Constitutions, Democracy, and the Rule of Law
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Liberty and Security Under Stress

A Uniquely Dangerous Time

George Fletcher: Mr. Chairman, fellow panelists, ladies and gentlemen, good morning. My subject is entitled "Liberty and Security Under Stress." 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 have a quantity and magnitude different from what we have known since World War II. The conclusion is that we must curtail civil liberties in order to secure our homeland against terrorist threats. This is hardly the first time since World War II that we have perceived great danger. The first perceived threat in the postwar period was the fear of communism. With Eastern European countries collapsing, we thought that we too might suffer an internal revolution leading to knocks on the door in the middle of the night. The remedy was supposedly a form of loyalty test and security clearances known as McCarthyism. Senator Joe McCarthy sought to expose one communist after another to ensure our safety. And these exposures proceeded often on the basis of rumor and association. His campaign collapsed when he went after members of the United States Army, and their lawyer, Joseph Welch, stood him down with a single question: "At long last, Senator, have you left no sense of decency?" That question brought us to our senses. The country held firm against those who wanted to use the fear of communism to undermine the legal projections of ordinary citizens.

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 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. And in those days, we heard the recurrent conservative cry
that we were too soft on criminals and that we must sacrifice civil liberties in order to ensure 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." When I refer to conservatives, by the way, I mean no disrespect toward libertarians or toward Burkian traditionalists. The particular vice I wish to highlight is class warfare between insiders and outsiders. Between those who think of themselves as the "good" citizens and compare themselves with others who are thought to be outsiders and the threats to law and order. The liberal instinct in criminal justice is to deny the distinction between insiders and outsiders and to insist that when it comes to the preservation of liberty we are all equally at risk.

And a quip that made the rounds in the 1980s, a conservative is a liberal who has been mugged. A liberal is a conservative who has been audited. Though we faced the current assertion of difference between insiders and outsiders, we 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 waiver in our commitment to the expansion of due process guarantees in the Warren Court. We resisted the pressure to sacrifice liberty for the sake of security.

We've resisted, that is, until September 11, 2001. With the attack against the Twin Towers and the Pentagon, we felt not only great sorrow but we experienced shock and disorientation in the aftermath of stench and smoke. An opportunity arose that had never existed in the twentieth century. In three rapid-fire blows from the end of September to mid-November 2001, the Justice Department and the White House brought about a basic redefinition of governmental power. First, knowing what hit us but not who hit us, the Attorney General rounded up some 1,200 suspects to see whether they could learn anything about terrorism in America. The department refused even to inform the families or the public of the names of the detainees. The administration eventually released, or deported, all of those suspected but without having found a single person to prosecute for terrorist acts. Preventive detention on a mass scale became the new norm.

Second, the administration pushed the United States PATRIOT Act through a complacent Congress. And third, the president issued an executive order establishing so-called military tribunals for trying suspected terrorists. Both of these latter measures represented a major constitutional reorientation. The PATRIOT Act in the area of surveillance, investigation. And the military tribunals in the area of trials.
They represent the rollback that conservative insiders yearn for against the communists and against the petty criminal outsiders. In the fear of the moment, it was hard for the liberals to say no. That is for virtually everyone except Russ Feingold, the only dissenting vote in the Senate. The PATRIOT Act is the primary effect of increasing the possibility of governmental surveillance over computer files, telephone conversations, and reading material in libraries and bookstores.

The president's executive order of November 13 establishes special tribunals to try suspected foreign terrorists. The judges are military judges, there's no jury, and no appeal to civilian authorities. To call these military tribunals is an insult to military justice. A system that has now been refined and developed into a respectable system of procedures guaranteeing due process for people in the military. Because these special courts are so closely connected to the president himself, it would be better to call them presidential tribunals.

President Bush has not yet dared to invoke one of his special courts but he constantly threatens to do so. The latest threat is against Zacarias Moussaoui. The government tried to prosecute the alleged twentieth hijacker, but then he sought to subpoena a witness whom the government did not want to disclose. Because the government would not produce the witness—and, of course, Moussaoui has a constitutional right to confront the witnesses against him—the trial judge dismissed the charges that could've been refuted by the missing witness. Those are all the serious charges, including those that carried the death penalty.

The government now contemplates shifting its case to a presidential tribunal. Or worse, just holding Moussaoui in jail in preventive detention as an enemy combatant. Similar threats are pending against some of the fighters captured in Afghanistan, now held in limbo as detainees at the Guantanamo Bay military base without access to lawyers or an acknowledged right to legal proceedings to determine whether they are properly confined.

**Perceptions: What Is the Threat?**

Apart from the impact on our concrete lives, the twin measures adopted after 9/11 have had an enormous impact on the perceptions and the discourse that has emerged in the United States and in the West about the military threat that we face. The first problem is perceiving the enemy outsiders, defining who they are. That is new. With the communists, we knew who the muggers were supposedly supposed to be. But who is the enemy today? 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 residing 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 that they would constitute a fifth column in the event of a Japanese evasion. No one could say that all these people were disloyal. But then, nor were all the Japanese in their homeland, or all the Germans in their homeland, hostile toward the United States.

In a war, individual loyalties do not matter. Only three categories matter: friend, foe, and neutral. The classification proceeds not be cities, not by neighborhoods, not by households, but by nations as a whole. Then we knew who the outsiders were, but today, we do not. Many 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 or all fundamental Muslims to be the enemy. Or even to think of Islam as one of the factors defining who the enemy is. Particularly, I thought it was very amusing that both Prime Minister Blair and President Bush bent over backward in the month after 9/11 to praise Islam as a religion of peace. I haven't heard those remarks lately. But in the beginning, it was obvious that no one. We were protesting too much. People did, in fact, want to identify the fundamentalist Muslims as the enemy but they didn't dare say so.

Our default position as a result, is to fluctuate between two extremes, both of which are reflected in the triple measures taken by the administration after 9/11. At one extreme, the all-inclusive enemy consists of all foreigners. The line between citizen and foreigner has taken on new significance. Aliens are subject to immediate detention on suspicion, secret confinement, and to a trial before a presidential commission. Citizens are exempt from all these measures of summary justice. Aliens get the INS, citizens get the constitution. At least this was our first impression after 9/11. We did not think that discrimination against aliens as outsiders would harm us, namely the insiders, the citizens of the United States. And let me clarify that point—this persecution of foreigners is limited to administrative proceedings. It doesn't apply in ordinary criminal trials. But part of the tactic after 9/11 has been to avoid the system of criminal justice, circumvent it as much as possible.

In the long run, you cannot define the enemy by that sometime arbitrary characteristic called "citizenship." We have to devise an enemy whose actions were closer to our insecurities; therefore, we found a word to bear the weight of all of our fears, precisely as we did with respect to the devious communists hiding under the bed in the 1950s or the mugger lurking in the shadows in the 1970s. I'm speaking of course of terrorists.

Fear of terrorism lies at the center, both of the PATRIOT Act and 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 hijackers were terrorists. Suicide bombers in Iraq and in Israel are terrorists, though some people call them martyrs. Beyond these court cases, there's 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 even for 9/11. The motives of the 19 hijackers 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 as the statute requires because there is no specific demand that the United States failed to meet. The fears of the West derive not just from the threat of further attack, but from not knowing what we can do to assuage the needs of those who want to kill us.

**The Conceptual Boundaries of Terrorism**

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

- **Number one**, who are the victims? Do the victims have to be civilians? 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 described this as a terrorist attack. On the other hand, no one describes the Japanese surprise attack on Pearl Harbor as terrorism. Why not?

- **Two**, the perpetrators. Must the perpetrators be private parties or could they be soldiers or agents of the government? There's no reason and principle to exempt military personnel, except perhaps the desire to keep terrorism distinct from war crimes. This, by the way, is a major point of division between the western states and the association of Islamic states. The West insists that state terrorism be excluded from any UN definition. The Islamic states insist on including state terrorism as part of the concept.

- **Point three**: the relevance of just cause. The most controversial issue in the definition of terrorism is captured by the slogan, "One person's terrorist is another person's freedom fighter." The problem is whether a good cause justifies the use of horrendous means. The Islamic states think that it does. And again, this group at the UN finds itself at odds with the dominant view in the West. Those who opt for terror always believe their cause is just. Sometimes it is, sometimes it is not. No American would be happy about branding the Boston Tea Party an act of a terrorist aggression against British property. Nor would supporters of the union and the American Civil War readily label General William Tecumseh Sherman's destructive march across Georgia as a campaign of terror against the southern population, which it was. Yet these acts of violence
against property and people do not meet the conventional, or if they do meet the conventional types of terrorism, but people balk at the implications.

Now I want to turn to three other factors that are rarely discussed in thinking about terrorism, but I think that they are actually more influential and important than the three that I've already mentioned:

- The fourth is the element of organization. Can terrorists act by themselves or must they be part of an organization? On July 4, 2002, an Egyptian named Hasham Mohammed Hadayet open fired on a line of people waiting to check in at the El-Al counter at the Los Angeles International Airport. Hadayet killed two people and injured five. He was then shot, himself, by people at the airport—security guards. The FBI investigated but they were unsure whether this was a terrorist incident. In the end, they decided it was not because Hadayet had no known links with terrorist organizations. He was a loose cannon. This is a very revealing judgment because it suggests that some element of collective or organizational coordination informs our intuitions about what terrorism is. Why?

- Fifth element: the element of theater, never discussed. Crime often occurs in secret but terrorism always takes 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 in the statute books and in the literature, recognizes either the element of organization or of publicity. Yet an adequate account of terrorism requires that we consider both of these because that's the only way to explain why terrorism strikes terror in the hearts of people.

- The sixth element is very intriguing. It's 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. Suppose we tried to define the terrorist dimension of 9/11 with this formula: "A violent organized and public attack by private parties on other civilians without guilt, regardless of the justice of the cause." The problem is that each of these six dimensions admits of counterexamples.

Sometimes the victims are military and the perpetrators are states. Sometimes the cause appears to be just. And one person, with speaking to the issue of organization, one person with enough weapons but no organization might wreak terror, for example, by sending out letters laced with anthrax. That last point also bears on the issue of publicity. And letters laced with anthrax do not strike terror by being a public statement. They are a series of private statements. And
similarly, there might be many terrorists who, in fact, feel compunction or have bad feelings about what they take to be their necessary political actions.

All of our six dimensions of terrorism admit of counterexamples. But this should not be so surprising. Relationships of family resemblance are like this. Family relatives might share many characteristics—height, skin color, hair color, various physical features. Some members of the family might have some of these characteristics and not others. Others will have other characteristics, enough of the same. But there will be a sufficient commonality of shared characteristics to recognize members of the same family.

This is the way to understand terrorism; as a matter of family resemblance, as a conjunction of factors, each of which admits to some counterexamples. But this is hardly the way to define a crime in a federal statute. If terrorism is too complex to be contained in legal language, then we are understandably tempted to go to the other extreme and focus on the broader enemy, namely, all aliens.

We end up in a contradiction of conflicting ambitions. On the one hand, we cannot articulate precisely who the terrorists are or what the concept is. But we are convinced that we hate them and that we must 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 unjust to 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 PATRIOT Act, or by the threat of prosecution in a military tribunal. But in our confusion about the enemy, the bulwark of citizenship suffered a great reach. 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 did not. But neither can expect to have a trial anytime soon.

They are treated as exactly as though they were among the so-called enemy combatants retained on the field in Afghanistan, which Hamdi was, rather than in the shadow of an American court that could afford them a trial based upon 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 a citizen suspected of a crime, you're entitled to a jury trial in a federal court. This is true. And if you're a foreigner living in the United States and you're suspected of an ordinary crime not related to terrorism you have exactly the same rights. And this is true unless the government suspects, that is, when you bring up the subject of terrorism, it creates an entirely different line of potential prosecution. You can be subject to the military tribunals, you can be subject to special surveillance under the PATRIOT Act.
A foreign combatant who was kept offshore can be held without any right to a trial at all, and this is true, it turns out, if you are a citizen arrested in the United States but you’re 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 marshal law in which the Bush administration can potentially imprison any suspect at any time. The sad fact of the matter is, that despite our early official tolerance toward Islam, if you are neither an Arab nor a Muslim, you have less to fear.

**What Are the Liberties at Stake?**

My dire description of the state of criminal justice brings us to the question, "When we speak of liberty and security, what do we have in mind?" Their liberty and our security? All foreigners suspected of terrorism, all Muslim citizens suspected of terrorism, all noncitizens captured in foreign military trial in foreign territory, all of them live outside the protections of the constitution. They live under a minimalist regime of constitutional projections. They pay in liberty and we 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 off our shoes at airport check-ins? I don't think so. This carries no stigma. It's a minor inconvenience. We who are privileged to be able to fly can bear it. A better example of the potential conflict would be the FBI's trying to sleuth out clues of terrorism by subpoenaing reading lists from libraries or bookstores or scanning e-mails for the use of incriminating words or reporting, demanding reports from universities about foreign students. Some people might be offended that the FBI could know what we read and whether we use provocative language when we do searches on Google. 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 really been concerned about our privacy, we would have fought back harder when it became clear to us that the government could search our e-mail records in ways that far exceeded its power over private papers and postal correspondence. The greater danger from governmental access to this information is not our sense of humiliation, it's rather that the government will generate profiles on the basis of the acquired information and that these profiles will lead to unfortunate consequences in a totally irrational way.

Security is hard to measure. Even if there were a basic human right to physical security, of course there's no right to security mentioned in the constitution. If there were a basic right to physical security, how much security would we be talking about? Never to be hit by a car? Never to be injured by a kitchen appliance? That's almost laughable. The relevant security that we must be
concerned about is the right not to be killed by those who hate us collectively and seek to do us damage on a collective basis.

The Discourse of Balancing

Remarkably, the Bush administration has induced a generation of scholars and commentators who believe that we should secure this form of security by compromising our liberty. Unfortunately, time prohibits me from giving you all of the examples, but my general thesis is that in the face of this enormous crisis in our constitutional structure, we in the law schools have not behaved well; we have not acted with courage. On the contrary, the general tendency has been to say, "Let us compromise, let us balance, let us seek pragmatic solutions, let us gain access to the halls of power by recognizing the authority of the government to proceed and to make suggestions to ameliorate here or to ameliorate there."

From the very beginning, the government tried to trade on the ambiguity between crime and war. They would not commit themselves on the issue of 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 they want neither. Neither crime nor war. They will not treat their detainees as suspects of crime, nor will they follow international law and treat them as POWs.

Yet, this ambiguity coupled with the pervasive willingness to balance interest, security against liberty, has given the government a range of repressive options that they have not had since Abraham Lincoln suspended the writ of habeas corpus in the Civil War. The genius of Bush's proposing his own back office courts, the presidential tribunals, has been the fact that he has not implemented the order because if he had implemented the order there would've been test cases in the courts and he probably would've lost. But instead, by taking these measures and not enforcing them, the administration has generated a discourse of balancing interests, of balancing liberty against security, that establishes that they can proceed so long as they make the case to the public that in this situation or in some situation the value of a security is more important than the value of liberty.

The Constitution Is Not a Suicide Pact

Of all the clichés marshaled in favor of the president's policies, the most understood is the claim that the constitution is not a suicide pact. Of course, it's not that the constitution is not a suicide pact—our purpose is to live well under the constitution, not to die under the constitution. But a careful study of all of the opinions in which the court has used this phrase reveals that they have
something in mind that is fundamentally different from the way this phrase is used by commentators, pundits in the media.

In every case in which the court has said the constitution is not a suicide pact, they've also gone on to reason in this case there's a conflict between civil liberties and the power of the government. But in this case, the citizen wins. Sometime in the future there might be a crisis in which security will outweigh the interest in liberty. But right now, when we come to a test case, a concrete case, the citizen wins. That's in those cases where they've mentioned this phrase.

I think that we can gain a great deal in this debate by drawing on lessons taught in the early work of the early philosopher John Rawls. Rawls developed the idea that the principle of liberty must take logical precedence over our interest in welfare, including our interest in security. And the reason it must take logical precedence is that when we begin to compromise, without knowing whether we will be winners or losers, if we were deciding fairly, would we accept these compromises? Would we accept the indignities and the injustices that are inflicted upon foreigners today, not knowing whether you would be a citizen or a foreigner, would you accept that system? And the answer is you'd have to be a fool to accept that system. If you were thinking fairly and without bias and without knowing who was going to win and who was going to lose, you would have to be a fool to accept the system that we now have today.

I think there’s much to be gained as well from a historical understanding; the traditional Burkian sense of the constitution and what it means. 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 succession was based exactly on this traditionalist argument. The American nation had become so entrenched in the course of "Four score and seven years . . . " that no generation had the authority to succeed and thus override the judgment of history. So it is with the constitution today. Its principles were cast with a long horizon. No particular generation or politicians or judges has the authority to subvert it. Preserving our constitution in the time of stress requires an attitude akin to love. We must see our national charter as the horizon of meaning in our political life. It must be the beginning and the end of our political thought. If we love the constitution and we 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."