force of terrorism experts issued a report, "Task Force Principles on Suppressing Terrorism Within the Framework of International Law." The main points can be briefly summarized: "the threat of terrorism should not be used by states as a reason to disregard fundamental norms of international law"; the fight against terrorism should not become a pretext "to adopt measures which unlawfully restrict the rights to freedom of expression, religion, opinion"; all restrictions of substantive human rights in a state of emergency must be provided for by law, and not exclude the possibility of judicial review. The task force was particularly insistent about guarantees of due process: "The fundamental due process guarantees must be accorded those facing trial, whether before a military tribunal or regularly constituted court, at times of peace and during armed conflict. This necessitates at the least protecting the presumption of innocence, the right to be tried by an independent and impartial court, access to counsel and the right to appeal." It recommended that the independence of the judiciary be maintained and that judges act impartially. Those detained must not be held incommunicado or in solitary confinement; they must be able to challenge their imprisonment in court, they must not be held indefinitely, and they may not be held outside the jurisdiction of courts competent to determine the legality of their detention. The IBA argued that "International Cooperation Respect for the rule of law and adherence to international human rights standards will greatly enhance international cooperation in combating terrorism."

2. *Possibility frontiers.*

If what Democratic Senator Patrick Leahy says about the performance of the attorney general and the Department of Justice is true,

would that not indicate that the key issue is not best framed as a trade-off between national security and due process of law but rather as getting the department closer to the “possibility frontier”? Paul Rosenzweig of the Heritage Foundation, a Washington, D.C. think tank and research center that takes a conservative point of view, notes that “America is not limited to a zero-sum game. There are effective ways to limit the ability of the government to intrude into Americans’ lives while increasing security. America can and must adhere to fundamental and firm principles of limited government, and it can do so while also answering the terrorist threat.”³⁶

3. *Following or leading public opinion.*

A national public opinion survey (conducted by the Media and Society Research Group of Cornell University) on terrorism and civil liberties found that 44 percent of the respondents believed that the government should curtail civil liberties for Muslim Americans. Specifically, 27 percent thought they should be required to register their location, 26 percent thought mosques should be closely monitored, 29 percent thought law enforcement agents should infiltrate Muslim civic and volunteer organizations, and 22 percent thought the government should be able to profile Muslims as terrorist threats based on their religion or Middle East background. In contrast, 48 percent of respondents did not support restricting civil liberties for Muslim Americans. The poll responses differed by party, with Republican respondents about twice as likely to support restrictions as Democrats. Respondents who followed the news were more likely to be concerned about terrorism and more likely to favor restrictions. Members of racial, ethnic, and religious minorities were more likely to be concerned about threats to civil liberties than white American citizens. Do you believe that public opinion on the question of restrictions of civil rights and liberties should play a role in making public policy? Should protections of the Bill of Rights depend on the support of the majority?

4. *Excessive costs to the judiciary?*

Chief Justice William Rehnquist, in his January 1, 2005, annual report on the judiciary, detailed budget and staffing shortfalls in coping with a torrent of cases. “As the Judiciary’s workload continues to grow,” he warned, “the current budget constraints are bound to affect the ability of the federal courts efficiently and effectively to dispense justice.” Does this mean that the courts would be overburdened with terrorism cases? That it is too costly and inefficient to provide defendants with due process guarantees? Since 2004 the government has withheld information on the number of cases of terrorism investigated or prosecuted. Data from the two years after 9/11, compiled by a data clearinghouse, TRAC, indicate that the numbers of investigations and cases are manageable and will not swamp the court system. In that two-year

period, 6,400 or so terrorist or antiterrorist matters were referred to prosecutors by investigative agencies, with about 3,500 classified as acts of terrorism (many of these involve domestic groups not linked to al Qaeda or Islamic terrorist activities, such as Ku Klux Klan groups). This compares in that same two-year period with 3,600 corruption matters and 2,400 environmental matters. Of the 3,500 referred to prosecutors, only 748 cases were prosecuted. And of 184 convictions obtained during that period, 171 received either no jail sentence or sentences of less than one year. During that time, perhaps a thousand or so other cases were pending (the more serious ones had not yet been resolved), but the data indicate that these more serious cases will result in annual numbers of convictions in the low hundreds and serious jail time in the dozens.

Endnotes

1. *60 Minutes*, CBS Network, September 11, 2002.
2. Quoted in Charles Lane, "Fighting Terror vs. Defending Liberties," *Washington Post National Weekly Edition*, September 9–15, 2002, p. 30.
3. Christopher Newton, "FBI Expands Search for Terrorists," Associated Press, July 12, 2002.
4. On weapons of mass destruction, see Tushar K. Ghosh et al., eds., *Science and Technology of Terrorism and Counterterrorism* (New York: Marcel Dekker, Inc., 2002).
5. Jonathan Medalia, *Terrorist Nuclear Attacks on Seaport: Threat and Response* (Washington, D.C.: Congressional Research Service, 2005).
6. Richard Falkenrath, Testimony on April 27, 2005, "Vulnerability of Toxic Industrial Chemicals to Terrorist Attack," Committee on Homeland Security and Governmental Affairs, U.S. Senate (Washington, D.C.: Government Printing Office, 2005).
7. "Modeling Attacks on the Food Supply," National Academy of Sciences, 2005.
8. On simulations of a smallpox epidemic, see Peter J. Roman, "The Dark Winter of Bioterrorism," *Orbis*, Summer 2002. Also see Kimberly Thompson, Robert Armstrong and Donald Thompson, "Bayes Bugs Bioterrorism: Lessons Learned From the Anthrax Attacks," Center for Technology and National Security Policy, National Defense University, 2005. Also see *The Smallpox Vaccination Program: Public Health in an Age of Terrorism*, National Academics Press, 2005.
9. John D. Moteff, *Critical Infrastructures: Background, Policy and Implementation* (Washington, D.C.: Congressional Research Service, 2005); Eric Fischer, *Creating a National Framework for Cybersecurity: An Analysis of Issues and Options* (Washington, D.C.: Congressional Research Service, 2005).
10. "Means of Attack," in *National Strategy for Homeland Security* (Washington, D.C.: The White House, 2002).
11. Richard A. Clarke, "America Attacked: The Sequel," *The Atlantic*, January/February 2005, pp. 61–79.
12. Rose Gottemoeller, Testimony on June 28, 2005, "Pathways to the Bomb: Security of Fissile Materials Abroad," Subcommittee on the Prevention of Nuclear

and Biological Attack, Committee on Homeland Security, U.S. House of Representatives (Washington, D.C.: Government Printing Office, 2005); Charles D. Ferguson II, Testimony on May 24, 2005, "Reducing the Threat of Nuclear Terrorism: A Review of the Department of Energy's Global Threat Reduction Initiative," Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives (Washington, D.C.: Government Printing Office, 2005).

13. Roland Jacquard, director of the International Observatory on Terrorism in Paris, calculates that a "second wave" of attacks is likely in the U.S. and a "third wave" against monuments in Europe will occur. See Associated Press, "Europeans Sound Terror Warnings," Sept. 10, 2002.

14. The administration is contracting for next-generation devices at the nuclear weapons laboratories, particularly at NIS-6 at Los Alamos. In part the efforts are designed to catch al Qaeda attempts to use strontium-90 and cesium-137 in dirty bombs. See Barton Gellman, "High Anxiety, High Alert," *The Washington Post National Weekly Edition*, March 11–17, 2002, p. 8. Meanwhile, a team from ABC News managed to bring across European and U.S. borders a mock "suitcase bomb" filled with 15 pounds of radioactive material without having the suitcase checked or opened once. See "How Safe Are Our Borders," by Brian Ross, Rhonda Schwartz, and David Scott, *ABC News*, September 11, 2002.

15. Eric Lipton and Matthew Wald, "U.S. to Expand Its Track of Radioactive Materials," *New York Times*, February 1, 2005, p. A16.

16. Dafna Linzer, "Could They Pull It Off: Atomic Weapons Capabilities May Elude al Qaeda Terrorists, Experts Say," *Washington Post National Weekly Edition*, January 10–16, 2005, pp. 6–7.

17. Lawrence Husick and Stephan Gale, "Planning a Sea-borne Terrorist Attack," *Foreign Policy Research Institute*, 2005.

18. Richard K. Bett, "The Soft Underbelly of American Primacy: Tactical Advantages of Terror," in Demetrios Caraley, ed., *September 11, Terrorist Attacks, and U.S. Foreign Policy* (New York: Academy of Political Science, 2002), pp. 33–50.

19. Quoted in an interview with Reuters, January 28, 2005.

20. Insurers such as Berkshire Hathaway have written policies to cover high-profile targets, and policyholders pay between 5 and 30 percent of policies' face value, which gives some quantification to the probabilities. See "Buffet Jumps in Where Others Fear to Tread," *Business Week*, July 15, 2002, p. 120.

21. The National Intelligence Council on January 12, 2005, forecast the prospects for a terrorist attack through 2020 and described the dangers of biological agents or a nuclear device being detonated as two of the greatest dangers facing the nation.

22. David Frum, *An End to Evil* (New York: Random House, 2003).

23. John Miller and Michael Stone, *The Cell: Inside the 9/11 Plot, and Why the FBI and CIA Failed to Stop It* (New York: Hyperion, 2002).

24. There have been very few trials of international terrorists in the United States in recent years: 8 indictments in 1997, 7 in 1998, 29 in 1999, 14 in 2000, and 57 in 2001. Data from "A Special TRAC Report: Criminal Enforcement Against Terrorists," p. 1. These contrast with the scope of investigations into potential terrorist activities conducted by the FBI (538 in FY 2000) at a cost of \$443 million.

25. See the case of Qatari citizen Ali Saleh Kahlah al-Marri, as detailed in "Detainee Files Lawsuit Against Rumsfeld," *Human Rights Watch*, August 8, 2005.

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26. Dan Eggen and Julie Tate, "In Terror Cases, Few Convictions," *Washington Post*, June 12, 2005.

27. Nancy Kassop, "The War Power and Its Limits," *Presidential Studies Quarterly*, Vol. 22 No. 3, September 2003, pp. 509–529.

28. P.L. 107-40 (2001).

29. Philip Heyman, *Terrorism, Freedom and Security: Winning Without War* (Cambridge, MA: MIT Press, 2003).

30. Richard Posner, "Security Versus Civil Liberties," *The Atlantic Monthly*, November 2001, p. 46.

31. Richard Posner, *Catastrophe* (New York: Oxford University Press, 2004).

32. Legal commentators noted for their defense of due process of law have made a similar point. See Laurence Tribe, "Trial by Fury," *The New Republic*, December 10, 2001, p. 12; and Ronald Dworkin, "The Threat to Patriotism," *The New York Review of Books*, February 28, 2002, p. 47.

33. On possibility frontiers, see Edith Stokey and Richard Zeckhauser, *A Primer for Policy Analysis* (New York: W.W. Norton, 1978).

34. James Fallows, "How We Could Have Stopped It: The Plan We Still Don't Have," *The Atlantic*, January/February 2005, pp. 80–92.

35. On FBI mistakes, see Steven T. Wax and Christopher J. Schatz, "A Multitude of Errors: The Brandon Mayfield Case," *The Champion*, September/October 2004, Vol. 28, p. 6; also William C. Thompson and Simon A. Cole, "Forensics: Lessons From the Brandon Mayfield Case," *The Champion*, April 2005, Vol. 29, pp. 42–60.

36. Paul Rosenzweig, "Principles for Safeguarding Civil Liberties in an Age of Terrorism," Executive Memorandum #854 (Washington, D.C.: The Heritage Foundation, 2003). ♦