

The Critical Balance: Individual Rights and National Security in Uncertain Times

By Mark Blitz
Fletcher Jones Professor of Political Philosophy
Claremont McKenna College in Claremont, California

The government's efforts to prevent another round of terrorist attacks have raised a welter of complex constitutional issues that are being decided by U.S. courts and debated by legal scholars.

Among the many effects of the terrorist attacks on the United States on September 11 has been a vigorous debate about certain civil liberties. Should suspected terrorists be treated differently from other suspects in court? Should the activities and whereabouts of noncitizens in the United States be regulated more strictly? Should we begin to require national identity cards? Several of these issues have gone beyond the stage of discussion, as suspected terrorists have been detained and brought to trial and as new legislation is passed and old legislation reinterpreted to permit stricter scrutiny of communications and financial transactions.

The Context for Civil Liberties in the United States

These issues are all discussed and acted on within a context that in many ways says more about civil liberties than does the current debate itself. Americans have long enjoyed and supported a full range of such liberties, ranging from guarantees of freedom of speech and toleration of diverse religions to equal protection under the law.

The fundamental concern with preserving civil liberties is one element of the context for the current discussion. A second element is the manner in which Americans make concrete political and legal decisions. Courts, Congress, and the president all play a part. Legislative direction on important matters normally comes from the president, but measures become law only with congressional approval, which often occurs (if it occurs at all) only after proposals are substantially changed. In times of war or emergency, the president's executive authority and his formal position as commander-in-chief of the armed forces become more significant legislatively, and emergency measures he proposes are dealt with swiftly, although even at these times Congress can make alterations. After September 11, some important

legislation to deal with the immediate and long-term terrorist threat was passed quickly and overwhelmingly by Congress. The president's proposal to create a cabinet-level Department of Homeland Security, however, has been dealt with at a slower pace and with give-and-take more typical of ordinary legislation.

Presidential authority is especially strong in times of war because war requires that mobilization of resources and military decisions reside in a single office. United States law and practice give presidents wide executive authority in wartime. How far this authority reaches in the specific instance of the September 11 terrorist attacks is another matter, however, because the scope, duration, and methods of the antiterror campaign are unlike conventional warfare in many respects. Congress still has a critical responsibility to set limits on the exercise of executive authority by conducting hearings, passing legislation, and controlling budgets.

The courts—ultimately the Supreme Court—are able to rule on the constitutionality of legislation and executive actions. Courts, moreover, are free to deal with specific grievances in the course of criminal and civil trials. In fact, while some of the current discussion of civil liberties concerns legislative action in such areas as immigration reform, much of it involves courts as they rule in specific cases about actions of the president and his cabinet.

The Current Controversies

The major current controversies about civil liberties and the response to terrorism concern the rights that criminal defendants should have in terrorism cases, the fairness of detention of those suspected of terrorist activities or having significant information about these activities, and the status and treatment of combatants captured in Afghanistan and elsewhere. In all these cases, treatment is measured against a standard that has given U.S. citizens growing protection over the past 40 years, a standard that has grown from a constitutional base that was already quite high. This high level of proper procedure in dealing with crime is the third important contextual element for understanding the current debate.

In the U.S. legal system, everyone, including the indigent, has basic guarantees:

- The right to legal counsel is assured in criminal cases.
- Material found in the search of suspects' homes can be used against them in court only if

the strictest procedures have been followed.

- Suspects must be notified that they need not talk to police, and anything said if they have not had such notification cannot be used in court.
- Police are punished for coercive tactics, and coerced evidence, such as confessions, is inadmissible during trials.
- Suspects must be tried speedily and must be made aware of the charges against them.

In these areas and more, the practical meaning of these guarantees of "due process of law" can be matters of ongoing discussion, but, fundamentally, they limit the actions of the government's prosecutors and protect defendants from unfair prosecution.

Given this context, we can appreciate the several issues involved in the current discussion. One issue concerns the government's actions under the United States PATRIOT Act, which Congress passed after the September 11 attacks. The act allows the government several new powers in wiretapping, in tracking computer activity, and in monitoring financial transactions in order to deal with suspected terrorists and those who aid them.

Some commentators feared initially that these powers would allow the government excessive intrusion into private lives. Because the new powers must be exercised under established procedures and in light of the Constitution's prohibition of unreasonable searches and seizures, the likelihood of such excesses decreases. The nation's courts continue to be actively engaged in defining the boundaries of these enhanced investigative powers.

A second issue centers on the government's aggressive use of laws that currently exist to detain in prison possible terrorists and those suspected of aiding them or of having useful information about them. Shortly after September 11, Attorney General John Ashcroft likened this activity to tactics used against organized crime by Robert Kennedy when he was attorney general during his brother's presidency in the 1960s. Violations of visa status, for example, have made those with possible information about past or future terrorist acts subject to sometimes lengthy detention. Some have questioned the government's aggressive tactics generally, but it is especially the issue of detention that has been widely debated.

Federal District Judge Gladys Kessler ruled recently that

the government must list the names of those who are being detained, which it had not been doing. Detainees are and have been free to consult attorneys, and they and their families are and have been free to publicize their detentions. The Department of Justice would prefer not to release the names generally, however, out of concern that terrorists will make use of the information or that it would put the detainees at risk, particularly after they return to their home countries. The issue will finally be resolved as the administration appeals Judge Kessler's decision to higher courts.

A third set of issues concerns trials against suspected terrorists. The government has distinguished among foreign nationals, American citizens, and combatants who may be directly charged with committing crimes of war. In the case of combatants, some concerns initially existed about the administration's plans to use military tribunals to try those captured in battle (those now held on Guantanamo Naval Base, for example) or while engaging in military activities. Publication of the rules for the military tribunals has made clear that the most critical of the normal procedural safeguards will still be in place. In addition, the presidential edict authorizing such tribunals did not rule out the option of holding trials against suspected terrorists in civilian courts. The final current issue is less specific. Even if

government prosecutors and investigators act within the law, some civil libertarians believe that these actions—aggressive information-gathering, strict application of immigration law, and impaneling military tribunals—create an atmosphere hostile to free discussion.

Others argue in reply that the government—and the public's—quick response to ill treatment of some Arab-Americans and visitors after September 11, the full and open political discussion of how best to deal with terrorism, and the procedural propriety with which judicial actions have proceeded demonstrate the deep importance and undiluted presence of civil liberties and the careful constitutional balance of powers even in trying times. From this standpoint, American citizens' commitment to civil liberties is as strong and forceful as their support of efforts against terrorists who would take these liberties from them.

Blitz is a former associate director of the U.S. Information Agency, and currently chairman of the Department of Government at Claremont McKenna College.

The opinions expressed in this article are those of the author and do not necessarily reflect the views or policies of the U.S. government.