



February 2014

Liberty's Duty to Defend Itself

Curt Weldon

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Curt Weldon, *Liberty's Duty to Defend Itself*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 277 (2005).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol19/iss1/12>

This Essay is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

LIBERTY'S DUTY TO DEFEND ITSELF

CURT WELDON*

The *Notre Dame Journal of Law, Ethics & Public Policy* generously invited me to contribute an article to the issue on "security and liberty," noting that my views were being solicited because the initial response to the issue was "slightly more favorable" from the Democratic side. My initial assumption was that I was being invited to play the role of Custer at Little Big Horn, making a desperate stand in defense of President Bush's Patriot Act¹ against overwhelming numbers of critics.

After all, when academia and the media raise the topic "security and liberty" these days, it is usually the Patriot Act they have in mind. The predominant view among those who dwell in ivory towers and among the liberal media seems to be that the Bush administration is endangering our civil liberties while prosecuting the war on terrorism. Moreover, when academia and the media pose the topic "security and liberty" what is usually meant is "security *or* liberty." The premise that underlies the debate over the Patriot Act specifically and the war on terrorism generally is that security and liberty contradict each other, that one cannot be increased without diminishing the other.

But this is a false premise. National security preserves liberty, makes liberty possible. Today the choice is not between national security and liberty, but between national security and the abyss of terrorism.

Of course, it is legitimate and necessary to be vigilant always against the encroachment of governmental power on our liberties. This was fundamental to the political philosophy of our Founding Fathers and is a bedrock belief of modern political conservatives. And in the currently polarized political climate, I am sure there will be an abundance of academics and Democratic politicians protesting that the Bush administration has overstepped the legitimate bounds of government power with the Patriot Act.

I support President Bush and the Patriot Act. Contrary to the arguments of its critics, the Patriot Act has significantly

* United States Representative, Seventh District of Pennsylvania.

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

strengthened national security with no real diminution or practical risk to the liberties of the American people. But the Patriot Act has already been ably defended elsewhere.²

Here, I will be a voice underrepresented in the media in the current debate over national security and liberty, addressing a somewhat different question than that raised by the press. Usually the question asked by academia and the media is: "How far can the government go in pursuit of national security before the quest for security becomes a threat to liberty?" The question is rarely posed the other way around: "What is the obligation of a free people toward defending their own liberty?"

Over the years as a senior member of the House Armed Services Committee, now Vice-Chairman of that Committee, the practical exigencies of national security have led me to think considerably—less in theoretical and more in concrete, practical terms—about the above question, about what we as a free people owe in defense of our own liberty. What follows are a few suggested "sacrifices" that all of us, as citizens, should be willing to make on behalf of our own liberty.

I. DO NOT RESTRICT THE INTELLECTUAL FREEDOM OF DEFENSE SCIENTISTS WHO ARE TRYING TO PROTECT YOUR LIBERTY.

Intellectual liberty combined with economic freedom is the ultimate source of the United States' national and military strength. American inventiveness has given the United States the most advanced technology and the most powerful economy in the world. Intellectual and economic freedom has enabled us to out-compete all contenders in peace and war. During the Second World War, the United States was the arsenal of democracy. Our immense productivity enabled us to overwhelm Germany and Japan militarily. During the Cold War, the United States' free system proved superior to the totalitarian Soviet Union. It was the inability of Soviet communism to compete technologically and economically that ultimately led to the collapse of the Soviet Union, after its half-century-long arms race with the United States.

Intellectual freedom, free scientists, and free political and economic thinkers give us the best technological base and the best weapons in the world. During World War II, the Manhattan

2. U.S. DEP'T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK (2004), http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

Project benefited immensely from the intellectual freedom of the United States, which attracted the world's top physicists who enabled us to build the atomic bomb. Today, the United States has cruise missiles of incredible accuracy that have no counterpart in the arsenals of our strategic competitors. Our defense intelligence and communications satellites and other space systems give our soldiers, our air forces and navies, a decisive military advantage over all possible enemies. Our supercomputers and advanced command, control, and intelligence systems will make possible the unbeatable digitized U.S. Army of the future. National missile defense is not the least example of the fruits of intellectual freedom in the United States.

All of these advanced weapon systems and operational capabilities are a product of the intellectual freedom of the United States. The bottom line is that intellectual freedom produces the best scientists, the best engineers, the best economists, and the best strategists. Freedom is vital to our military strength.

It logically follows, and should be intuitively obvious, that restricting the intellectual freedom of our defense scientists endangers our troops, endangers our nation, and endangers our liberty.

Yet, during the Clinton administration, there were onerous technical restrictions imposed on what our scientists could and could not do in research on national and theater missile defenses, in the name of the then outdated and now defunct Anti-Ballistic Missile (ABM) Treaty.³ The Clinton administration used the ABM Treaty as an excuse to hamstring our defense scientists because President Clinton was ideologically opposed to missile defense. The Clinton administration used the ABM Treaty and the administration's own Agreed Statements on ABM/TMD (Theater Missile Defense) Demarcation⁴ to prohibit the use of space-based sensors for theater missile defenses and to propose speed limits on missile interceptors. Even though Con-

3. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., 23 U.S.T. 3435.

4. First Agreed Statement Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, U.S.-Belr.-Kaz.-Russ.-Ukr., available at http://www.fas.org/nuke/control/abmt/text/abm_scc1.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy); Second Agreed Statement Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Sept. 26, 1997, U.S.-Belr.-Kaz.-Russ.-Ukr., available at http://www.fas.org/nuke/control/abmt/text/abm_scc2.htm (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

gress stopped the speed limits from becoming law, the ABM Treaty and the Clinton administration's obvious intention to hobble missile defense research deterred the Defense Department and the aerospace industry from giving missile defense the high priority it deserved in terms of intellectual and material resources.

As a consequence, the national missile defense program that we have today is not the best program that the United States could have produced. The current program could have been eight years more advanced and eight years further down the road of research and development, had the Clinton administration not limited the intellectual freedom of our defense scientists. Similarly, the theater missile defenses that the United States has today are not the best that could have been produced as a direct consequence of legal restrictions that were both proposed and actually imposed on the intellectual freedom of our scientists and design engineers.

Until recently, legal restrictions were imposed on the intellectual freedom of the scientists who work in our nuclear weapon laboratories. By law, our scientists at Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and other defense laboratories were not allowed to even think about possible designs for future generations of new nuclear weapons.⁵ The intent of the law was to prohibit the development of more advanced technologies for nuclear weapons than those that currently exist in our present nuclear arsenal. Fortunately, Congress repealed this law just last year.⁶

The practical effect of that law would have been to permanently saddle us with nuclear weapons of Cold War vintage. These weapons were designed primarily as weapons of mass destruction to enforce the so-called strategy of Mutual Assured Destruction (MAD), the strategy that is premised on the destruction of cities and of entire peoples. None of us want a world where the very existence of civilization is threatened by nuclear weapons of mass destruction. However, tying the hands of our scientists and preventing them from thinking about nuclear weapons of new design is not the way to escape that threat. Indeed, this perpetuates that threat by freezing us in the technologies of the past, making us perpetually dependent upon the mass destruction nuclear weapons of the Cold War. Intellectual

5. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 3143, 116 Stat. 2458, 2733-34 (repealed 2004).

6. *Id.*

stagnation imposed by law on our own defense scientists is wrong in principle.

If we unleash our scientists and give them the intellectual freedom they deserve, they can and will invent new weapons employing nuclear energy that will basically make the old style nuclear weapons obsolete. Dr. Robert Jastrow, a great scientist, one of the founders of NASA and the Goddard Space Institute, some two decades ago wrote a far-sighted book entitled *How To Make Nuclear Weapons Obsolete*.⁷ Dr. Jastrow suggested that by developing new technologies for a national missile defense, we could make nuclear weapons of mass destruction obsolete, by inventing the means to defend ourselves.⁸

Another way of making the "city-busting" nuclear weapons of today obsolete is to develop nuclear weapons of new design that are tuned for specific effects and that have a different purpose than mass destruction. For example, it is possible to imagine nuclear weapons that emit a powerful electromagnetic pulse that does not kill anyone but would incapacitate the electronic systems and forces of an enemy. Such a nuclear weapon would not be a weapon of mass destruction, but a weapon of mass electronic disruption. Such a weapon would make theoretically possible a bloodless war and the capability to achieve a humane victory over an adversary by preserving the lives of troops, while rendering impotent the adversary's military technologies and machinery.

Another new kind of life-saving nuclear weapon that could be devised might rely on X-rays, neutrons, or other effects that could be employed on national and theater missile defenses. These nuclear weapons would not inflict mass destruction on human lives but would destroy chemical, biological, and nuclear warheads aimed at our cities or troops and, thus, would save lives. Still another life-saving nuclear weapon that our defense scientists have sought permission to research is based on the principle of penetrating the earth, so that the explosion and most of the nuclear effects are contained underground. Such a weapon would be used to neutralize chemical and biological agents that are stored underground. An earth-penetrating nuclear weapon would limit the massive collateral damage likely to be inflicted on surrounding civilian populations by non-nuclear strikes that would release deadly chemicals or biological agents into the air.

Another reason for respecting the intellectual freedom of our defense scientists, especially in the nuclear area, is so that

7. ROBERT JASTROW, *HOW TO MAKE NUCLEAR WEAPONS OBSOLETE* (1985).

8. *Id.* at 138-40.

other nations do not overtake the United States in nuclear technology. Such a development could threaten the global balance of power and could tempt nations that are currently following a path of cooperation to relapse into confrontation. China and Russia have not restricted their nuclear scientists from researching and developing new nuclear weapons. North Korea has developed nuclear weapons and an intercontinental missile to deliver warheads to the United States. Iran is in the process of trying frantically to develop nuclear weapons. By resting on its laurels, the United States is inviting potential adversaries to overtake us. Most Americans do not know it, but today, Pakistan can produce more “nuclear pits”—the core of a nuclear weapon—than the United States!

Finally, we have a moral obligation to allow our nuclear scientists the intellectual freedom to create new generations of nuclear weapons that could save lives. There is a long legal and moral tradition in Western “Just War” theory, extending from St. Thomas Aquinas⁹ to Michael Walzer,¹⁰ that a nation has an obligation in war to spare lives, to be merciful. By denying our scientists the intellectual liberty to develop new generations of more humane nuclear weapons that would be more precise, have smaller yields, and employ different effects than heat and blast, we are denying to ourselves the technological capability to be merciful in war. Instead, we are imposing on ourselves reliance on nuclear weapons designed for mass destruction. This seems to be a direct violation of that ancient obligation we have under the Judeo-Christian tradition and in “Just War” theory to spare lives, to be merciful.

I have introduced legislation to establish through Congress a “Commission on the New Strategic Posture of the United States.”¹¹ The purpose of this Congressional Commission will be to think deeply about the role of nuclear weapons in U.S. national security policy over the next twenty years.¹² What is the future threat environment going to be like? What are the technological possibilities for nuclear weapons in the future? What

9. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 40, at 1359 (Fathers of the English Dominican Province trans., Benziger Bros. 1947).

10. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (1977).

11. National Defense Authorization Act for Fiscal Year 2005, H.R. 4200, 108th Cong. § 1074 (2004). (Author’s note: This legislation passed the House by a wide margin but was narrowly rejected by the Senate in conference. I will reintroduce the bill this year to establish such a commission.)

12. *Id.*

are the best strategies and technologies that the United States should adopt over the next twenty years?

Another purpose of the Commission is to bring together that great generation of nuclear scientists and strategists who won the Cold War—and who averted a nuclear holocaust—with a new generation of strategic thinkers and scientists. The great generation that won the Cold War without nuclear war is aging and may not be with us long. This Commission will afford us an opportunity to take advantage of their wisdom, hopefully to impart some of that wisdom to a new generation of scientists and strategic thinkers before the last of the great generation departs from the world scene.

I hope that in some small way this Commission will help restore some of the intellectual freedom to our defense scientists. We need to encourage imaginative thinking about the vital topic of nuclear weapons and future nuclear strategy that has been discouraged both by law and by long neglect during the Clinton administration.

II. SUPPORT THE SPREAD OF FREEDOM TO OTHER NATIONS.

Americans should support the spread of freedom to other nations and peoples as a means of making more secure our own liberty, as President Bush is doing in Afghanistan and Iraq. There are many examples of how expanding the domain of liberty increases American national security.

After the defeat of Germany and Japan in the Second World War, their democratization created a more stable world order. Turning these nations away from their militaristic pasts and into democracies made the world a much safer place. Establishing democracy in Germany eliminated a centuries-long basis of conflict in Europe that had been the source of two world wars that threatened liberty globally. Establishing democracy in Japan ended a centuries-long trend of Japanese militarism that, when linked to a modern industrial base, posed a threat globally to liberty that was second only to Nazi Germany. The reconstruction of Japan on democratic lines avoided the bitterness of a vengeful peace, as experienced by Germany after World War I. Endowing the Japanese people with freedom in return freed us from the threat of a vengeance-seeking Japan and made that nation our friend today.

The expansion of freedom to Russia is drawing Moscow westward and makes American liberty more secure. Democracy is still young in Russia. The democratic experiment in Russia could still fail. America needs to make a major effort to ensure that

democracy succeeds in Russia, so that Russia can take its place alongside the Western democracies as a friend and not relapse into an authoritarian future.

If freedom fails in Russia, Moscow could become an ally of totalitarian China and the source of a new Cold War.

To advance democracy in Russia, to make our own liberty more secure, I have launched an initiative called "A New Time, A New Beginning," that has the support of Russian President Vladimir Putin.¹³ "A New Time, A New Beginning" envisions numerous small pilot programs to develop better relations with Russia on all levels: cultural, civil, economic, and military.¹⁴ It involves seeking areas of cooperation in culture, business, civil affairs, and science on the theory that the building of trust by small steps, and in non-controversial or less controversial areas, can lead to resolution of major differences and cooperation in the most controversial areas of national security and foreign policy.¹⁵ "A New Time, A New Beginning" also seeks to help build a free Russia on firm foundations.¹⁶ For example, a stable civil society with honest courts and fair laws is an essential prerequisite for a good business climate and a free economy. Prosperity and free enterprise will put Russian democracy on firm foundations. Accordingly, "A New Time, A New Beginning" promotes bringing together American jurists and Russian jurists to work together on constructing in Russia a sound and fair legal system, where contracts are honored and where businesses can trust in the courts.¹⁷

The liberation and democratization of Afghanistan and Iraq, if we succeed, also promises to create a more stable world order and to make our nation and liberties more secure against the threat of terrorism. Whatever our party affiliations, all Americans should support President Bush in his effort to bring freedom to Afghanistan and Iraq to establish democracies in those societies.

Despite our long experience that bringing freedom to others also significantly increases our own national security, the United States still does not seem to appreciate that the best preemptive defense strategy is the active liberation of other nations. If a bomb or missile existed that could provide to the United

13. See CURT WELDON, U.S.-RUSSIA PARTNERSHIP: A NEW TIME, A NEW BEGINNING 11, available at <http://www.house.gov/curtweldon/usrussia.pdf> (last visited Mar. 1, 2005) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

14. *Id.* at 4-5.

15. *Id.* at 3, 8, 18, 20.

16. *Id.* at 26-27.

17. *Id.* at 3, 24-25.

States the same level of security as did the transformation into democracies of Germany, Japan, and the Soviet Union, would it not be wise to invest billions into that weapons system? Yet our investment in promoting political and economic freedom as a "weapons system" to defend our liberty is modest, especially considering its proven success. The National Endowment for Democracy (NED), the Agency for International Development (AID), and other small programs scattered throughout various federal agencies comprise our inadequate commitment to promoting freedom in the world.

Most of these programs are not integrated into a national security strategy. President Bush has done a heroic job in Afghanistan and Iraq of liberating countries and attempting to reconstruct them as democratic nations. But reconstructing these nations as democracies is being done on an *ad hoc* basis. This is not the fault of the Bush administration. It is our collective fault as a nation for our failure to take more seriously the use of liberty as the most effective weapon in our arsenal for providing for our own national security. We would be having a much easier time in Afghanistan and Iraq if there were contingency plans on the shelf, planned out well in advance, for helping these countries become democracies.

Just as the United States has contingency plans for winning all manner of possible wars against all possible adversaries, we need contingency plans for winning the peace against possible adversaries by transforming them into democracies and, thus, making our own nation and liberty more secure. Right now, we usually find ourselves with no exit strategy after achieving military victory over adversaries. There should be a standard exit strategy when we are compelled to defeat an authoritarian or totalitarian power completely, as we did in Iraq, rather than leaving the adversary nation in ruins—to leave our defeated foe reconstructed physically and politically on the basis of democracy, as we did in Germany and Japan. Indeed, our national security policy should invest more resources in trying to transform our political adversaries into democracies before war becomes necessary.

Accordingly, I am considering introducing new legislation to establish a new institute dedicated to the cause of advancing freedom in the world and so making our own nation and liberty more secure. The Ronald Wilson Reagan Institute for Freedom would have area specialists dedicated to analyzing the prospects for creating programs and strategies to move authoritarian and totalitarian states toward freedom. The Institute would have on the shelf contingency plans for democratizing those countries as

part of a larger national security policy in peacetime and as part of an exit strategy in case the United States is compelled to defeat those nations in war. The Institute would coordinate its work with NED, AID, and other freedom agencies. The Institute would keep track of the activities of all agencies dedicated to advancing freedom. The Institute would propose ways to use the resources we spend promoting freedom more efficiently and effectively and as part of a broader national security policy.

I am interested in what readers of this *Journal* think about this idea.

III. SUPPORT THE SOLDIER WHO DEFENDS YOUR FREEDOM.

Everyone has the right to protest, even during war. But everyone also has the right to disapprove of the protesters, and in terms as strident as those the protesters themselves use.

The United States appears to have lost its long tradition of unity during war. In America's past wars there have always been some protesters, but never on the scale and with the serious consequences that attended the protests of the Vietnam War. Vietnam seems to have established a new standard and a new scale of expected American tolerance for protests during war. In the liberal culture and liberal media, the Vietnam War protesters are lionized and treated as heroes. The media wants us to admire the protesters of today. But the ones that deserve our admiration, the people that most Americans rightly admire, are the soldiers and leaders who won our past wars and who are today protecting U.S. national security and preserving our liberty. Protesters during times of war are not the role models I want my children to follow.

During the present war on terrorism, people have the right to protest. Yet the protestors and a sympathetic media challenge the right of Americans to protest the protestors. Questioning the wisdom and loyalty of protestors, they complain, has a chilling effect on their free speech.

Moreover, today's protestors want it both ways—they want to protest the war on terrorism in Iraq and claim they still support the troops. You cannot protest the war and truthfully claim that you also support the troops. Terrorists know they cannot win on the battlefield. They can only win by breaking the will of the American people, and of America's political leaders, to prosecute the war on terror. When protestors and political partisans accuse President Bush of being a "liar" and call for the withdrawal of our troops from Iraq before freedom is firmly established in that country, inevitably, if unwittingly, they encourage the enemy to

think they are winning the war on the political battlefield and, thus, embolden terrorists to fight longer and harder.

Further, I fear that as partisan political feeling deepens, we will become a more deeply divided people. I fear that the protestors will turn on American troops and the military the way they did in Vietnam. If the protestors and the liberal media and academia are capable of tolerating lies against President Bush, they are capable of tolerating lies against the military and our citizen-soldiers. The hysterical rhetoric and epithets being hurled at President Bush today, faithfully reported everyday by the liberal media, may well be directed at our troops tomorrow.

The Framers of the Constitution lived in a different America of small towns and closely knit communities defended by militia, citizen-soldiers. The social intimacy of that bygone society made people more circumspect about the consequences of protesting war, after war had begun. Failure to support the troops meant endangering husbands, sons, kin, and neighbors.

Now we have a larger, less connected, more divided society—a more specialized society too, where academics and highly paid journalists do not mix with our soldiers, perhaps do not want to know them. For many Americans who have never served in the military and who have no personal ties to the military, our soldiers and our military institutions are an abstraction, and not an abstraction well-understood or respected.

Floyd Spence, the late Chairman of the House Armed Services Committee, a great and good man, had a favorite poem about the American soldier. That poem spoke movingly to him, and to me, about the obligation of free men to respect the American soldier, who is the source of liberty:

When the country has been in need, it has
 Always Been The Soldier!
 It's the soldier, not the newspaper, which has given us
 The freedom of the press.
 It's the soldier, not the poet, who has given us
 freedom of speech.
 It's the soldier, not the campus organizer, who has given
 us the freedom to demonstrate.
 It's the soldier, who salutes the flag,
 and serves under the flag,
 It's the soldier whose coffin is draped with the flag,
 Who allows the protestor to burn the flag.
 And, it's the soldier who is called upon
 to defend our way of life!

Another poem, rather more frank, "The Patriot" by Sergeant Aaron M. Gilbert describes what soldiers in the field think about protests back home:

Freedom is not free,
It comes with its toll,
And some never return,
And leave their stories untold.
I acknowledge the protest,
The riots, the rage,
And the ones given their freedom
Without having to pay.
But let it be known,
Come rain, sleet or hail,
The Marines are on call,
To fight and die for your betrayal.