

ADDRESS

THE FIRST AMENDMENT AND THE WAR AGAINST TERRORISM*

*by Floyd Abrams***

We meet today at a time unique in our history. Savagely attacked by murderous and suicidal terrorists just over a year ago, our nation—and certainly my city, New York—is only now fully getting back to something approaching normalcy. But there can be no true normalcy in the sense of returning to the world we lived in (or thought we lived in) on September 10, 2001. That world is gone and our world requires new decisions and some difficult and delicate assessments of the claims of national and personal security vis-à-vis those principles of civil liberties embodied in the Bill of Rights of which we are so justly proud.

Let me start with an example I have been thinking about for some months. I was one of many people who supported the so-called USA-PATRIOT Act,¹ legislation which, among other things, makes it easier for the government to wiretap, easier to read e-mails, and easier to incarcerate people, particularly immigrants, on less evidence than might otherwise have been possible. Most of the provisions of that bill were not conceived of, in the first instance, by the Department of Justice under the leadership of Attorney General John Ashcroft, but were articulated first during the Clinton Administration by one of a number of presidential task forces that reviewed issues relating to terrorism in the 1990s. Like all the other recommendations of such task forces (one of which I worked with), their recommendations were filed and duly ignored.

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¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA PATRIOT Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

In any event, I supported the PATRIOT Act, notwithstanding its obvious threats to civil liberties. I still do. But I also appear before you as someone who is deeply concerned about both the predictable and the as-yet-unforeseeable risks to civil liberties of this legislation and other acts of the Administration. I never doubted, for example, when the Act was passed that civil liberties would have been far better accommodated with a two-year rather than a four-year sunset provision on the entire legislation, and with far more judicial oversight. What I had not doubted sufficiently, however—what I had been insufficiently cynical about, that is—was the Administration's willingness to report to Congress about how the legislation works in practice. For even if the legislation was (as I still think) a reasoned response to the new level of danger confronting us, it surely raises special risks to civil liberties which require a high level of congressional scrutiny. And when the House Judiciary Committee Chairman and its ranking member (one person in each party) on June 13, 2002 sent a list of questions of about 50 issues relating to the PATRIOT Act to the Department of Justice, only 34 were answered at all, as of the House's summer recess.² In fact, the Administration wrote to Congress explicitly refusing to provide detailed information on how the new powers granted under the PATRIOT Act had been used. Taken together with its resistance to almost any judicial review of its conduct, the Administration has sought to walk on constitutionally dangerous terrain with virtually no oversight at all.

I cite that as only one example of this difficulty, yet the continuing necessity, of making a series of painful cost-benefit decisions rooted in the threats to our national and personal security and the threats to the security of our civil liberties. Some, but not all, of what I will say will be about the First Amendment. Some will reflect agreement with the Administration, some disagreement. All of what I say will relate to topics that are difficult and as to which reasonable people may plausibly disagree.

To start: I am persuaded that the degree of threat to our individual security is unparalleled in American history. We live in a new world in which foreign terrorists, dedicated to our destruction, suicidal in behavior, and with possible access to modern weapons, imperil our people. If I thought otherwise, I would have very different views with respect to many of the comments I will offer to you today. If I thought the Al-Qaeda threat was a passing one, or akin to that of the Barbary pirates of the past, or the equivalent (as Michael Mandelbaum has argued) of a "badly stubbed toe" that caused pain and

² *Civil Libertarians File FOIA Request for Data on Government's Use of Surveillance Powers*, 71 U.S.L.W. 2179, 2180 (Sept. 17, 2002).

shock but left “the world . . . much as it had [been] before,”³ I would not be at all so ready to make painful compromises between the claims of security and freedom.

But I do consider the terrorist threats to us to be real and continuing, and thus transformative in their impact. MIT Professor Stephen Van Evera put it well when he said recently that “[w]e’re in a struggle to the death with these people. They’d bring in nuclear weapons here if they could. I think this could be the highest threat to our national security ever: a non-deterrable enemy that may acquire weapons of mass destruction.”⁴

Our country is not at existential risk. These enemies cannot conquer or destroy it. But our people are indeed at enormous risk, perhaps more so than ever before in our history. An editorial in last week’s *New Yorker* summarized well our enemies and the challenge they pose to us this way:

Those who attacked the United States last year were not merely avatars of fanatical intolerance; they were and are mortal enemies of the very idea of tolerance. To review the list of the thousands of the dead, to see their faces, to learn even a little of how they lived, is to view a microcosm of the United States and of the world. Their killers meant to destroy not only as many lives as possible but also a set of conditions—modernity, fluidity, personal liberty—that constitute an increasingly global aspiration. The challenge to an open society is how to deal with, and defeat, those who exploit its freedoms in violent pursuit of a closed, intolerant, and unfree society⁵

How are we to do that? It will not do to act as if we can decide every civil liberties issue as if the events of September 11 had not occurred. We were not the victims of some terrible, once-in-a-century natural disaster. No perfect storm happened upon us last September; no unforeseeable tsunami rose out of the ocean to overcome us. We were attacked. We may well be attacked again. We must defend ourselves while taking care not to lose those special qualities of our free society that our Bill of Rights exists to protect.

But we should not deceive ourselves that the Bill of Rights will or should be interpreted without regard to the nature of the risks we face or the likelihood that those risks will be transformed into dreadful reality. I have never been much of a fan of Learned Hand’s transformation of the “clear and present danger” test into one that examines the “gravity of the ‘evil’ discounted by its impossibility” to

³ MICHAEL MANDELBAUM, *THE IDEAS THAT CONQUERED THE WORLD: PEACE, DEMOCRACY, AND FREE MARKETS IN THE TWENTY-FIRST CENTURY* 12 (2002).

⁴ Nicholas Lemann, *The War on What?: The White House and the Debate About Whom To Fight Next*, *NEW YORKER*, Sept. 16, 2002, at 36.

⁵ David Remnick & Hendrik Hertzberg, *The Talk of the Town—Comment*, *NEW YORKER*, Sept. 16, 2002, at 31.

determine if free speech rights may be limited.⁶ That test can far too easily lead to far less speech at the very time it is most needed. But at times like these we must not forget that the gravity of the evil before us is both very great and very real.

We must also recognize something else. Our new situation is long-term in nature. While the notion of a war on terrorism is part reality/part metaphor, that war—or, at the least, the new and grim dangers before us—will be with us for many years to come. And so, therefore, will any impositions upon civil liberties that we choose to accept as the price-tag for seeking to avoid still more successful attacks on us. We must accept that as Professor Laurence Tribe has observed, “the sacrifice of checks and balances has to be weighed not as a temporary expedient but assessed as a proposed permanent change.”⁷

Must we agree to sacrifice anything in the area of civil liberties at all? With the deepest regret, I think we must.

In 1993, I wrote an article for the *New York Times Magazine* shortly after the World Trade Center bombing.⁸ My topic was privacy and my theme was that we should prepare regretfully—very regretfully—to give up considerable privacy rights in the service of avoiding terrorism in the future. There would be more surveillance, I said; it was unavoidable but terribly sad, I said. At its best, my piece was a sort of journalistic eulogy for privacy—how important it is, how deeply the new state of affairs after the World Trade Center bombing would inevitably cut into it, how much we would miss it.

What never occurred to me then was that the 1993 bombing would lead to almost no new limitations on privacy at all—or, to put it differently, no new serious or meaningful steps to prevent additional acts of urban terrorism at all.

A few years later, I served on a civil liberties advisory committee to a commission headed by Vice President Gore relating to aviation safety and security. Asked by that commission to advise it on a proposal to “implement an automated profiling system for all passengers on all flights,”⁹ we responded unequivocally. Any profiling system, we said, “should not contain or be based on material of a constitutionally

⁶ See *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950).

⁷ Charles Lane, *Debate Crystallizes on War, Rights; Courts Struggle Over Fighting Terror v. Defending Liberties*, WASH. POST, Sept. 2, 2002, at A01.

⁸ Floyd Abrams, *Big Brother's Here: And—Alas—We Embrace Him*, N.Y. TIMES, Mar. 21, 1993, § 6 (Magazine), at 36.

⁹ White House Comm'n on Aviation Safety and Sec., *Final Report to President Clinton*, at Appendix A (Feb. 12, 1997), available at <http://www.fas.org/irp/threat/212fin-1.html> (last visited Oct. 24, 2002).

suspect nature—e.g., race, religion, national original of U.S. citizens.”¹⁰

I, as well as others, had insisted on the inclusion of the words “U.S. citizen:” It was preposterous, I thought, to tell airport officials not even to consider the citizenship of visitors from any, say, Iran or Libya when deciding whom to search with particular intensity.

And now we meet a year after 19 suicidal, murderous hijackers—all from the Middle East, all Arabic-speaking—have attacked our nation in conjunction with what appear to be cells of others who are also of Middle Eastern background, and are all also Arabic-speaking. We meet at a time when we have already committed troops to overthrow the Al-Qaeda-connected Taliban regime in Afghanistan and at a time when we may well commit far more troops to engage Saddam Hussein’s forces in Iraq. And we meet at a time when our government has just announced new regulations requiring visiting citizens of Iran, Iraq, Syria, Sudan, and Libya to be fingerprinted, photographed, and required to regularly report their addresses and activities while in the USA. Those regulations, criticized by some on civil liberties grounds, seem to me to be perfectly reasonable accommodations to the new level of danger that afflicts us.

In fact, an accompanying regulation may not even go far enough. Fingerprinting, photographing, and reporting requirements are also to be imposed on “anyone arriving with a student, business, or tourist visa who is believed to fit the criteria of a potential terrorist . . . [or] who [is] considered [a] security risk by the State Department or by the Immigration and Naturalization Service officers, based on intelligence reports of terrorist strategy and behavior.”¹¹ This seems to me fine so far as it goes. But the *New Republic* last week asked a telling question: “why, for heaven’s sake, would anyone who is in any meaningful sense ‘believed to fit the criteria of a potential terrorist’ or considered a security risk by government officials be admitted to the United States at all?”¹²

My view, in short, is that we must accept that we now live at a level of vulnerability which requires distressing steps of a continuing nature in an effort to protect ourselves. As a result, we must, I think, be prepared to yield some of our privacy, to accept a higher level of sur-

¹⁰ *Id.*

¹¹ *Notebook*, NEW REPUBLIC, Sept. 23, 2002, at 10. See also Susan Sachs, *Threats and Responses: Security; Government Ready To Fingerprint and Keep Track of Some Foreign Visitors*, N.Y. TIMES, Sept. 9, 2002, at A16; Press Release, Department of Justice, Attorney General Ashcroft Announces Implementations of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), available at http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm (last visited Oct. 23, 2002).

¹² *Notebook*, *supra* note 11.

veillance of our conduct, even to risk some level of confrontation with the Fourth Amendment of the United States Constitution.

Let me pose another question, one that I answer the same way. It is whether FBI agents should be permitted to attend public meetings of a political or religious nature for the purpose of reporting upon what is said there. When it did so in the 1950s and 1960s, some of the worst abuses of the regime of J. Edgar Hoover occurred. The “chill” on speech was real; Hoover intended just that and achieved just that. It was a civil liberties disaster. After Hoover died, new guidelines, drafted by former Attorneys General Edward Levi and William French Smith, were adopted, effectively barring FBI agents from doing so in most circumstances.¹⁵ Those limits were hailed by civil libertarians—and they should have been.

A quarter of a century has now passed, however, and we now face new risks. Shall we now permit, as Attorney General Ashcroft has determined, FBI surveillance of such events? If the Bureau believes that public statements made in a particular mosque, say, may be of assistance in preventing future acts of terrorism, but it is short of proof sufficient to demonstrate the likelihood of criminal behavior, should surveillance of the event be permitted? I think so. Yet when we make that trade-off, we obviously risk the very governmental overreaching and misconduct that tends to accompany any broadening of governmental powers.

I have thus far cited examples that fall in the area in which I would be most inclined to give the government some greater powers. It is what we might characterize as the area of prevention of terrorism rather than punishment of it. Obviously, these areas intersect; punishment is, after all, supposed to prevent as well as to punish. But the more we move away from the surveillance mold and into that of how we treat individuals that we have already apprehended, the less willing I think we should be to move even incrementally away from the rules that have historically governed the way we treat people we have apprehended and we believe have committed grievous wrongs.

Another example may be useful. Perhaps the most disturbing constitutional overreaching of all by the Administration has occurred in its treatment of American citizens who have been deemed “enemy combatants” and thus, according to the Administration, denied virtu-

¹⁵ Att’y Gen. Edward Levi, *Guidelines on Domestic Security Investigations* (1976). These guidelines were most protective when Attorney General Levi first issued them, but they were subsequently scaled back by Attorney General William French Smith and now Attorney General John Ashcroft. See Att’y Gen. William French Smith, *Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations*, March 7, 1983, reprinted in 32 *Crim. L. Rep.* (BNA) 3087 (1983); Att’y Gen. John Ashcroft, *Attorney General’s Guidelines on General Crime, Racketeering Enterprise, and Domestic Security/Terrorism Investigations*, May 30, 2002, available at <http://www.usdoj.gov/olp/generalcrimes2.pdf> (last visited Oct. 22, 2002).

ally all rights that the Constitution provides to our citizens.¹⁴ The case of Yasser Esam Hamdi is one well-publicized example.¹⁵ Now incarcerated in a military prison in Virginia as an enemy combatant, Hamdi—apparently an American citizen—has been treated as if he had no rights at all under a theory rightly characterized by the Court of Appeals for the 4th Circuit as rooted in the “sweeping position” that “with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government’s say so.”¹⁶

If anything, the less publicized case involving Jose Padilla¹⁷ is still more troubling. Like Hamdi, Padilla is an American citizen. Unlike Hamdi, however, he was not apprehended in Afghanistan, but in Chicago, and he has been held indefinitely since then, without charges being filed against him and without being granted access to counsel. In fact, when the civilian judicial system began to impose its normal obligations upon the government, it simply withdrew him from that system altogether, deeming him an enemy combatant and taking the position that he was not entitled to the protections of the Bill of Rights and that the scope of review by the judiciary was all but nonexistent.

In cases of this sort, we are left (and, perhaps more important, the defendant deemed an enemy combatant is left) without the benefit of almost any legal protections. According to the government, so long as it presents even a pro forma articulation of that which he is suspected of doing, no lawyer may go behind it and no judge may question it. This, as the *Washington Post* observed recently, “is a breathtakingly radical” position, one about which the *Post* rightly concludes that “among the many confrontations between civil liberties and the war on terror, the government is advancing no contention more dangerous.”¹⁸

You will notice that I have already cited two judicial rulings. I could cite many more and I think special tribute is owed to our courts in this respect. In India, during the so-called “emergency” declared

¹⁴ See Karen Rivedal, *Terror War Tramples on Rights, Writer Says*, WIS. ST. J., Oct. 1, 2002, at B1; Jeffrey Rosen, *Liberty Wins—So Far; Bush Runs into Checks and Balances in Demanding New Powers*, WASH. POST, Sept. 15, 2002, at B01.

¹⁵ See, e.g., Tom Brune, *Taking Liberties; Collateral Damage; Government Efforts To Prevent Future Terrorist Acts Are Putting Civil Liberties at Risk, Critics Say*, NEWSDAY (New York), Sept. 15, 2002, at A03; John Crewdson & Cam Simpson, *Real Clues to Plot Have Been Elusive; While Global Investigation Shed Light on Al Qaeda, It Failed To Crack Open the Sept. 11 Conspiracy*, CHI. TRIB., Sept. 5, 2002, at 1; Eunice Moscoso, *Remember 9/11: The Investigation: Terrorism Cases Pose Challenges for Courts*, ATLANTA J.-CONST., Sept. 10, 2002, at 11A.

¹⁶ *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

¹⁷ See Mark Brown, *Accused Terrorist a Product of City Streets*, CHI. SUN-TIMES, June 11, 2002, at 2.

¹⁸ Editorial, *Alleged but Not Proven*, WASH. POST, Sept. 1, 2002, at B06.

by then Prime Minister Indira Gandhi in the 1970s which significantly limited civil liberties, only the courts were willing to resist that governmental misuse of power. This was done at considerable personal risk to the judges themselves. Here, our judges are not in any such peril. But it remains not at all easy for even our judges to say to our government at a time such as this that steps enacted to fight terrorism may not be permitted. Yet to their enormous credit, in one case after another, our courts have been willing to take a hard look at what the government is doing and, more often than not, to rein in unlimited and unconstitutionally exercised executive branch power.

One thing I am not prepared to even begin to compromise about is the First Amendment. In fact, as we give the government more power, it is all the more important that the press be utterly free to criticize the manner in which the government exercises that power and (more controversially) to be knowledgeable about what the government has done. If, for example, the government should abuse the new powers that are embodied in the anti-terrorist legislation (and some level of abuse is inevitable), only the press is likely to serve as a check upon that governmental conduct.

That is why I believe the Court of Appeals for the Sixth Circuit was so correct in barring the government from effectively closing all immigration proceedings to public scrutiny, and why Judge Keith of that court was so eloquent in observing that “[d]emocracies die behind closed doors.”¹⁹ That is why we must continue to resist every effort of the Administration to characterize dissent as treason. And that is why we should oppose the ongoing and pervasive efforts of this Administration to prevent the public from learning just who is being detained, for how long, and for what reason, and otherwise to avoid public and congressional scrutiny.

I want to be clear. The Administration has taken no direct steps to curtail public criticism. Fortunately, the First Amendment is part of our culture as well as our law, and although the Administration might well wish that less were said of a critical nature, it is unlikely to attack the right of critics frontally and has not done so.

Not much, anyway. In the days shortly after the attack, we had some disturbing examples of overreaction by the Administration. Commenting on some on-air remarks of Bill Maher,²⁰ Ari Fleischer warned—no other word will serve—that we should watch what we

¹⁹ *Detroit Free Press v. Ashcroft*, No. 02-1437, 2002 U.S. App. LEXIS 17646, at *4 (6th Cir. Aug. 26, 2002); *but see North Jersey Media Group, Inc. v. Ashcroft*, No. 02-2524, 2002 U.S. App. LEXIS 21032, at *7 (3d Cir. Oct. 8, 2002) (disagreeing with the Sixth Circuit because “Congress has never explicitly guaranteed public access [for deportation hearings]”).

²⁰ *See Paul Fashi & Christopher Stern, Big Story Costly to Media Firms; Newspaper, TV Companies Warn Wall Street of Impact on Earnings*, WASH. POST, Sept. 20, 2001, at E01.

say.²¹ It reminded me of my youth during World War II, when we heard on the radio and saw on billboards the repeated refrain, "Loose Lips Sink Ships." But Bill Maher wasn't sinking ships. He was making a political statement in a tasteless way at a time of national grieving. What he was saying should have been well outside the bounds of threatening presidential commentary. In fact, one might well remind Mr. Fleischer himself of the dangers of loose lips.

At around the same time, we had a troubling level of pressure placed on the news media not to broadcast or publish what bin Laden said about the events of the day. I have no doubt that everything he said (or—who knows?—may yet say) is for propaganda purposes. But it is important for the public to know what he says and how he says it. There was never any risk of our public buying into his manic mumbling of demented ideas. But there was great risk in the government seeking to keep us from hearing and seeing him or anyone else.

Throughout the entirety of the ongoing war with Afghanistan, the government continued with a policy that was clearly designed to minimize the presence of American journalists and, as a result, their ability to engage in informed criticism of the military effort. As Barbara Cochran, the president of the Radio-Television News Directors Association phrased the problem:

Veteran correspondents who have covered the Defense Department for years, even through the restrictions imposed during the Gulf War, say they have never seen tighter restrictions. For the first time in history, American military forces were deployed abroad without any press accompaniment. Reporters not only were barred from traveling with special forces units to Afghanistan (an understandable prohibition), they were also denied positions on the carrier *Kitty Hawk* where those units were based, and were prohibited from accompanying the 10th Mountain Division, a regular Army unit, to the region. Even after the U.S. military established a base near Gardez in Afghanistan, they refused to admit a party of American journalists covering action in the area, forcing them to spend the night in their cars, at the mercy of local bandits. Information about the war has been limited, imprecise, and less than timely. It is released at the Pentagon, thousands of miles from the action, in briefings that have been cut back from daily to twice weekly. Secretary Donald Rumsfeld has made it clear that leaks will not be tolerated. The veteran correspondents say their sources have dried up.²²

²¹ Press Release, Office of the Press Secretary, The White House, Press Briefing by Ari Fleischer (Sept. 26, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010926-5.html> (last visited Oct. 23, 2002).

²² Barbara Cochran, *America's Free Press: Now More Than Ever*, CORNERSTONE PAPERS NO. 4 (The Media Institute), 2002, at 1-2, available at <http://www.mediainstitute.org/cornerstone/papers.html> (last visited Oct. 23, 2002).

Throughout the entire period after September 11, 2001, one of the most disturbing aspects of the Administration's approach has been Attorney General Ashcroft's willingness to walk far down the road of suggesting that critics of, among other things, his military court proposals were lending aid and comfort to the enemy—an outrageous notion not only because his proposals were worthy of criticism, but because critical speech about those proposals (whether correct or not) is at the heart of self-government.²³ And as it turned out, that speech mattered. Some of the most troubling features of the initial Ashcroft proposals were changed *because* of the criticism it engendered from William Safire of the *New York Times*,²⁴ among others—the right to appeal, the presumption of innocence, unanimous vote to impose the death penalty, etc. The First Amendment worked: The differences between the initial notion of military courts as set forth in an Executive Order of the President²⁵ and the final one issued by the Defense Department²⁶ bear witness to how important public criticism can be in the formulation of policy.

It is not as if we have no history of major governmental abuse of civil liberties during wartime. President John Adams, now much fawned over as a result of David McCullough's overly flattering (and now Pulitzer Prize-winning) biography,²⁷ signed into law the Sedition Act of 1789 and chose the defendants for prosecution under it. This was a law passed when war with France seemed imminent and which made it a crime to defame the United States government, the President, or Congress. The last is the single most repressive piece of domestic legislation relating to civil liberties ever adopted in this country. Not until 1964, a century and a half later, did the Supreme Court have occasion to conclude that the verdict of history was that the law was unconstitutional.²⁸

Or consider almost everybody's favorite president, Abraham Lincoln. During the Civil War, he suspended the writ of *habeas corpus*. That is, he simply scrapped for the duration of the war one of the most central individual rights protected by the Constitution—the right to have a court pass upon the legitimacy of placing someone under arrest and imprisoning her. Only after the Civil War was over

²³ See Susan Milligan, *Fighting Terror/AG Speaks Out; Critics Aid Terrorists, AG Argues*, BOSTON GLOBE, Dec. 7, 2001, at A34.

²⁴ See, e.g., William Safire, *Kangaroo Courts*, N.Y. TIMES, Nov. 26, 2001, at A17.

²⁵ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

²⁶ Dep't of Def., Military Comm'n Order No. 1 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited Oct. 24, 2002).

²⁷ DAVID MCCULLOUGH, JOHN ADAMS (2001).

²⁸ *New York Times v. Sullivan*, 376 U.S. 254, 298 n.1 (1964).

did the Supreme Court rule that Lincoln's conduct was unconstitutional.²⁹

Or consider the now justly reviled conduct of President Franklin Roosevelt in overseeing the placement of Japanese-Americans (American citizens, all) in camps throughout the duration of World War II, actions that the Supreme Court let stand³⁰ in opinions which themselves have not stood the test of time and which were, it is now clear, indefensible when issued. These are some of the worst examples, but had the effort of the Nixon administration to suppress publication of the Pentagon Papers in the *New York Times* succeeded in 1971,³¹ that might have been on my list as well.

Our government's conduct, it is worth saying again, is nowhere near anything of the sort I've just recalled for you. And, as I said earlier, the risks posed by our enemies are real and terribly dangerous. But as our security risks have risen, so have our civil liberties risks. There will be no easy answers about how to reconcile the two. But we had better keep our minds open as we attend to the painful task of determining how to do so.

²⁹ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

³⁰ *See Korematsu v. United States*, 323 U.S. 214 (1944) (holding that keeping American citizens of Japanese descent in internment camps was justified by the threat to national security).

³¹ *New York Times v. United States*, 403 U.S. 713 (1971).