CATO HANDBOOK FOR CONGRESS

Policy Recommendations for the 108th Congress

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13. National ID Cards and Military Tribunals

Congress should

- resist the establishment of a national identification card and
- resist the establishment of military tribunals for civilians.

In the wake of a calamitous terrorist attack, such as the one that America experienced on September 11, 2001, it is prudent for Congress to review our laws, policies, and customs with an eye to changes that would enhance our safety and security. Each policy proposal, however, should be carefully examined. Congress should not hastily enact any proposal simply because it is packaged as an ''anti-terrorism'' measure. Every proposal should be vetted for its necessity, efficacy, and constitutionality.

National ID Cards

It was only a matter of days after the attack of September 11 before some members of Congress proposed the implementation of a national ID card system as a way of thwarting additional terrorist attacks. The national ID card has been proposed in the past as a way of stopping illegal immigration. Since September 11 the policy proposal has been repackaged as a ''security'' measure.

The national ID card proposal would be a very bad deal for America because it would require some 250 million people to surrender some of their freedom and some of their privacy for something that is not going to make the country safe from terrorist attack. An ID card with biometric identifiers may seem ''foolproof,'' but there are several ways that terrorists will be able to get around such a system. If terrorists are determined to attack America, they can bribe the employees who issue the cards or the employees who check the cards. Terrorists could also recruit people who

possess valid cards—U.S. citizens or lawful permanent residents—to carry out attacks.

Proponents of the card point to countries in Europe, such as France, that already have national ID card systems. But the experience of those countries is nothing to brag about. The people in those countries have surrendered their privacy and their liberty, yet they continue to experience terrorist attacks. National ID cards simply do not deliver the security that is promised.

Moreover, the establishment of a national ID card system will dilute civil liberties. The Fourth Amendment to the Constitution protects Americans against unreasonable searches and seizures. The quintessential ''seizure'' under the Fourth Amendment is to be arrested or detained by the police. The police can seize or arrest a person when they have an arrest warrant or when they have ''probable cause'' to believe that the suspect has just committed a crime in their presence. But the police cannot stop people on the street and demand an ID, at least not under current law. The police can *request* an ID; they can *request* that people answer their questions. But the key point is that Americans get to decide whether or not they wish to cooperate. The legal presumption right now is on the side of the individual citizen. The people do not have to justify themselves to the police. The police have to justify their interference with individual liberty.

A national ID card system will turn that important legal principle upside down. After the enactment of the system, pressure will begin to build to enact laws that will require citizens to produce an ID whenever a government official demands it. This is very likely to happen for two reasons. First, in the countries that already have national ID card systems, the police have acquired such powers. Second, in this country there already are cases in which the police have arrested Americans for failure to produce IDs. Thus far, however, courts have thrown out such arrests, ruling that such a refusal does not constitute ''disorderly conduct'' or ''resisting an officer.'' And yet, if Congress passes a law that says people must produce IDs, the courts may well yield on that point.

It is important to note that many of the proponents of the national ID card—such as Alan Dershowitz of Harvard Law School and Larry Ellison from Oracle—present the idea in its most innocuous form. The proponents say the card will be ''voluntary'' and that people will have to present it only at airports. They say there will be no legal duty to produce an ID card. But, over time, the amount of information on the card will surely expand. The number of places where one will have to present an ID card

will also expand, and it will eventually become compulsory. And, sooner or later, a legal duty to produce an ID whenever a government official demands it will be created.

Secretary of Defense Donald Rumsfeld has already warned us to expect more terrorist attacks, so it is a safe bet that more anti-terrorism proposals will emerge in Congress in the wake of such attacks. Perhaps there will be an attack a year from now, and a limited national ID card will be proposed and enacted. Maybe five years later, America will be attacked again; people will die, and law enforcement will go to Congress and say, ''We have a national ID card, but the problem is that it is voluntary, not compulsory.'' Thus, by increments, America will get the full-blown national ID card system that is now in place in other countries. Congress should avoid this slippery slope by focusing its attention on more meritorious proposals. A national ID card expands the power of government over law-abiding citizens, but it will not really enhance security.

Military Tribunals

In November 2001, President Bush issued a ''military order'' that said that suspected terrorists could, on his command, be tried before specially designated military tribunals instead of civilian courts. That order immediately came under fire because of its disregard for constitutional norms.

Article III, section 2, of the Constitution provides, ''The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury.'' The Sixth Amendment to the Constitution provides, ''In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.'' To limit the awesome powers of government, the Framers of the Constitution designed a system in which citizen juries would stand between the apparatus of the state and the accused. If the government prosecutor can convince a jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquittal by a jury is final and unreviewable by state functionaries.

The federal government did try people before military commissions during the Civil War. To facilitate that process, President Abraham Lincoln suspended the writ of habeas corpus—so that the prisoners could not challenge the legality of their arrest or conviction. The one case that did reach the Supreme Court, *Ex Parte Milligan* (1866), deserves careful attention.

In *Milligan*, the attorney general of the United States maintained that the legal guarantees set forth in the Bill of Rights were ''peace provisions.'' During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes ''the supreme legislator, supreme judge, and supreme executive.'' Under that legal theory, many American citizens were arrested, imprisoned, and executed without the benefit of the legal procedure set forth in the Constitution—trial by jury.

The Supreme Court ultimately rejected the position advanced by the attorney general. Here is one passage from the *Milligan* ruling:

> The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is *now* assailed; but if ideas can be expressed in words and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that ''in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,'' language broad enough to embrace all persons and cases.

The *Milligan* ruling is sound. While the Constitution empowers the Congress ''To make Rules for the Government and Regulation of the land and naval Forces'' and ''To provide for organizing, arming, and disciplining, the Militia,'' the Supreme Court ruled that the jurisdiction of the military courts could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.

President Bush and his lawyers maintain that terrorists are ''unlawful combatants'' and that unlawful combatants are not entitled to the protections of the Bill of Rights. The defect in the president's claim is circularity. A primary function of the trial process is to sort through conflicting evidence in order to find the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an unlawful combatant can understandably maintain that such a person is not entitled to the protection of our constitutional safeguards. The flaw, however, is that that argument begs the very question under consideration.

To take a concrete example, suppose that the president accuses a lawful permanent resident of the United States of aiding and abetting terrorism.

The person accused responds by denying the charge and by insisting on a trial by jury so that he can establish his innocence. The president responds by saying that ''terrorists are unlawful combatants and unlawful combatants are not entitled to jury trials.'' The president also says that the prisoner is not entitled to any access to the civilian court system to allege any violations of his constitutional rights. With the writ of habeas corpus suspended, the prisoner and his attorney can only file legal appeals with the president—the very person who ordered the prisoner's arrest in the first instance!

The Constitution's jury trial clause is not a ''peace provision'' that can be suspended during wartime. Reasonable people can disagree about how to prosecute war criminals who are captured overseas in a theater of war, but the president cannot make himself the policeman, prosecutor, and judge of people on U.S. soil. In America, the president's power is ''checked'' by the judiciary and by citizen juries.

Conclusion

It is very important that policymakers not lose sight of what we are fighting for in the war on terrorism. The goal should be to fight the terrorists within the framework of a free society. The federal government should be taking the battle to the terrorists, to their base camps, and killing the terrorist leadership; it should not be transforming our free society into a surveillance state.

Suggested Readings

Crews, Clyde Wayne. ''Human Bar Code: Monitoring Biometric Technologies in a Free Society.'' Cato Institute Policy Analysis no. 452, September 17, 2002.

Kopel, David. ''You've Got Identity: Why a National ID Is a Bad Idea.'' *National Review Online*, February 5, 2002.

Levy, Robert A. ''Don't Shred the Constitution to Fight Terror.'' *Wall Street Journal*, November 20, 2001.

Lynch, Timothy. ''Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism.'' Cato Institute Policy Analysis no. 443, June 26, 2002.

_____. ''Executive Branch Arrests and Trials.'' Testimony before the Senate Judiciary Committee on Military Tribunals. December 4, 2001, www.cato.org/testimony/ct_tl120401.html.

Twight, Charlotte. ''Watching You: Systematic Federal Surveillance of Ordinary Americans.'' Cato Institute Briefing Paper no. 69, October 17, 2001.

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