September 10, 2004

bandwidth

An Online Newsletter of Discovery Institute

Dot Disconnect: Privacy Purists, Profiling Protestors, Licentious Libertarians and Homeland Security in Post-9/11 America

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The Homeland Security Operations Center, opened in 2003, is tasked with "connecting the dots"—the operational buzz-phrase in the wake of this year's 9/11 Commission hearings. The Center runs the Homeland Security Information Network, connecting 1,500 federal and state agencies, plus private firms that operate key infrastructure assets. Eventually some 5,000 users are to be connected via real-time secure linkage. Homeland Secretary Tom Ridge personally briefs President Bush if he deems an item sufficiently urgent. Along with the CIA's Terrorism Threat Integration Center, this is the good news.[1]

And now the bad news: Three years after the atrocities of 9/11 concerns over security have been trumped by concerns over privacy and civil liberties. The most recent casualty is CAPPS II, the second-stage Computer-Assisted Passenger Pre-Screening system, under which passengers would be pre-screened and security codes assigned, based upon database matching of passenger name, date of birth, address and phone number.[2] At the state level, political correctness reigns equally. In Orlando, Florida a program whereby firefighters, cable tv installers and others were to identify terror-suspect homes by noting sparsely furnished homes occupied by multiple Arab/Muslim males aged 18 to 45, has been shelved after objections were raised by civil liberties groups.[3] This came just prior to the July 22 release of the declassified 9/11 Commission final report.[4] The 9/11 panel discussed the interplay between counter-terror technologies and concern for privacy and civil liberties.

Before examining the panel's position, perspective can be gained by examining two items: (1) a major critique of privacy and civil liberties advocates, one that accuses them of blocking essential tools for countering terrorism at home; (2) six Supreme Court cases—two addressing America's 1942-44 internment of Japanese-Americans and aliens in relocation camps, three terror war rulings handed down in June 2004, and a famed First Amendment case dissent.

Demonizing Databases: Privacy Purists Pounce

In a major article published this spring, Manhattan Institute Fellow Heather Mac Donald showed how privacy advocates, citing fears of Orwellian "Big Brother" abuses, have succeeded in torpedoing nearly every major post-9/11 terror database initiative. According to Mac Donald, their most effective tactic has been to assert that even if a proposed database program does not violate privacy in its present form, it could be altered to do so at a later date; this is, she notes, a hard rhetorical technique to counter, as any program can be altered later.[5]

Already, several major programs have been killed by fierce attacks from privacy mavens: The Pentagon's Defense Advanced Research Projects Agency (DARPA) alone has cancelled four: (1) Total Information Awareness (TIA), an advanced "data mining" program designed to flush terror suspects by combining government and commercial databases—its termination was partly attributable to the involvement of former Iran-Contra figure Admiral John Poindexter;[6] (2) Human Identity at a Distance, a visual surveillance system designed to identify individuals biometrically and by their "gait," intended for use at embassies and key government sites;[7] (3) LifeLog, a camera-equipped computer program to record and analyze situations, enabling analysis of human experience, possibly to aid battlefield soldiers;[8] and (4) FutureMap, an attempt to create a market assessment program to predict terror strikes.[9]

The now jettisoned CAPPS II would have ranked passengers on a three-tier scale—green (acceptable), yellow (unknown) and red (unacceptable), passing greens quickly, questioning yellows and barring reds pending clearance from the authorities.[10] A major state police initiative, the Multistate Anti-Terrorism Information Exchange, which combines state crime databases to enable rapid record retrieval from some fifty separate databases, has been sharply curtailed, from thirteen to only five participating states.[11]

Mac Donald explains that privacy folks conflate several distinct database concepts: data mining, which refers to sophisticated pattern recognition analysis of complex sets of data—sets vastly larger than human analysis can sift; link analysis, which is a simpler matching technique; and simple database retrieval queries, which involve searching records for particular data without pattern recognition analysis. Proposed access to link counter-terror databases with commercial databases was to be under privacy safeguards, with search results only and not entire records disclosed to the government. *Only records currently legally permissible for the government to search were to be targeted*.

The privacy firestorm, Mac Donald notes, has effectively driven out virtually every computer technology firm, for fear of legal liability. Northwest and JetBlue face multi-billion dollar lawsuits for providing passenger database access in connection with trials of CAPPS II.[12] In April the American Civil Liberties Union (ACLU) sued the government over its "no-fly" program, as mistakes would stigmatize travelers inaccurately and thus violate their constitutional rights.[13]

In yet another development, the ACLU has run afoul of a pledge it falsely made in connection with participation in the Combined Federal Campaign, a program under which charitable groups may receive contributions from government employees via payroll deduction. In 2003 the ACLU raised $470,000 via this funding vehicle (the ACLU's 2002 budget was $102 million). Last October the government required program participants to sign a certification that they would review terror watch lists prepared by the Departments of State, Justice and Treasury, and purge their rolls of those on it; false certification would be grounds for program expulsion. The ACLU, incredibly, now concedes that it signed the certifications while intending to ignore them; its executive director admitted, regarding the lists: "I've printed them out. I've never consulted them."[14]

All these developments have come to pass despite two conclusions of a joint Congressional committee investigating the 9/11 attacks: (1) "a reluctance to develop and implement new technical capabilities aggressively" was a causal factor behind the pre-9/11 intelligence failures; and (2) "While technology remains one of this nation's greatest advantages, it has not been fully and most effectively applied in support of U.S. counter-terrorism efforts."[15]

Shadow of the Supremes: The World War II Internment Cases

Two wartime Supreme Court Decisions, *Hirabayashi v. United States* (1943)[16] and *Korematsu v. United States* (1944)[17] shed more light on terror war issues. *Hirabayashi* upheld the government's right to impose a curfew on West Coast Japanese-Americans; *Korematsu* upheld the government's decision to force them to geographically relocate. Both cases embraced a common premise, with Chief Justice Harlan F. Stone, in *Hirabayashi*, quoting his immediate predecessor, Charles

Evans Hughes: "The war power of the national government is 'the power to wage war successfully.'"[18] Concurring, Justice William O. Douglas, a noted civil libertarian, wrote:

> It is said that if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal are reduced to a small percent….where the peril is great and the time is short….[19]

More narrowly concurring was Justice Frank Murphy: "It does not follow, however, that the broad guarantees of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war."[20] Justice Wiley Rutledge rejected the Chief Justice's claim that the courts lack power to review military decisions during wartime.[21]

Korematsu was a split decision, with several dissents filed by Justices who felt that the decision went too far beyond *Hirabayashi* in affirming broad power of the government during wartime. Defending disparate impact upon a racial group, Justice Hugo Black, another strong civil libertarian, spoke for the majority:

> But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure….But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[22]

Justice Felix Frankfurter, concurring, while acknowledging that war powers are subject to constitutional constraint, ceded broad powers to the state:

> Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless.[23]

Dissenting opinions by Justices Frank Murphy and Owen Roberts stated that the exclusion order punished racial ancestry. Roberts noted Britain had set up 112 tribunals to process 74,000 German and Austrian aliens within six months, with 2,000 interned, 8,000 subject to special restrictions and 64,000 freed outright."[24]

But the dissent filed by Justice Robert H. Jackson, later a Nuremburg prosecutor, bears the closest scrutiny for lessons applicable post-9/11. Jackson began:

> Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one' s antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.'[25]

Jackson conceded the urgency of the war power: "The armed services must protect a society, not merely its Constitution."[26] There are, however, limits: "But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[27] Courts lack the ability to intelligently review assertions of military necessity:

> In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.[28]

Then Jackson explains the hazard of judicial affirmation of military orders:

> But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge [*sic*] Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'[29]

Dismissing judicial review of military orders as "wholly delusive," Justice Jackson stated: "The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy."[30] Only "military superiors," he noted, can assess "military reasonableness," with the only meaningful constraints "their responsibility to the political judgments of their contemporaries and to the moral judgments of history."[31]

Emphasizing Justice Jackson's warning about decisions based upon limited information, author Michelle Malkin, in her just-published history of the Japanese-American internment, points out that intercepts of Japan's secret diplomatic code, which contained evidence of Japanese espionage and sabotage plans targeting the West Coast, was closely held by a few top officials; not even senior military officials implementing the relocation, nor FBI Director J. Edgar Hoover, nor Attorney-General Francis Biddle were aware that such intercepts existed, let alone their contents. Neither were the Supremes.[32]

Wartime secrecy meant that public justification of internment and property confiscation could not mention the most critical evidence supporting the decision. This does not validate the decision—Justice Murphy's citation of Britain's use of individual processing suggests that the U.S., with roughly triple England's population, could have processed half-again as many individuals (112,000 here versus 74,000 there) case by case. But it does suggest that the popular image of the internment as driven by racism and hysteria ignores a genuine security concern—albeit, one far better addressed, taking into account America's constitutional traditions, by following the English example.[33]

Three bedrock propositions emerge from the internment cases: (1) wars are waged to win, by whatever means necessary; (2) equality of hardship takes second place behind wartime exigency; and (3) protecting a constitutional

order requires protecting society itself, and the underlying civil order. That the internment decision is today viewed—rightly—as unwarranted does not contradict these ideas. If unequal hardship would not justify mass internment today, it *could* justify profiling, an inconvenience hardly akin to confinement.

Terror War Tremors: The Supremes Speak Again

The trio of Supreme Court rulings in terrorist detention cases augur more trouble ahead in gathering information about terrorist groups. In three cases decided at the end of its 2003-04 term the High Court resolved disputes over which detainees could seek habeas corpus and if so, where. It held that all captives may seek the Great Writ, but, in an apparently anomalous result, detainees held outside the U.S. can pick any of 94 federal districts in which to file, while those held within the U.S. must do so in the specific jurisdiction where they are being held. All the cases were decided on federal statutory grounds, without reaching constitutional claims.[34]

This last point is reassuring, as Congress is thus free to pass a statute that supplants the Court's rulings—something it may well do to correct the anomaly of allowing detainees outside the U.S. to have full geographic choice of judicial forum, while those held inside the U.S. must litigate locally. In one case, the Supreme Court ruled that alleged al-Qai'da "dirty bomb" plotter Jose Padilla must seek habeas corpus in the federal district where he is being held, *i.e.*, Northern Virginia. Padilla, arrested in Chicago, had sought habeas review in New York. Stevens eloquently dissented, noting Padilla's indefinite incommunicado detention and interrogation:

> At stake in this case is nothing less than the essence of a free society....Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.....Executive detention of subversive citizens....may not…be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure....For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.[35]

Stevens's viewpoint on interrogation gives cause for concern that in later cases—sure to be filed—the court may seriously limit the ability of U.S. authorities to gather intelligence from captives. We cannot penetrate terror groups. If captives feel fully free to refuse to cooperate it will become well nigh impossible for us to learn terror group structure, plans and operations. No one with Western values would wish to give interrogators *carte blanche* to torture captives and family members, but interrogation is essential to gather intelligence. True, Stevens was dissenting, but dissent language not infrequently finds its way into later majority opinions.

It is famously hazardous to predict what the Supremes will do, and subsequent rulings may not follow Stevens's counsel. But if they do, perhaps the most vital source of inside information on terrorist groups will be cut off.

One person who on 9/11 grasped the new exigencies was Attorney-General John Ashcroft. He promptly had authorities round up 768 Muslim-country visitors who were here illegally—contrary to accusations by libertarians, these detentions were lawful;

eventually, 531 were deported. Average hold time was 80 days.[36] *According to the 9/11 report, a* "*senior al-Qai'da detainee" stated that the rapid homeland response of the government regarding immigration files and deportations "forced al-Qai'da to operate less freely in the United States.*"[37] For ignoring political correctness and multicultural pieties, John Ashcroft, much-vilified by libertarians, emerges as a major unsung post-9/11 hero.

Ashcroft's resolute response evokes memory of the most famous such act in American history: Abraham Lincoln's suspension of the writ of habeas corpus in 1861. Lincoln asked Congress on Independence Day: "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?"[38]

Jackson Joins Lincoln: Survival First

An equally eloquent answer to Justice Stevens was provided in a 1949 Supreme Court case, in which the Court upheld the First Amendment rights of a speaker given to anti-Semitic rhetoric and indiscriminate anti-Communist accusations akin to those later uttered by the notorious 1950s demagogue Senator Joseph McCarthy. Dissenting, Justice Jackson noted that speech is one thing, prompting violence by public insults another. Jackson warned:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either. 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.[39]

As if to underscore the flaws in Stevens's position, the recent intelligence about terrorist attacks directed against financial institutions in New York and Washington came from a raid in Pakistan that produced documents, plus captives who were interrogated without Johnny Cochran to represent them. Ditto for 9/11 mastermind Khalid Sheikh Muhammad, who has been held incommunicado and interrogated since his March 2003 capture. He has reportedly provided a treasure trove of information on what goes on inside al-Qai'da. Though not tortured outright, he has been subjected to "pressure" interrogation. Would America and its allies be safer had he instead been accorded the courtesies of domestic and/or international law as might be found applicable, and thus free to keep silent?

Privacy purists and civil liberties hawks would do well to keep in mind Justice Jackson's sage admonition, as well as the 9/11 panel's warning that nothing would so damage liberty as a successful terrorist attack at home. Consider the impact upon society of detonation of a nuclear device in a major American city. Beyond the horrific loss of life—a midtown New York Hiroshima-yield nuke could kill one million[40]—imagine the immediate public health catastrophe as local facilities are overwhelmed, and the likely crash of world financial markets. And then consider two possibilities: (1) the terror group identifies itself, and submits a list of blackmail demands, such as the U.S. immediately departing the Middle East entirely; or (2) no group takes responsibility and, as with the 2001 anthrax attack, the government is unable to ascertain who is responsible. The impact on societal confidence and civil liberties would surely be catastrophic.

The 9/11 Commission Report: Privacy and Liberty Require Security

The 9/11 panel neatly framed its assessment of the current state of domestic homeland security: "[A]lthough Americans may be safer, they are not safe."[41]
The panel echoes Jackson's "suicide pact" theme:

> We must find ways of reconciling security with liberty, since the success of one helps protect the other. The choice between security and liberty is a false choice, as nothing is more likely to endanger America's liberties than the success of a terrorist attack at home. Our history has shown us that insecurity threatens liberty. Yet, if our liberties are curtailed, we lose the values that we are struggling to defend.[42]

The panel defends the USA Patriot Act, much maligned as a threat to civil liberties and as unconstitutional:

> ….Many of the act's provisions are relatively noncontroversial, updating America's surveillance laws to reflect technological developments in a digital age. Some executive actions that have been criticized are unrelated to the Patriot Act. The provisions in the act that facilitate the sharing of information among intelligence agencies and between law enforcement and intelligence appear, on balance, to be beneficial. Because of concerns regarding the shifting balance of power to the government, we think that a full and informed debate on the Patriot Act would be healthy.[43]

The report addresses issues pertaining to privacy and civil liberties issues. It recommends that the Department of Homeland Security adopt a comprehensive integrated border and transportation screening program; already, US VISIT (United States Visitor and Immigration Status Indicator Technology program) is phasing in a dual biometric identifier system, using digital photos and printouts of two fingers.[44] The panel stressed the importance of connecting database dots with decision-makers:

> Linking biometric passport to good data systems and decisionmaking [*sic*] is a fundamental goal. No one can hide his or her debt by acquiring a credit card with a slightly different name. Yet today, a terrorist can defeat the link to electronic records by tossing away an old passport and slightly altering the name in the new one.[45]

Other key homeland security recommendations were: (1) federal standards for birth certificates and drivers licenses;[46] (2) implementing "no-fly" and "automatic selectee" lists;[47] (3) a "trusted traveler" program, allowing individuals who provide certain information to pass screening;[48] (4) a board within the executive branch to monitor privacy and civil liberties compliance on the part of the government.[49]

More Than One Way to Lose Liberty

With our survival at stake, should preserving privacy trump database searches, for records or patterns that might unearth terror cells? Government and commercial databases already have vast oceans of data. *If we wish to connect dots, we must connect databases, departments and decision-makers. In modern*

life connecting dots means linking databases, casting for suspicious patterns, and gathering detailed information from all potentially useful sources. No dots connected means less chance of stopping terror strikes. How much less cannot be quantified in advance, but the plausible prospect a of mega-death WMD strike that cripples America argues for better dot connecting.

To achieve those objectives, the three favorite counter-arguments of the libertarian crowd must be overcome: (1) it won't work; (2) it could be abused or altered; (3) it is a slippery slope. The first argument parallels arguments Pentagon critics use against every U.S. weapon since the slingshot—weapons won't work, or can be easily countered. And to be fair, some weapons did not work. But most of them did, and quite well—ask Saddam Hussein. Regarding data abuse, it is fair to assume that sooner or later, any tool used by government—or the private sector, as well—will be abused, despite stringent safeguards. Punish the abuser, but do not leave vital homeland security tools unused. As for potential alterations, contest them if proposed; worrying over hypothetical horrors will kill everything. But in allowing the government to compile and access sensitive data in vast databases, as distrust of government is often justified, we should be guided by Ronald Reagan's negotiating motto vis-a-vis the Soviets, "trust, but verify." As for slippery slopes, democratic societies are generally successful at adjusting misguided policies as experience dictates.

What about searching library records? Won't that have the famed "chilling effect" on exercise of First Amendment rights? In fact, library records were searched in connection with the Unabomber and Zodiac killer cases; they are already legally retrievable. If America stops reading, it will be the television and America's pathetic public schools that will be the culprits. It is also worth noting that our exercise of free speech—yes, vital—is not cost-free: Al-Qai'da's top leaders learned about the potential value of chemical weapons from us, as this memo to Muhammad Atef, operational commander of al-Qai'da (killed by U.S. forces in Afghanistan), from Ayman al-Zawahiri, al-Qai'da's number two, relates:

> The enemy started thinking about these weapons before WWI. Despite their extreme danger, we only became aware of them when the enemy drew our attention to them by repeatedly expressing concerns that they can be produced simply with easily available materials.[50]

Lincoln acted decisively to curb seditious speech in wartime, jailing "Copperhead" antiwar Democrat Clement Vallandigham, and wrote the New York Herald Tribune in defense of his decision: ""Shall I shoot the simple soldier-boy who deserts while I must not touch a hair of the wily agitator who induces him to desert?"[51] Recently, an Islamic school in Alexandria, Virginia was taken to task for teaching first-graders to hate other religions.[52] Is such classroom speech that may produce the next generation of Islamic terrorists immune under academic freedom? Allowing jihad here while fighting it elsewhere makes no sense.

How about a recipe posted on the Internet guiding terrorists on how to make a nuclear bomb? This last case is not an academic hypothetical: In 1978 an anti-war magazine tried to publish an article on how to make a hydrogen bomb. The Department of Energy went to court and won a rare prior restraint of speech order, delaying publication of the article pending detailed review.[53]

Financial privacy? Every time a buyer uses a credit card to make a purchase the card is

swiped through a networked scanner which verifies that the card's credit limit has not been exceeded; credit card issuers and phone companies monitor use for suspicious patterns, to limit financial loss. If the IRS can turn Joe and Josephine Citizen upside down in search of $49.17, shouldn't the FBI be able to track financial records in search of the next suspected Muhammad Atta wannabe? As Mac Donald observes, vast audit trails exist in commercial databases—access to which was a prime objection of privacy purists who forced DARPA to back off database linkages. After 9/11, Acxiom, the largest commercial data "aggregator" with 20 billion customer records covering 96 percent of U.S. households, found 9 of the 19 of hijackers in its database; another aggregator, Seisint, found 5.[54]

Can we make do without CAPPS II or trusted traveler screening? On 9/11 CAPPS I flagged 4 of the 19 hijackers, but that triggered only a search of their bags. Had CAPPS I been cross-linked to terror watch lists in the U.S. and abroad—the very kind of linkage that, as Mac Donald notes, the libertarian crowd opposes—9/11 might have been at least partially thwarted.[55] How disconnected were the dots on 9/11? *The security chief of the Federal Aviation Administration told the 9/11 panel that the first time he heard of the State Department's TIPOFF list of known and suspected terrorists was at a panel hearing in January 2004*.[56]

Profiles in Political Correctness

Augmenting concerns about privacy are those about profiling—precisely what CAPPS I & II are designed to perform. The four 9/11 hijackers flagged by CAPPS I were not subjected to extraordinary screening of their carry-on luggage because in 1997 that policy had been abandoned as discriminatory.[57]

Pressure from Arab and anti-profiling groups had led the Clinton Administration to agree not to interview flyers flagged by CAPPS I. As for CAPPS II, it would only have retrieved four "data points" per flyer: name, address, phone number and date of birth—the first three, for most passengers, are already voluntarily listed in the phone book, while the last is on everyone's driver's license or state ID, required for boarding. Moreover, the data would be discarded upon landing. With Northwest and JetBlue facing lawsuits over their participation in DARPA's TIA database program, no airline would volunteer to run a CAPPS II trial.[58]

Worse, panel member John Lehman asserted earlier this year that Transportation Secretary Norm Mineta imposed a policy on screeners that pulling aside more than two Arab/Muslim passengers on a single flight would mean trouble. *Under this rule, none of the 9/11 flights hijacked could have been purged of hijackers.* Mineta's anti-profiling policy, imposed by a September 21, 2001 letter to the airlines, led to his Department fining three airlines in 2003 and 2004, *including the two whose planes had been taken on 9/11*. DOT's policy forbids classifying passengers by race, color, national or ethic origin or religion; it specifically warns against treating differently passengers of Middle Eastern or Arab origin, or who appeared to be Muslim.[59]

Mineta denies a "two-Muslim" rule, but United Airlines former chief of security told the 9/11 panel that a Justice Department official warned him his screening system would be "shut down" if in total more than three people of the same ethnic origin were flagged; thus it appears that an informal quota is in fact being applied.[60] True, not all bombers and hijackers are Muslim or Arab, but for decades most have been members of those groups. As the 9/11 report states, we are at war with "not just 'terrorism,' some generic

evil….The catastrophic threat at this moment in history is ….*Islamist* terrorism."[61] So how long must we be saddled with a DOT chief obsessed with the memory of his childhood trauma due to his relocation camp internment during World War II?

True, there have been no domestic hijackings since 9/11, but the last such event in U.S. airspace pre-9/11 was in 1993; we went eight years with near-zero protection and were not hit.[62] The last multiple hijacking anywhere in the world was in 1970.[63] If we are safer airborne since 9/11 it is due to better bag screening and the change in passenger behavior protocol initiated by the heroes of United Flight 93. Flying will not be made safer by pulling aside Norwegian grandmothers, Australian paraplegics and former Vice-Presidents (Gore and Quayle—at the least the wasted effort was bipartisan in coverage).

One key change we should accept: a national ID card, biometrically verified. Continental Europe has had this for years—albeit, not biometric and thus highly subject to fraud; Interpol estimates that up to 10 million lost or stolen passports are now in circulation.[64] Does anyone think that the result has been a Stalinist police state over there? True, terrorism persists in Europe, but biometric validation would make it far harder for terror cells to operate. The 9/11 panel found that on 9/11: (1) 15 out of 19 hijackers were "potentially vulnerable to interception" by border patrol; (2) using pattern-matching of travel and travel documents could have flagged 4 to 15; and (3) another 3 could have been flagged by "more effective use" of existing U.S. government databases.[65]

The 9/11 panel recommended a "comprehensive screening system for border entry, including biometric passports, and that we stop returning fraudulent passports to their holders (yes, we have been doing this).[66] The State Department plans to introduce passports in early 2005 with a biometric international facial recognition standard adopted by the International Civil Aviation Organization (ICAO), an affiliate of the UN. The standard was chosen partly for ease of implementation, but also partly to defuse objections from privacy groups; an ICAO report concluded that because the face is shown in public, the photo "is already socially and culturally accepted internationally."[67]
The State Department rejected a dual biometric identifier—face/fingerprints—even though it would allow other countries to use the less reliable international standard, while giving Americans at home better protection against terrorist entry.

The panel recommended for air travel two measures vehemently opposed by privacy advocates: linking biometric passports to data systems and implementation of a trusted traveler program.[68] The panel warned that aviation security is "fighting the last war."[69] False positives plague no-fly lists: Senator Edward Kennedy and Congressman John Lewis found their names on a no-fly list. Far better amelioration procedures must be put in place to allow those mistakenly flagged to correct the record. Trusted traveler programs, now in trial runs at several major U.S. airports, use biometric scanning; if adopted they will reduce TSA's burden, currently 1.8 million passengers screened daily.[70]

Privacy groups object more to travel fingerprinting than facial scans. One sure result: more false positives, as fingerprints are 99.6 percent reliable, versus 90 percent for facial recognition.[71] Confirming this, the UK Passport Service admonishes passport photo subjects not to smile, as a "neutral expression" is required for the lip scan to work; yet head

coverings "for religious reasons" will be allowed, thus making Islamic head coverings a potential disguise aid for terrorists.[72]

To meet privacy concerns, the panel proposes an executive privacy officer.[73] This must be balanced by security. The Federal Communications Commission, to its credit, brushed aside privacy complaints and unanimously proposed that Internet calls, like others, be accessible to wiretaps.[74] Conversely, lawsuits against those cooperating with DARPA database projects will disconnect dots.

Sun Microsystems co-founder and CEO Scott McNealy once famously called privacy issues a "red herring," adding: "You have zero privacy anyway. Get over it."[75] Privacy is hardly a "red herring," but the price of privacy purism and civil liberties excess may be a successful catastrophic terror strike. How will voters who willingly surrender daily far more information than CAPPS II would gather judge an Administration that caves to protests over database profiling, if an Islamic terror cell puts anthrax in a subway or skyscraper ventilating system?

Consider a final example of database dot connection. The Wisconsin project on Nuclear Arms Control, a private group, compiles from public information sources a list of 3,500 firms that engage in nuclear and missile technology commerce. It sells a bi-monthly Risk Report database CD to the CIA, the Defense Department, and to both American and European export officials.[76] It is simply inconceivable for privacy concerns to preclude the government from accessing such data. Allowing the government to access other commercial databases to find terror suspects is no different.

Conclusion

Benjamin Franklin famously warned: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[77] But Franklin's aphorism begs the question of what liberty is "essential," and was made when the threat of nuclear terrorism was centuries away. In many situations Americans and visitors must show ID already, and in many contexts we share personal information with commercial vendors. Concealing one's identity from a government that is waging a global war against Islamic terrorists who seek WMD cannot reasonably be considered an "essential liberty."

Recalling the wartime Japanese-American internment cases, we must be mindful of former Chief Justice Hughes's injunction that the power to wage war implies all necessary power to win it, and former Justice Black's point that unequal hardships on persons or groups might be imposed during wartime. Above all, we must be mindful of Justice Jackson's admonition: "The armed services must protect a society, not merely its Constitution." No society—no Constitution.

On 9/11 tactically clever terrorists turned our modern technology against us. Now a left-right coalition of licentious libertarians, profiling protesters and privacy purists, invoking the talisman of the Constitution, wage war on every technology tool sought by the government to protect America against enemies who give no quarter. If they prevail the price is greater exposure to terror.

Libertarian fear of our technology is not shared by terrorists; they embrace it. A fine state of affairs, this: While terrorists turn our technology against us, libertarians turn us against our technology. We must make our technology an enabling asset in the war, while

preventing adversaries, and also misguided dissenters who ignore terror watch lists, from making it a crippling liability.

Wars have always led to some curtailment of domestic liberty, restored later in the case of free societies. Neither privacy nor liberty will survive in recognizable form should mega-death terror reach our shores. To reject modest civil liberties compromises now is to risk wholesale loss of our liberties later. This is a dangerous wager to make. If we lose that bet, then, to borrow a favored cliché of the civil libertarian set, the terrorists will indeed have won.

(Endnotes)

[1] *At the Nervous Center of Homeland Security*, Washington Post, p. A1 (May 18, 2004).

[2] *Plan to Collect Flier Data Cancelled: Color-Coded System Seen as Privacy Threat*, USA Today (7/15/04). < http://www.usatoday.com/usatonline/20040715/6367163s.htm > TSA has proposed a successor to CAPPS II, named Secure Flight, with 60 data fields, many more than CAPPS II. The larger number is intended to reduce false positives. *Latest Flight Screening Reviewed*, Washington Times, p. C12 (Aug. 27, 2004).

[3] *'Aware' Primer Will Be Revised*, orlandosentinel.com, 7/16/04. < http://www.orlandosentinel.com/search/dispatcher.front?Query=firefighters&target=article&x=12&y=10 >

[4] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, 567 p. (W.W. Norton & Company 2004).

[5] *What We Don't Know Can Hurt Us*, City Journal, p. 25 (Spring 2004).

[6] *Id.*, pp. 16-21.

[7] *Id.*, pp. 21-22.

[8] *Id.*, pp. 22-23.

[9] *Id.*, pp. 20-21.

[10] *Id.*, pp. 23-27.

[11] *Id.*, pp. 27-30. The five states still using MATRIX are Connecticut, Florida, Michigan, Ohio and Pennsylvania. < http://www.matrix-at.org/states.htm >

[12] *Id.*, pp. 27-28.

[13] *A.C.L.U. Board is Split Over Terror Watch Lists*, New York Times, p. A1 (July 31, 2004).

[14] *Id.* On July 31 the ACLU rescinded the agreement with the government and returned the federal charity funds. Wendy Kaminer, a national ACLU board member of the ACLU, opined on NPR radio August 1 that but for the New York Times story the ACLU would not have rescinded the agreement and returned the money. Hentoff, Nat, *Liberty Beat*, villagevoice.com, 9/8-14/04. <http://www.villagevoice.com/hentoff/>

[15] Mac Donald, fn. 5 *supra*, p. 31.

[16] 320 US 81. < http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/320/81.html >

[17] 323 US 214. < http://caselaw.lp.findlaw.com/scripts/printer_friendly.pl?page=us/323/214.html >

[18] *Hirabayashi*, fn. 16 *supra,* p. 5 (online pagination).

[19] *Id.*, p. 11.

[20] *Id.*, p. 12.

[21] *Id.*, p. 16.

[22] *Korematsu*, fn. 17 *supra*, p. 3 (online pagination).

[23] *Id.*, p. 5.

[24] *Id.*, p. 6 & p. 17.

[25] *Id.*, p. 12. Citing U.S. Constitution, Article III, section 3, clause 3.

[26] *Id.*, p. 13.

[27] *Id.*

[28] *Id.*

[29] *Id.*, p. 14. Justice Benjamin Cardozo served on the Supreme Court from 1932 to 1938.

[30] *Id.*

[31] *Id.*, pp. 14-15.

[32] *In Defense of Internment* (Regnery 2004). Access to MAGIC, the Japanese diplomatic code, was restricted to President Franklin Roosevelt and a few senior officials; of those involved in the internment decisions, only Secretary of War Henry Stimson and Stimson's deputy, John McCloy, had access privileges. *In Defense of Internment*, p. 41.

[33] The U.S. did not intern its German and Italian populations—at 52 million they represented 38.5 percent of the entire American resident population of 135 million. *Id.*, p. 84. The 112,000 Japanese-American internees were less than one-tenth of one percent of the total.

[34] The cases, all decided June 28, 2004: *Hamdi v. Rumsfeld*, No. 03-6696; (U.S. citizen captured on foreign battlefield, held inside the U.S., must file habeas petition in the jurisdiction where held); *Rasul v. Bush*, No. 03-334 (non-U.S. citizen detainees are entitled to habeas petition, and can file anywhere within the U.S. federal court system); *Rumsfeld v. Padilla*, No. 03-1027 (U.S. citizen held on domestic territory must file habeas petition in the jurisdiction where held). < http://www.supremecourtus.gov/opinions/03slipopinion.html >

[35] *Rumsfeld v. Padilla*, Stevens, J., dissenting, pp. 11-12.

[36] *9/11 Commission Report*, fn. 4, *supra*, p. 328.

[37] *Id.*, p. 329.

[38] Rehnquist, William H., *All the Laws But One: Civil Liberties in Wartime*, p. 38 (Alfred A. Knopf, 1998).

[39] *Terminiello v. Chicago*, 337 US 1 (1949), Jackson, J., dissenting.

[40] Allison, Graham, *Nuclear Terrorism: The Ultimate Preventable Catastrophe*, pp. 91-92 (Times Books 2004

[41] *9/11 Commission Report*, fn. 4, *supra*, p. 383.

[42] *Id.*, p. 395.

[43] *Id.*, p. 394.

[44] *Id.*, pp. 387-88.

[45] *Id.*, p. 389.

[46] *Id.*, p. 390.

[47] *Id.*, p. 393. "Automatic selectee" passengers are pulled aside and screened.

[48] *Id.*, p. 396.

[49] *Id.*, p. 395.

[50] Cullison, Alan, *Inside Al-Qaeda's Hard Drive*, Atlantic Monthly, p. 62 (Sept. 2004).

[51] Rehnquist, fn. 35 *supra*, p. 73.

[52] *Islamic Groups Hit Curriculum at Saudi School*, Washington Times, p. A1 (Aug. 2, 2004). < http://www.washingtontimes.com/metro/20040802-123606-9597r.htm >

[53] *U.S. v. Progressive, Inc.*, 467 F. Supp. 990 (1979). < http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/progressive.html >

[54] Mac Donald, fn. 5 *supra*, pp. 17-18. Her source for this data was an article in *Fortune*.

[55] *Id.*, p. 18.

[56] *9/11 Commission Report*, fn. 4, *supra*, pp. 83 - 84.

[57] *Id.*, p. 84.

[58] Mac Donald, Heather, *Hijacked by the 'Privocrats'*, Wall Street Journal (Aug. 5, 2004).

[59] *Arab Profiling Homeland Security* < http://www.warriorsfortruth.com/news-arab-profiling.html > Under negotiated settlements with DOT, United was fined $1.5 million in November 2003, American $1.5 million in March 2004 and Continental $500,000 in April 2004.

[60] *Political Correctness or Passenger Safety?*, p. A18, Washington Times (Aug. 5, 2004).

[61] *9/11 Commission Report*, fn. 4, *supra*, p. 362. (Emphasis in original.)

[62] *Id.*, p. 14. It was a Lufthansa flight. The last American flight hijack attempt anywhere in the world was in 1986, carried out by Islamic terrorists against a PanAm plane in Karachi, Pakistan. ASModernPlanes. < http://www.geocities.com/khlim777_my/ashijack.htm >

[63] *9/11 Commission Report*, fn. 4 *supra*, p. 10 & fn. 66. It was carried out by Palestinian terrorists in 1970.

[64] *Passports Remain Terrorists' Weapons*, Washington Times, p. A12 (Aug. 9, 2004).

[65] *9/11 Commission Report*, fn. 4, *supra*, p. 384. Mac Donald's count is 9 flagged by CAPPS, but the 9/11 panel found that only 4 were actually CAPPS suspects; the remaining 5 pulled aside had tripped metal detectors.

[66] *Id.*, pp. 386-87.

[67] *Passport ID Technology Has High Error Rate*, Washington Post, p. A1 (Aug. 6, 2004).

[68] *9/11 Commission Report*, fn. 4 *supra*, pp. 388-89.

[69] *Id.*, p. 394.

[70] *Registered Traveler*, Transportation Security Administration Brochure (Summer 2004).

[71] *9/11 Commission Report*, fn. 4 *supra*, p. 394.

[72] *Look Miserable to Help the War on Terrorism*, telegraph.co.uk, 8/6/04. < http://news.telegraph.co.uk/news/main.html > (Partial link; full link would not transfer.)

[73] *Id.*, p. 393.

[74] *FCC Adopts Notice of Proposed Rulemaking and Declaratory Ruling Regarding Communications Assistance for Law Enforcement Act*, FCC News, Aug. 4, 2004. < http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-250547A3.pdf >

[75] Slashdot.com, Jan. 28, 1999. < http://slashdot.org/articles/99/01/29/0047249.shtml >

[76] Allison, fn. 40 *supra*, p. 196.

[77] *The Quotable Franklin*. < http://www.ushistory.org/franklin/quotable/quote04.htm >

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