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Reconciling Civil Liberties and Security

Notes from the comments of Paul Rosenzweig, Joseph Onek & Timothy Edgar

Paul Rosenzweig began his remarks by suggesting that we are only at the beginning of a process of trying to reconcile civil liberties and security, and it is unclear where this process is going to lead. So far, a number of security programs and policies have been somewhat prematurely adopted and have short-circuited. Mr. Rosenzweig referenced his paper, *Principles for Safeguarding Civil Liberties in an Age of Terrorism*, and noted that even at a very general level, there is, in fact, a fairly well developed consensus about how to reconcile civil liberties and security.

Mr. Rosenzweig argued that this generalized agreement about how to reconcile civil liberties and security breaks down for three reasons when it comes to implementing and applying new security policies. First, because different people evaluate threats differently. Second, because there is no longer confidence in the effectiveness of new security policies and their ability to act as a panacea in the fight against terrorism. Third, the civil liberties vs. security debate tends to be perceived as a zero sum game, in which both ends cannot be achieved simultaneously.

Mr. Rosenzweig outlined two constructive solutions to the civil liberties vs. security dilemma:

> **I. Oversight.** There is a significant role for the legislative and judicial branches in providing checks and balances, and in acting as a bulwark against the executive branch. Traditionally, the legislative branch, with its powers of oversight, has been used as the principal check. During the 1960's however, Congress became much less aggressive in its oversight. The judiciary substituted for this to a certain extent by becoming far more active in restricting Congressional and executive activity. Recently, there has been a backward trend towards the Congressional model of oversight. This trend has been driven in part by the fact that the judiciary has less power and influence in the war against terror. For example, enemy combatants fall outside of the judiciary's scope of action. Moreover, judges are relatively ill placed to make foreign policy and national security decisions. Therefore, it is important to both enhance and demand more from the legislature. While the legislature was perhaps too accommodating in the immediate aftermath of September 11th, this situation seems to be changing. The legislature has begun to pay more attention to security issues - evidenced by an increased number of hearings and legislative proposals.
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> Mr. Rosenzweig suggested that there are two answers to the dilemma of how to grant authority without fearing that this authority will be abused: 1) to not grant increased authority at all, and 2) to empower the executive while also providing oversight. Through the exercise of oversight it is possible to avoid fear becoming a strait jacket, and to enhance our ability to fight terror.

II. Technology. There are a variety of technological means by which to enhance security at the same time as protecting civil liberties, for example, encryption technology. Currently, the government can secure a large amount of information about individuals, much of which is readily accessible through databases, etc. Through a 'one-way hash' and encryption, technology can ensure that information is still accessible but is not attached to an individual's personal identifying characteristics. Personal identity can therefore be kept separate to pattern data that is relevant to criminal and terror investigations. The information can then be arranged so that only judicial officers can authorize access to personal identifying characteristics.

Mr. Rosenzweig concluded that there are two competing conceptions of privacy: 1) that personal conduct should be completely shielded from view – a concept we can ill afford in an age of terrorism, and 2) that an individual's conduct should be subject to scrutiny only in an anonymous way - that is, it should only be exposed as belonging to a specific individual if there is some reason or probable cause. Through the use of legal structures and technology it is not now feasible to put this second concept into practice.

Joseph Onek agreed with Paul Rosenzweig that the civil liberty vs. security dilemma is not a zero sum game. The problem is rather that the goals of national security have yet to be adequately defined. Donald Rumsfeld's recently leaked memo expressing concern that more terrorists are being recruited than the U.S. is either capturing or killing, clearly demonstrates how the war against terror is a war for hearts and minds. The war against terror is therefore very different from the Second World War, in which bombing and occupation secured victory for the U.S. in Japan and Germany. Obviously, the U.S. is never going to be able to occupy the entire Islamic world - currently the U.S. barely has a presence outside of Kabul in Afghanistan. Therefore, there is a need to *deter* young men or women from terrorism. If we fail to do so, there will be grave consequences.

Mr. Onek suggested that our treatment of Islamic people within the U.S. and in Guantanamo Bay is therefore crucial. He argued that the legality of holding suspects in Guantanamo Bay is beside the point. The point is that this policy has not been smart in terms of deterring people from terrorism. In contrast to a court martial, suspects held at Guantanamo Bay have no route to civilian appeal, certain materials can be seen only by the defense counsel, and all conversations between private counsel and their client can be listened to. Such measures are unnecessary and were never enacted, for example, against the Viet Cong in Vietnam. Further, in the opinion of the British courts, the U.S. has violated international law in Guantanamo Bay because of the lack of hearings and due process. If hearings had been held, and if President Bush had not said that those held at Guantanamo would not be treated as prisoners of war, the image of Guantanamo Bay abroad would likely be very different. By creating a system in Guantanamo Bay expressly to avoid civilian review and Habeas Corpus, the U.S. has created a system without legitimacy. Hence, Guantanamo Bay amounts to a self-inflicted wound on the U.S. Mr. Onek argued that the basic question underpinning security policies should therefore be, 'how do such policies play in the rest of the world?' For example, when the arrests of immigrants in the U.S. are broadcast around the world, they likely do more harm than good.

Mr. Onek concluded that there is, in fact, no conflict between national security and civil liberties. The treatment of the Islamic population in the U.S. has had an adverse impact only to the extent that this treatment has been perceived to be abusive. If we reverse this treatment and these perceptions, the U.S. is likely to be far better off. Alienating the immigrant population makes little sense when there is a real need for their cooperation in the war against terror. For example, immigrants' translation skills are crucial yet the U.S. seems to have turned off many people who could have provided these services. Finally, separation of powers and the structure of government have been undermined by executive unilateralism. Congress has exerted little influence over the Patriot Act, the designation of enemy combatants, or suspension of Habeas Corpus. Currently, there are hopes for renewed and more vigorous Congressional oversight. Yet, there is still a perception that opposition to homeland security is unpatriotic and this makes it extremely difficult for Congress to step up to the plate. Further, while it is true that the courts are perhaps not the best decision makers regarding military and foreign policy, they are however, the bulwark for individual liberty.

Tim Edgar focused his comments on the role of the courts and the judicial branch. Mr. Edgar suggested that a theme has emerged of the Administration trying to minimize or eliminate the role of the courts in relation to homeland security. Yet he argued that there is a need for far more checks and balances and greater oversight on the part of the courts. Moreover, this oversight must be meaningful in terms of the standards being applied. Judges should not just be rubber-stamping but be given a more substantive role.

Mr. Edgar argued that while much attention has been paid to the issues of enemy combatants and Guantanamo Bay, more attention should be paid to domestic issues such as the USA Patriot Act and immigration. Mr. Edgar noted that the USA Patriot Act and the related use of criminal law and surveillance have significantly changed legal standards and resulted in a great deal of confusion about the definition of the Patriot Act. Mr. Edgar explained that while the Patriot Act is complicated, dense and technical, about seventy to eighty per cent of its contents are relatively uncontroversial. Indeed, it would have made sense to have divided the Act up into two distinct parts - controversial and uncontroversial - before submitting it to the legislative process. The Administration did not do so however, for fear that the legislation would not pass.

Mr. Edgar concluded that the drive to amend and change the Patriot Act has encouraged and developed relations among many different and disparate groups. For example, conservative leaders and conservative organizations like the American Conservative Union, Free Congress Foundation, the religious right and groups such as Americans for Tax Reform have all begun to work together. These groups have developed a Security and Freedom Enhanced Act, or SAFE Act, which aims to make discrete and moderate changes to three controversial areas of the Patriot Act. In particular, it seeks to restore standards and safeguards on the library records and national security letters.