Liberty and Security under Stress

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This is, they say, a uniquely dangerous time. Since 9/11 we have been conscious of risks to our security and safety that are supposedly of a quality and magnitude different from what we have known since World War II. We have confronted the need to curtail civil liberties in order to secure our homeland against terrorist threats.

Whether the threat to our security is as grave as initially believed or not, this is hardly the first time in recent decades that we have been in danger. In the nearly six decades since the end of the War against Germany and Japan, we have encountered recurrent threats to our personal safety and the stability of our government. The first was the Communist threat of the 1950s that led many to fear that the United States would go the way of Stalinist Russia and that we too would suffer knocks on the door in the middle of the night. The remedy was supposedly a form of loyalty tests and security clearances known as McCarthyism. The House UnAmerican Activities Committee would find out who the disloyal or potentially disloyal were and then it would be up to the rest of American society to shun them in order to keep our institutions free of Communist contamination. Senator Joe McCarthy sought to expose one Communist after another, often on the basis of rumor and association. His campaign collapsed when he went after supposedly disloyal members of the Army. Their lawyer Joseph Welch stood him down with a single question, “At long last, have you left no sense of decency? ”

That question brought people to their senses. The country held firm against those who wanted to use the fear of Communism to undermine the legal protections of ordinary citizens. Though Congress wanted to make it a crime to be a mere member of the Communist Party, the Courts said, No – membership alone can never be a crime. You have to pose an active threat more serious than signing up and getting your membership card.

The second major threat to our security was the wave of criminal behavior that hit our streets in the 1970s and 1980s, a threat that made Columbia students quiver in their shoes as they walked down Broadway and guaranteed that they avoided the streets north and east of the campus. A professor in the Law School was murdered when he got off at the wrong subway stop and found himself on the streets of Harlem. In 1984, as the violence approaches its peak, Bernhard Goetz shot black youths on the IRT, the No 2 downtown express. His trial proceeded amidst widespread sympathy for the new hero of New York, the subway vigilante, who stood up against the gangs that terrorized us at the time.

In those days we heard the recurrent conservative cry that we were too soft on the real criminals (not Goetz but the four black kids who got shot) and therefore we must restrict civil liberties in order to insure our safety on the streets. In the previous two decades the Supreme Court, under the leadership of Chief Justice Earl Warren, had greatly expanded the procedural guarantees enjoyed by criminal suspects. The shift was most dramatic in the fields of search and seizure, interrogation, assistance by counsel, the right to a speedy trial, and a powerful but short-lived attack on the death penalty. The conservatives wanted to tear it all down. Their slogan then as always: We must balance liberty against security.
American society should be proud that when we were most in danger, when Eastern European states were suffering under Communist dictatorship, when we could not walk the streets without fearing a mugging, we did not waver in our commitment to the expansion of due process guarantees in the Warren court. If we had looked to the experience of the European Continent, we could have found all sorts of models for adapting our legal culture to cope with mass criminality. We could have followed the English in Northern Ireland with their Diplock proceedings that dispensed with the right to a jury trial. We could have heeded the Italian example, which circumvented procedural reforms in prosecutions of the Mafia. We could have decided to overhear conversations between lawyers and their clients, as did the Germans when they faced the threat of the Baader-Meinhoff gang. We could have abandoned our distinctively American principles, but we did not. We resisted the pressure to sacrifice liberty for the sake of security.

We resisted, that is, until September 11, 2001. With the attack against the twin towers and the Pentagon, we felt not only great sorrow but also shame in the face of the rest of the world. How could the world’s only super power allow this to happen? The most convincing answer is that we must be facing a new and more powerful enemy, one more powerful than the international Communist conspiracy, one more capable of great devastation than the spontaneous activities of large numbers of petty criminals.

The shock and disorientation in the months after 9/11 created an opportunity that had never existed in the 20th century. In two rapid-fire blows, at the end of October and in mid-November, 2001, the White House pushed the USA Patriots Act though a complacent Congress and then added the executive order establishing so-called military tribunals for trying suspected terrorists. Both of these measures represent a major constitutional reorientation. They are the rollback that conservative republicans yearned for against the Communists and against the street gangs, but then they could not succeed in the face of a strong liberal commitment to the Constitution. In the shadow of the twin towers’ burning it was hard for the liberals to say no – that is, for virtually everyone except Russ Feingold, the lone dissenter in the Senate.

The Patriot Act has had an impact in two radically different areas. First, it increases the possibility of wiretapping or searching the computer files of all of us. The only requirement for the warrant to snoop is to have a purpose, a significant purpose to gather intelligence about foreign agents in the United States. Second, it creates, for the first time, an institution of preventive detention, but applied, for now, only against foreigners. The Attorney General can have any alien suspected of terrorism arrested and detained for seven days, after which they must be either charged with a crime or deported. A loophole permits Ashcroft’s office to hold aliens even longer provided he certifies every six months that he regards them as a security risk. In the immediate aftermath of this law’s coming into force, agents of the executive detained some 1200 foreigners and, incredibly, refused even to inform the public of the precise number or of the names of the detainees. These men and women simply disappeared -- until they were deported or released as a matter of grace.

The President’s Executive Order of November 13 establishes special tribunals to try suspected foreigner terrorists. The judges are military judges, but the special panels otherwise
have little to do with the refined system of military justice designed for the men and women in
the military services. There is, of course, no jury; in contrast to the real military court, there are
no rules of evidence and no right of appeal except, as the order says explicitly, “to me,” that is,
to George W. Bush personally, or to the Secretary of Defense. The military judges under
executive control can impose the death penalty. Because they are so different from military units
and because they are so closely connected to the President himself, it would be better to call
them presidential tribunals.

Bush has not yet dared to invoke one his special courts but he constantly threatens to do
so. The last threat was against Zacharias Moussaoui. The government and the media have
labeled Moussaoui as the 20th highjacker but in fact there is no evidence of his involvement in
the plot. The government tried to prosecute him in federal court but then he sought to subpoena
a witness whom the government did not want to disclose. The government now threatens to
withdraw the case from federal court and invoke a more malleable presidential tribunal to
prosecute Moussaoui. A similar threat is pending against some of the fighters capture in the
Afghanistan war and held in limbo as detainees without legal rights at the Guantanamo Bay
military base.

1. Perceptions: What is the Threat?

Apart from the impact the impact on our concrete lives, the twin measures adopted after
9/11 have an enormous impact on the perceptions and the discourse that has emerged in the
United States and in the West about the military threat we face. The first problem is perceiving
the enemy – finding out who they are. In the Second World War, we could and did take all Axis
nationals to be our enemy. As German or Japanese citizens their property was subject to
forfeiture and all of them resident in the United States were subject to detention and deportation.
We even went so far as to detain several thousand Japanese Americans living on the West coast
for fear they would constitute a fifth column in the event of a Japanese invasion. Of course some
of those detained might have been loyal to Japan but it is also true that many Germans, Japanese,
and Italians living in their home countries were either indifferent to the war or secretly praying
for an Allied victory.

But in a war individual loyalties do not matter. The nature of the alternative legal order
called war is to divide the nations of the world neatly into three categories — ally, enemy, and
neutral, in other words: friend, foe, and legally on the fence. The classification proceeds not by
cities, not by neighborhoods, not by households, but by nations as a whole.

In the military-mind set that has taken hold after 9/11 we see ourselves as fighting an
undefined enemy. We assume that there is some group of people out there, loyal to Osama bin
Laden, who want to replicate the devastation of 9/11. We don’t know who they are or where
they are.

Think how it easy it was to declare war against the Japanese. We knew who they were
and where they were. There are many who see the Islamic world as engaged in a clash of
civilizations with the West. But because we respect religious liberty, we are inhibited about
taking all Muslims to be the enemy or even think of Islam as one of the factors defining the
enemy. In the immediate aftermath of 9/11 President Bush and Prime Minister Blair bent over backwards -- almost to the point of self-satire -- to praise Islam as a religion of peace.

Because we don’t know who the enemy is, we fluctuate between two extremes, both of which are reflected in the legal measures of the Patriot Act and the presidential tribunals. The broad, all-inclusive enemy consists of all foreigners. The line between citizen and alien has suddenly acquired great significance. Aliens are subject to immediate detention on suspicion, secret confinement, and to trial before Presidential Commissions. Citizens are exempt from all these measures of summary justice -- or, I should say, injustice. Aliens get the INS; Citizens get the Constitution. Of course, the situation is not so simple. But this was our first impression after 9/11. We thought additional discriminations against aliens would not harm us, the loyal citizens of the United States.

In the long run, however, you cannot define the enemy by that sometime s arbitrary characteristic called citizenship. We had to devise an enemy whose actions were closer to what we feared and therefore we found a word to bear the weight of all of our fears, precisely as we did with respect to the devious Communist in the 1950s or the mugger lurking in the shadows did in the1970s. I am speaking, of course, of terrorists.

Fear of terrorism lies at the center of both the Patriot Act and of Bush’s proposed tribunals. The only problem is that we are not sure exactly what terrorism is or who terrorists are. We assume that the 19 highjackers were terrorists. Suicide bombers in Iraq and in Israel are terrorists (though some people call them martyrs). Beyond these core cases, there is nothing but confusion. We have a federal statutory definition of terrorism, which focuses on acts of violence designed to intimidate the public or otherwise influence the government. The worst part of this and many other definitions is that they fail to account for 9/11 itself. The motives of the 19 highjackers seem to have been to kill infidels and to wreak symbolic as well as concrete damages on the commercial values of the West. This is not intimidation because there is no specific demand that the U.S. failed to meet. The fears of the West derive not just from the threat of further attack but from not knowing what we can to assuage the needs of those who want to kill us.

Drawing the proper conceptual boundaries of terrorism is far more difficult than meets the eye. Questions arise in at least six dimensions of the idea. Briefly, these are:

1. **The victims.** Must the victims be innocent persons? If they are members of the military, are the attacks of suicide bombers not acts of terrorism? Al Qaeda blew up the USS Cole and most people describe this as a terrorist attack. On the other hand, no one describes the Japanese surprise attack on Pearl Harbor as terrorism. Why not?

2. **The perpetrators.** Must the perpetrators be private parties, or could they be soldiers or agents of the government? There is no reason in principle to exempt military personnel except perhaps the desire to keep terrorism distinct from war crimes. Yet the Rome Statute establishing the ICC does not explicitly limit war crimes to actions by the military, and therefore the two concepts overlap, both covering the same ground as the separate offense of crimes against humanity. It turns out that we have many names for the same acts of violence.
3. The relevance of just cause. The most penetrating dispute in this area is whether the concept of terrorism should be defined exclusively by focusing on prohibited means or whether it the ends matter as well. If the ends matter, then a good end could justify the use of violence. For some the good end is terminating the practice of abortion in abortion clinics. For others, it is forcing the settlers on the West Bank to withdraw from occupied lands. For still others, the good end is fighting apartheid or the contamination of the environment. There is simply no denying that terrorism depends on perspective. In this respect it differs fundamentally from the classic crimes of homicide, rape, and theft. Even if you think these crimes serve an important ulterior purpose, every one would agree when they occur. The element of good cause is extrinsic to the definition of the crime but in the case of terrorism, the question of justified cause seems to be built into the very concept itself.

4. The element of organization. Can terrorists act by themselves? Or must they be part of an organization. On July, 2002, an Egyptian named Hesham Muhammed Hadayet opened fire on a line of people waiting to check in at the El Al counter in the Los Angeles International Airport. He killed two people and injured five. The FBI was unsure whether this was a terrorist incident. In the end they decided it was not because Hadayet had no known links with terrorist organizations. This is a revealing judgment because it suggests that some element of collective or organizational coordination informs our intuitions of terrorism. The question is why?

5. The element of theater. Crime often occurs in secret, but terrorism always take place in the public eye. Terrorists want to make a statement, they want to be seen, otherwise they cannot strike terror into the hearts of others. Not a single definition of terrorism -- of many bandied about on the statute books and in the literature -- recognizes either the element of organization or of publicity. Yet an adequate account of terrorism would have to include both of these.

6. The element of guilt. Even more significant than the factors of organization and publicity is the fact that terrorists feel no guilt. They are always convinced that they are doing the right thing. This explains why they are so dangerous and why we fear them.

To take a position on these six dimensions and use them to define a crime of terrorism would represent a very innovative approach law-making. For example, consider my preferred definition, combining positions on the six dimensions.

Terrorism is an act of unjustified violence outside the arena of warfare, perpetrated anyone against any victim, regardless of the justice of the cause. It is committed in public, by an organization with a well-defined chain of command, and in which the perpetrators are so convinced that they are doing the right thing that they suffer no guilt.

This is a peculiar way to define a crime. It combines normative and sociological elements. It might be the only proper way to capture terrorism but it is not a mode of legal drafting likely to appeal to conventional legislators.

If terrorism is too complex to be cabined by the conventional approach to defining
crimes, then are understandably tempted to go to the other extreme and focus on the broader enemy of all aliens. We end up in a contradiction of conflicting ambitions. On the one hand, we cannot articulate who the terrorists are or what the concept is, but we are convinced that we hate them and that we strike out against them. On the other hand, we know precisely who the foreigners are but we also know that it is irrational to hate them and persecute them.

At least until the spring of 2002, we thought that citizens were safe. They could not be touched by the detention provisions in the Patriots Act or by the threat of prosecution in a military tribunal. But in our confusion about the enemy, the bulwark of citizenship has suffering a grave breach. In April and May 2002 the government started arresting American citizens on American soil, claiming that they were enemy combatants and not entitled to any legal protection, not as suspects of crime, not as prisoners of war. These are the notorious cases of Yaser Hamdi and Jose Padilla, both American citizens, both Muslims, both now held incommunicado in American prisons. Padilla is supposed to be able to see a lawyer and Hamdi not. Neither can expect to have a trial anytime soon. They are treated exactly as though they were among the so called enemy combatants detained on the field in Afghanistan rather in the shadow of an American court that could afford them a trial based on due process of law.

We now have a jerry-built system of criminal justice that is probably one of the most self-contradictory in the civilized world. If you are citizen suspected of a crime you are entitled to a jury trial in a federal court. This is true unless the government suspects you of being a terrorist or agent of Al Qaeda. A foreign combatant who is kept offshore can be held without any right to a trial at all. This is also true, it turns out, if you are citizen arrested in the United States but you are suspected of being affiliated with Al Qaeda.

In this area there are no predictable rules of law. We live in a de facto state of martial law in which Bush Administration can potentially imprison any suspect at any time and any place. The sad fact of the matter is that despite the early official tolerance toward Islam, if you are neither an Arab nor a Muslim, you have less to fear.

2. Perceptions: What are the Liberties at Stake?

My dire description of state of criminal justice brings to the question: When we speak of balancing liberty and security, is this what we have in mind? Their liberty and our security? All foreigners suspected of terrorism, all Muslim citizens suspected of terrorism, all non-citizens captured in foreign military trials – all of them live outside the Constitution, under a minimalist regime of constitutional protections. They pay in their liberty and we supposedly gain in security.

Or is the conflict between liberty and security about something that potentially affects all of our lives on a regular basis? Are we concerned, for example, about taking our shoes off at airport check-ins? This is a minor inconvenience and it carries no stigma -- and no danger of being falsely accused of a crime. Those who choose to fly can bear the added cost in time and bother.

A better example of potential conflict would be the FBI’s trying to sleuth out clues of
terrorism by subpoenaing reading lists from libraries or books stores or scanning email for the use of incriminating words. Some people might be offended that the FBI could know what they read and whether they use provocative language on the Internet. But this is not likely to be the primary concern of those who believe in balancing liberty against security. First, because our rights to privacy have eroded for some time, particularly in the computer age. If we had been truly concerned about our privacy we would have fought back harder when it became clear to us the government could search our email records in ways that far exceeded their power over private papers and postal correspondence. The greater danger from government access to this information is not our sense of humiliation in being exposed or known about. It is rather the risk that the government will engage in reckless profiling on the basis of a few chance words or personal characteristics.

It may be that when people express concern about their security after 9/11 they are not concerned about their liberty at all, but about the simple fact of being able to live and work in a metropolitan area or indeed in any area without risking large-scale attacks against their lives. Security in this rudimentary physical sense is hard to measure. Even if there were a basic human right to be physically secure, how much security would we be talking about? Never to be hit by a car or injured by a kitchen appliance? No, that is not it, the relevant security must be the security against the recurrence of events on the scale of 9/11.

When innocent citizens are slaughtered, the government fails. Or at least we have good to think that the government has failed in its duty to protect us against homicidal threats. But does 9/11 represent a greater failure, per victim killed or injured, than, say, the Oklahoma City bombing? I think it probably does. The relevant features of terrorism, we should recall, are publicity, organization and moral conviction. McVeigh had moral conviction but no organization. Not many feared that his crime was but the first in a series. In aftermath of 9/11, however, we sensed a large organization behind the deeds and knew that the perpetrators were dedicated to their task. We were anxious about the many similar incidents that might follow. Now, two years after the event, we realize that another attack might occur but we do no know whether it will be tomorrow or five years from now.

Our sense of time is under revision. The response no longer appears so urgent. There is no doubt that we now face a major adversary in the world, but we need time to figure out exactly what this conflict is about and how best to respond. Bombing foreign countries has not been particularly effective so far. And nor, I will argue, have we accomplished much by talking so much about balancing liberty against security.
3. The Discourse of Balancing

The Bush Administration could move decisively in the aftermath of 9/11 because it encountered a legal and political culture with little commitment to constitutional principles. We should not forget that Bush himself had just won the election with the help of a Supreme Court that could hardly mount a consistent argument in favor of its decision. The dominant legal culture favors pragmatic balancing and contextualized trade-offs. These instincts were immediately evident in the quotes attributed by the media to leading scholars of constitutional law. Laurence Tribe argued in *The New Republic* that due process was the process due under the circumstances, and now after 9/11 the circumstances had changed. Civil liberties, he said, included a right to be secure so therefore we have to balance two civil liberties against each other, liberty and security. Cass Sunstein testified before the Senate Judiciary Committee that a 1942 wartime case, *Ex parte Quirin*, established the constitutionality of the presidential tribunals. It did not impress him that we were not officially at war with terrorists all over the world, and that even had we been, the government would have been loathe to admit it because they were not prepared, as we later discovered in Guantanamo Bay, to treat detained combatants as prisoners of war protected by the Geneva Conventions.

Of course there were many who tried to cooperate with the administration in the hopes of improving the procedures offered in the presidential tribunals. But there were few who were willing to say, point-blank, that this was a violation of the Constitution and could not be tolerated. One of few voices in the media to be clear-headed was William Safire. By and large, the universities -- like Congress and the Democratic Party -- simply acquiesced.

From the very beginning the government tried to trade on the ambiguity between crime and war. They would not commit themselves on the issue whether the attack on the twin towers was more like the Oklahoma City bombing or more like Pearl Harbor. In the beginning the administration wanted it both ways, crime for purposes of seeking justice, war for purposes of justifying the massive use of deadly force. When it came time to decide what to do with the prisoners in Guantanamo and now in Iraq, it turns out that they want neither. They will not treat their detainees as suspects of crime; nor will they follow international law and treat them as POWs.

This ambiguity, coupled with the pervasive willingness to balance interests, has given the government a range of repressive options that they have not had since Lincoln suspended habeas corpus during the Civil War. The genius of Bush’s proposing his own back-office courts but not implementing the order is that he can probe the attitudes of the critical public without triggering a test case in the courts. The conservative Republicans found that the country not only would tolerate repressive measures, it gave the President unprecedented approval ratings. When the congressional elections came around in November 2002, the Democrats avoided addressing both the war and the internal repression. They said nothing to call in question the legitimacy of the President’s actions.

Of all the clichés marshaled in favor of the President’s policies, the most misunderstood is the claim: “The Constitution is not a suicide pact.” This slogan crept into Supreme Court
opinions after World War II, when Justice Jackson worried out loud in a dissenting opinion that the Court had gone too far in recognizing the free speech rights of a Nazi hate monger in Chicago. Having just returned from service on the Nuremberg tribunal Jackson was afraid that tolerating hate speech could lead to fascism in America.

Since then -- contrary to popular belief -- the judges who invoked the phrase have done so in order to protect rather than restrict civil liberties. In 1963 Justice Arthur Goldberg wrote that the Constitution was not a suicide pact, but in the case before him he was resolved to protect the rights of an American threatened with loss of citizenship for avoiding the draft.

As a frequently-cited writer of articles and books, Richard Posner seems to favor a spineless accommodation with executive power. He is willing to endorse whatever is efficient and he trusts the experts to tell him when the benefits outweigh the costs. But as a judge he hews to the straight and narrow of constitutional rules. In 1999 he declared a routine Indiana roadblock provision unconstitutional because it violated the Fourth Amendment prohibition against unreasonable searches and seizures. This was an easy case. However efficient or reasonable it might be for the Indiana police to conduct their roadblock stops, the law laid down in past decisions was clearly opposed. But Posner also fended off his possible critics with the now banal defense: "The Constitution is not a suicide pact. But no such urgency has been shown here."

For the pundits-- even for Posner-as-pundit-- the situation seems always to be so urgent that a compromise with liberty is required. Alan Dershowitz caused a stir last year when he championed the use of torture when necessary to locate "ticking bombs." His reasoning was the banal point that sometimes the benefit outweighs the costs. The academic experts typically prefer contextualized judgments about economic efficiency. They all willing to roll with the latest spin. Fortunately this is not yet true, at least not in general, of our judiciary. Most judges have been willing to stand up to executive and legislative power and affirm the principles that define our constitutional culture.

Last year a federal district judge Harold Baer declared unconstitutional a New York prohibition against wearing masks in public places. He held the statute to be in violation of the First Amendment's guarantee of free speech. Judge Baer bowed in ritual obeisance to the slogan that the Constitution is not a suicide pact, but then added this graceful conclusion: "the rational and measured exercise of jurisprudence must be zealously sustained even in time of war, including the war on terrorism."

Beware, then, of discussing suicide pacts out of context. The only judges who discuss them are prepared, in the specific cases, to uphold civil liberties. Unfortunately, these days, too many judges are willing to submit to the fears of the moment and defer to authority of the President. It is hard to believe that our judges came to the results they did in the Hamdi and Padilla cases, that they actually concluded that an American citizen can be held behind bars indefinitely, without being charged with a crime, without being treated as a prisoner of war, so far as the government can manipulate the situation without having access to council. They in effect have endorsed ad hoc suspensions of the writ of habeas corpus and permitted the government to apply martial law to its own citizens. It is hard to believe that the army, a branch
of the executive, can run a military base in Guantanamo Bay, convert the base into a prison for persons captured in Afghanistan, and then pretend that the Constitution does not apply to their activities. And again the courts comply with this outrageous situation, as though it should be thinkable that the federal government may act abroad without being restrained by the very document that established what it is and what it is allowed to do.

4. Lessons from Criminal Law

The issue that we are debating here has long been familiar to criminal lawyers. The question is whether you imprison suspects of crime because, although they are innocent of the crime charged, they have unquestionably done something else. A good example is Demaniuk as he was charged in the Israeli courts with having been a specific murderer at Sobibor. It turns out that there was little to support this charge but a great deal of evidence, indeed proof beyond a reasonable doubt, that he was at the camps and that he participated in the Holocaust. The Israeli Supreme Court decided that the rule of law permitted only one result – an acquittal. The public was outraged, as publics are always in these cases, because their guiding assumption is that the man had committed some heinous crime, whether charged or not, and he should be locked up. Period.

The struggle in criminal law has always been to keep our focus on the particular case -- to look exclusively at the man or woman in the dock. Did this defendant do it? Is he or she culpable for her actions? These are the questions that inform justice. But the temptation is always to cast the judicial glance more broadly and encompass the good of society in considering the guilt of innocence of the suspect. Then the usual refrain is heard: we must balance the security of society against the liberty of the suspect. Perhaps guilt in the individual case is not so important if the suspect is known to be dangerous.

The conflict between security and justice in the criminal law reaches its apotheosis in the debate about strict liability as opposed to moral culpability as a necessary condition for conviction. The common law has traditionally been wary of a full embrace of the culpability or the guilt principle, as it is called in Continental Europe. This reflects an underlying commitment to utilitarian thinking in criminal justice, compensated, perhaps, by a strong commitment to procedures that protect the interests of the accused. Thus, for example the common law does not take issues like mistake of law as seriously as an excuse as might be the case in many Continental legal systems, including Germany, Italy, Spain, Japan, and Korea. Common lawyers committed to justice in the criminal law are committed to reform the principles of their criminal law to rid them of their implicitly utilitarian character.

John Rawls undertook to establish the same principle of lexical ordering in his master work, *A Theory of Justice*. He would not sacrifice liberty for the sake of a better economy or for the sake of social goods. Liberty came first, without trade offs. In the same spirit, the first principle of criminal justice should be to do justice to the accused, both by holding fast to constitutional principles and to imposing punishment when it is deserved. The rights of the accused are not subject to being traded off because so doing will enhance the security of potential victims of similar crimes. Herein lies a message for the approach that we should take today toward the Constitution.
As the Constitution represents our accumulated wisdom over time, we, the present generation, have no authority to compromise its integrity. Its principles come first. They are lexically prior to considering measures that will enhance public safety and welfare.

Lincoln’s case against Southern secession was based on the principle that the American nation had become so entrenched in the course of “four score and seven years” that no generation had the authority to secede and thus overrule the judgment of history. So it is with the Constitution. Its principles were cast with a long view. No particular generation of politicians or judges has the authority to subvert it.

Preserving our Constitution in a time of stress requires an attitude that is akin to love. We must love the Constitution as a lover holds fast to her beloved. We must take the principles of our liberty as the beginning and the end of our political lives. They can no more be traded off than the interests of a loved one can be sold to the highest bidder. The Constitution is not a security pact, but nor does it permit us to debase ourselves by putting it on the auction block of competing values.

If we love the Constitution and are loyal to it, then we can understand what Benjamin Franklin meant when he said, “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”