The relationship between terrorism and human rights is commonly described as one of conflict or balance between liberty and security. But this perceived trade-off between security and liberty is a false choice. That is so because security should not be (and under a constitutional democracy, is not) an end in itself, but rather simply a means to the greater end of liberty.

This recognition does not settle the debate but only begins the conversation, for the essential question is what one means by liberty. Here, I think Edmund Burke put it best: ‘The only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.’

Order and liberty, under this conception, are symbiotic; each is necessary for the stability and legitimacy that is essential for a government under law.

To illustrate this symbiotic relationship, consider liberty without order. Absent order, liberty is simply unbridled license: Men can do whatever they choose. It is easy enough to recognize that such a world of liberty without order is unstable, but I would argue that it is also illegitimate. The essence of liberty is the freedom from subjugation to the will of another. In a world of unbridled license, the strong do what they will and the weak suffer what they must. One man’s expression of his desires will deprive another of his freedom. Liberty without order is illegitimate because one man can infringe, by force if necessary, another’s freedom. True liberty only exists in an ordered society with rules and laws that govern and limit the behavior of men.

Just as liberty cannot exist without order, order without liberty is not only illegitimate but also unstable. The first of these propositions is widely accepted, so I will not dwell on it here. But it is important to recognize that where there is order but not liberty, force must be exerted by men over men in an attempt to compel obedience and create a mirage of stability. Most people are familiar with Rousseau’s dictum that ‘Man was born free, yet everywhere he is in chains’. But often neglected is the sentence that immediately follows in On The Social Contract: ‘He who believes himself the master of others is nonetheless a greater slave than they.... For in recovering its freedom by means of the same right used to steal it, either the people is justified in taking it back, or those who took it away were not justified in doing so.’

Order without liberty is unstable precisely because it is illegitimate. In an apparent order maintained by brute strength, the ruler has no greater claim to the use of force than his subject, and the master and slave are in a constant state of war — one trying to maintain the mirage of stability created by his use of force, the other seeking to use force to recover his lost freedom.

---

1 Viet D. Dinh is Professor of Law at Georgetown University and formerly U.S. Assistant Attorney General for Legal Policy.
2 Edmund Burke, Speech at His Arrival at Bristol Before the Election in That City (1774).
Order and liberty, therefore, are not competing concepts that must be balanced against each other to maintain some sort of democratic equilibrium. Rather, they are complementary values that contribute symbiotically to the stability and legitimacy of a constitutional democracy. Like love and marriage, order and liberty go together like horse and carriage; one cannot have one without the other.

In *The Structure of Liberty*, Professor Randy Barnett distinguishes liberty structured by order from unbridled license by comparing the former to a tall building, the Sears Tower. License permits thousands of people to congregate in the same space, but only with the order imposed by the structure of the building — its hallways and partitions, stairwells and elevators, signs and lights — would those thousands be endowed with liberty, each to pursue his own end without trampling on others or being trampled upon. Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to achieve their ends. To illustrate the essential necessity of that structure, Barnett posits this hypothetical: 'Imagine being able to push a button and make the structure of the building instantly vanish. Thousands of persons would plunge to their deaths.'

Osama bin Laden pushed that button on September 11, and thousands of persons plunged to their deaths. Just as Barnett’s building was only a metaphor for the structure of ordered liberty, Al Qaeda’s aim was not simply to destroy the World Trade Center. The target was the very foundation of our ordered liberty.

Knowing what we now know about Al Qaeda, it is easy to see that its radical, extremist ideology is incompatible with, and an offense to, ordered liberty. Al Qaeda seeks to subjugate women; we work for their liberation. Al Qaeda seeks to deny choice; we celebrate the marketplace of ideas. Al Qaeda seeks to suppress speech; we welcome open discussion.

More fundamental, however, is the proposition that Al Qaeda or any other terrorist group, simply by adopting the way of terror, attacks the foundation of our ordered liberty. Terrorism, whomever its perpetrator and whatever his aim, poses a fundamental threat to the ordered liberty that is the essence of a constitutional democracy.

The terrorist seeks not simply to kill, but to terrorize. His strategy is not merely to increase the count of the dead, but to bring fear to those who survive. The terrorist is indiscriminate in his choice of victims and indifferent to the value of his targets. He uses violence to disrupt order, kills to foment fear, and terrorizes to incapacitate normal human activity.

In this sense, the terrorist is fundamentally different from the criminal offender normally encountered by the criminal justice system. By attacking the foundation of order in a society, the terrorist seeks to demolish the structure of liberty that governs the lives of citizens. By fomenting terror among the masses, the terrorist seeks to incapacitate them from exercising the liberty to pursue their individual ends. This is not criminality. It is a warlike attack on the polity.

In waging that war, the terrorist employs strategies that fundamentally differ

---

from those used by traditional combatants on the battlefield according to the established rules of war among nations. Those rules clearly distinguish uniformed combatants who battle each other from innocent civilians who are off-target — a distinction that is not only ignored but exploited by the terrorist to his advantage. In this war, the international terrorist differs even from the guerrilla warrior who mingles among and, at times, targets innocent civilians. The activities of the terrorist are not limited to some hamlet in Southeast Asia or remote village in Latin America. For the international terrorist, the world is his battleground, no country is immune from attack, and all innocent civilians are exposed to the threat of wanton violence and incapacitated by the fear of terror.

This, then, is the enemy we face: a criminal whose objective is not crime but fear; a mass murderer who kills only as a means to a larger end; a predator whose victims are all innocent civilians; a warrior who exploits the rules of war; a war criminal who recognizes no boundaries and who reaches all corners of the world.

I appreciate the search for the root causes of terrorism, but we need to be clear: A terrorist is not a social worker, but one who works to defeat the social order. And a terrorist is not a politician seeking to advance a political objective, but one who would coerce agreement with his ideology by mortally threatening the polity.

In combating this new enemy, we face the old dilemma common to wars and well articulated by Joseph Conrad in *Heart of Darkness*: How to defeat the enemy without becoming the enemy?

At a minimum, in prosecuting the war against terror, the international community has to adhere to the rules and laws that govern the conduct of civilized nations — because our objective is to uphold that system of international law and order. Beyond this essential commitment to the law of nations, I offer here some observations from the perspective of a constitutional lawyer and former law enforcement official.

First, the dilemma is a dilemma primarily because most of us in the debate adopt one or the other perspective. For the libertarians or human rights activists, we usually concentrate on the costs of governmental action: that is, how does this action affect the rights of the accused terrorists, of those associated with the terrorist, and of the general public to be free from governmental intrusion.

The security experts generally focus on the costs of inaction. Because our job is to ensure the security of the country and the safety of its people, we live in dread that a preventable terrorist attack would occur under our watch, that we could have done more to protect the lives and liberties of those lost in the attack.

For the ultimate decision-makers, however, and the disinterested commentators judging those decisions, I think it is critical to focus not just on the risk of action or the risk of inaction, but on the relative risk of action versus inaction.

That is why, immediately after September 11, the U.S. Department of Justice and other components of the U.S. Government crafted and implemented a

---

prevention strategy to identify and disrupt terrorist conspiracies instead of following the more traditional method of waiting for the crime to happen and then picking up the pieces and counting the bodies.

There are two primary ways (outside of luck and prayer) to implement a strategy of prevention: information and detention. Of these, unless we are to repeat the tragic mistakes of the past — in my country those mistakes include the indiscriminate roundups called the Palmer Raids and wholesale internment of Japanese and German Americans during WWII — information has to be the primary component.

Questions surrounding information can be divided into two separate inquiries: first, what information should the government be able to collect and under what circumstances, and second, what should the government be able to do with the information already collected.

In my view, from a counterterrorism perspective, the second question is the primary one. If the government can make the best use of the legal authorities at its disposal and the information it has already collected, there would be little need for new expansions in governmental authority to collect more information.

In order for information to be of any use, it must be shared and analyzed. That is why a key feature of the U.S. counterterrorism reform after 9/11 is to lower the artificial wall dividing our intelligence community from our law enforcement agencies. If all hands are called on deck in the common fight against terrorism, then the left hand should be able to know what the right hand is doing.

The same applies in the international context. Because of the disaggregated nature of terrorist conspiracies — where the mastermind resides in one country, the plans are hatched in another, the training occurs in a third, financing comes from yet another region, and the execution is in an unrelated target country — the sharing of intelligence and law enforcement information across jurisdictions is critical for us to create the entire mosaic of information relating to terrorist threats. National or multilateral restrictions on the sharing of such information are a significant impediment to a coordinated and concerted international effort to defeat terrorism.

I understand that these restrictions have strong justifications in the protection of the privacy of ordinary citizens. But many of these privacy protections, like the Privacy Act in the U.S., have exceptions for law enforcement and intelligence purposes. We need to think critically about these protections and exceptions to ensure that governments can fully and efficiently use information it has already collected. Failing such an assessment, there will be the increasing call for more governmental authorities to collect more information — something that I think is much more threatening to privacy interests.

Finally, I want to touch briefly on the question of detention. The Fourth Amendment to the U.S. Constitution prohibits law enforcement officials from conducting preventive detention. Each and every detention by U.S. law enforcement has to be based on an individualized predicate, and to the best of my knowledge all arrests related to the 9/11 investigation have been.

With respect to military detentions, I think it is beyond question that military
authorities in times of war have the authority to detain enemy combatants. A more
difficult question is how this authority applies to the war against terror, where
terrorists are not soldiers and do not restrict their killing to lawful combatants on
the battlefield. I think that even in such cases we have to recognize at least
concurrent jurisdiction of the military to detain such terrorists as enemy
combatants, because that is in fact what they are.

The most difficult question with respect to military detention is, in my mind,
how the military should treat its detainees. Obviously, standards of humane
treatment are a necessity. The more fundamental question is what legal processes
should be afforded to the detainees. Here, I think that few would disagree that an
immediate adjudication before an independent judiciary is not required —
otherwise battlefields would be filled with the bodies of lawyers (which, I must
admit, some may not find such a bad thing).

However, I think that there has to be a promise of some sort of process. It
does not have to be judicial — I think executive or military tribunals are recognized
in law and tradition as adequate. Nor must the process be immediate; the
government’s need for military expediency and intelligence interrogations should
be accommodated. The U.S. Department of Defense has promulgated regulations to
govern the conduct of military tribunals for its detainees. I know that these tribunals
are a subject of controversy, but I think the procedures crafted to implement these
tribunals afford a full and fair trial with the attendant processes one would normally
attribute to a judicial criminal proceeding. But in order to show the world that they
are indeed fair, the government needs actually to use these tribunals rather than
keeping military detainees in limbo beyond their usefulness as intelligence assets.

In particular, the military is currently detaining Jose Padilla, who was arrested
at Chicago airport based on intelligence that he was planning to detonate a dirty
bomb. Although he is a United States citizen arrested on American soil, the United
States government has not indicated when or whether he would be afforded legal
process in any forum, judicial or military. Padilla’s petition for a writ of habeas
corpus is currently being litigated, so it may be premature for me to pass judgment
or predict an outcome. But I do not see how the Supreme Court would defer to
military and executive processes, as the government is asking, when there is no
alternative process to defer to. I do not question the President’s authority to detain
Padilla — I think that power is attendant to his duties as commander in chief in this
war against terror — but I think past precedents provide little support for a
detention without the prospect of any process.

***

Karl Llewellyn, a renowned teacher of American law, once observed: ‘Ideals
without technique are a mess. But technique without ideals is a menace.’ During
these times, when the foundation of ordered liberty is under attack, it is critical that
we reaffirm our common ideals of the universal rights of man and also that we
master the techniques to secure those ideals against the threat of terror.

6 Karl N. Llewellyn, On What is Wrong with So-Called Legal Education, 35 Colum. L. Rev. 651, 662 (1935).

Helsinki Monitor 2003 no. 4