
Giving the Devil His Due Process: Civil Rights Meet a Culture of Terror

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The title of my remarks comes from an experience of a year ago. As I left the Cathedral at Chartres I noticed over its huge doors an arresting sight—a depiction of the Last Judgment. Worshipers were to be focused—both as they came to and left the divine service—on their final accountability to the God who made them. The picture shows what the Bible calls the “day of the Lord.” It gives hints of both the severity and the breadth of a judgment that extends to beings both spiritual and corporeal and to every tribe and time of the human family. What it shows for our purposes this afternoon, is that God, the final judge, gives even the Devil due process. A court is in session even if the verdict may not be in

doubt. One might conclude from this future precedent, by the inexorable legal logic of *a fortiori*, that even current devils can be extended due process, therefore, as well. The key question in a time of terror, of course, is what process is due?

My title may have further relevance, however. When I heard the careful and nuanced assessments of our American president and his attorney general made both by our European friends and the distinguished American academics here present, placing President Bush—it would seem—on a character continuum somewhere between Adolf Hitler and Pol Pot, viewed apparently as mildly more sociopathic and less capable of redemption than

Saddam Hussein, I got a new appreciation for a phrase from my undergraduate days, “over the top.”

A key element of due process is hearing the other side. Perhaps the Dantes whose rhetoric is overheated by what they perceive as the inferno of a Republican administration could give the president and Mr. Ashcroft their due. And the application could be extended even one more step. As someone who represented the Florida Senate as lead counsel and the Florida legislature as lead legal spokesman in the great election controversy of 2000, I could be viewed as one who gave material aid and comfort to the Bush campaign and whose briefs may have made some modest contribution to his election. In C.S. Lewis terminology, I might be viewed as the Dr. Slubgob to the great Satan. So perhaps I need to ask you for a Pascalian moment, a “willing suspension of disbelief,” while I give you a significantly different assessment of the American response to terrorism than what you have heard so far.

A collision

It is by now a tired cliché that “everything changed” on September 11, 2001. As the lexicographer Samuel Johnson put it, the great thing about a hanging is that “it wonderfully concentrates the mind.” Both the American psyche and the American political process were wonderfully concentrated by September 11. Its suddenness, its savagery, and its apparent senselessness combined to reveal a new vulnerability that has affected deeply the national psyche. Our free society stood face-to-

face with what philosophers sometimes call surd evil—evil without apparent purpose or design.

This collision with the American psyche was matched by a collision with American political life and the principles of due process. The feeling of vulnerability led to a public demand for political action. The minds of political leaders, wonderfully concentrated, caused them to lurch into action with new laws, regulations, and directives. This process is not unprecedented, even though the event that triggered it was. Given the calamity of September 11, the response may have been greater in intensity and degree, but it was not unique to terrorism. It was an example of what we might call a political paroxysm. A paroxysm assumes the existence of an underlying disease that occasionally erupts into acute symptomology—fevers, chills, seizures, and other traumas. It is a familiar process after notorious crimes, including white-collar crimes. Most recently the front pages were filled with accounting fraud. The business section of the newspaper became the front page and the news was replete with shocking revelations about Enron, Arthur Andersen, WorldCom, and Tyco, all sometime darlings in their industries. The resulting paroxysm is still being felt. Over the past twenty years there have been several others: the defense industry revelations spurred by the Grace Commission report of the early 1980s; the financial institution scandals of the late 1980s; the environmental Sturm und Drang after the public problems of Anne Gorsuch Buford in the Reagan administration.

Such paroxysms run a predictable course, their choreography as stylized as a Peking opera. There comes first a scandal or calamity (\$1,500 hammers, plug numbers, outrageous fraud), followed in due course by a public outcry, followed in turn by political action, normally a raft of new laws and regulations (like the current Sarbanes-Oxley legislation), followed next by a wave of prosecutions, the creation of new perils for peripheral players and a new class of “permanent defendants,” the rest of whose professional careers will be spent as litigants, against the federal prosecutors, the Securities and Exchange Commission, the class-action plaintiffs, the insurance carriers, the spouses’ divorce lawyers. Given the government penchant for the “ready, fire, aim” approach to public paroxysms, I have in each of these settings tried a major national case to acquittal on all charges—due often, I must say with candor uncharacteristic for a trial lawyer, more to the government’s diffuse targeting than to extraordinary trial skill.

When the same process arises in the current terrorism context, however, the issues—particularly the political responses—implicate foundational principles of the American experiment. What can be more fundamental to our concepts of due process than the following:

- The right to a trial before a court, with a trained judge, according to principles of due process;
- The right to be promptly advised of the charges that led to confinement;
- The right to representation by competent counsel;
- The right to confidential and privileged communications with that counsel;
- The right not to be detained without some probable cause to believe there has been wrongdoing;
- The right to be free of searches and seizures done without a warrant and the approval of a judge, based on some reasonable cause to believe that the search will reveal evidence of a crime;
- The right to be free of torture when examined.

Though fundamental, these principles are not, to be sure, absolute. Each has its qualifications and footnotes. But they largely define our American understanding of due process. And they are largely significantly diminished in some circumstances as a result of the American response—and not the American response alone—to the concern about terrorism triggered by September 11, 2001. As a result of the USA Patriot Act, a somewhat Orwellian appellation for even conservative ears, the practitioners of terror are targeted for somewhat different process:

- Trial may be by military tribunals rather than by courts, often under the cloak of secrecy;
- Indefinite detention of people characterized as illegal combatants with no timeline for trial, or promise that any trial will ever be had;

- No charges need be brought, and no habeas corpus is available;
- No right to counsel and to the extent counsel is available to the suspected terrorist in American prisons, conversations with counsel may be monitored;
- A person who is not suspected of terrorist activity may nonetheless be detained indefinitely as “a material witness;”
- Reports of investigative techniques hint that American security forces abroad may threaten suspects that they may, if uncooperative, be turned over to “other services” in nations not known for the delicacy of their inquiries, like Jordan, with interrogators who may not feel constrained by international conventions on torture, which themselves do not necessarily prohibit, according to an American operative, a little “smacky face.”

Now while these developments may appear troubling in a vacuum, we do not live in a vacuum. While a political state has an obligation to do justice—as Samuel Rutherford famously put it as early as the seventeenth century, “lex rex,” law ought to be king, not the king (the executive branch), the law. It also has a fundamental obligation to ensure the security of its citizens, without which due process and the niceties of *Miranda* warnings and the like are irrelevant. A number of the prior speakers have not recognized this balance. Our friend from the London School of Economics observed that

public policy cannot be driven by fear and hypothetical occurrences. True enough. But there was nothing hypothetical about the collision of two passenger aircraft with the World Trade Center towers. There was nothing hypothetical about the fireball. There was nothing hypothetical about the horrifying and immense collapse that followed. There is nothing hypothetical about Ground Zero. There is nothing hypothetical about the 3,000 graves of innocents slaughtered as a result of the terrorist attack.

While those who regularly deal with the government know only too well its vulnerability to overreaction and ill-considered actions—the government would often do better to obey the admonition, “don’t just do something, stand there!”—it would be utterly irresponsible for government to ignore a new and dramatic threat to the safety and security of its citizens. While we may react unwisely under the influence of this new public paroxysm by tilting the balance too dramatically to draconian efforts to achieve security, it is also possible to overreact the other way—doomsday fears that pragmatic responses to this new and fanatical brand of criminal behavior will lead us all forthwith to the Gulag Archipelago. We have seen more than a little of this hysterical hyperventilation most notably in the reaction of many of the usual suspects from the left, to avert counter-terrorism actions.

Such fear-driven hypotheticals ignore that each of the rights delineated above has its own footnote, its own common-sense limitations and exceptions

fashioned by our federal courts over many years. In addition, a sort of libertarian fundamentalism ignores the balance of important and fundamental obligations of government. Where the balance is set and how the scale is calibrated may be a matter on which reasonable minds can differ. But that there need be no balance, and Warren Court fastidiousness can be applied uncritically in a time of war against a barbaric and elusive set of unconventional combatants, is both reckless and indifferent to the even more fundamental purposes of a civilized society to provide a stable matrix for its citizens to secure the right to life, liberty and the pursuit of happiness. Our Federalist Papers remind us of the objective to create a government that would be a “palladium of free government” and a “citadel of ordered liberty.” These objectives are impossible to realize in a culture of terror.

The paroxysms of terror are not entirely novel either. Saboteurs and assassins are not a twentieth century invention. Our history is dotted with such episodes on a smaller and less lethal scale. The early 1900s saw the assassination of President McKinley and acts of violence by various collections of what were called “anarchists.” And the history of our responses to such processes suggests both reasonable concerns and significant comfort in striking an appropriate balance. Let’s discuss first the concerns.

A concern

The concerns can be expressed as a paradox and a problem. The paradox is that in such wars as the one we now

find ourselves in—the war on terror—one can lose while winning. The great collision of September 11, 2001, was a collision of two cultures and two ways of thinking. The second aircraft, as it headed to its target, flew past the Statue of Liberty, a world symbol of political liberty. It flew into the World Trade Center, a global symbol of economic liberty, showing the powerful engine of free exchange. And its victims, a diverse group of various religious faiths and non-faith, represent collectively religious liberty, working harmoniously in the workplace.

Those who committed the atrocity were representing a different culture, a culture of control. There have always been those who believe that some things—politics, economics, religion—are too important to be left to free choice of individual citizens. The Taliban—with Al-Qaida comrades—was a sort of Platonic Form for this control mindset: a feudalistic controlled economy, suffocating political Omar-autocracy, and a religious theocracy enforced by roving bands of thugs for whom no detail of dress or deportment could be too small a pretext to enforce social control. To prevent things from spinning out of control, Plato even envisioned the creation of a committee of women to supervise and control the domestic life of newlyweds for the first ten years of marriage. The Plato of the Laws was afraid the artisan class would get everything wrong—their marriages, their child-bearings, their callings—without the guidance of a small group of wise guardians.

This collision of freedom and control is chronic. Medieval religious persecution, the rise of the modern totalitarian state embodied in the Soviet empire, the varying degrees of economic collectivism in socialist states, the contemporary neo-fascist tendency, mostly promoted by self-professed “liberals,” to insist on “political correctness” as a precondition of a place at the table in public discussion, or entrance into academic acceptability or professional position. All these bear witness to the continuing seductions of the control mentality.

The evidence, of course, is now in. Freedom works better. The political freedom of the American experiment has proved a more durable and successful form of government than the totalitarian control of the “evil empire” that threatened to bury it. Economic liberty of capitalism, and free markets in contradistinction to the regiments of the economic central planners, has consequences that are not subtle. One results in the Mercedes, the other results in the Trabant, a car so unreliable some East Berliners were given to placing cardboard on the dashboard so one could work on the engine comfortably from the inside when it broke down in the rain. And the faith of freely chosen convictions, in the tradition of Roger Williams, is hardier than the enforced religious orthodoxy of the Taliban. It is the very success of freedom that appears to have stoked the primal sin called envy that resulted in this lashing out by people like bin Laden. Their miserable progress, stunted by bad ideas, closed minds, and suffocating

control, prompts them to long for a fanciful return to the past and to seek to collapse an infuriating present.

But it would be paradoxical if the response of freedom to this attack by the soldiers of control would lead us to construct layers of political and economic control that suffocate the precious freedoms of our citizens. If security trumps liberty, and liberty permanently yields, we may lose much by winning. As Jefferson pointed out, in times of crisis there is an inherent conflict between government and liberty; government tends to grow and liberty tends to yield.

This paradox leads to a threefold problem. The first is the “shrinking Constitution” argument. Founding documents, like the foundation of a house, are designed for stability in storms. If they do not serve that purpose, they fail in their primary function. Jesus told the story of the wise man and the foolish man at the end of his “Sermon on the Mount.” Both men were builders. Both built a house. The difference in building methods was unseen. The foolish man built on the sand. The wise man built on the rock. Both buildings, presumably served well, at least until a violent storm arose. The winds and water began to beat on both structures. It was then that the distinctions between the dwellings became clear. The structure on the sand collapsed. The structure on the rock stood firm.

Jesus’ metaphor illustrates the difference between a profession of faith—a lip service based on mere hearing—and a faith that is expressed in obedience to his words. But it is also a useful

metaphor for nation-building. The key test of the foundation is whether it withstands the swirling storms of crisis. That is paramount. The threat of war, and its especially fearsome expression as terrorism against innocent civilians, is the kind of storm that tests the allegiance of a society to its constitutional foundation. The argument that counter-terrorism tends to undermine traditional constitutional protections cannot be disregarded.

A second problem is the “slippery slope” argument, called often, and appropriately in this context, the *in terrorem* argument. One can conjure a parable of horrors from current practices to evoke a variety of specters. Like a ski jumper, once skis leave the secure ledge and tip downward, the skier—like a society’s compromises on civil justice—will pick up speed quickly and will soon be hurtling uncontrollably to the abyss. One often (one might say, one usually) exaggerates by a sort of *reductio ad absurdum* when making this argument. Some absolutists are always ready to argue that to prevent some perverse voyeur from viewing child pornography on the Internet in a public library will lead inexorably to the banishing of Solomon’s “Song of Songs” and Jane Austen’s *Pride and Prejudice* in short order.

The abuse of the argument, however, does not mean it is without force. Those who deal with the government professionally know that a combination of the doctrine of unintended consequences and the lack of sunset provisions in government regulation create formidable and incremental

dangers to liberty. The level of regulation is a “sticky downward.” And there may arise future pharaohs who know not Ashcroft and who may use Patriot Act precedents for new, surprising, and disagreeable purposes. Government, we need to be reminded, is more often the problem than the solution, as President Reagan reasonably informed us.

A third problem is more nebulous. It is nonetheless significant. It is the corrosion of sensibilities of the public. I can remember my first visit to East Berlin. I was struck by the visibility of oppression. I had never been so close to machine guns, armed soldiers, and the intense stare of smiling Dobermans. The presence of such force contrasted with the benign contacts with peace officers in the United States. After September 11, 2001, I found—and was initially shocked by—the presence of similarly armed soldiers at Lindbergh terminal in Minneapolis-St. Paul International Airport. The cumbersome security procedure—shoes off, meaningless questions asked and answered, random searches—were even more distressing, even if understandable. But the need for such visible expression of government power, the prospect of interrogations and government questioning, can corrode our freedoms and sensibilities, can accustom us to incursions on our liberties.

The comforts

But such concerns are unbalanced without mention of even more significant comfort. Our society and its institutions are hardier and recent counter-terrorism initiatives less

threatening than alarmists suggest. The point can be made by a more careful look at recent government responses to what is a very real threat, the continued terror against our citizens. The measures, when viewed practically and realistically, are hardly the stuff our more hysterical friends make them out to be. Some examples:

Military Tribunals

The use of military tribunals or “commissions” is far from unprecedented. There is a long tradition of treating illegal combatants—those who do not wear uniforms or observe military conventions and ordinary rules of warfare—differently from regular soldiers. Old-fashioned terrorists, like the Nazi saboteur in World War II, did not get tried in federal court but by a military tribunal. Indeed, the first such military tribunal was held long before that. It was instituted by George Washington in the matter of Benedict Arnold’s comrade, Major Andre. The next such commissions were put in place under the authority of Abraham Lincoln in the Civil War. A third example was use of the military tribunal by FDR’s administration during World War II. The fact that those who presided over such panels were not Article III federal judges does not mean that the process and persons carrying it out were unfair. The secrecy of such proceedings is also not unreasonable, given the furtive conspiracies of this illegal combatant underworld and the sensitive intelligence used to expose them. Nor is this process in any sense a sure prediction

of conviction. The acquittal rate of all these examples, by the way, was over 18 percent, notably higher than the acquittal rate for terrorists tried over the past few years in federal courts, and three times the 5 percent conviction rate reported in federal criminal courts. It would be daunting, in any case, to try to argue that the commissions of presidents like Washington, Lincoln, and Roosevelt did lasting damage to the American fabric.

Eavesdropping

The limited circumstances under which there may be eavesdropping on normally privileged and other confidential conversations seem largely sensible as used. Such communications may give useful leads to the detection and prevention of future crimes and conspiracies. The information gleaned cannot be used as evidence against defendants in any trial.

INS Priorities

While the Immigration and Naturalization Service is one of my least favorite agencies, it is hard for me to state a persuasive argument in the current circumstances against directing the agency to make more careful inquiries about people seeking, for ambiguous reasons, to enter the country from places like Saudi Arabia. This is an agency, after all, that posthumously granted visas to two of the terrorists who attacked the World Trade Center. Entering the United States is not a right. It is a privilege. A lack of vigilance in assessing potential entrants in

these circumstances is itself criminal negligence; exercising vigilance is not pernicious profiling, but simple good sense.

Voluntary Interviews

The attorney general has been criticized for writing letters to Muslims and immigrants in America asking them to submit to voluntary interviews. This has been characterized as tantamount to racist profiling, and condemned as the first step to horrors like quarantine of Japanese citizens during WWII. Sometimes neglected in this jeremiad is the critical fact about these interviews: they are voluntary. I personally find it inoffensive. If a Swedish Republican Army were threatening terror against American citizens if they did not immediately install a Swedish style welfare state and put a modern day Olaf Palme in power, I would not feel threatened if the FBI came knocking and inquired whether I had observed such attitudes at the American Swedish Institute. I have been questioned for seeking various positions, and others have been asked about me as well. I have also been asked about others. This is hardly the American analogy to the activities of the Stasi of East Germany.

Interrogation

While resort to torture is horrific in any context, the use of investigation techniques against hardened terrorists is a critical battlefield in the war against terror. Such techniques are always, even in more conventional

criminal investigations, a shadowy discipline at best. Those who practice criminal law are familiar with some of the time-honored tactics: good cop, bad cop; veiled threats; bold lies about what is known, what others have said, what will happen; psychological manipulation of almost every kind and description.

This is not a gentle art; neither its practitioners nor their subjects are gentle. But significant discretion needs to be afforded investigators who are not sadists, who do not enjoy pulling wings off flies, who are not sons or brothers of Saddam Hussein. They want to solve past crimes and detect and deter future crimes. This noble purpose does not, to be sure, validate "an ends justifies the means" inhumanly. But this does not seem unreasonable when dealing with a Khalid Sheikh Mohammed, a man with a mental Rolodex of tactics and terror and terrorists. Should one not tell him, "We can do this the easy way or we can do this the hard way"?

These pragmatic approaches are hardly an assault on our Founding documents.

The "slippery slope" argument also has corollary comforts. The federal judiciary, its imperialist inclination notwithstanding, has hardly as a historic matter been eager to construct a balance between liberty and security that prejudices individual liberties. Those in law enforcement know the frustration of holdings that seem to create risks with some insouciance to the public in order to protect the rights of the criminal. Military tribunals have

nonetheless been approved by the Supreme Court in a 1942 case. Other nuanced decisions have recognized the need to balance competing objectives of security and freedom in a number of contexts. We are no closer to the gulag for all this. While the courts may get it wrong in human rights—from the **Dred Scott** decision to the **Korematsu** decision about the quarantine of Japanese—such decisions are generally corrected over time. As Lord Mansfield said, “the common law works itself pure.” If some provisions of the Patriot Act are overreaching, the corrective will be applied. From past evidence, there is more likely to be an overreactive, a Warren Court fastidiousness that seems, if anything, to give special protections to the accused.

The sensibility issue is equally not without counterbalancing comfort. A poll in April 2003 revealed that 82 percent of the public feel no incursion on their personal liberties from counterterrorism. There is little difference on this score between Democrats and Republicans. Only 21 percent of Democrats feel an incursion; 79 percent do not. Over 80 percent of the public is supportive of the Bush administration measures against terrorism. The public seems to be saying—understandably—that the new measures are worth it, even though they’re sometimes annoying.

The voice of the people is not, at any snapshot of time, the voice of God. Our Founders understood the limitations of a direct democracy and the

need for factions, and checks and balances, to prevent a democratic tyranny that tramples on rights of individuals. But it is also true that there is both power and wisdom in an aroused democracy. And at the end of the day, a civilized and free people generally gets it right.

I conclude with a comment on the reputation of our people. I was traveling from East Berlin to Stockholm before the collapse of the Honneker regime. I was in the East Berlin airport, being rudely treated—it was *de rigueur*—by the East German security force. I was not alone in this abuse. A Swedish man began to grouse to me—in Swedish—about this bit of fascism. We commiserated in Swedish until he concluded, “I wish there were an American here!” I asked why. “Because they wouldn’t take this. They would walk up to the counter, pound on it and say, ‘I’m an American. I’ve got rights. You can’t do this to me!’ ”

I didn’t have the heart to tell him my citizenship. The expectations would be too high, and potentially costly. But I take comfort in our reputation. The best safeguard of our liberty is ultimately not a document but the moral resolve of our people to be vigilant about our liberties. I think we will find that the future will prove we have generally done well, and justly, in the war with a new and barbaric enemy of our liberties—and we have done so while giving the devil his due, but only his due. ■