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HOMELAND SECURITY AND CIVIL LIBERTIES:  
PRESERVING AMERICA’S WAY OF LIFE

DANIEL W. SUTHERLAND*

Together we will answer history’s call to protect America and preserve our way of life.¹

INTRODUCTION

America is at war. A small group of extremists have declared, most demonstratively on September 11, 2001, that they are dedicated to killing Americans and attacking our society at every opportunity. We are aggressively taking the war to them, and thousands of the enemy’s combatants have been removed from the battlefield. The war on terror presents America with unprecedented challenges and dangers. Yet it also presents us with opportunities—to make needed adjustments to our national security, to see people of good will banding together as never before, and to see a recommitment to our basic roots as a people and a culture.

A critical element of the war on terror is the protection of our homeland against those who would do us harm. An effective homeland security strategy means that America must come to grips with a full spectrum of security challenges. We must secure air travel, including screening passengers before they board airplanes, stationing air marshals on selected flights, and securing cockpit doors. We must secure our borders, making accurate determinations about whether those who seek to visit our country have a history of criminal or terrorist involvement and assuring that those who apply for student visas are in fact carrying out their stated academic pursuits. We must disrupt the terrorists’ financial pipelines and protect our own economy in spite of the

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risks of attack and the costs of increased security. We must ensure that chemical and nuclear plants and other critical elements of our national infrastructure are protected. We must ensure that large public gatherings, such as sports and political events, are secured. Through the work of the Department of Homeland Security, significant progress has been made in all of these areas.

But one of the greatest challenges brought on by the war on terror is to ensure that, while we increasingly secure our nation from terrorist attack, we also preserve America's way of life. Our core mission at the Department of Homeland Security is not just to protect America's tangible assets—our buildings, airports, and power plants. Rather, it is to protect America and our way of life, including the freedoms of speech, press, worship, assembly, and many other principals that form the foundation of our country.

Every legal argument requires an analysis of facts and then of law. In this article, I will argue that we must make policy with a clear understanding of the facts and of the unique challenges placed upon us in the twenty-first century. I will then argue that we must make policy with a re-energized understanding of the foundational principles entrusted to us by our Founders in the eighteenth century. In particular, we must understand the principles that the Framers aspired to—and the political and military contexts in which our Founders laid out those principles—which have always guided our nation and provided inspiration to people around the globe. In short, we must look ahead to the threats we face while also redoubling our efforts to understand and appreciate the liberties upon which our nation was built.

I. THE CHALLENGE OF RECOGNIZING THE NEW THREAT

On September 11, 2001, America learned that it is under attack by "an enemy who is sophisticated, patient, disciplined and lethal." In the words of the 9/11 Commission: "[This enemy's] hostility toward us and our values is limitless. Its purpose is to rid the world of religious and political pluralism, the plebiscite, and equal rights for women. It makes no distinction between military and civilian targets. Collateral damage is not in its lexicon."3

In an interview with Al Jazeera television a month after the September 11 attacks, Osama bin Laden stated: "The values of this Western civilization under the leadership of America have been destroyed. Those awesome symbolic towers that speak of

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3. Id.
liberty, human rights, and humanity have been destroyed. They have gone up in smoke. I tell you, freedom and human rights in American are doomed."

A coalition of loosely-connected men and women have killed thousands of people in an attempt to destroy some of our country's greatest symbols in New York and Washington, D.C. They have murdered hundreds of commuters on their way to work in Madrid, Spain. They have struck hundreds of young people enjoying a holiday in Bali, Indonesia. They have slit the throats of noble civilians trying to improve life in Iraq. They have massacred hundreds of children and teachers excitedly attending their first day of school in Beslan, Russia.

The enemy America faces is different than any this country has faced before—it is small, mobile, and able to function without clearly established chains of communication or logistical supply lines. It knows no geographic boundaries and is able to operate on limited budgets. This enemy is every bit as dangerous as any this country has faced before, as it has clear intentions to leverage our own technology against us and to use weapons of mass destruction in our largest urban areas. Most chillingly, it has no conscience. This enemy presents us with imminent threats and is right now planning ways to kill us, our families, and our neighbors. This enemy is patient and methodical, so we cannot think that because nothing has happened recently the threat has subsided. Finally, this enemy is not reasonable. Compassion, logical arguments, and reasoned debate will not reach them. As the 9/11 Commission concluded: "It is not a position with which Americans can bargain or negotiate. With it there is no common ground—not even respect for life—on which to begin a dialogue. It can only be destroyed or utterly isolated."

One of the key challenges facing those who seek to influence public opinion regarding homeland security and civil liberties is the need to recognize this context and to understand how this new factual context changes the terms of the debate. Many of the basic issues in the war on terror are very familiar to Americans. For example, there have been heated debates about the issue of "racial profiling" for many years. There have been criticisms regarding the expansion of the Border Patrol for many years. There have been criticisms that the United States allows too many—or too few—immigrants for many years. All of these

4. For the text of these remarks, see Migration Policy Institute, America’s Challenge: Domestic Security, Civil Liberties, and National Unity After September 11, at 5 (2003) [hereinafter America’s Challenge].

5. 9/11 Commission Report, supra note 2, at 362.
issues, and many others, still must be recognized and resolved. However, it is critical that America recalibrates and reassesses the issues in a post 9/11 world.

As decision makers, advocates, and opinion leaders approach the issues of homeland security and civil liberties, we have a duty to promote innovation. We are in a new century, we are in a new context, and we must look for new paradigms and fresh approaches. Justice Louis Brandeis wrote, “If we would guide by the light of reason, we must let our minds be bold.”

Likewise, scholars at the Migration Policy Institute have stated:

It is too easy to say that if we abandon our civil liberties the terrorists win. It is just as easy to say that without security there will be little room for liberty. What is hard is to take both arguments with equal seriousness and to integrate them within a single framework.

Harvard law professor Randall Kennedy’s book, Race, Crime and the Law, contains important insights. Even though Professor Kennedy’s words were written prior to September 11, 2001, his analysis is more timely than ever. Professor Kennedy argued that the “inherited debates” on race and civil rights “have become increasingly sterile.” He asserted that “useful prescriptions for problems as complex as those generated by the imperatives of law enforcement in our large, rambunctious, multiracial society can arise only from thinking that frees itself of reflexive obedience to familiar signals.”

There has been, and will continue to be, a great deal of discussion about America’s civil liberties record throughout the war on terror. This analysis is welcome, and, indeed, critical. But the analysis must be constructive—in addition to criticism, thoughtful policy recommendations must be offered. The analysis also must explicitly recognize the grave national security threat that America faces. Perhaps more than anything, those who debate these issues must become excellent listeners if we are to move beyond the sterile debates of the past. This is, of course, antithetical to the soundbite media culture. But respectfully listening to the opinions of others with views on these issues, and lowering the decibel level of criticisms, is absolutely critical to building partnerships to resolve the challenges that face us in this new century.

7. AMERICA’S CHALLENGE, supra note 4, at 6.
9. Id.
One concrete example of an innovative approach to difficult issues is in the area of racial profiling, which has been an issue in the law enforcement arena for many years. The use of race or ethnicity in law enforcement, aviation security, border policing, intelligence gathering, and national security matters remains a constant issue in homeland security. The difficulty is that while everyone—commentators, political leaders, advocacy groups, and law enforcement—opposes “racial profiling,” neither the courts nor commentators have proved able to define it sufficiently or to offer specific guidance on how to avoid it. Of course, the issue became much more complicated after the September 11 attacks, which were executed by a group of men from one particular area of the world.

President Bush was determined to address constructively these gaps between our values, our rhetoric, and our daily reality. In his first State of the Union message, President Bush stated that racial profiling “is wrong and we will end it in America.” He directed the Attorney General to study the extent of the problem and then to issue specific guidance to federal law enforcement agencies.

In June 2003, the Department of Justice released Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The Guidance is an excellent effort to constructively and innovatively resolve a relevant issue and therefore serves as a useful model for discussing the full range of issues at the intersection of homeland security and civil liberties. It provides strong general statements of direction, solid legal analysis, and specific direction for law enforcement through fourteen hypothetical fact patterns that operators in the field can understand. The Guidance begins by defining the term “racial profiling”:

Racial profiling at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more


likely to engage in misconduct than any particular individual of another race or ethnicity.\textsuperscript{12}

The \textit{Guidance} then lays out a strong case that racial profiling is wrong. Targeting individuals based on their perceived race or ethnicity is wrong for our country, as it undermines our core values of fairness and justice. Moreover, it is ineffective, as law enforcement officers who look no further than a person's perceived race or ethnicity are not considering objective indicators of criminal behavior. As a result, racial profiling leads to errors, causing law enforcement to expend limited resources investigating the wrong people. Furthermore, targeting based on race or ethnicity can undermine the credibility of the entire law enforcement process, jeopardizing public confidence in one of the most important functions of our government. This lack of confidence may be manifested in jury nullification, in dangerous and heated encounters at traffic stops, and in general community hostility toward law enforcement officers. Finally, under certain circumstances, racial profiling may also amount to a violation of the Constitution. The Supreme Court has held that, "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race,"\textsuperscript{13} and the Court of Appeals for the Seventh Circuit has held that any general policy of "utiliz[ing] impermissible racial classifications in determining whom to stop, detain and search" violates the Equal Protection Clause.\textsuperscript{14} In short, racial profiling is wrong—it undermines our Constitution and our values and simultaneously dilutes our enforcement efforts.

The \textit{Guidance} makes clear that in traditional law enforcement activities, federal law enforcement officers may not use the perceived race or ethnicity of an individual as even one factor among many when deciding whether to stop, question, or detain that individual:

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers may not use race or ethnicity to any degree, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.\textsuperscript{15}

\textsuperscript{12} Id. at 1.
\textsuperscript{13} Whren v. United States, 517 U.S. 806, 813 (1996).
\textsuperscript{14} Chavez v. Illinois State Police, 251 F.3d 612, 635 (7th Cir. 2001).
\textsuperscript{15} \textit{Guidance}, \textit{supra} note 11, at 2.
This standard is more stringent than the limits imposed by federal courts in such situations. Federal courts typically allow law enforcement officers to consider race or ethnicity as one of several factors in deciding whom to stop.\textsuperscript{16} However, the DOJ Guidance wisely raises the bar for federal law enforcement officers: "[T]his guidance in many cases imposes more restrictions on the consideration of race and ethnicity in Federal law enforcement than the Constitution requires."\textsuperscript{17}

However, the Guidance does not preclude the use of race in conjunction with suspect descriptions. Witnesses often describe a suspect according to his or her apparent race or ethnicity (e.g., "the bank was robbed by a white male, driving a blue corvette"). The Guidance properly explains:

In conducting activities in connection with a specific investigation, Federal law enforcement officers may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization. This standard applies even where the use of race or ethnicity might otherwise be lawful.\textsuperscript{18}

This must not be read too broadly. The Guidance points to a Ninth Circuit Court of Appeals decision: "We must be particularly careful to ensure that a 'high crime' area factor is not used

\textsuperscript{16} See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 886–87 (1975) (describing that officers may stop vehicles only if they are aware of specific facts, along with rational inferences therefrom, which would reasonably warrant suspicion that the vehicles are occupied by aliens who may be illegally in the United States; and stating that an officer whose observations lead him reasonably to suspect that a particular vehicle might contain illegal aliens is entitled to stop the vehicles briefly, question the occupants about their citizenship and immigration status, and ask them to explain suspicious circumstances).

\textsuperscript{17} United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997) (holding police may not stop individuals for investigative scrutiny solely on the basis of race, but a stop based on "many reasons" which include race as one factor "may not violate equal protection principles"); United States v. Rush, 673 F. Supp. 1097 (D.D.C. 1987) (approving investigative stop based on a drug courier profile resulting in arrest, where one of the profile's elements included race); cf. United States v. Mendenhall, 446 U.S. 544 (1980) (approving generally of the use of profiles to build reasonable suspicion justifying an investigative stop, although not addressing the use of race as a factor generally); Brignoni-Ponce, 422 U.S. at 886–87 (holding that a brief investigative stop at a fixed roadside immigration checkpoint relying in part on race or ethnicity could be justified, if several specific articulable facts—one of which could be race or ethnicity—could reasonably support an inference that the vehicle occupants were illegal aliens).

\textsuperscript{18} Guidance, supra note 10, at 2.
with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity. Therefore, in the arena of traditional law enforcement activities, the federal policy is that race or ethnicity may never be used as a factor unless there is specific credible information relating to an identified criminal incident or scheme.

Most commentators would be satisfied to leave the discussion at this point. However, this analysis would not be complete in a post 9/11 world. The Guidance therefore lays out a paradigm for implementing the prohibition of racial profiling in the context of national security and border integrity. While commentators usually avoid this context because it is complex and because the stakes are so high, the Guidance issued by the Department of Justice addresses the issue innovatively and effectively.

The Guidance begins by laying the constitutional framework—whenever a government official makes a decision based in any part on racial or ethnic considerations, strict scrutiny applies. That is, for a federal law enforcement officer to consider the race or ethnicity of an individual before deciding to stop or question that individual, he or she must be able to identify a compelling governmental interest and must ensure that the decision is narrowly tailored to advance that interest.

Clearly, a threat to national security is a compelling governmental interest. The Supreme Court has held, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." However, the Guidance reinforces the prohibition on actions based on stereotype or invidious bias:

In absolutely no event . . . may Federal officials assert a national security or border integrity rationale as a mere pretext for invidious discrimination. Indeed, the very purpose of the strict scrutiny test is to "smoke out" illegitimate use of race, Adarand, 515 U.S. at 226 (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)), and law enforcement strategies not actually premised on bona fide

19. United States v. Montero-Camargo, 208 F.3d 1122, 1138 (9th Cir. 2000).
national security or border integrity interests therefore will not stand. To help explain how these principles should be applied, the Guidance includes hypothetical fact patterns. One describes a national security threat that is sufficiently specific to qualify as a compelling governmental interest:

Example: U.S. intelligence sources report that terrorists from a particular ethnic group are planning to use commercial jetliners as weapons by hijacking them at an airport in California during the next week. Before allowing men of that ethnic group to board commercial airplanes in California airports during the next week, Transportation Security Administration personnel, and other federal and state authorities, may subject them to heightened scrutiny.

By contrast, reliance on generalized stereotypes with no specific threat warning, even in a national security context, is forbidden:

Example: At the security entrance to a Federal courthouse, a man who appears to be of a particular ethnicity properly submits his briefcase for x-ray screening and passes through the metal detector. The inspection of the briefcase reveals nothing amiss, the man does not activate the metal detector, and there is nothing suspicious about his activities or appearance. In the absence of any threat warning, the federal security screener may not order the man to undergo a further inspection solely because he appears to be of a particular ethnicity.

In sum, the "national security" section of the Guidance strikes the difficult but essential balance between using all available tools to protect our country while also honoring the rule of law and principles of non-discrimination. The intention is to allow the executive branch the full flexibility the Constitution allows in order to protect the country while minimizing to the greatest extent possible the use of race or ethnicity in law enforcement activities. Practically, this means that on a daily basis law enforcement personnel should not be using race as a factor in their activities. However, there could be certain national security contexts in which all options must be available to the Executive to protect the country. The Guidance concludes: "The Constitution

22. GUIDANCE, supra note 11, at 9-10.
23. Id. at 10.
24. Id.
prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional circumstances.”

The Department of Homeland Security (“Department”) is aggressively implementing the Guidance. The President’s prohibition of racial profiling, as described by the Guidance, has been communicated to Department personnel, has been inserted in policy manuals, and is being included in the curriculum at law enforcement training academies. In addition, the Department adopted a policy establishing a commitment to race-neutrality in law enforcement activities:

“Racial profiling” at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement activities. It is premised on the erroneous assumption that any particular individual or one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. DHS explicitly adopts the Department of Justice’s “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” issued in June 2003. It is the policy of the Department of Homeland Security to prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional circumstances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present. Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual’s connections to countries that are associated with significant terrorist activity. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.

Some commentators argue that when federal officials develop a list of countries that merit special attention, and target individuals who have connections with those countries, those officials engage in “racial profiling.” The argument is that if federal officials target individuals with connections to particular countries, there may be a disparate impact on the racial and ethnic groups who live in those countries. However, both strategic

25. Id. at 9.
and legal considerations show that this argument is not persuasive in a post 9/11 world.

We know that terrorist activity flourishes in certain geographic areas. For example, the 9/11 Commission found, "Almost all the 9/11 attackers traveled the north-south nexus of Kandahar-Quetta-Karachi [Pakistan]."\(^{27}\) It is therefore natural that the government has an interest in people who have connections with particular geographic areas. In fact, it would be negligent not to consider these factors when deciding which individuals should be subjected to heightened scrutiny. These geographically-oriented security measures would direct heightened scrutiny toward such individuals as the September 11 attackers, John Walker Lindh, and Jose Padilla.

Moreover, the legal argument for targeting based on connections to countries in which terrorism flourishes is solid. Courts defer to the executive branch in the arenas of foreign policy and in shaping our national security. Safeguarding America’s borders falls under this broad area of discretion as it directly relates to U.S. foreign policy and is an integral part of national security. Therefore, many courts have upheld the use of country lists by the executive branch, so long as the executive branch has a rational basis for singling out specific countries.\(^{28}\) The war on terror, in which thousands of Americans have died on U.S. and foreign soil, clearly would be considered to constitute a rational basis for creating such distinctions. As the Fourth Circuit has held, the United States, “is not bound to treat the nationals of

27. 9/11 Commission Report, supra note 2, at 368.

28. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (stating that immigration policies are “intricately interwoven” with foreign affairs and “are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference”); Fiallo v. Bell, 430 U.S. 787, 792 (1977) (classifications among aliens based on gender is consistent with due process if supported by “facially legitimate and bona fide reason”); Malek-Marzban v. Immigration and Naturalization Service, 653 F.2d 113, 116 (4th Cir. 1981) (rejecting the equal protection argument of petitioners, Iranian nationals singled out for scrutiny by the Attorney General during the hostage crisis, and confirming that classification of aliens by a nationality was sustainable if it had a rational basis); Nademi v. Immigration and Naturalization Service, 679 F.2d 811, 814–15 (10th Cir. 1982) (agreeing with Fourth Circuit’s opinion in Malek-Marzban); Dunn v. Immigration and Naturalization Service, 499 F.2d 856, 858 (9th Cir. 1974) (responding to an allegation that a federal policy treated aliens from Western Hemisphere countries less favorably than others, and holding that it was not unconstitutional to deny eligibility for an adjustment of alien status to natives of the Western Hemisphere because Congress has the authority to exclude any class of aliens from the United States).
unfriendly powers with the same courtesy and consideration it extends to nationals of friendly powers." \(^{29}\)

The district court in *Roudnahal v. Ridge* considered a constitutional challenge to the government's decision to subject aliens from a target set of countries to heightened scrutiny. \(^{30}\) In November 2002, Attorney General Ashcroft issued a notice in the Federal Register requiring all non-immigrant aliens from a list of countries to register with the local Immigration and Naturalization Service (INS) office. \(^{31}\) Five citizens from the targeted nations argued in a federal district court that this special registration program was a violation of constitutional, statutory, and regulatory law. The court held that "immigration policies are 'intricately interwoven' with foreign affairs and 'are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" \(^{32}\) As a result, the court upheld the use of a rational basis test to determine the validity of singling out specific countries: "So long as such distinctions are not wholly irrational they must be sustained [against due process and equal protection challenges]." \(^{33}\) Looking at the purpose of the special registration program, the court determined that the executive branch, entrusted to shape national security, had a rational basis for singling out non-immigrant aliens from these targeted countries. More specifically, the court found that in light of military operations overseas and the continuing terrorist threats at home, targeting nonimmigrant aliens from Iran, Iraq, Libya, Sudan, and Syria, among others, was rational.

In an earlier case, *Narenji v. Civiletti*, the District of Columbia Circuit Court of Appeals held constitutional a regulation that required all alien post-secondary school students who were natives or citizens of Iran to provide the INS information on their current residence and maintenance of their nonimmigrant status. \(^{34}\) The court held: "Distinctions on the basis of nationality may be drawn in the immigration field by Congress or the Executive. So long as such distinctions are not wholly irrational they

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29. Malek-Marzban, 653 F.2d at 116.
32. Roudnahal, 310 F. Supp. 2d at 892 (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952)).
33. *Id.* (citing Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1980)).
34. 617 F.2d 745 (D.C. Cir. 1979).
must be sustained [as against due process and equal protection challenges]."\textsuperscript{35}

Even if courts were willing to entertain the argument that an executive branch list of targeted countries had a disparate impact on certain racial or ethnic groups, the Supreme Court has made it clear "that \"[p]roof of racially discriminatory intent or purpose is required\" to show a violation of the Equal Protection Clause."\textsuperscript{36} There is no evidence that country lists are, or recently have been, used for any purpose other than to advance national security and therefore these lists do not constitute evidence of intentional discrimination.\textsuperscript{37}

The Bush administration's handling of the racial profiling issue is an example of how this country must approach difficult civil liberties issues with innovation. We need similarly innovative and constructive thinking to be applied to other questions that America must now confront, such as:

- How can we embrace the expansion of technological developments such as biometric identifiers without creating a national ID card and compromising privacy?
- How can America maintain its tradition as a country that welcomes immigrants while also gaining control of our borders?
- How can we fight those conspiring to kill large numbers of our people without casting suspicion on whole communities?

America faces many challenges in a post 9/11 world; we will be effective only if we recognize the new context in which we live and explore innovative options to address those challenges. The Hebrew scriptures referred to the men of the ancient tribe of Issachar as "men who knew the times."\textsuperscript{38} History judges harshly those who overreact or underreact to threats in their own time. History will judge us well if we come to be known as a people who understand the significance of the times in which we live. We must also rise up to meet those challenges armed with our timeless values.

\textsuperscript{35} Id. at 747.


\textsuperscript{38} 1 Chronicles 12:32.
II. THE CHALLENGE OF RE-ESTABLISHING OUR TRADITIONAL VALUES

While we must recognize that the twenty-first century brings America dangerous new challenges, we must also pay close attention to the eighteenth century when our Founders laid out the principles that guide our nation.

It is natural for some to think that, for a time, the threats are so substantial that America needs to set aside or compromise certain principles. One key to winning this war is to struggle to overcome this natural tendency—rather than fight fire with fire, we must go back to our roots and redouble our commitment to the Constitution, to the Bill of Rights, and to our freedoms.

The terrorists started this war in large part because they despise our way of life and the rights we believe are universal—freedom of religion, freedom of expression, freedom of press, the right to privacy, and our commitment to equal rights for women. These principles are attractive to many people around the world, and their spread is perceived as a threat to the power of those who would attack us. It is critical that we recognize that, if we allow our civil rights and civil liberties to be compromised, we will be compromising the very principles for which we are fighting. Although these principles are attractive, and their spread in recent years is seemingly inevitable, the growth of liberty abroad and preservation of liberty at home are by no means guaranteed. If we compromise our societal and cultural foundation, we will not be stronger, but weaker. As John Quincy Adams once wrote to a friend: "Individual liberty is individual power, and as the power of a community is a mass compounded of individual powers, the nation which enjoys the most freedom must necessarily be in proportion to its numbers the most powerful nation."39

America will win the war on terror as we live out the best of our principles, allowing people around the world to see that we take seriously the inspiring words in our founding documents. The 9/11 Commission concluded:

We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors. America and Muslim friends can agree on respect for human dignity and opportunity. To Muslim parents, terrorists like Bin Ladin have nothing to offer their children.

but visions of violence and death. America and its friends have a crucial advantage—we can offer these parents a vision that might give their children a better future . . . . That vision of the future should stress life over death: individual educational and economic opportunity. This vision includes widespread political participation and contempt for indiscriminate violence. It includes respect for the rule of law, openness in discussing differences, and tolerance for opposing points of view.\textsuperscript{40}

Some assert that, as we focus on increasing security, we must necessarily decrease our civil rights and civil liberties. However, it is a dangerous mistake to see the two principles—security and civil liberties—as in competition with one another; this would condition us to accept decreased civil liberties as the cost of improved security. This perspective cannot be allowed to flourish; we must look for ways to enhance both security and civil liberties at the same time. Department of Homeland Security's first Secretary Tom Ridge has said, "We will not, as [Benjamin] Franklin once warned, trade our essential liberties to purchase temporary safety."\textsuperscript{41} If we are mindful of the critical importance of sustaining this country's traditions of liberty, security measures can be narrowly tailored to respond to the need.

President Bush has set the pursuit of liberty and freedom at the forefront of the war on terror. The President declared in a speech at the twentieth anniversary of the National Endowment for Democracy:

The advance of freedom is the calling of our time; it is the calling of our country. From the Fourteen Points to the Four Freedoms, to the Speech at Westminster, America has put our power at the service of principle. We believe that liberty is the design of nature; we believe that liberty is the direction of history. We believe that human fulfillment and excellence come in the responsible exercise of liberty. And we believe that freedom—the freedom we prize—is not for us alone, it is the right and the capacity of all mankind.\textsuperscript{42}

\textsuperscript{40} 9/11 Commission Report, supra note 2, at 376.


The President’s commitment to these principles was evident from the very earliest days of the war on terror. For example, just weeks after the attacks the President gave this charge to a conference of federal prosecutors: “We have a huge responsibility, and that [is] to defend America while protecting our great liberties.”\(^4\)

In August of 2004, President Bush issued Executive Order 13353, which established the President’s Board on Safeguarding Americans’ Civil Liberties.\(^4\) The Executive Order begins with a broad statement of policy: “The United States Government has a solemn obligation, and shall continue fully, to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions.”\(^4\)

The President then established a Board to oversee the executive branch’s work, with the mission of ensuring that civil liberties are protected and indeed enhanced. The Board is made up of some of the most senior level officials in the government, including representatives from the Justice Department (the Deputy Attorney General and two assistant attorneys general), the Department of Homeland Security (the Under Secretary for Border and Transportation Security, and four other officials), the Department of the Treasury (two senior officials), the Central Intelligence Agency, the Federal Bureau of Investigation, the National Security Agency, and many others. The Board represents the President’s determination that these issues be part of the policy-making considerations at the most senior levels of government.

In July 2002, President Bush issued *The National Strategy for Homeland Security*, a blueprint for the homeland security effort. One of the pillars of the *National Strategy* was a commitment to the protection of civil liberties:

> We are a Nation built on the rule of law, and we will utilize our laws to win the war on terrorism while always protecting our civil liberties . . . Where we find our existing laws to be inadequate in light of the terrorist threat, we should craft new laws carefully, never losing sight of our strategic purpose for waging this war—to provide security and liberty to our people. We should guard scrupulously against


\(^4\) Id. § 1.
incursion on our freedoms, recognizing that liberty cannot
exist in the absence of governmental restraint. As we move
forward in the fight, we should refrain from instituting
unnecessary laws, as we remain true to our principles of
federalism and individual freedom.\textsuperscript{46}

When the new Department of Homeland Security was cre-
ated, this commitment continued. Secretary Ridge pledged that,
"[O]ur strategy and our actions [will be] consistent with the indi-
vidual rights and civil liberties protected by the Constitution."\textsuperscript{47}
Consistent with this pledge, the protection of civil liberties has
been embedded into the Department's strategic plan. The
"vision statement" is clear: "Preserving our freedoms, protecting
America... We secure our homeland."\textsuperscript{48} The "guiding prin-
ciples" in the strategic plan ask Department employees to make
decisions with certain fundamental themes in mind—working
hard to integrate with all of the new agencies that are now com-
bined, to innovate through a willingness to meet all challenges,
and to be accountable to measurable goals that will reward excel-
lence and solve chronic problem areas.\textsuperscript{49} However, the very first
"guiding principle" is to "protect civil rights and civil liberties."\textsuperscript{50}
Department employees are instructed to act along these lines:

We will defend America while protecting the freedoms that
define America. Our strategies and our actions will be con-
sistent with the individual rights and liberties enshrined by
our Constitution and the Rule of Law. While we seek to
improve the way we collect and share information about
terrorists, we will nevertheless be vigilant in respecting the
confidentiality and protecting the privacy of our citizens.
We are committed to securing our nation while protecting
civil rights and civil liberties.\textsuperscript{51}

\textsuperscript{46} Office of Homeland Security, The National Strategy for Homel-
nat_strat_hls.pdf (on file with The Notre Dame Journal of Law, Ethics & Public
Policy).

\textsuperscript{47} Secretary of Homeland Security Tom Ridge, Remarks by Secretary
www.dhs.gov/dhspublic/display?theme=44&content=558&print=true (on file
with the Notre Dame Journal of Law, Ethics & Public Policy).

\textsuperscript{48} U.S. Dep't of Homeland Security, Securing Our Homeland: U.S.

\textsuperscript{49} Id. at 6.

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 7.
Respect for civil liberties is also integrated into the "core values" and throughout the "goals and objectives." The leadership of the Department of Homeland Security has been clear that the effort to secure our nation must include an awareness of the need to protect the rights of the individual, that all strategies and actions undertaken by the Department will be undertaken with civil liberties in mind, and that the Department will seek to enhance our nation's security while guaranteeing citizens' personal liberties.

Congress strongly reaffirmed our country's commitment to preserving civil liberties during the war on terror as the 108th Congress concluded its work in 2004. In the omnibus appropriations bill, Congress required that every federal agency must have a chief privacy officer. In the Intelligence Reform and Terrorism Prevention Act of 2004, Congress created a Privacy and Civil Liberties Oversight Board. The purpose of the Board is to develop "an enhanced systems of checks and balances to protect the precious liberties that are vital to our way of life." The Board will have five members with the responsibility of providing oversight of the executive branch's activities as it prosecutes the war on terror. The Intelligence Reform bill also contained language strengthening the Office for Civil Rights and Civil Liberties, the Office of the Chief Privacy Officer, and the Office of the Inspector General at the Department of Homeland Security. These actions of Congress demonstrate again that leaders throughout our government recognize that we need to increase both security and liberty at the same time.

Searching for ways to enhance security and civil liberties at the same time is a difficult challenge. It takes serious work to preserve something as important as our civil liberties. Thomas Jefferson wrote to a friend that people living in America could

52. The core values, standards of behavior that will be expected of Department employees, include integrity, vigilance, and respect, which are defined by the following statement: "We will value highly the relationships we build with our customers, partners and stakeholders. We will honor concepts such as liberty and democracy, for which America stands." Id. at 5. The "goals and objectives" include these comments in a number of ways, including goal 3: "Protection: Safeguard Our People and Their Freedoms, critical infrastructure, property and the economy of our nation from acts of terrorism, natural disasters, or other emergencies." Id. at 9, 20.
55. Id. § 1061(a)(2).
56. Id. §§ 8301–8305.
not expect "to be translated from despotism to liberty in a featherbed." The serious work necessary to reinvigorate America's commitment to the Constitution can be done in at least three arenas.

First, contributions can be made by the business community. Companies that do business in the homeland security field should consider issuing a strategic plan that parallels the Department's commitment to these issues. Protecting the Constitution and our way of life is not just the job of government officials in Washington; corporate America can play a vital role by embedding these concepts into the culture of their companies.

Second, our educational system can play a role by redoubling efforts to teach an understanding of and respect for the basic principles of the entire Constitution—both the structural provisions and the Bill of Rights. Students across America should learn again the importance of the separation of powers between the three branches of the federal government and to respect the different and independent roles of the federal, state, and local governments because they are especially powerful bulwarks of freedom. Students need to learn again the critical role that the freedom of the press plays in a democracy. They need to become fluent with the text of the Fourth Amendment to the U.S. Constitution and how it incorporates timeless notions of privacy. Our fundamental rights of privacy are increasingly under challenge, and Americans should carefully study the intersection of technology and privacy in this new century. Lastly, students need to be challenged to revere the freedom of religion and assembly and to understand why the Framers specifically established those protections.

Finally, opinion leaders in academia and Washington, D.C., should commit themselves to re-reading and encouraging the study of the basic texts of our nation's Founding. Those who are making decisions that guide America through the war on terror should be fluent in the Constitution, the Bill of Rights, prominent Supreme Court decisions, and the federal civil rights and privacy laws that are the cornerstone of our democracy.

CONCLUSION

The war on terror presents many challenges, and Americans face unsettling and dangerous years. However, if we fight the war on terror in the right way, America will emerge more secure. Our skyscrapers, airports, and utility plants will be better pro-

57. Letter from Thomas Jefferson to Lafayette (April 2, 1790), in FAMILIAR QUOTATIONS, supra note 39, at 388.
tected. Our national dialogue will be more constructive and respectful. Most importantly, we will emerge from this war as a nation that better appreciates liberty and democracy and that truly embodies the vision of its Founders.