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Abstract: The article discusses the conflict between civil liberties and security in the United States in the wake of the terrorist attacks of September 11, 2001. It is said that constitutional law is flexible, and designed to adapt to changing circumstances, so giving absolute priority to either liberty or security would be a mistake. Redirecting resources from the war on drugs to the war on terrorism is recommended as a way to restore many civil liberties that have been impaired by anti-drug policies.

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THE LAW

Security Versus Civil Liberties

A distinguished jurist advises us to calm clown about the probable curtailing of some personal freedoms in the months ahead. As a nation we've treated certain civil liberties as malleable, when necessary, from the start

In the wake of the September 11 terrorist attacks have come many proposals for tightening security; some measures to that end have already been taken. Civil libertarians are troubled. They fear that concerns about national security will lead to an erosion of civil liberties. They offer historical examples of supposed overreactions to threats to national security. They treat our existing civil liberties — freedom of the press, protections of privacy and of the rights of criminal suspects, and the rest — as sacrosanct, insisting that the battle against international terrorism accommodate itself to them.

I consider this a profoundly mistaken approach to the question of balancing liberty and security. The basic mistake is the prioritizing of liberty. It is a mistake about law and a mistake about history. Let me begin with law. What we take to be our civil liberties — for example, immunity from arrest except upon probable cause to believe we've committed a

crime, and from prosecution for violating a criminal statute enacted after we committed the act that violates it — were made legal rights by the Constitution and other enactments. The other enactments can be changed relatively easily, by amendatory legislation. Amending the Constitution is much more difficult. In recognition of this the Framers left most of the constitutional provisions that confer rights pretty vague. The courts have made them definite.

Concretely, the scope of these rights has been determined, through an interaction of constitutional text and subsequent judicial interpretation, by a weighing of competing interests, I'll call them the public-safety interest and the liberty interest. Neither, in my view, has priority. They are both important, and their relative importance changes from time to time and from situation to situation. The safer the nation feels, the more weight judges will be willing to give to the liberty interest. The greater the threat that an activity poses to the nation's safety, the stronger will the grounds seem for seeking to repress that activity, even at some cost to liberty. This fluid approach is only common sense.

Supreme Court Justice Robert Jackson gave it vivid expression many years ago when he said, in dissenting from a free-speech decision he thought doctrinaire, that the Bill of Rights should not be made into a suicide pact. It was not intended to be such, and the present contours of the rights that it confers, having been shaped far more by judicial interpretation than by the literal text (which doesn't define such critical terms as "due process of law" and "unreasonable" arrests and searches), are alterable in response to changing threats to national security.

If it is true, therefore, as it appears to be at this writing, that the events of September 11 have revealed the United States to be in much greater jeopardy from international terrorism than had previously been believed — have revealed it to be threatened by a diffuse, shadowy enemy that must be fought with police measures as well as military force — it stands to reason that our civil liberties will be curtailed. They should be curtailed, to the extent that the benefits in greater security outweigh the costs in reduced liberty. All that can reasonably be asked of the responsible legislative and judicial officials is that they weigh the costs as carefully as the benefits.

It will be argued that the lesson of history is that officials habitually exaggerate dangers to the nation's security. But the lesson of history is the opposite. It is because officials have repeatedly and disastrously underestimated these dangers that our history is as violent as it is. Consider such underestimated dangers as that of secession, which led to the Civil War; of a Japanese attack on the United States, which led to the disaster at Pearl Harbor; of Soviet espionage in the 1940s, which accelerated the Soviet Union's acquisition of nuclear weapons and emboldened Stalin to encourage North Korea's invasion of South Korea; of the installation of Soviet missiles in Cuba, which precipitated the Cuban missile crisis; of political assassinations and outbreaks of urban violence in the 1960s; of the Tet Offensive of 1968; of the Iranian revolution of 1979 and the subsequent taking of American diplomats as hostages; and, for that matter, of the events of September 11.

It is true that when we are surprised and hurt, we tend to overreact — but only with the benefit of hindsight can a reaction be separated into its proper and excess layers. In hindsight we know that interning Japanese-Americans did not shorten World War II. But was this known at the time? If not, shouldn't the Army have erred on the side of caution, as it did? Even today we cannot say with any assurance that Abraham Lincoln was wrong to suspend habeas corpus during the Civil War, as he did on several occasions, even though the Constitution is dear that only Congress can suspend this right. (Another of

Lincoln's wartime measures, the Emancipation Proclamation, may also have been unconstitutional.) But Lincoln would have been wrong to cancel the 1864 presidential election, as some urged: by November of 1864 the North was close to victory, and canceling the election would have created a more dangerous precedent than the wartime suspension of habeas corpus. This last example shows that civil liberties remain part of the balance even in the most dangerous of times, and even though their relative weight must then be less.

Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation. I want to emphasize something else, however the malleability of law, its pragmatic rather than dogmatic character. The law is not absolute, and the slogan "Fiat iustitia ruat caelum" ("Let justice be done though the heavens fall") is dangerous nonsense. The law is a human creation rather than a divine gift, a tool of government rather than a mandarin mystery. It is an instrument for promoting social welfare, and as the conditions essential to that welfare change, so must it change.

Civil libertarians today are missing something else — the opportunity to challenge other public-safety concerns that impair civil liberties. I have particularly in mind the war on drugs. The sale of illegal drugs is a "victimless" crime in the special but important sense that it is a consensual activity. Usually there is no complaining witness, so in order to bring the criminals to justice the police have to rely heavily on paid informants (often highly paid and often highly unsavory), undercover agents, wiretaps and other forms of electronic surveillance, elaborate sting operations, the infiltration of suspect organizations, random searches, the monitoring of airports and highways, the "profiling" of likely suspects on the basis of ethnic or racial identity or national origin, compulsory drug tests, and other intrusive methods that put pressure on civil liberties. The war on drugs has been a big flop; moreover, in light of what September 11 has taught us about the gravity of the terrorist threat to the United States, it becomes hard to take entirely seriously the threat to the nation that drug use is said to pose. Perhaps it is time to redirect law-enforcement resources from the investigation and apprehension of drug dealers to the investigation and apprehension of international terrorists. By doing so we maybe able to minimize the net decrease in our civil liberties that the events of September 11 have made inevitable.

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By Richard A. Posner

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