

# The Wrong Tool

## *Secure identification is better than military tribunals*

by Lindsey Grant

**T**he President's recent decisions to limit individual liberties in the pursuit of terrorists raises a question: is he selecting the wrong means, and dangerous ones?

I was in the Department of State in the McCarthy era and when J. Edgar Hoover was stalking Martin Luther King as a suspected communist and terrorist. To those too young to remember I urge: be warned.

The actions by the President and Attorney General Ashcroft should be ringing alarm bells around the nation. They have created special military tribunals to try legal resident aliens, thereby bringing us to the edge of martial law without the consent of Congress – without even notifying it. They have sanctioned hundreds of

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secret detentions without charges and without provision for habeas corpus. They have instructed the FBI to violate the confidentiality of detainees' consultations with their lawyers. These new powers apply only to aliens, but there is no assurance they will not be extended. Mr. Ashcroft says he plans to instruct the FBI to undertake surveillance of political and religious organizations – not simply of individuals – suspected of terrorist actions, without showing reasonable grounds for suspicion.

The government already had extensive powers to monitor and apprehend terrorists, and Congress gave it the additional powers the White House requested after the events of September 11. At this point, Congress should ask, how much more do we tilt the age-old tension between individual liberty and law and order? It will be a sad epitaph for a wonderful constitutional experiment if we allow twenty suicidal fanatics to panic the nation into undoing the protections that were built into our system by the first ten amendments to the Constitution, two centuries ago.

The emergency measures are based on a flawed image of the nature of the threat. The President apparently sees this as a traditional war, which can be

won and finished. It is more likely to be a subterranean pursuit of a shadowy enemy for years or decades to come. Growing Arab populations are generating extreme water scarcities, declining incomes, widening disparities between rich and poor, joblessness and alienation. They drive a rage that turns people to extremists like bin Laden. Those conditions are not disappearing; they are getting worse, and there is no reason for confidence that moderate Moslem leaders will be able to bring the fanatics under control. And terrorism is not simply an Arab phenomenon. It has been endemic in Africa and Latin America. It can indeed be home grown, as Oklahoma City taught us.

Dealing with the terrorist threat will require patience and time. It will require that we learn how to identify and track the terrorists. That in turn requires that we cooperate with other nations, and those nations are going to back away if they think we have become irrational. Spain has already said it will not extradite suspects to the United States for trial by a military tribunal.

There are other things we should do that raise no constitutional issues. The government is forced to use a bludgeon where a scalpel would do better, because it does not have the information it should have. To put it bluntly: the Government does not know who is entering and leaving the United States, or who is here. If we should learn that a terrorist is planning an attack in the country, we could probably not find him. Our ability to identify people in the United States is negligible. It has declined in recent decades, because powerful interests don't want to see illegal immigration controlled and because of a misplaced congressional fear of identity cards. The right to conceal one's identity is not written into the Constitution, and it benefits only those who have something to hide. We need to put a better identification system in place, finally, and to develop the technology for sharing information with other countries. It would much improve our odds against terrorists, and it would help to control drug trafficking, organized crime, and the scale of illegal migration.

Presidents and Congress have been warned of the dangers of our present laxity, but they have equivocated

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in the face of opposition from businesses and organizations that benefit from cheap labor and foreign students' tuition payments, and from the immigration industry itself. (See David Simcox's article "Identifying, Screening, and Tracking Aliens: the fatal gap in the anti-terrorist shield," *The Social Contract*, Fall 2001, pp. 59-65, for a description of the history and specific proposals for change.)

The measures that are needed do not raise constitutional issues. Indeed, most of them have been legislated at one time or another and then vitiated or repealed, not because of Constitutional challenges but because of political opposition.

The creation of systems to identify potential terrorists would itself provide the basis for the FBI to obtain court orders for surveillance and detention within existing laws. In the meantime, the Congress has an obligation to examine, and if necessary withhold funds for, any governmental proposals to widen the scope of quasi-legal judicial procedures or to dilute the procedural protections against unreasonable search and surveillance. If Congress concludes that the government indeed needs some emergency powers, it would be wise to sunset any such legislation, to permit a longer and cooler look at it after the present mood has calmed. And the President's orders to the military last month to create secret military tribunals to try civilians has no place in our system. If necessary, our civilian justice system should be strengthened to do the job in the open. There is always the threat of more terrorist attacks, even if we develop a much a better system of identifying terrorists, but there is no clear and present danger to the nation that justifies dismantling our constitutional protections. •