

On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky

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I. INTRODUCTION

In this issue of the *Washburn Law Journal*, Professor Erwin Chemerinsky's article, *Civil Liberties and the War on Terrorism*, paints a grim picture of America—one in which we are condemned to a repeated cycle of repression, where secrecy runs rampant, and where citizens recoil in fear that their civil liberties have been destroyed.¹ Perhaps this exaggerates a bit, but it is difficult to read Professor Chemerinsky's article without a feeling of unrelieved depression and angst. Surely, if Professor Chemerinsky is right, we are living in a time and place of uncommon threat to cherished American values.

Fortunately, the America we live in bears little resemblance to the haunting picture painted by Professor Chemerinsky. Indeed, his concerns and fears remind one of nothing so much as the fears commonplace among a certain set of intellectuals in England during World War II. George Orwell recounted that unreasoning fear shortly after the war ended. "I have heard it confidently stated, for instance, that the American troops had been brought to Europe not to fight the Germans but to crush an English revolution. One has to belong to the intelligentsia to believe things like that: no ordinary man could be such a fool."² Much the same can be said of Professor Chemerinsky's unhappy account of post-9/11 America; it bears little resemblance to the experiences of ordinary Americans.

Indeed, Professor Chemerinsky's dismay is so extensive and comprehensive that this brief response cannot possibly answer each concern. To do so would require an article of even greater length than his article, since the ease with which fear may be created is not matched, regrettably, by the capacity of comfort to explain why the unease is unwarranted. In this case, the "angel" is truly in the details. A conscientious respondent must, therefore, choose selectively the subjects of his response. With those limitations in mind, I propose to address only three aspects of Professor Chemerinsky's article: one philosophical (his reading of American history) and two more practical (his critique of the Guantánamo Bay detentions and of roving wiretaps in the Patriot Act).

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1. Erwin Chemerinsky, *Civil Liberties and the War on Terrorism*, 45 WASHBURN L.J. 1 (2005).

2. George Orwell, *Notes on Nationalism*, POLEMIC, Oct. 1945, at 46.

II. THE MEANING OF HISTORY³

To be sure, there is much in American history of which we have little reason to be proud. And, with only a few quibbles, I accept Professor Chemerinsky's recitation of that history as factually accurate.⁴ But he, like others who share his fears,⁵ draws the wrong conclusions from that history. Critics who oppose changes in our legal régime post-9/11 subscribe to the George Santayana view that those who forget history are doomed to repeat it.⁶ Fearing that repetition, they remind us always of our failings.

But in doing so, opponents neglect the success of our history, the changed circumstances of today, and the reality of how liberty is lost. If those who forget history are doomed to repeat it, then just as surely those who are obsessed with and captive of history are doomed never to escape it. Reading too much into our history is a mistake—potentially quite a grave one.

To be sure, some of our past mistakes are universally considered mistakes; nobody defends today the internment of the Japanese.⁷ But not every one of the historical examples cited by Professor Chemerinsky is so obviously a mistake. The tenor of his argument is that all of our prior reactions have been overreactions, and that as a result, we may suppose that our reactions today are also overreactions. The premise, however, is wrong.

Professor Chemerinsky tells us, for example, that historians think that Lincoln's jailing of anti-war protestors did not advance the Union's cause.⁸ While some certainly make that argument, others disagree. Many, for example, think that Lincoln's suspension of the writ

3. This section is modified from an earlier publication, Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663 (2004).

4. Chemerinsky, *supra* note 1, at 1-2.

5. The leading expositor of this history and its "lessons" is Professor Geoffrey Stone, from whom Professor Chemerinsky seemingly draws much of his history. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

6. This saying appears in many different forms, but the earliest version is probably that of the poet and philosopher George Santayana who stated: "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, *LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 284 (1905), available at <http://www.iupui.edu/~santedit/>.

7. Though Judge Richard Posner has argued that in the context of the times it was understandable. RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 294 (2003). As Judge Posner wrote,

the Supreme Court . . . made the correct decision in the *Korematsu* case, when it refused to invalidate an army order, approved by President Roosevelt (and by Earl Warren, who at the time was the governor of California), removing persons of Japanese extraction from the west coast in 1942, shortly after Pearl Harbor. In hindsight, it is apparent that the order was erroneous—that the Japanese-Americans did not pose a threat to the nation and that the order was influenced by racism. But the wisdom of hindsight is treacherous.

Posting of Richard Posner to Lessig Blog, <http://www.lessig.org/blog/archives/002117.shtml> (Aug. 24, 2004, 17:42).

8. Chemerinsky, *supra* note 1, at 1.

of habeas corpus was essential to the prosecution of the war.⁹ Some argue that it was necessary to protect the troops, save Maryland for the Union, and secure the safety of Washington, D.C.¹⁰ Lincoln certainly felt the necessity.¹¹ And later in the war, the anti-draft rioters in New York (whom Professor Chemerinsky characterizes as “dissidents . . . criticizing the way the government was fighting the war”)¹² threatened to deprive the Union army of conscripts.¹³ Had that happened (though a counter-factual can never be proven), Lincoln feared a premature end to the war—leaving the United States divided and slavery ongoing.¹⁴ Using the authority granted to him by Congress in the Habeas Corpus Act,¹⁵ Lincoln directed the draft boards to ignore writs of habeas corpus issued to them by state courts seeking release of the conscripts,¹⁶ and ordered military troops to end the riots. It is not unreasonable to argue that, however legally improper Lincoln’s acts were, they were justifiable on practical grounds and thus should be praised.

Thus, Professor Chemerinsky is, with respect, quite wrong to read our history as one of unremitting error. Certainly, his conclusion is subject to dispute, and the time to judge our current reaction to Sep-

9. *E.g.*, HARRY V. JAFFA, *A NEW BIRTH OF FREEDOM: ABRAHAM LINCOLN AND THE COMING OF THE CIVIL WAR* 364 (2000).

There can hardly be any question but that the provision for suspending the writ of habeas corpus is placed in the Constitution to enable the government to provide for the public safety in the case of a rebellion. *Where* in the Constitution it is placed is wholly subordinate to why it is there at all. Lincoln’s suspension of the writ is therefore lawful. Q.E.D.

Id.; see also William Rehnquist, *Civil Liberty and the Civil War*, in 6 GAUER DISTINGUISHED LECTURE IN LAW AND PUBLIC POLICY (1997). Rehnquist stated as follows:

Lincoln felt that the great task of his administration was to preserve the Union . . . [I]t is in the nature of the presidency during wartime to focus on accomplishment of . . . strategic ends on an emergency basis without too much regard for any resulting breaches in the shield which the Constitution gives to civil liberties. Perhaps it may be best that the courts reserve serious consideration of questions of civil liberties . . . until after the war is over.

Id. at 23.

10. See MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 29 (1991) (“Not every historian today would credit [the suspension of habeas corpus] with saving Maryland for the Union, but that conclusion became almost a truism in Lincoln’s day.”).

11. Lincoln made the argument in a special address to Congress on July 4, 1861. See ABRAHAM LINCOLN: *SPEECHES AND WRITINGS 1859-1865*, at 246-62 (Don Fehrenbacher ed., 1989).

12. Chemerinsky, *supra* note 1, at 1.

13. The draft riots have been called the greatest instance of domestic violence in United States history. See J. G. RANDALL & DAVID DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 316 (2d ed., rev. 1969). The riots were no trivial threat to the Union’s ability to wage war successfully and cannot fairly be described as mere “criticism” of how the war was being waged.

14. NEELY, *supra* note 10, at 69-70 (quoting *THE DIARY OF EDWARD BATES, 1859-1866*, at 306 (Howard K. Beale ed., 1933)).

15. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, ch. 81, § 1, 12 Stat. 755, 755 (1863).

16. The relevant text of the proclamation (issued on September 15, 1863), which suspended the writ nationwide in cases involving draftees and deserters, is reprinted in NEELY, *supra* note 10, at 72 (quoting *THE COLLECTED WORKS OF ABRAHAM LINCOLN 451-52* (Roy P. Basler et al. eds., 1953)).

tember 11 likely lies some time in the future. But if we are to judge it today, as Professor Chemerinsky proposes, then the lesson of history is exactly the opposite of the one he draws. For we are doing better today than we have in the past—much better. By comparison with past excesses, our history should actually give us some comfort.

To choose a metaphor, the balance between liberty and security is much like a pendulum, swinging back and forth over time. And since World War II and the 1950s, our society has matured such that the scope of the swing in the pendulum is not nearly as great as it has been in the past. Whatever one may think of the detention of three Americans as enemy combatants, for example, there can be little disagreement that this detention, based upon some quantum of individualized suspicion, is different in kind from the wholesale detention of over 100,000 Japanese Americans detained in the complete absence of any individualized suspicion. To quote Chief Justice Rehnquist:

[T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty.¹⁷

What accounts for this seeming change in contemporary context? A rough analysis can identify a number of factors, all of which contribute to greater oversight in the exercise of executive authority, constraining the greatest excesses. These factors include the following:

- A more activist court. Unlike the Court during the Civil War, which did not rule until after the war was ended, or World War II, which deferred to the Executive, today's Court has already intervened, strongly, in imposing its will on the Executive's conduct of the anti-terror campaign.¹⁸
- A more partisan Congress. The prospect of aggressive congressional oversight—a relatively modern, post-Watergate phenomenon—acts as a check on executive power. The prospect of public censure has the *in terrorem* effect of preventing abuse and has the general effect of ameliorating the Executive's independence. We have already seen examples of controversial

17. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 224-25 (1998). Or, as Professor Jeffrey Rosen has written, "none of the legal excesses that followed 9/11 could compare to those that followed World War I." JEFFREY ROSEN, *THE NAKED CROWD* 131 (2004).

18. The Supreme Court's recent decisions in the enemy combatants cases, see *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (plurality opinion); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion), and the Guantánamo detainees case, see *Rasul v. Bush*, 124 S. Ct. 2686 (2004), reflect this activism and the involvement of the Court at a very early stage of the war—far earlier than in past conflicts. *E.g.*, *Ex parte Milligan*, 71 U.S. 2 (1866) (decision rendered one year after hostilities ended in Civil War).

post-9/11 programs that have been terminated because of congressional concerns.¹⁹

- The growth of investigative journalism. Since Watergate, the press has come to more aggressively serve an important public function, exposing activities that some might otherwise prefer to keep secret. None can imagine a return to the days when the press actively concealed Roosevelt's injuries, or Kennedy's dalliances. And that means, equally, that the prospect of secret prosecutions and secret searches and seizures is minimal at best.
- The rise of the public interest groups. Americans now organize themselves into public interest groups in a way that they never have before. In earlier times, there were few, if any, public interest litigation groups like the American Civil Liberties Union (ACLU). These organizations, through their public information and litigation activities, act as an important check on the exercise of executive authority. Notably, for example, these public interest groups initiated the Guantánamo Bay detention cases. These groups are, in effect, the "canary in the mineshaft," serving as an early warning system of abuse.²⁰
- The increase in the public's ability to monitor government. Though technology, assuredly, offers greater opportunity for our government to monitor our activities, that same technology holds the promise of greater public accountability by enhancing the transparency of government functions.²¹
- And, finally, the public is far more educated about civil liberties today than at any time in the past. With the rise of the Information Age and the Internet, we are more able to individually gather information necessary to make decisions and to organize a response to government power if one is deemed necessary. From the Ozzie and Harriet quiet of suburbia in the 1950s, we have come to a point in which many Americans are vitally concerned about freedom, liberty, and government

19. The most notable example is the termination of the Terrorism Information Awareness program (formerly known as the Total Information Awareness program). See Department of Defense Appropriations Act of 2004, Pub. L. No. 108-87, § 8131, 117 Stat. 1054, 1102 (2003).

20. See Michael Kinsley, Editorial, *An Incipient Loss of Freedom*, WASH. POST, June 15, 2003, at B07, available at LEXIS, News ("The American Civil Liberties Union is alarmed, but the ACLU's function, which I admire and support, is to be alarmed before I am, like the canary down the mineshaft.").

21. See generally DENNIS BAILEY, *THE OPEN SOCIETY PARADOX: WHY THE 21ST CENTURY CALLS FOR MORE OPENNESS—NOT LESS* (2004) (arguing that openness will, paradoxically, enhance privacy); DAVID BRIN, *THE TRANSPARENT SOCIETY* (1998) (greater transparency is inevitable and transparency of government functions will allow greater citizen control of government).

action and exercise their franchise with those concerns in mind.²²

Thus, today is not the 1860s, the 1940s, or the 1950s. Today we live in an appreciably different world in which we have substantially strengthened our ability to examine, oversee, and correct abuses of executive power. And that power of oversight gives us freedom—freedom to grant the government great powers when the need arises, secure in the knowledge that we can restrain its exercise in appropriate ways. Indeed, it is the modern reification of the Founding Fathers' traditional genius of reliance on checks and balances, writ large on the canvas of American society. In short, the better lesson from history is that we should not be utterly unwilling to adjust our response to liberty and security in today's crisis of terrorism—for we have the capacity to manage that adjustment and readjust it as necessary.

Finally, the reality of history is that liberty does not die in small steps but in big leaps.²³ It is difficult, indeed almost impossible, to identify a truly democratic society that slipped gradually into totalitarianism through a small series of changes, each eroding liberty by a minor degree. Rather, liberty perishes in societies that change through revolutionary moments, and those moments arise not when governments “trim” civil liberties, but when they fail to maintain public order. The democracy of the Weimar Republic passed into Nazism not because the rulers cut back on civil liberties, but because they failed to do so, and thus, neglected the principal obligation of security. One might fairly ask Professor Chemerinsky if any real democracy has ever died a death of a thousand small cuts.

III. GUANTÁNAMO BAY

Professor Chemerinsky takes the government to task for detaining prisoners at the Guantánamo Bay facility without due process of law. He argues that the detention is “inconsistent with the most basic aspects of the rule of law.”²⁴ To the contrary, the detentions are not only consistent with the rule of law, but also are vitally necessary as a matter of good policy.

It is not clear from his article what the source of law is that Professor Chemerinsky believes prohibits detentions of this sort or de-

22. Survey evidence supports the instinct that the public is reacting cautiously. Though immediately after September 11, sixty percent agreed that the average citizen would have to give up civil liberties to fight terrorism, by June 2002 that number had fallen to forty-six percent. See Amitai Etzioni & Deirdre Mead, *The State of Society: A Rush to Pre-9/11*, http://www.gwu.edu/~ccps/The_State_of_Society.html (last visited Oct. 31, 2005). One suspects the number has fallen still further in the subsequent months.

23. I am indebted to Professor Amitai Etzioni of George Washington University for the historical insights contained in this paragraph.

24. Chemerinsky, *supra* note 1, at 8.

finer the due process to which the detainees are entitled. From his repeated use of the word “prisoners,” one might suspect that he would look to American standards of criminal due process. That would be a fundamental category mistake; treating the detainees at Guantánamo Bay as if they were criminals detained for prosecution would fail to acknowledge the reality that they are, in fact, enemies of the United States, combatants in a war, intent on doing us harm.

We know that in many cases the contention that the detainees are combatants is indisputably true—and that knowledge is gained from hard, unfortunate experience. Though not apparent from Professor Chemerinsky’s article, the government has been routinely evaluating the status of its detainees, attempting to assess whether they pose continuing risks to American troops. As a result of those ongoing determinations, many of the detainees have been released.²⁵ And it is a sad fact that some of our decisions have been wrong—at least ten of the detainees released from Guantánamo have rejoined the fight against American forces, often with tragic results.²⁶

Thus, there is a clear military purpose to the detentions; individuals are detained to prevent them from returning to the field of battle. As the Supreme Court has said, the international laws of armed conflict acknowledge the legitimacy of this goal.²⁷ It is part of the “universal agreement and practice” in the world and amply supports the detentions at Guantánamo.²⁸

And so, at least as a first approximation, the detainees are best characterized as combatants captured on the field of battle, and the place to look for legal standards governing their conduct is the laws of war. And maybe that is what Professor Chemerinsky means; maybe he is suggesting that the due process, which should be afforded these combatants, is that of other combatants captured on the field of battle—the due process, that is, of the Geneva Conventions.

But the Geneva Conventions do not apply to al Qaeda combatants. International law defines a “lawful combatant”—that is, a

25. As of August 31, 2005, some 245 had been released. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE FACT SHEET: GUANTÁNAMO DETAINEES BY THE NUMBERS (Aug. 31, 2005), available at <http://www.defenselink.mil/news/Aug2005/d20050831sheet.pdf> [hereinafter DEP’T OF DEFENSE FACT SHEET].

26. See DEP’T OF DEFENSE, JTF-GTMO INFORMATION ON DETAINEES, at 4 (Mar. 4, 2005), available at <http://www.dod.mil/news/Mar2005/d20050304info.pdf> [hereinafter JTF-GTMO]. For example, al Qaeda-linked militants recently kidnapped two Chinese engineers, and former detainee, Abdullah Mahsud, is their reputed leader. *Id.*

27. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004) (plurality opinion) (“[D]etention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.”).

28. *Id.* at 2640; see also Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT’L REV. OF THE RED CROSS 571, 572 (2002). “[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’” *Id.* (quoting decision of International Military Tribunal at Nuremberg, reprinted in 41 AM. J. INT’L L. 172, 228-29 (1947)).

captured fighter who is entitled to the protection of international treaties—as one who wears a uniform, carries his weapons openly, responds to the hierarchy of military authority, and fights according to the laws of war (e.g. not targeting innocent civilians or hiding behind them in hospitals).²⁹ The detainees at Guantánamo are not lawful combatants; they are unlawful combatants captured on the field of battle, having fought for al Qaeda or the Taliban regime, neither of which ever purported to abide by the laws of war.

In the 1970s, some governments wanted to change the “lawful combatant” definition. In a move to protect Third World “freedom fighters” they sought to include guerillas and terrorists as lawful combatants if they had a political goal. But the United States never signed the proposed treaty amendment (known as Protocol I) that would have accomplished this—and rightly so. Otherwise, an al Qaeda terrorist who recognizes no international legal limit on his own conduct would be entitled to legal protection under international law. That would be a mistake. Indeed, as Professor Allan Rosas wrote, “the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status.”³⁰ In addition, “persons who are not entitled to prisoner-of-war status are as a rule regarded as unlawful combatants, and can thus be prosecuted for the mere fact of having participated in hostilities.”³¹ This view is not idiosyncratic. At the time Protocol I was rejected by the United States, nearly everyone agreed that the rejection was wise and appropriate. Even the *New York Times* characterized it as a sound decision.³²

The reasons were twofold. First, as the *Washington Post* editorialized, extending Geneva Convention status to irregular combatants would endanger innocent civilians.

Worst of all was the impact of the new rules on the traditional purpose of humanitarian law, which is to offer protection to noncombatants by isolating them from the perils of combat operations. The changes granted status as combatants (and, when captured, as prisoners of war) to irregular fighters who do not wear uniforms and who otherwise fail to distinguish themselves from combatants—in brief, to those whom the world knows as terrorists.³³

Of equal salience, extending the protections of the Convention to those who do not recognize its limitations fails to honor the rule of law

29. See Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention].

30. ALLAN ROSAS, *THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS* 344 (1976).

31. *Id.* at 419.

32. Editorial, *Denied: A Shield for Terrorists*, N.Y. TIMES, Feb. 17, 1987, at A22, available at 1987 WLNR 1012457.

33. Editorial, *Hijacking the Geneva Conventions*, WASH. POST, Feb. 18, 1987, at A18, available at LEXIS, News.

by rejecting methods of deterring bad behavior—and thereby endangering all combatants who abide by the rules of war.

Unlawful combatants are denied the full rights of lawful belligerents so as to create an incentive system for appropriate behavior in wartime. Unlawful combatants cannot exploit legal asymmetry, demanding the privileges that they fail to accord to their adversary. The matter was put plainly by Professor Richard Baxter of Harvard: “International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponents.”³⁴

Thus, it is today almost indisputable that “terrorists would not qualify under Article 4 of Geneva Convention III as Prisoners of War.”³⁵

The appropriate characterization makes a difference. The detentions also provide an opportunity for the United States to conduct interrogations that have gathered substantial intelligence about al Qaeda activity.³⁶ Indeed, as one presidential commission recently characterized it, the interrogation of captured detainees is a critical source of information about terrorist plans and operations.³⁷ But lawful combatants, that is POWs within the Geneva Convention, are entitled to refuse to answer any question without suffering adverse consequences.³⁸ This is, of course, an exceedingly solicitous rule—one that is more solicitous, for example, than our own treatment of criminal defendants who are routinely disadvantaged by their refusal to cooperate.³⁹ That solicitude, while appropriate for those who comport themselves with the laws of war is, it seems, utterly inappropriate for those who act outside its bounds.

But what if the Geneva Convention did apply? Even if the Convention applied, the detainees at Guantánamo would have no right to release. For the Geneva Convention allows the internment of combatants until the termination of hostilities.⁴⁰ However one defines the origins of the Guantánamo detainees—whether as members of al Qaeda or the Taliban—there can be no doubt that the conflict in Af-

34. See Brief for Law Professors et al. as Amici Curiae Supporting Respondents, at 13-14, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343).

35. Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 *Wis. INT'L L.J.* 145, 184-85 (2000). The D.C. Circuit Court of Appeals recently reached the same conclusion. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40-42 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).

36. See JTF-GTMO, *supra* note 26, at 1-4.

37. COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 373 (Mar. 31, 2005), available at http://www.wmd.gov/report/wmd_report.pdf.

38. See 1949 Geneva Convention, *supra* note 29, at art. 17 (no prisoner refusing to answer questions may be subject to any disadvantageous treatment).

39. For example, those who refuse to cooperate are not, generally, entitled to reductions in their sentences. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). The government may seek such a reduction for those who do provide information about their confederates. *Id.* at cmt. n.1.

40. 1949 Geneva Convention, *supra* note 29, at arts. 21, 118.

ghanistan continues, and thus that continued detention is lawful.⁴¹ It is true, of course, that the end of hostilities cannot be predicted, but that is true of every war. We may hope that the conflict in Afghanistan does not last as long as the sixteen-year war in Vietnam, but until the terrorist conflict with al Qaeda (or the regional conflict with the Taliban) is complete, it is perfectly lawful to detain those who fought on their behalf.

Thus, under the Geneva Convention the very *most* that a detainee could argue is that he is not, in fact, a combatant of any sort and that he is therefore not properly subject to detention (whether under the Geneva Convention as a POW or under customary international law as an unlawful enemy combatant). And, indeed, the Convention itself, in Article 5, provides that if there is doubt as to the status of an individual, he should be afforded a hearing before a “competent tribunal.”⁴² So perhaps Professor Chemerinsky’s claim is that the detainees have been denied these Article 5 hearings.

But that, too, is an inaccurate portrayal. The Executive has set up Combatant Status Review Tribunals (CSRTs), which provide a process by which the detainees can challenge their status.⁴³ During CSRTs, the detainees are provided with a personal representative; notice of the factual basis for the claim that they are properly classified as combatants; and the opportunity to present evidence on their own behalf, all as part of their appearance before an independent tribunal—procedures that amply meet the Convention’s requirement of a competent tribunal.⁴⁴

To be sure, there remains a dispute as to whether or not these procedures are adequate to comply with American due process requirements. The rules, for example, allow the court to deny the detainee or his representative access to certain classified evidence that might be used—permitting it to be presented *ex parte*. One federal district court judge has determined this particular process denies the detainee due process, while another has suggested that it does not,⁴⁵ and the case is now pending on appeal. And on that narrow question, reasonable minds may surely disagree.

41. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2642 (plurality opinion) (recognizing continued conflict in Afghanistan and lawfulness of detention during conflict).

42. See 1949 Geneva Convention, *supra* note 29, at art. 5.

43. See THE SEC’Y OF THE NAVY, MEMORANDUM FOR DISTRIBUTION (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb/pdf>.

44. I know of no other country that, since the Convention took effect, has provided even this much process for a status review. One hesitates to use absolutes, but it is safe to say that the procedures authorized in Guantánamo exceed almost any other in history.

45. Contrast Judge Richard Leon’s dismissal of the habeas petitions before him, *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 452 n.14, 481 (D.D.C. 2005), with Judge Joyce Hens Green’s conclusion that petitioners’ due process rights had been violated, *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 482 (D.D.C. 2005).

But note how far we have come from Professor Chemerinsky's overwrought complaint that we are violating basic due process rules by detaining people indefinitely. To the contrary, a nuanced analysis establishes that America's right to detain combatants until the conflict has ended is well grounded in international law, and that, with some disagreement at the margins as to particulars, we have put in place a review process that is effective⁴⁶ and comports with due process.

IV. THE PATRIOT ACT AND ROVING WIRETAPS

As Justice Robert Jackson stated, "[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."⁴⁷ Ignoring this counsel, Professor Chemerinsky views the acts of the Bush Administration and its Attorneys General as "unprecedented," creating an "enormous" loss of freedom.⁴⁸

But if we are to be serious about our assessment of the enormity of the freedoms that have been "lost," then surely we would be interested not in the theoretical question of whether the possibility of abuse exists, but rather in the empirical question of whether in the disordered real world we live in, the mechanisms we have set in place for checking abuse are functioning effectively. And if that were the question, Professor Chemerinsky would have to write a different article. Instead of speculating about the potentials for abusive uses of the Patriot Act through allegedly broad definitions of terrorism or roving wiretaps, he would ask whether there is any concrete evidence of actual abuse. It is no argument to say that the potential for abuse of Patriot Act powers exists, so the power should not exist, any more than it is a sensible argument to say that the potential for misuse of government-issued police handguns exists, so the police should go unarmed. We deal here with both costs *and* benefits in a real world in which the quantum of actual abuse is a relevant question.

On that score, Professor Chemerinsky takes far too much counsel of his fears,⁴⁹ for there is precious little evidence of actual abuse of the

46. There are, as of August 31, 2005, 505 detainees at Guantánamo. See DEP'T OF DEFENSE FACT SHEET, *supra* note 25, at 1. As noted, since operations began, 245 have been released. *Id.* The CSRTs have reviewed 558 cases and determined that thirty-eight detainees are no longer enemy combatants. *Id.*

47. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

48. Chemerinsky, *supra* note 1, at 2, 19.

49. General Stonewall Jackson is said to have advised his soldiers to never take counsel of their fears. See Bryan Britton, *The Enigma of General "Stonewall" Jackson: An Icon of Christian Faith and Tenacity* (on file with *Washburn Law Journal*). Others attribute the sentiment to General George S. Patton. About.com, A Selection of Military Quotations,

Patriot Act. The Inspector General for the Department of Justice has reported biannually that there have been no instances in which the Patriot Act has been invoked to infringe on civil rights or civil liberties.⁵⁰ This is consistent with the conclusions of others. For example, at a Senate Judiciary Committee Hearing on the Patriot Act, Senator Joseph Biden (D-Del.) stated, “some measure of the criticism [of the Patriot Act] is both misinformed and overblown.”⁵¹ His colleague, Senator Dianne Feinstein (D-Cal.) stated, “I have never had a single specific abuse of the Patriot Act reported to me. My staff . . . asked [the ACLU] for instances of actual abuses. They . . . said they had none.”⁵² Even the lone Senator to vote against the Patriot Act, Russ Feingold (D-Wis.) stated that he “supported 90 percent of the USA Patriot Act” and that there is “too much confusion and misinformation” about the Act.⁵³ These views, from Senators outside of the Administration and from an internal watchdog, are at odds with the fears often expressed by the public.⁵⁴

Consider but one aspect of Professor Chemerinsky’s concerns—the roving wiretap authority adopted in section 206 of the Patriot Act.⁵⁵ Shortly after the Patriot Act was passed, opponents of the Act

tions.about.com/cs/inspirationquotes/a/FamousMilita2.htm (last visited Oct. 31, 2005) (“There is a time to take counsel of your fears, and there is a time to never listen to any fear.”).

50. See, e.g., U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., REPORT TO CONGRESS ON IMPLEMENTATION OF SECTION 1001 OF THE USA PATRIOT ACT (Aug. 15, 2005); see also *Report Finds No Abuse of Patriot Act*, WASH. POST, Jan. 28, 2004, at A2, available at LEXIS, News (summarizing 2004 report).

51. *Protecting Our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions: S. Comm. on the Judiciary*, 108th Cong. 8 (2003) [hereinafter *National Security*] (statement of Sen. Joseph Biden).

52. *Id.* at 11 (statement of Sen. Dianne Feinstein). Senator Feinstein reiterated those views during recent consideration of the Patriot Act’s reauthorization when she made the following statement:

As part of my effort to oversee the implementation of the USA-Patriot Act, I asked the ACLU, in a letter dated March 25, 2005, to provide an update of their October 2003 statement that they did not know of any abuses of the USA-Patriot Act. On April 4, 2005, the ACLU published a reply to my letter, in which they listed what they described as “abuses and misuses” of the Act. I carefully reviewed each of the examples provided in the letter. I also reviewed information provided to me by the Department of Justice about each of the examples. And while I understand the concerns raised by the ACLU, it does not appear that these charges rose to the level of “abuse” of the Patriot Act.

Senator Dianne Feinstein, Statement by Senator Feinstein on the Patriot Act (June 9, 2005), <http://feinstein.senate.gov/05release/r-patriot0609.htm>.

53. *National Security*, *supra* note 51, at 13-14 (statement of Sen. Russ Feingold).

54. It reveals much that the Senate Judiciary Committee—a hotbed of partisanship—recently voted to make permanent all but two of the provisions of the Patriot Act. USA Patriot Improvement and Reauthorization Act of 2005, S. 1389, 109th Cong. (as reported unanimously on July 22, 2005). To be fair, one of the provisions the committee expressed doubt about is section 206—the provision I discuss below. But when my own disagreements with Senator Kennedy are modest ones at the margins and Professor Chemerinsky’s are, apparently, wholesale, that says much about whether his concerns are widely shared.

55. Portions of this section originally appeared in a different form in Paul Rosenzweig, *Section 206: Roving Surveillance Authority Under FISA*, in *PATRIOT DEBATES: EXPERTS DEBATE THE USA PATRIOT ACT 22-29* (Stewart A. Baker & John Kavanaugh eds., 2005) [hereinafter *Baker & Kavanaugh*]. For an in-depth analysis of section 206, see Peter M. Thomson, *White Paper on the USA Patriot Act’s “Roving” Electronic Surveillance Amendment to the Foreign Intel-*

wrote regarding section 206: “These wiretaps pose a greater challenge to privacy because they are authorized secretly without a showing of probable cause of crime. . . . This Section represents a broad expansion of power without building in a necessary privacy protection.”⁵⁶ Thus was painted an apocalyptic picture of Big Brother on steroids—a security apparatus that can listen to “anyone at anytime.” Professor Chemerinsky echoes this picture complaining that “the police can listen to any phone that a person might use. This means that the police can listen to all phones where a person works, shops, or visits.”⁵⁷

The truth, of course, is far less fearsome. It is useful to recall the genesis of the roving wiretap rules and the fundamental reasons why they were extended to intelligence investigations. The Fourth Amendment requires that search warrants specify with particularity the place to be searched. This is intended to prevent the accidental or abusive search of an innocent person with, for example, a warrant obtained to search the home of another. As originally applied to electronic surveillance, the particularity requirement meant that law enforcement officers had to specify the particular phone they were intercepting.

Roving wiretap authority is a response to changing technology. Our original electronic surveillance laws stem from a time when phones were fixed in one place and linked to a network by a hard copper wire. Today, when phones can cross state and international boundaries at the speed of flight and are disconnected from any physical network, that model is antiquated.

Responding to these changes in technology, Congress authorized a relaxation of the particularity requirement for the investigation of drug offenses in 1986.⁵⁸ Under the modified law, the authority to intercept an individual’s electronic communication was tied only to the individual who was the suspect of criminal activity (and who was attempting to “thwart” surveillance by, for example, changing phones or locations frequently), rather than to a particular communications device. Thus, the roving wiretap law that Professor Chemerinsky complains of has, in other contexts, been in use for almost twenty years.

In 1998—well before the September 11 attacks—Congress altered the standards somewhat to permit use of a roving wiretap when

ligence Surveillance Act, (Apr. 2004), available at <http://www.fed-soc.org/War%20on%20Terror/rovingur.pdf>.

56. ACLU, HOW THE USA PATRIOT ACT LIMITS JUDICIAL OVERSIGHT OF TELEPHONE AND INTERNET SURVEILLANCE, <http://www.911-strike.com/ACLU-surveillance.htm> (last visited Oct. 31, 2005); see also ACLU, HOW THE ANTITERRORISM BILL LIMITS JUDICIAL OVERSIGHT OF TELEPHONE AND INTERNET SURVEILLANCE, Oct. 23, 2001, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9154&c=111>.

57. Chemerinsky, *supra* note 1, at 18.

58. In 1986 Congress added 18 U.S.C. § 2518(11) to Title III. Pub. L. No. 99-508, § 106(d)(3), 100 Stat. 1857 (1986).

the target's conduct in changing telephones or facilities had the effect of thwarting the surveillance. In other words, the law was changed from a difficult to establish intent test to a more readily measured effects test.⁵⁹ Prior to September 11, it was not clear that these statutes could be used to track terrorists, independent of predication to believe a crime was being planned. To clarify the law, and to close the potential gap, section 206 authorized similar techniques for foreign intelligence investigations—an extension that, on its face, seems reasonable.

Reflecting that “reasonableness,” the relaxation of the particularity requirement for roving wiretaps trenches on no constitutional limits. To be sure, no court has addressed the constitutionality of section 206, and the Supreme Court has yet to pass on the constitutionality of roving wiretaps generally. But it is not as if the courts have never addressed roving wiretaps at all. Indeed, *every* appellate court to consider the constitutionality of roving wiretaps has held that they do not violate the particularity requirements of the Constitution, reflecting a contextual understanding that these investigative practices are reasonable.⁶⁰

Does Professor Chemerinsky agree with this analysis of the law generally? One cannot tell from his article. If he objects (on constitutional or policy grounds) to the modernization of investigative techniques to account for new technology, then his argument really goes back to the changes in the electronic communications interception law in the last century and his condemnation of the Patriot Act is simply a non sequitur. For there is nothing in the Act that causes roving wiretaps to operate any differently in the context of terrorism investigations than they have in the past for drug investigations.

But let us assume that some aspect of the law that extends the roving wiretap authority to terrorism cases troubles Professor Chemerinsky. He does not identify that concern directly, but perhaps it can be inferred from his critique. His article portrays roving wiretaps as an unlimited license to wiretap virtually any phone that a suspect is near, irrespective of whether or not the phone is actually in use by the suspect; whether the suspect is particularly identified; and whether the suspect is discussing terrorism activities or his mother's favorite recipe. Others who share similar concerns build on them to offer modifications to existing section 206 requirements, the most notable of which is an ascertainment requirement (a requirement that law enforcement ascertain that an individual is actually using a phone

59. Pub. L. No. 105-272, tit. VI, § 604(a)(1), 112 Stat. 2396 (1998) (amending 18 U.S.C. § 2518(11)(b)).

60. For a representative example, see *United States v. Bianco*, 998 F.2d 1112 (2d Cir. 1993).

before turning on the wiretap).⁶¹ Such a requirement would seem to answer Professor Chemerinsky's concerns and at first blush appears plausible—yet on closer examination it proves both unnecessary and unwise.

Imposing an ascertainment requirement on law enforcement and intelligence agents would burden their ability to monitor the activities of suspected terrorists, and, at the margin, would decrease the utility of section 206. Whereas opponents see the prospect of the interception of innocent conversations, proponents are concerned that during the delay while an ascertainment is being made, or in circumstances when an ascertainment is uncertain, vital terrorism intelligence will be lost.

To casually suggest that faster wiretap approval procedures are all that is necessary (as Professor Chemerinsky does)⁶² is simply to blink reality; the change of cell phones may happen five times in twenty minutes—a pace that outstrips the capacity of any bureaucratic system. We should rightly reject any solution that is premised on a swift-moving federal government. Thus, the question is the balance of risks and benefits. While the balance struck by the ascertainment requirement might make sense in the traditional criminal context (though, as noted below, it does not exist in that context), it makes even less sense in the context of terrorism investigations.

To begin with, the statute has substantial safeguards against misconduct already. No interception may be authorized unless there is probable cause to believe that the target of the surveillance is a foreign power or an agent of a foreign power.⁶³ There must also be probable cause to believe that “each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used,” by the foreign agent who is the target of the surveillance.⁶⁴ And, the FISA court may only authorize such roving wiretaps if it

61. For a thoughtful discussion of these proposals from an advocate of their adoption see Baker & Kavanaugh, *supra* note 55, at 18-22, 27-28.

62. Chemerinsky, *supra* note 1, at 18.

63. 50 U.S.C. § 1805(a)(3)(A) (2000). A “foreign power” includes both foreign governments and groups engaged in international terrorism. 50 U.S.C. § 1801(a)(1). The definition of an agent of a foreign power includes any person who “knowingly engages in clandestine intelligence gathering activities . . . which . . . involve or may involve a violation of the criminal statutes of the United States” or “knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor[e] . . .” 50 U.S.C. §§ 1801(b)(2)(A), (C). International terrorism is, in turn, defined as “violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States . . . or that would be a criminal violation if committed within the jurisdiction of the United States.” 50 U.S.C. § 1801(c)(1). Thus, one of the great and enduring myths about the Foreign Intelligence Surveillance Act (FISA) and the Patriot Act is that they allow electronic surveillance haphazardly for non-criminal activity. For any non-espionage activity under investigation, connection to the violation of some underlying criminal law is required. The specter of unfettered investigation of political groups for non-criminal activity is a scare tactic unsupported by a realistic appraisal of the law.

64. 50 U.S.C. § 1805(a)(3)(B). Title III has a parallel requirement: probable cause to believe that the facilities are being or will be used for the commission of a domestic criminal of-

makes a finding that “the actions of the target of the application may have the effect of thwarting the identification” of a terrorism suspect.⁶⁵ These requirements are subject to both administrative and judicial scrutiny prior to authorization, limiting substantially the chances that a “fishing expedition” of innocents will be initiated.

In addition, a minimization requirement mandates the termination of surveillance upon the determination that an intercepted conversation is innocent. Thus, minimization is based upon knowledge of ongoing conversations, while ascertainment is based upon suppositions regarding future events. It is absolutely predictable that the uncertainty of ascertainment will cause hesitancy in the initiation of an interception. And through the gap created by that hesitancy will flow terrorist communications.

In addition, the ascertainment requirement in traditional criminal law⁶⁶ applies only to “oral communications” (i.e. those revealed by a hidden microphone) and does not apply to the interception of “wire” or “electronic” communications, like the telephonic conversations subject to interception under section 206. Thus, the ascertainment requirement advanced as a response to the “problem” of roving wiretaps under the Patriot Act takes a rule used in criminal cases only for oral conversations (like those of Mafia members in a restaurant) and applies it to telephonic and electronic communications. But this means that if the ascertainment requirement were adopted, it would be something totally new to electronic interceptions and actually make it more difficult to intercept the telephonic communications of terrorists than of drug dealers—surely not the ideal answer.

But, the ascertainment requirement is wrong for a more fundamental reason: It imposes a narrow law enforcement paradigm on the efforts to combat terrorism. The traditional law enforcement model is highly protective of civil liberty in preference to physical security. The post-9/11 world changes this calculus, principally by changing the costs from a mistake. Whatever the costs of failing to collect information regarding organized crime boss John Gotti might be, they are considerably less than the potentially horrific costs of failing to stop the next al Qaeda assault. Thus, the theoretical rights-protective construct under which our law enforcement system operates must, of necessity, be modified to meet the new reality. We simply cannot afford a rule that “better ten terrorists go unscrutinized than that one innocent be

fense or are leased to, used by, or listed in the name of the individual suspected of committing the crime. 18 U.S.C. § 2518(3)(d) (2000).

65. 50 U.S.C. § 1805(c)(2)(B) (as amended by section 206 of the Patriot Act).

66. 18 U.S.C. § 2518(12).

mistakenly subject to surveillance.”⁶⁷ Asserting a direct equivalence between terrorist investigations and the traditional law enforcement construct—which is essentially what Professor Chemerinsky broadly advocates—misses this point altogether.

Whatever else may be said about the Patriot Act, even its most ardent critics must admit that they are basing their proposals for revision on the fear of potential abuse rather than the reality of actual abuse. In the absence of any pattern of abusive practice, the case for concern simply fails.

V. CONCLUSION

There is no false choice between preserving civil liberty and fighting terrorism. To the contrary, the right answer is to seek to maximize both values to the extent possible. America is not the only country that cherishes liberty, yet faces challenges to its security. Others face the same quandary, far more palpably even than we do. They, at least, recognize that a careful, nuanced inquiry is necessary. As the Supreme Court of Israel wrote,

There is no avoiding—in a democracy aspiring to freedom and security—a balance between freedom and dignity on the one hand, and security on the other. Human rights must not become a tool for denying security to the public and the State. A balance is required—a sensitive and difficult balance—between the freedom and dignity of the individual, and national security and public security.⁶⁸

The disappointment in Professor Chemerinsky’s article is that it gives no real evidence of grappling with this difficult question. An incremental change in the nature of civil liberties is simply not the same as

67. I am, of course, deliberately contrasting this formulation with the familiar maxim that “it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.” *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring). This maxim originated in WILLIAM BLACKSTONE, 4 COMMENTARIES *358-59, and embodies a fundamentally moral judgment that when it comes to enforcing criminal law, American society prefers to have many more Type II errors (false negatives) than it does Type I errors (false positives). *E.g.*, *In re Winship*, 397 U.S. 357, 372 (1970) (Harlan, J., concurring) (“In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty . . . [T]he requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

That preference arises, at least implicitly, from a comparative valuation of the social costs attending the two types of error. We see a great cost in any Type I error because we value liberty highly. And, though we realize that Type II errors free the guilty to return to the general population, thereby imposing additional social costs on society, we have a common-sense understanding that those costs, while significant, are not so substantial that they threaten large numbers of citizens or core structural aspects of the American polity. My fundamental disagreement with Professor Chemerinsky is that he has failed to recognize that the post-9/11 world changes this calculus by changing both the harms arising from Type I errors and, principally, the costs of Type II errors.

68. Aharon Barak, *The Supreme Court and the Problem of Terrorism*, in JUDGMENTS OF THE ISRAEL SUPREME COURT: FIGHTING TERRORISM WITHIN THE LAW, 15 (2004) (quoting A.Cr.H. 7048/97, *John Doe v. Minister of Defense*, 54(1) P.D. 721 (5760/61- 2000) (IsrSC)), available at <http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorism Law.pdf>.

their elimination; yet, to read Professor Chemerinsky's article is to get the sense that he sees these modest adjustments as the first step in an inevitable downward spiral. While we should not forget our history, lest we repeat it, it is equally important that we not be captives of history, lest we never escape it. Professor Chemerinsky, I fear, remains a captive of pre-9/11 history.

Those who oppose the post-9/11 legal changes argue, in essence, that a nation that responds to danger with incremental changes in how it addresses civil liberties is somehow less worthy of respect or loyalty and is failing on its own terms. But if history is any real judge, the constant adjustment of law to circumstance is both to be expected and to be welcomed—as is the readjustment once the threat has passed. To exalt the status quo as of September 10 is to falsely believe that circumstances do not change. As Eric Posner and Adrian Vermeule have written, “A government that refuses to adjust its policies has simply frozen in the face of the threat. It is pathologically rigid, not enlightened.”⁶⁹ Our history of responses to threats is sometimes overwrought. But failing to modify our behavior in changed circumstances—the course advocated by today's intelligentsia—is equally unwise. One hopes that our country is not so foolish.

69. Eric A. Posner & Adrian Vermeule, Editorial, *Judicial Clichés on Terrorism*, WASH. POST, Aug. 8, 2005, at A15, available at LEXIS, News.