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Foreword

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FOREWORD

FRED F. FIELDING*

Since the beginnings of the Republic, no topic has been of greater importance to the American people, and to the success of the American experiment in government, than finding the right balance between our cherished values of security and liberty. In the Preamble of the Constitution, we define for ourselves and future generations the purposes of government, both to “provide for the common defense” and to “secure the blessings of liberty to ourselves and our posterity.”

For more than two centuries we have struggled mightily to strike the proper balance between security and liberty. Crafting the proper balance consumed the attention of our Founding Fathers, who insisted on a Bill of Rights to protect individual rights and check the strong powers conferred on the federal government in the Constitution. At critical points in our history, when the Nation has been at risk, the balance has shifted. During the Civil War, both World Wars, and the Cold War, the Executive exercised powers it deemed necessary for national security. Sometimes those actions had the support of the Congress and the courts; sometimes they did not and became the topic of great debate and controversy.

One constant in our history has been that debate. Each generation must address the question of security and liberty anew, and find for itself the proper balance. The principles of government passed down to us by our forebears must be applied to today’s problems to address new technologies and new threats. The answers are never easy, and the 9/11 attacks posed age-old questions in new and painful ways.

As part of this great debate, the Congress and the President created the National Commission on Terrorist Attacks Upon the United States. It was my honor to serve as a member of that

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Commission. Our mandate was to tell the story of the 9/11 attacks and to provide recommendations to make our country safer and more secure. Each of us on the panel—five Republicans and five Democrats—was also mindful of another duty: to ensure that, in our collective zeal to fight terrorism, our solutions do not compromise the very rights and liberties that distinguish us from so many other nations and that make our system of government and our society worth defending.

The Commission made a number of recommendations that touch on the question of security and liberty. First, the Commission found that a failure to share information across government agencies meant that opportunities to discover and disrupt the 9/11 plot were lost.¹ Therefore, the Commission recommended improvements and enhancements in the government's information-gathering and information-sharing abilities.² At the same time, it recognized that with the enhanced flow of information comes a need to establish guidelines and oversight to make sure that the privacy of our citizens and residents is respected and preserved.³

Second, the Commission also looked at information sharing provisions in the USA PATRIOT Act. The Commission supported elimination of "the wall" that had severely constrained the flow of information acquired through surveillance under the Foreign Intelligence Surveillance Act from the intelligence side of the FBI to the criminal side of the FBI and to federal prosecutors.⁴ It also supported broadening the ability of the Justice Department to share grand jury information with other intelligence and law enforcement agencies.⁵ Witnesses were virtually unanimous in telling the Commission that elimination of "the wall" was extremely helpful to law enforcement and intelligence investigations with little, if any, adverse impact on the rights of potential defendants.

However, the Commission did propose a general test to be applied to consideration of the renewal of other provisions of the USA PATRIOT Act, as well as other legislative and regulatory proposals designed to strengthen our security.

The test is a simple but important one. The burden of proof should be on the proponents of a measure to establish that the power or authority being sought would, in fact, materially

1. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 266-75 (2004).

2. *Id.* at 416-19.

3. *Id.* at 394.

4. *Id.* at 78-80, 424.

5. *Id.* at 79-80, 502 n.40.

enhance national security, and that there will be adequate supervision of the exercise of that power or authority to ensure protection of civil liberties.⁶ If the power is granted, there must be adequate guidelines and oversight properly to confine its use.⁷

It is in this spirit that the Commission made a third recommendation. The Commission recommended that Congress grant executive branch agencies a number of additional authorities to protect national security.⁸ In addition, it recommended that there should be a central office or board within the executive branch that has the responsibility to oversee adherence to guidelines that are built into these national security programs in order to safeguard individual rights and liberties.⁹ Congress adopted this recommendation and established the creation of a Privacy and Civil Liberties Board.¹⁰ As we look to the future, how this Board exercises its role will be a key indicator of the balance between security and liberty.

Returning to the present, we are fortunate that the debate on security and liberty will be shaped by the superb contribution of the *Notre Dame Journal of Law, Ethics & Public Policy*. In the pages that follow, FBI Director Mueller tells us that the FBI will not shy away from using all tools provided to Congress to protect Americans from terrorism—and that the FBI will also struggle to ensure that it lives up to its obligations not only to protect U.S. citizens but also to safeguard the rights provided under our Constitution.¹¹ The Director of the National Security Agency, General Hayden, spells out how his agency is working to share signals intelligence more broadly within the government, while at the same time protecting privacy rights.¹² Senator Richard Lugar describes the importance of the Cooperative Threat Reduction Program to secure nuclear materials safely: nothing poses a greater threat to our future liberties, he tells us, than the possibil-

6. *Id.* at 394–95.

7. *Id.* at 395.

8. *Id.* at 393–94.

9. *Id.* at 395.

10. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

11. Robert S. Mueller III, *The New FBI: Protecting Americans Against Terrorism* (June 13, 2003), in 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 327 (2005).

12. Michael V. Hayden, *Balancing Security and Liberty: The Challenge of Sharing Foreign Signals Intelligence*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 247 (2005).

ity of a major terrorist attack involving weapons of mass destruction.¹³

This symposium on security and liberty also includes thoughtful and probing articles on the FISA statute, the theory of just war, homeland security and civil liberties, the law of armed conflict in the global war on terror, legal issues involving Guantanamo detainees, and the impact of recent Supreme Court decisions on enemy combatants. It is a unique, substantive and timely contribution to the Republic's ongoing debate.

The question is: How we shall continue to provide for both security and liberty, as the Constitution calls upon us to do? Amidst the backdrop of a lethal threat to our nation from a new and determined enemy, the debate continues, as the Framers envisioned it would. It is hoped that this outstanding collection of articles will help inform citizens, scholars, and policymakers as we seek to carry out the purposes of our government: to provide for the common defense and to secure the blessings of liberty to ourselves and our posterity.

13. Richard G. Lugar, *Nunn-Lugar in the Second Term*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 233 (2005).