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## Lesser Evils

By Michael Ignatieff

### I. The Fire Next Time

It has taken nearly three years, but the 9/11 commission and the Supreme Court hearings on enemy combatants have given us our first serious public discussion about how to balance civil liberties and national security in a war on terror. Even so, we have not begun to ask the really hard questions. The hardest one is, Could we actually lose the war on terror?

Consider the consequences of a second major attack on the mainland United States -- the detonation of a radiological or dirty bomb, perhaps, or a low-yield nuclear device or a chemical strike in a subway. Any of these events could cause death, devastation and panic on a scale that would make 9/11 seem like a pale prelude. After such an attack, a pall of mourning, melancholy, anger and fear would hang over our public life for a generation.

An attack of this sort is already in the realm of possibility. The recipes for making ultimate weapons are on the Internet, and the matériel required is available for the right price. Democracies live by free markets, but a free market in everything -- enriched uranium, ricin, anthrax -- will mean the death of democracy. Armageddon is being privatized, and unless we shut down these markets, doomsday will be for sale. Sept. 11, for all its horror, was a conventional attack. We have the best of reasons to fear the fire next time.

A democracy can allow its leaders one fatal mistake -- and that's what 9/11 looks like to many observers -- but Americans will not forgive a second one. A succession of large-scale attacks would pull at the already-fragile tissue of trust that binds us to our leadership and destroy the trust we have in one another. Once the zones of devastation were cordoned off and the bodies buried, we might find ourselves, in short order, living in a national-security state on continuous alert, with sealed borders, constant identity checks and permanent detention camps for dissidents and aliens. Our constitutional rights might disappear from our courts, while torture might reappear in our interrogation cells. The worst of it is that government would not have to impose tyranny on a cowed populace. We would demand it for our own protection. And if the institutions of our democracy were unable to protect us from our enemies, we might go even further, taking the law into our own hands. We have a history of lynching in this country, and by the time fear and paranoia settled deep in our bones, we might repeat the worst episodes from our past, killing our

former neighbors, our onetime friends.

That is what defeat in a war on terror looks like. We would survive, but we would no longer recognize ourselves. We would endure, but we would lose our identity as free peoples.

Alarmist? Consider where we stand after two years of a war on terror. We are told that Al Qaeda's top leadership has been decimated by detention and assassination. True enough, but as recently as last month bin Laden was still sending the Europeans quaint invitations to surrender. Even if Al Qaeda no longer has command and control of its terrorist network, that may not hinder its cause. After 9/11, Islamic terrorism may have metastasized into a cancer of independent terrorist cells that, while claiming inspiration from Al Qaeda, no longer require its direction, finance or advice. These cells have given us Madrid. Before that, they gave us Istanbul, and before that, Bali. There is no shortage of safe places in which they can grow. Where terrorists need covert support, there are Muslim communities, in the diasporas of Europe and North America, that will turn a blind eye to their presence. If they need raw recruits, the Arab rage that makes for martyrs is still incandescent. Palestine is in a state of permanent insurrection. Iraq is in a state of barely subdued civil war. Some of the Bush administration's policies, like telling Ariel Sharon he can keep settlements on the West Bank, may only be fanning the flames.

So anyone who says "Relax, more people are killed in road accidents than are killed in terrorist attacks" is playing games. The conspiracy theorists who claim the government is manufacturing the threat in order to foist secret government upon us ought to wise up. Anyone who doesn't take seriously a second major attack on the United States just isn't being serious. In the Spanish elections in March, we may have had a portent of what's ahead: a terrorist gang trying to intimidate voters into altering the result of a democratic election. We can confidently expect that terrorists will attempt to tamper with our election in November. Condoleezza Rice, the national security adviser, said in a recent television interview that the Bush administration is concerned that terrorists will see the approaching presidential election as "too good to pass up."

Thinking the worst is not defeatist. It is the best way to avoid defeat. Nor is it defeatist to concede that terror can never be entirely vanquished. Terrorists will continue to threaten democratic politics wherever oppressed or marginalized groups believe their cause justifies violence. But we can certainly deny them victory. We can continue to live without fear inside free institutions. To do so, however, we need to change the way we think, to step outside the confines of our cozy conservative and liberal boxes.

## II. The Necessity of Lesser Evils

When democracies fight terrorism, they are defending the proposition that their political life should be free of violence. But defeating terror requires violence. It may also require coercion, secrecy, deception, even violation of rights. How can democracies resort to these means without destroying the values for which they stand? How can they resort to the lesser evil without succumbing to the greater?

Putting the problem this way is not popular. Civil libertarians don't want to think about lesser evils. Security is as much a right as liberty, but civil libertarians haven't wanted to ask which freedoms we might have to trade in order to keep secure. Some conservative thinkers, like those at the libertarian Cato Institute, come down the same way but for different reasons: for them, the greater evil is big government, and they oppose measures that give the executive branch more power. Other conservatives, like Attorney General John Ashcroft, simply refuse to believe that any step taken to defend the United States can be called an evil at all.

But thinking about lesser evils is unavoidable. Sticking too firmly to the rule of law simply allows terrorists too much leeway to exploit our freedoms. Abandoning the rule of law altogether betrays our most valued institutions. To defeat evil, we may have to traffic in evils: indefinite detention of suspects, coercive interrogations, targeted assassinations, even pre-emptive war. These are evils because each strays from national and international law and because they kill people or deprive them of freedom without due process. They can be justified only because they prevent the greater evil. The question is not whether we should be trafficking in lesser evils but whether we can keep lesser evils under the control of free institutions. If we can't, any victories we gain in the war on terror will be Pyrrhic ones.

### III. How to Think About Civil Liberties

Civil liberties are not a set of pesky side constraints, pettifogging legalisms tying democracy's hands behind its back. Ask what the American way of life is, and soon we are talking about trial by jury, a free press, habeas corpus and democratic institutions. Soon we are talking about that freedom and that confident sense of an entitlement to happiness that the Europeans find so strange in this country. Civil liberties are what America is.

Civil liberties may define us, but we have a bad record of jettisoning them when we get scared. We have the A.C.L.U. today because patriotic liberals after World War I were ashamed that the Russian Revolution of 1917 had terrified us into the Red Scare, the Palmer Raids and the needless roundup, arrest and deportation of mostly Eastern European immigrants, whose worst offense was that they had socialist, anarchist or communist illusions. We learned from the Red Scare that we need a civil liberties lobby because frightened majorities do reprehensible things. Between 1917 and 1920, we did ourselves plenty of harm. A congressman, Victor Berger, was denied his seat in the House after being convicted of espionage for writing an antiwar article, and a presidential candidate, Eugene V. Debs, was sentenced to 10 years in prison for delivering an antiwar speech. Aliens were harassed and deported. Legal strikes were smashed, and trade-union leaders were jailed. Indeed, by comparison with the Red Scare or later shameful episodes like Roosevelt's detention of Japanese during World War II, there have been no mass detention camps in the United States since Sept. 11 and no imprisonments for dissent. Not yet anyway.

Even so, after 9/11 we were frightened, and Congress and the government weren't always thinking straight. After the attack, it may have made sense to detain more than 700 aliens on one immigration pretext or another until we could figure out whether there were other sleeper cells at

work. But it made a lot less sense to hold them for months (80 days on average) and to deny them lawyers and public due process before we tossed most of them out of the country. It was shameful, as a Justice Department report found, that many Arab and Muslim detainees were abused and harassed in confinement. Civil libertarians like Prof. David Cole of Georgetown nobly stood up and denounced such detentions as the abuses that they were.

But being absolutely right on this issue doesn't make a civil liberties position right on every other issue. Consider the question of a national ID system. Instead of crying "1984," the civil liberties lobby should be taking an honest look at the leaky sieve of the existing driving license ID system and admit how easy it was for the hijackers to talk their way into the ID's that got them onto the planes. Instead of defending a failed ID system, civil libertarians should be trying to think of a better one. One possibility is for Congress to establish minimum national standards for identification, using the latest biometric identifiers. Any legislation should build in a Freedom of Information requirement demanding that the government divulge the data it holds on citizens and purge data that is unsound.

President Bush has been trying to use civil liberties as a wedge issue, campaigning for the swift renewal of the Patriot Act in an effort to portray his rival as soft on the war on terror. The civil liberties lobby has taken the bait, leading the charge against the Patriot Act and its renewal. But partisan politics and civil liberties ideology are making it hard to take an unbiased look at what Bush has actually done. While some aspects of the Patriot Act were vexatious and ill conceived -- for example, giving federal agents the power to force librarians and bookstores to divulge what their customers are reading -- other parts of the act (and the antiterrorism measures in general) are right-minded. Giving the F.B.I. the same powers to wiretap terrorist suspects that they already use against the Mafia and drug traffickers seems reasonable, particularly because the taps are controlled by court order. Requiring banks and security brokers to file suspicious-activity reports to prevent money-laundering by terrorists sounds like an overdue reform. Enhancing the ability of the C.I.A. and F.B.I. to pool and share information seems like a good idea. As the staff reports of the 9/11 commission have shown, neither agency regularly shared its list of Al Qaeda suspects before Sept. 11 or passed the list to the airlines.

Our vulnerability to attack on 9/11 was not a result just of bureaucratic bungling, dysfunctional Beltway turf wars and plain inertia. The disaster also was a result in part of the unintended consequences of well-meaning measures taken by civil libertarians in the past. Erecting fire walls between domestic intelligence gathering and law enforcement seemed like a positive development in the wake of the abuses of J. Edgar Hoover's F.B.I. These same good intentions led Congress in 1978 to pass the Foreign Intelligence Surveillance Act. This law created a special federal court that meets in secret to rule on requests by counterintelligence officers to put espionage and terrorist suspects under surveillance. These warrants could be issued on lower standards of evidence than those required under the Fourth Amendment rules that regulate warrants issued in standard criminal cases. In order to guarantee that law enforcement would not exploit these lower standards, a legal "wall" was installed between intelligence gathering and criminal investigations.

The court could grant F.B.I. intelligence agents a domestic surveillance warrant only if the primary purpose of their surveillance was foreign intelligence, not criminal prosecution.

Richard Clarke, the former terrorism czar, has wisely proposed lowering the wall between domestic law enforcement and intelligence functions. This would allow us to pull all our domestic antiterrorism capabilities into a version of Britain's MI5, an agency charged with domestic intelligence-gathering and counterterrorism but without law enforcement responsibilities.

A second victory for civil liberties -- the taming of the C.I.A. after its excesses during the Vietnam War era -- may have also weakened our human intelligence capacities before 9/11. In the wake of disclosures that the C.I.A. had tried to assassinate foreign leaders as well as thousands of Communist political cadres in South Vietnam, Senator Frank Church's Congressional investigation persuaded the Ford administration to rein in the C.I.A. and ban covert assassination activity. At the time, this seemed like a victory for civilian control of intelligence. But C.I.A. veterans like Robert Baer, a former operative in the Middle East, charge that the post-Church controls on the C.I.A. inadvertently created a culture in which agents preferred to sit behind Washington desks, reading reports, rather than risking their lives running informants and agents in the alleyways and tenements of Arab cities. This aversion to risk led the C.I.A. to cease investing in human intelligence and to rely too heavily on satellite and signals intelligence. The United States appears, for example, to have had almost no one on the ground in Iraq after 1998, hence the catastrophic misjudgment by U.S. intelligence about Saddam Hussein's weapons of mass destruction.

But the problems began much earlier. We know now that the war being waged by Islamic fundamentalists against the United States began in 1983 with the bombing of the U.S. Embassy in Beirut and escalated through the African embassy bombings and the attack on the U.S.S. Cole. As the enemy steadily escalated the fight, the C.I.A. needed to have operatives in the bazaars, teahouses and mosques of the Arab world, bribing, importuning and, if necessary, eliminating our enemies. Who doesn't wish we had killed Osama bin Laden in the late 1990's? But the rules on assassination were drawn to outlaw it in so-called peacetime. They were at war with us, and we convinced ourselves that we were not at war with them. Post-Church, we may have betrayed a fatal preference for clean hands in a dark world of terror in which only dirty hands can get the job done.

But dirty hands need not be lawless. If we need a tough counterintelligence service, we do not want it out of control, bribing, suborning, bugging and assassinating anyone it sees fit. To paraphrase Cofer Black, the former C.I.A. counterterrorism chief, we may want to put terrorist heads in boxes, but we need presidents, not C.I.A. operatives or their for-hire hitmen, to decide whose heads we are targeting. There have to be rules, presidential directives controlling the resort to assassination. Congress should weigh in here and call for new legislation. Three rules for targeted assassination seem relatively obvious: only as a last resort, only when capture is impossible without undue risk to American lives and only where death or damage to innocent civilians can be avoided. We need to make sure that assassinations don't do more harm than good.

As the Israelis have discovered through their own assassination policy, killing Sheik Yassin of Hamas and his successor may only strengthen Hamas control of Gaza. A war on terror that succeeds tactically -- taking out this potential terrorist, breaking up that potential cell -- while failing strategically, further enraging the Arab populace, is not a success. So we need rules in a war on terror, first of all to keep free institutions intact and second so that we don't fail in our strategic objective, which is to make America some friends instead of numberless new enemies.

#### IV. Striking a Balance

Civil libertarians may tie our hands unduly, while the gung-ho "anything goes" brigade might bring us tactical victories at the price of strategic disaster. Either extreme won't work, so where is the balance to be found?

Let's not pretend it's going to be easy to agree about this. Abiding disagreement about the trade-off between liberty and security is a permanent characteristic of any free society. The founding fathers designed the Constitution to enable our institutions to adjudicate such fundamental disagreements of principle. The key innovation of American government was the system of checks and balances. The founders required the executive branch to justify coercive measures before Congress, and later Justice Marshall in *Marbury v. Madison* established the principle of judicial review. This system of "adversarial justification" is what keeps us free. Presidents are just like the rest of us: they can justify anything if they have to justify it to only themselves. Our system of government, like trial by jury, puts all coercive measures to the test of hostile, questioning review. Our system is supposed to challenge the president every step of the way. Show me, prove it to me, give me the facts -- this is supposed to be the American way.

A war on terror puts this system under real strain. Checks and balances work slowly -- Congress must deliberate; the courts must review -- and meanwhile, the crisis calls out for decisive action. This is why terrorism's chief impact on democracy -- not just in the United States but also in every other free society and especially in Spain and Britain -- has been to strengthen the power of presidents and prime ministers at the expense of legislatures and the courts and to increase the exercise of secret government. Much of the war against terror has to be fought in secret, and the killing, interrogating and bribing are done in the shadows. This is democracy's dark secret -- the men and women who defend us with a bodyguard of lies and an armory of deadly weapons -- and because it is our dark secret, it can also be democracy's nemesis.

The key question is whether free institutions -- Congress, courts and the press -- are strong enough to keep this secret army under control. Its budget is offline, and its operations are below the Congressional radar. Despite the 9/11 commission's remarkable exercise in public education, the government is still trying to make the war on terror ever more secret. The administration has fought attempts by the A.C.L.U. to force the Justice Department to disclose how often it has used its expanded authority under the Patriot Act. It has successfully resisted attempts to require disclosure of the names of those detained in investigations after Sept. 11, and an executive order of the president has clamped down on the release of public information relating to critical

infrastructure. Obviously it's a good idea to keep recipes for ricin off government-financed research Web sites, and it's not a good idea to have target detail on critical infrastructure available for download. But adversarial review, as intended by the founding fathers, can't work if ordinary citizens are denied the information they need.

Keeping the war on terror under control also requires judges who are unafraid to challenge presidential power. For nearly two years, the courts deferred to the president's powers as commander in chief, refusing to deny him authority to designate American citizens as "enemy combatants" and allowing him to imprison foreign combatants at Guantánamo beyond the reach of American courts. The president created military tribunals to try foreign combatants, but kept these tribunals free from review by federal courts and free of the due process safeguards that apply in U.S. military courts-martial. To their credit, a group of military defense lawyers assigned to these tribunals has gone public to question whether their defendants stand a chance of a fair trial.

The courts have watched these developments with growing alarm. The judges of the United States Court of Appeals for the Fourth Circuit, even when refusing to grant habeas corpus review to Yaser Esam Hamdi, one of the American enemy combatants currently held in a Navy brig in Charleston, S.C., sounded troubled by the president's powers. The government, they wrote, seems to be "embracing a sweeping proposition -- namely 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." Now, at last, the Supreme Court is reviewing these presidential powers, and to judge from questioning at the Guantánamo hearings, many justices are troubled by them. As Justice Stephen Breyer said during oral arguments, "It seems rather contrary to an idea of a Constitution with three branches that the executive would be free to do whatever they want, whatever they want without a check." Just as no justice wants to second-guess a president's decision to commit U.S. forces, so no court can afford to defer to the president on the fundamental civil rights of American citizens. The Supreme Court will have to determine whether it was ever in the intentions of the founders to give the president the power to imprison a citizen at pleasure and to hold him beyond the reach of the law, and if these were not their intentions, whether emergency or wartime situations could ever justify such a departure from constitutional safeguards.

Whatever the court decides, Congress may eventually have to decide how much emergency power the president should wield. Bruce Ackerman, a liberal law professor at Yale, has recently proposed a wholesale revision of the president's current power to declare a national emergency, suggesting that if terrorists strike again, the president should be given the authority to act unilaterally for a week and to arrest anyone he sees fit. After a week, Congress would have to vote to renew his powers for a period of 60 days. Thereafter, an overwhelming majority would be required to extend the term further. Better to formalize and control emergency power, Ackerman argues, than to allow the president to slowly accumulate the power of tyranny.

Yet Congress, with rare exceptions -- like the joint Congressional inquiry of 2002 into Sept. 11 and

the powerful Senate dissents of Robert Byrd and Edward Kennedy -- has become as reluctant as the judiciary to subject the president's powers to proper scrutiny. The first Patriot Act was large, cumbersome and poorly drafted, and it passed both the Senate and the House so quickly that it is doubtful Congress really knew what was in it. As the sunset provisions of the act come up for renewal in 2005, Congress has an opportunity to redeem itself.

Thus far, it has not been Congress but the bipartisan commission on 9/11 whose public hearings have focused national debate on civil liberties. It was not Congress that uncovered evidence that the United States has been handing terrorist suspects over to foreign governments like Morocco, Egypt and Jordan for possible torture but diligent reporters like Barton Gellman and Dana Priest of The Washington Post.

Only if our institutions work properly -- if Congress reviews legislation in detail and tosses out measures that jeopardize liberty at no gain to security, if the courts keep executive power under constitutional control and if the press refuses to allow itself to become "embedded" with the government -- can the moral and constitutional hazards of lesser evils be managed.

#### V. The Detention Archipelago

Even if our institutions do their jobs, the hazards they must manage are considerable. Consider the issue of preventive detention of terrorist suspects. All the major countries on the front line of the war on terror are currently detaining such suspects, often for indefinite periods of time. It is hard to see how a successful counterterrorism campaign can succeed unless the police can arrest and detain suspects on standards of evidence lower than those required for proof of guilt in a criminal trial. Waiting until police have met the Fourth Amendment's exacting standards for search, seizure and arrest would expose innocent civilians to unnecessary risk of terrorist attack. Who doesn't wish the 9/11 hijacker who was pulled over for speeding in the weeks before the attack had been detained until police could check his ID against C.I.A. and F.B.I. watch lists?

Currently, terrorism suspects in the United States can be detained as enemy combatants, held as material witnesses or detained for immigration violations. We do not even know how many suspects are being held under these categories. If we were to add up all the suspects, citizens and noncitizens held in U.S. institutions, together with those in Guantánamo, Iraq, Afghanistan, Diego Garcia and U.S. brigs and stockades in between, the number might run into the thousands. No one knows how many detainees there are, and that is the crux of the problem: the United States may be operating a global archipelago of detention beyond the law and ken of its citizens. Clearly, there need to be rules to govern detention, and the key rule -- one that defines democracy itself -- is that no one, citizen or otherwise, should be held without access to public review of his detention by independent judicial authorities. Where they are held, whether offshore or at home, should be immaterial. If they are detained by Americans, they are America's responsibility, and basic due process standards should apply.

Philip Heymann of Harvard Law School has argued that we have to stop holding American

citizens indefinitely without charge. We should try them or let them go. If a suspect cannot be brought to trial without revealing evidence that would endanger key informants, then a federal judge could order further detention, but only for a maximum period of two years. After that, the person would have to be brought to trial or released.

Overseas, in Guantánamo, Iraq and elsewhere, where combatant or terrorist detainees are held, the government should create military tribunals that offer detainees the right to challenge the basis of their detention with the assistance of counsel. Of course, this is costly, and of course, some bad characters may talk their way out of America's clutches. Release upon detention, though, does not preclude surveillance upon release. These are hard choices, but we would be better advised to let a few bad characters go than to continue to run a global network of detention facilities that, right now, are an open invitation to abuse.

## VI. Torture

The abuse we need to talk about is torture. Torture, our founding fathers said, was the vice of tyrannies and its absolute exclusion the mark of free government. At the same time, keeping torture, or at least what used to be called "the third degree," from creeping back into our police squad rooms at home has required constant vigilance by D.A.'s and honest cops. Now it may be creeping into our war on terror. There is some evidence that the United States has handed key suspects over to Middle Eastern governments for torture. In the metal containers stacked up behind rings of razor wire on Bagram air base in Afghanistan, beatings are reportedly routine, and at least two suspects have died during secret interrogations. It is possible that similar physical methods have been used against detainees from the Hussein regime at Baghdad airport.

Some observers believe such physical methods are inevitable if we hope to break terrorists who are willing to die in attacking us. Alan Dershowitz of Harvard Law School supports an outright ban on torture, but argues that if the United States is going to rely on it, Congress should regulate it by law. Interrogators would at least be required to apply to a court for a "torture warrant," which would set limits to the practice. The evidence extracted by torture would remain inadmissible in court, but it could be used to prevent impending attacks.

Dershowitz's ideas suggest that it is possible to bring the rule of law into the interrogation room, but as an exercise in the lesser evil, it is likely to lead to the greater. Once you allow warrants for genuine "ticking bomb" cases -- situations in which torture can prevent an imminent calamity from occurring -- little by little, torture may be used when there is no immediate danger. There has never been any certainty, moreover, that information extracted by torture is more reliable than information coaxed out of a suspect by persuasive means. Why should we suppose that pain produces truth? And how can we forget what everyone who has ever been tortured always tells us: those who are tortured stay tortured forever. If you want to create terrorists, torture is a pretty sure way to do so.

Israel has thought hardest about torture in terrorist cases. After watching how interrogation

degenerated into torture when the Landau Commission of 1987 allowed physical force in questioning, the Israeli Supreme Court ruled in 1999 that shaking suspects and confining them in chairs tipped forward in painful positions for long periods were violations of Israel's national and international commitments against torture.

Yet the Israeli Supreme Court also conceded that physical force against suspects sometimes prizes out information that saves lives in ticking-bomb cases. So it allowed interrogators a justifying excuse. Torture was banned absolutely, but interrogators charged with torture could enter evidence that they were seeking to save lives in order to plead to reduced sentences for breaking the rules. An outright ban on torture, rather than an attempt to regulate it, seems the only way a democracy can keep true to its ideal of respecting the dignity even of its enemies. For that is what the rule of law commits us to: to show respect even to those who show no respect for us.

To keep faith with this commitment, we need a presidential order or Congressional legislation that defines exactly what constitutes acceptable degrees of coercive interrogation. Here we are deep into lesser-evil territory. Permissible duress might include forms of sleep deprivation that do not result in lasting harm to mental or physical health, together with disinformation and disorientation (like keeping prisoners in hoods) that would produce stress. What crosses the line into the impermissible would be any physical coercion or abuse, any involuntary use of drugs or serums, any withholding of necessary medicines or basic food, water and essential rest.

Fine idea, you say, but who is to enforce these safeguards? It ought to be the rule that no detainee of the United States should be permanently deprived of access to counsel and judicial process, whether it be civilian federal court or military tribunal. Torture will thrive wherever detainees are held in secret. Conduct disgracing the United States is inevitable if suspects are detained beyond the reach of the law.

## VII. Controlling the President

So far, the basic rules for regulating a war on terror look relatively simple: first, make sure all measures are subjected to review by Congress and the judiciary; second, make sure the law keeps watch over detainees and suspects. In a word, we need to ensure that we wage a war for the rule of law and not a war against it and that we wage it by means of democratic consent rather than by presidential decree. We have enough of an imperial presidency as it is.

Keeping the president under democratic control is not going to be easy. The dilemmas here are best illustrated by looking closely at pre-emptive war. It is a lesser evil because, according to our traditional understanding of war, the only justified resort to war is a response to actual aggression. But those standards are outdated. They were conceived for wars against states and their armies, not for wars against terrorists and suicide bombers. Against this kind of enemy, everyone can see that instead of waiting for terrorists to hit us, it makes sense to get our retaliation in first. The problem with pre-emption is keeping the president's war power under democratic control.

The president's power to make war is supposed to be balanced by Congress's power to declare it, but in practice, since Vietnam, Congress has not been able to rein in a president bent on the use of force overseas. A war on terror, declared against a global enemy, with no clear end in sight, raises the prospect of an out-of-control presidency. As we learned in the run-up to the war in Iraq, the case for a pre-emptive war is always bound to be speculative, based on doubtful intelligence that will be hard for either an electorate or its representatives, let alone the bureaucracy, to assess for credibility. In the pre-emptive wars of the future -- Iraq will not be our last exercise in this moral hazard -- our leaders will try to secure our consent by alternately threatening and reassuring us with the phrase "If you only knew what we know."

But as we have found to our cost, this is not nearly good enough. The facts may not be as clear before the event as they are likely to be afterward, but voters must be told what we need to know, before government commits to war in our name. Over Iraq, our name was taken in vain.

We need national and international rules to control such wars. This may require both Congressional legislation and United Nations resolutions. Pre-emptive war can be justified only when the danger that must be pre-empted is imminent, when peaceful means of averting the danger have been tried and have failed and when democratic institutions ratify the decision to do so. If these are the minimum tests pre-emptive war has to meet, the Iraq war failed to meet all three.

Even those -- like me -- who supported the Iraq war because it might bring freedom and democracy to people who had been gassed, tortured and killed for 30 years had better admit that if our grounds for war had been squarely put to the American people, they probably would have voted to stay home. Worse still, Congress failed to put the president's case for war to adversarial scrutiny and debate. The news media allowed itself to be managed and browbeaten. The war may or may not bring democracy to Iraq eventually, but it hasn't done democracy any good at home.

#### VIII. A Warrior's Honor

Regulating a war on terror with ethical rules and democratic oversight is much harder than regulating traditional wars. In traditional wars, there are rules, codes of warriors' honor that are supposed to limit the barbarity of the conflict, to protect civilians from targeting, to keep the use of force proportional and to keep it confined to military objectives. The difference between us and terrorists is supposed to be that we play by these rules, even if they don't. No, I haven't forgotten Hiroshima and My Lai. The American way of war has often been brutal, but at least our warriors are supposed to fight with honor and can be punished if they don't. There is no warrior's honor among terrorists.

The real moral hazard in a war on terror emerges precisely here, in the fact that no moral contract, no expectation of reciprocity, binds us to our enemy. Indeed, the whole logic of terrorism is to exploit the rules, to turn them to their own advantage. If we hesitate to strike a mosque because the rules of war designate it as a protected place, then the smart thing for a terrorist to do

is to store weapons and suicide belts there. If our forces start from the presumption that civilian women should be treated as noncombatants, then terrorists will train women to be suicide bombers. If all existing codes of warriors' honor forbid the desecration of bodies, then it is not just mindless brutality but actually a sound terrorist tactic to drag contractors from a car in Falluja, set them alight and display their severed and burned limbs from a bridge. Such provocations are intended to drag us down to their level.

This is the deepest reason why it is difficult to maintain self-control, let alone democratic control, in a war on terror. We are constantly being tempted to descend to the logic of terror itself. An eye for an eye. A tooth for a tooth. Vengeance is mine, saith the Lord, but unsaintly men and women, seeing their loved ones maimed and butchered, may begin to believe vengeance is theirs by right.

The siren song in any war on terror is "let slip the dogs of war." Let them hunt. Let them kill. Already, we have dogs salivating at the prospect. A liberal society cannot be defended by herbivores. We need carnivores to save us, but we had better make sure the meat-eaters hunt only on our orders.

Taunting us until we let the dogs slip is any canny terrorist's best hope of success. The Algerian terrorists who fought the French colonial occupation in the 1950's had no hope of defeating the armies of France in pitched battle. Their only chance of victory lay in provoking the French into a downward spiral of reprisals, indiscriminate killings and torture so that the Algerian masses would rise in hatred and the French metropolitan population would throw up its hands in disgust. The tactic worked. Terror won in Algeria because France lost its nerve and lost its control of counterterror.

In Iraq, we had better remember the French lesson: we cannot hope to win a war of occupation with harshness alone. We need a political strategy that undermines the terrorist claim that they are fighting a just war against military occupation. We need to turn the place back to Iraqis quickly or we will just have created another losing front in the war on terror.

On all fronts, keeping a war on terror under democratic scrutiny is critical to its operational success. A lesser-evil approach permits preventive detention, where subject to judicial review; coercive interrogation, where subject to executive control; pre-emptive strikes and assassination, where these serve publicly defensible strategic goals. But everything has to be subject to critical review by a free people: free debate, public discussion, Congressional review, in camera if need be, judicial review as a last resort. The war needs to be less secretive, not more. We need to know more about it, not less, even if what we learn is hard. If it comes to it, we need to know, every time we fly, that in case of a hijacking, the president has authorized our pilots to shoot us down if a crash risks killing still more people. In a war on terror, painful truth is far better than lies and illusions.

Above all, we need to keep faith with freedom. When terrorists strike against constitutional democracies, one of their intentions is to persuade electorates and elites that the strengths of these societies -- public debate, mutual trust, open borders and constitutional restraints on executive

power- are weaknesses. When strengths are seen as weaknesses, it is easy to abandon them. If this is the logic of terror, then democratic societies must find a way to renew their belief that their apparent vulnerabilities are actually a form of strength. This does not require anything new or special. It simply means that those who have charge of democratic institutions need to do their jobs. We want C.I.A. men and women who understand that the dogs of war are needed, but that they need to be on a leash. We want judges who understand that national security is not a carte blanche for the abrogation of individual rights; a free press that keeps asking, Where are the detainees and what are you doing with them? We want a Congress that will not allow national security to prevent it from subjecting executive power to adversarial review. This, after all, is only what our Constitution intends. Our institutions were designed to regulate evil means and control potentially evil people.

The chief ethical challenge of a war on terror is relatively simple -- to discharge duties to those who have violated their duties to us. Even terrorists, unfortunately, have human rights. We have to respect these because we are fighting a war whose essential prize is preserving the identity of democratic society and preventing it from becoming what terrorists believe it to be. Terrorists seek to provoke us into stripping off the mask of law in order to reveal the black heart of coercion that they believe lurks behind our promises of freedom. We have to show ourselves and the populations whose loyalties we seek that the rule of law is not a mask or an illusion. It is our true nature.

Photos: Since 9/11, National Guard and police patrols have become part of the commute at Grand Central Terminal. Security was increased further after the Madrid bombings. (Photographs by Antonin Kratochvil/VII)