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# Ordered Liberty and the Homeland Security Mission

By Judge James E. Baker



The last issue of this magazine included my stump speech on “The Constitutional Duty of a National Security Lawyer.”<sup>1</sup> The keynote headers can be summarized as follows:

- As a result of September 11, we have experienced what Harold Lasswell referred to as the “socialization of danger,” the sharing throughout society of the physical risk of war.<sup>2</sup> This is something new for America. As a result, we must reconsider the meaning of national security.
- National security means not only physical security, but also preserving our way of life, which means a society based on the rule of law.
- National security lawyers, to include military lawyers, contribute to our physical security and our way of life. As a consequence, this is an important time to be a lawyer, for so much of who we are, and how we will provide for our security, is the product of law, and foremost the Constitution.
- Military lawyers appreciate this better than most, because they swear an oath of allegiance to the Constitution and not to a person or a political or military regime. This is an essential part of the U.S. military’s code of honor and a principle reason that the U.S. military is the finest in the world.

I was subsequently asked to take this discussion a step further in the context of homeland security.<sup>3</sup>

I will start with a brief discussion of the threat because the threat of terrorism remains the predicate for any serious discussion of where we draw our legal lines. I will then suggest a legal model for looking at questions of homeland security called ordered liberty. The model is simple. First, given the nature of the threat, the executive must have broad and flexible authority to detect and respond to terrorism – to provide for our physical security. Second, the *sine qua non* for such authority is meaningful oversight. By oversight, I mean the considered application of constitutional structure, executive process, legal substance, and relevant review to decision-making — all of which depend on the integrity and judgment of government lawyers.

Meaningful oversight protects our way of life. It also protects our security by helping decision-makers get it right on the front end of a decision, rather than investigating on the back end. This model does not detail whether civil service rules should apply to the Homeland Security Department, or whether military commissions are a good idea. However, my comments will suggest some principles and lessons learned that can be applied to such questions. In the process, I also hope to debunk two false dichotomies: first, that security and liberty conflict; and, second that oversight and security conflict.

## I. The Threat of Terrorism

Let me start with some common footing regarding the threat of terrorism. The threat is real. It is lasting.

It is potentially devastating. And, it is local. Judith Miller captured all of this in her book, *Germes*, in asking: "Is the threat of germ weapons real or exaggerated? In most conditions, a five-pound bag of anthrax could kill many people, but not as many as half the inhabitants of Washington, D.C."<sup>4</sup>

As Secretary of Defense Rumsfeld and others have said, the margin for error is small. If this were not the case, the United States would not have launched a controversial missile strike on the Al-Shifa plant in Sudan to prevent the possibility of Al-Queda acquiring chemical weapons. And there would be no need to carefully consider how we maintain liberty and security in a democracy. Understanding the threat, I think it is clear that while any specific grant or assertion of authority may be ill-founded, as a general matter, executive actors need broad and flexible authority to address terrorism.

First, speed is critical in the Weapons of Mass Destruction arena. The Dark Winter exercise<sup>5</sup> (and many since) demonstrated that if you do not respond immediately to a biological warfare attack, a disease may spread within hours beyond the perceived contamination zone, nullifying any possibility of a limited ring quarantine. Second, we can learn the threat and apply the lessons of September 11, and we still may not foresee or prevent the next attack, nor identify every legal need in defending our open and global society.

Finally, the threat is seamless. Traditional Cold War distinctions between domestic and foreign authority in the intelligence area, for example, may prove dysfunctional when the enemy is in both locations, targeting both locations, and can move from one to the other. In short, if the threat is seamless, authority and lines of responsibility cannot begin and stop at the water's edge, or require a change in substantive legal gauge. Therefore, absent naked assertions of Constitutional authority, the legislature and executive must provide and define the authority to act in advance.

It is a principle of democratic theory (and a reality) that there is more risk of error (and abuse) with broad

authority than with narrow authority. As a student of government and a participant in democracy, I would prefer that my government act with narrow authority. But I also would prefer that today was September 10, 2001. As a student of national security, I have no doubt that broad authority and flexibility are essential to fight this battle and that much of the battle will be fought here in America.

This leads to what I call False Dichotomy Number One: An increase in security must result in a decrease in liberty and vice versa. This is an argument you find on both sides of homeland security debates. On a macro level, it may be useful to consider that in wartime the relationship between security and liberty might be different, as Chief Justice Rehnquist and Justice Breyer have recently suggested.<sup>6</sup> But in a conflict without foreseeable end and without recognized boundaries, this is just the begin-

ing and liberty. It is between liberty with order and anarchy without either."<sup>9</sup> In my view, to maintain order, we must work back from the threat and provide broad authority. To provide for liberty with order, we must have meaningful oversight.

## II. Oversight and National Security

This leads to False Dichotomy Number Two: Oversight impedes timely national security decision-making. Here I am talking about oversight as the process and substantive framework of decision. I am not talking about the sort of "oversight" that evokes images of show hearings and political theater, although sometimes that can be an important part of the democratic process.

Oversight is an essential component of national security decision-making itself. The right guidelines, the right measure of review, and the right measure of process result in better decisions. Oversight means think-

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ing of the conversation in a constitutional democracy.

People are fond of quoting Justice Jackson's statement, later repeated by Justice Goldberg, that the constitutional Bill of Rights is not a suicide pact.<sup>7</sup> (I might add that most do so without the context of the full quote: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."<sup>8</sup>). Surely you cannot have liberty without security. But that is a truism that does not tell you much about how to address the two in any given context. I think Jackson's full dissent tells us a great deal more about the analysis we should apply today than the phrase about suicide pacts. His argument is captured in the following sentences: "The choice is not between order

ing through what you are doing before you do it, if only for a moment, if a moment is all you have. Process ensures that multiple viewpoints are heard and that multiple sources of facts are considered. It allows decision-makers to better allocate finite resources. And, all of these factors help to sustain long-term public support for a long-term conflict.

### Judge James E. Baker

serves on the United States Court of Appeals for the Armed Forces. He is a former Special Assistant to the President and Legal Adviser to the National Security Council (NSC), where he advised the President, the National Security Advisor and the NSC staff on U.S. and international law involving national security, including use of force, the law of armed conflict, intelligence activities, foreign assistance, terrorism, arms control, human rights, and international law enforcement.

## A. Constitutional Oversight

Oversight starts with the Constitution, which has two fundamental structural checks on the exercise of executive power: a federal system of divided authority between national and state actors and a framework of separate and shared powers between co-equal branches of national government.

Federalism is a new prism for national security lawyers raised in a Cold War climate of national and executive authority. But homeland security, with its emphasis on first responders and local detection, requires vertical organization from federal to local government, and not just horizontal organization within the national government. This implicates Article IV and the 10<sup>th</sup> Amendment, which reserves to the states those powers not "delegated to the United States." Foremost, this means the police power, the residual power of states to protect the public welfare. Thus, finding the right balance between federal and local exercise of authority is

petitive constitutional forces of the political branches. It was a sometimes crushing, sometimes frustrating, but always a wonderful feeling. Wonderful, because it gave me a deeper faith in the Constitution as a functional instrument of democratic government. I saw it work on a daily basis in the interchange between branches, notwithstanding the efforts of some in both political branches to win. Tensions between the branches should not hide this pivotal truth. The exercise of separate, but shared powers is a source of homeland strength not weakness.

Why do I say that? First, the participation of each branch in the decision-making process is a source of authority. We can debate the ultimate breadth of the President's authority, but what we cannot debate is that where the President acts consistent with congressional authorization "his authority is at its maximum."<sup>10</sup> Second, the exercise of Constitutional oversight results in a better product. Certainly, if that exercise occurs at the wrong time or in

uncertain parameters where public support must be sustained over years.

## B. Substantive

Whether contained in a statute or directive, substantive thresholds, if they do not expressly bar an action, define the parameters of action. For example, the USA PATRIOT Act changed the substantive threshold for obtaining a FISA<sup>11</sup> warrant (as opposed to a Title III criminal search warrant) requiring certification that "a significant purpose" of the search is to collect foreign intelligence information.<sup>12</sup> By further example, the National Security Act defines covert action by what it is, an action intended to influence events abroad without the U.S. hand apparent or acknowledged, and by what it is not, certain "traditional" military, diplomatic, and law enforcement activities.<sup>13</sup> Where these thresholds are met, particular statutory and executive processes are engaged.

The flip side of this analysis is that standards do not always provide the measure of oversight anticipated. Some standards become so malleable as to become almost meaningless. For example, the International Emergency Economic Powers Act (IEEPA) requires a presidential declaration of national emergency finding an "unusual and extraordinary threat" to the "national security, foreign policy, or economy of the United States."<sup>14</sup> This would seem a high substantive threshold. However, while IEEPA was used to address emergencies like the taking of hostages in Iran, it has also been used to suspend the importation of Krugers into the United States. One of my last IEEPA debates at the NSC was over whether a dead man presented an "unusual and extraordinary threat" to the United States. That is just taking the argument too far. Ordered liberty requires something more than substantive thresholds as oversight.

## C. Process

Oversight means good process, which should be both prospective and retrospective. Prospective oversight includes policy review and the review of individual actions, what

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both a matter of efficacy and a matter of Constitutional design. Nonetheless, because defense of the homeland is arguably the central Constitutional responsibility, the authority of the United States, read with the supremacy clause (and doctrine of preemption), will ultimately eclipse principles of federalism. Therefore, the more enduring source of ordered liberty must be found in the separation of powers.

With the Constitution, everything flows from the structure of checks and balances found in the first three Articles. There are inherent and necessary tensions between the branches. As the National Security Council (NSC) Legal Adviser, I felt like a ball bearing between the com-

the wrong manner, that might not be the case. But there is no question in my mind that the Congress and the judiciary play an important role in testing and validating the actions of the executive branch to ensure not only that they are legal, but that they are working. The function is all the more important in an area of policy where much is necessarily secret, and thus the press and the public are not in the same position to perform this validating role essential to success and democracy. Finally, the participation of all three branches of national government is a source of legitimacy: democratic legitimacy in the case of the Congress, and constitutional legitimacy in the case of the judiciary. This is critical in a conflict with

John Hamre, the President of the Center for Strategic and International Studies, calls transactional oversight. Good process establishes accountability, which in turn improves result.

Retrospective oversight should do the same. With respect to individual actions, we should periodically ask whether this is an activity that should continue? Does the legal predicate still apply? With respect to guidelines, should we question whether they work as intended? Do they constrain as a matter of culture or as a matter of law? Often, complaints about guidelines only come out when there is a problem and actors are looking to shift responsibility. Oversight should include the constant reconsideration and adjustment of the rules of engagement.

Similarly, it is easier to start something in the government than to turn it off. With national security, the great weight of pressure leans toward continuing an action, because the consequences of stopping and being wrong can be devastating. But good process, particularly where U.S. personnel may be involved, includes active review so that finite resources can be shifted to real threats.

There are three complaints about process: first, it takes time; second, it risks operational disclosure; and, third, someone might disagree. My answer to the first two complaints is: Make it work; it is worth the effort. If speed is essential, convene the key actors in the Oval Office, and process will be as immediate as the President's decision.

Secrecy is always a matter of balance. Too small a circle risks the omission of key input or "group think." Too large a circle and a would-be leaker may find cover and concealment.

My answer to the third complaint is the President. Disagreement does not equal delay if decision-makers are willing to forward issues to the President, which if one adopts the nuclear model, we know can be done in minutes if we must.

#### D. Human Factor

Good government ultimately depends on good people. More than anything else, ordered liberty

requires courage and integrity from those who wield the authority of law or interpret law. Why? Because ultimately, any process or substantive standard is effective only because a person has triggered the process or applied the standard in good faith.

the policy outcome to objectively identify the enduring consequences of decisions. They have as their sole duty the consideration and application of law to the national security mission. The rule of law can be particularly hard to express when national security is invoked, and no

## Good government ultimately depends on good people.

What prevents an Iran-Contra at the NSC is not the presence of a legal adviser, but the presence of a national security advisor who insists on meaningful legal review. Warren Buffet said it slightly differently in response to the rash of recent financial crimes. "To clean up their acts ..., CEOs don't need 'independent' directors, oversight committees or auditors ... . They simply need to do what's right."<sup>15</sup>

### III. Ordered Liberty and the Culture of Law

Government and military lawyers are an essential link to ordered liberty. They help policy-makers do what is right. They alone may be sufficiently detached from

more so than when lives are at risk.

It is intuitive, but I cannot exaggerate the extent to which policymakers — Presidents — define their success or failure as national-security Presidents by whether American lives are lost on their watch. The pressure is palpable in a principals' meeting or in the Oval Office. Mind you, this is an observation, not a critique. Presidents have no more important responsibility than protecting Americans.

All these pressures are at play and at a deafening volume in the area of homeland security. This should inform the way we lawyer. Here are some brief lessons I learned, and hopefully applied, along the way.

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1. Participate. Ordered liberty in a constitutional democracy means that decisions are made in accordance with law, and that requires legal review. Invocation of national security does not mean “lawyers step aside;” rather, it is an invitation to work quickly and well. That means get in the loop — no small task when you are asking to attend a principals’ meeting of seven or a general’s planning cell. It also means having the courage to participate with incomplete information and incomplete law.

2. Do not create reasons to bypass the law. Meet deadlines. Get to the point. When you are debating a particular target, the client does not have time for a lec-

the legitimate role of oversight in a constitutional system is real law. Never lose sight of the real enemy — it is not constitutional democracy or those that help to articulate what that means.

4. Look over the horizon. Looking over the horizon means avoiding the rocks and shoals of past experience. Henry Kissinger correctly observed that many national security decisions are 51-49 affairs and might only look otherwise with hindsight.<sup>18</sup> Hindsight is 20-20, but there are decisions that should never be made that if subjected to the sort of oversight that I have described would have been seen as 80-20s or even worse at the time. While people may disagree on

## Looking over the horizon means avoiding the rocks and shoals of past experience.

ture on Grotius.<sup>16</sup> Find the applicable principles of law and apply them. This also means front-load work. We all can rattle off a reasonable summary of the Posse Comitatus Act.<sup>17</sup> But who is confident that they can advise a policymaker now, this minute, on the various exceptions to the Act and the substantive and procedural thresholds for applying them. That is a question every military lawyer anywhere in the United States must be able to answer on the spot, where the threat is national in scope, local in effect, and catastrophic in result. If you cannot answer the question, or you must get your answer approved in Washington, people may die during the delay.

3. Engage in real law. Smart lawyers can always craft an argument as to why their client can do something. But if you honor the rule of law, you should tell your client not only that they can do something, but the best way to do it — in our context, the way that accomplishes the mission and upholds ordered liberty. Saying that the Constitution is not a suicide pact is not legal analysis. Recognizing

the 1960s predicates for opening mail or listening to telephones, there certainly came a point when much of this activity should have stopped absent a showing of actual security harm or threat. Perceptions of the past color perspectives on the present, but we must look forward with clear vision. We cannot avoid the 51-49 decisions, but with meaningful oversight, we can avoid the decisions which should never be made or no longer warrant approval.

Looking over the horizon also means figuring out where the law should go. For military lawyers, there is no more important horizon than that which defines the military’s role in homeland security. *The Boston Globe* recently described this as “the next big debate in American society [that] is going to be one of the most unsettling debates of our time.”<sup>19</sup> But we have already crossed the line of departure.

The President’s report on homeland security describes three military homeland missions. “In extraordinary circumstances, the Department [of Defense (DoD)] would conduct military missions

such as combat air patrols or maritime defense operations.”<sup>20</sup> DoD would also be involved “during emergencies such as responding to an attack or to forest fires, floods, tornadoes, or other catastrophes.”<sup>21</sup> “In these circumstances, the Department may be asked to act quickly to provide capabilities that other agencies do not have.” Lastly, DoD would be involved “in ‘limited scope’ missions where other agencies would have the lead — for example, security at a special event like the recent Olympics.”<sup>22</sup>

As importantly, putting aside constitutional arguments, there already exist numerous exceptions to the Posse Comitatus Act, which together form a coherent framework for military participation in homeland defense. What are missing are an awareness of this framework and (happily) the repetitive knowledge of experience. There are legitimate concerns about losing public support and resource limitations if the military plays too central a domestic role in homeland defense. But this is not Vietnam. This is America. And there is no more important national security mission than protecting America from attack. In light of the threat, we cannot afford anything other than our best response, and in some areas, that may mean a military response. Therefore, we need to move beyond threshold issues as to whether the military should be used for homeland defense and address the manner of use and the measure of oversight.

What is the difference between an “extraordinary circumstance” as used in the President’s report on homeland security, and the everyday extraordinary circumstance of homeland security? Who will decide and subject to what process and substantive thresholds? Who will oversee this process? Who will validate the exercise of military authority? And will the military act with the full authority that comes from the participation of all three branches of government?

### IV. Conclusion

Homeland security is not an issue that one is for or against. It is a matter of now and how, and on that we can all agree. What we will not

necessarily agree on is where to draw each and every legal line. While I have not sought to provide specific answers, I have sought to describe a framework for looking at homeland security — called ordered liberty — that addresses democracy's desire for both security and liberty.

Now more than ever, we are asked to, and must have faith in, our government — federal, state, and local. One source of faith is an effective and democratic system of oversight. Designed well, oversight is not a bad word, but a source of security strength. Oversight ensures that broad authority is available to an executive who may have only moments to act. Oversight ensures that authority is exercised in the manner intended, with the result intended, and for the period intended. Oversight is also a source of legitimacy, which in a long fight is essential.

Another source of faith is found in a culture of law that celebrates public service, national security, and the Constitution. My faith in government comes in part because I have served in the Marines and at the NSC. I know that the best government and military lawyers not only know how to argue, but also know how to argue what is right.

## Notes

1. Judge James E. Baker, "The Constitutional Duty of a National Security Lawyer in a Time of Terror," *The Public Lawyer*, Vol. 10, Issue 2 (Summer 2002).

2. Harold D. Lasswell, "The Garrison State," *American Journal of Sociology*, Vol. 46, Issue 4 (Jan. 1941), 459.

3. The substance of this article was presented in a speech to the ABA's Standing Committee on Legal Assistance for Military Personnel at Marine Corps Base, Quantico, Virginia on Aug. 15, 2002.


4. Judith Miller, et al, *Germ: Biological Weapons and America's Secret War* 315 (2001).

5. The Dark Winter exercise was a senior-level war game held at Andrews Air Force Base, Washington, D.C. on June 22-23, 2001, that simulated a covert biological (smallpox) attack on the United States.

6. See Chief Justice William Rehnquist, *The Use of Military Tribunals*, Address Before the D.C. Circuit Judicial Conference (June 14, 2002); Justice Stephen Breyer, Remarks



## SECURITY BLANKET.

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at the Summit of World Bar Leaders in New York (November 10, 2001).

7. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1948) (Jackson, J., dissenting); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

8. *Terminiello*, 337 U.S. at 37.

9. *Id.*

10. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952).

11. Foreign Intelligence Surveillance Act, 50 U.S.C. 1801 et seq. (2000).

12. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (U.S.A. PATRIOT ACT), Pub. L. No. 107-56, § 218, 115 Stat. 272, 291 (2001).

13. National Security Act, 50 U.S.C. 413(b) (2000).

14. International Emergency Economic Powers Act, 50 U.S.C. 1701 (2000).

15. Warren Buffett, *Who Really Cooks the Books?*, N.Y. TIMES, July 24, 2002, at A19.

16. Hugo Grotius was a pioneer in international law theory from the late 16th and early 17th centuries. He wrote what many consider the first definitive text on international law, *The Rights of War and Peace*.

17. Posse Comitatus Act, 18 U.S.C. 1385 (2000).

18. Henry Kissinger, *Kissinger: Errors Possibly Made*, WASH. POST, Apr. 25, 2002, at A24.

19. David M. Shribman, *Next in the Debate Over Security at Home, the Role of the Military*, BOSTON GLOBE, Jul. 23, 2002, at A3.

20. OFFICE OF HOMELAND SECURITY, *THE NATIONAL STRATEGY FOR HOMELAND SECURITY*, 13 (July 2002).

21. *Id.*

22. *Id.*