December 2007

Justice Brennan and Civil Liberty in Times of Crisis

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It has been forty years since I had the privilege of serving Justice William J. Brennan, Jr. as a law clerk during the 1966 Term. That was a year of intellectual excitement mixed with warmth and friendship. Our reunions then were relatively intimate, as the Justice had fewer clerks. The Brennan home in Georgetown left many good memories, none more vivid than the charm, intelligence, and good humor of Justice and Mrs. Brennan.

Over the years, I continued to interact with Justice Brennan; once in this law school when I spoke at an event in his honor.¹ In December 1987, he asked me to attend a conference on “Free Speech and National Security” at The Hebrew University in Jerusalem. The trip was especially memorable for the Christmas mass we attended at the Church of the Nativity in Bethlehem, accompanied by the mayors of Jerusalem and Bethlehem—Teddy Kollek and Elias Freij. It turned out to be one of the last such events prior to the first intifada.

Justice Brennan delivered a speech at that conference entitled “The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises.”² It was characteristically insightful and courageous. He surveyed the security crises of U.S. history—from the Alien and Sedition Acts of 1798, to the Civil War period of 1861 to 1865, the Espionage Act and its amendments during World War I, the Japanese American internments during World War II, and the laws and investigations launched to combat the Communist threat during the 1950s. He concluded that security crises in the United States often led to exaggerated claims of danger and unnecessary deprivations of civil liberties. In reaching this conclusion the Justice was not questioning the seriousness of

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some of the crises he surveyed. Rather, his point was that many of the
deprivations of civil liberties that accompanied these crises were determined in
retrospect to have been needless.

Typically purposeful, Justice Brennan asked what could be done about the
critical problem of civil liberties in times of security crises. Unlike many civil
liberties advocates, the Justice was well aware that the problem of overreacting
to security crises is not the product of any particular political party, and that all
three branches of our government share responsibility for its existence. He
proposed, instead, that the phenomenon resulted from “the good fortune of
relative tranquility” that the United States has experienced, in which
emergencies have been “episodic, and the lessons learned and the experience
garnered have grown faint during the lapses between security crises.”

Perhaps

the only way our handling of such crises might improve, he suggested, was for
things to get worse. “Prolonged and sustained exposure to the asserted security
claims may be the only way in which a country can gain both the discipline
necessary to examine asserted security risks critically and the expertise
necessary to distinguish the bona fide from the bogus.”

Abstract principles are
ineffectual, he said, unless “fleshed out by a detailed jurisprudence explaining
how those civil liberties will be sustained against particularized national
security concerns.”

Procedures must be set up in advance, and a
“jurisprudence capable of braving the overblown claims of national security
must be forged in times of crises by the sort of intimate familiarity with
national security threats that tests their bases in fact, explores their relation to
the exercise of civil freedoms, and probes the limits of their compass.”

Justice Brennan would find little comfort today in the fact that his theory
is in the process of being tested. The United States has been in a security crisis
since at least September 11, 2001, over five years. Additionally, if Islamic
fundamentalists continue to have friendly governments providing them with
money, arms and explosives, the United States is in for a protracted period in
which measures will continue to be proposed or implemented that limit civil
liberties to which Americans are accustomed in normal times. We will see in
due course whether this continuing crisis leads us to do better in what he
described as building “bulwarks of liberty that can endure the fears and frenzy
of sudden danger—bulwarks to help guarantee that a nation fighting for its
survival does not sacrifice those national values that make the fight
worthwhile.”

We are far enough along in the war on terror to ask how we are doing. Are
we building a jurisprudence for dealing with crisis, with proper standards and

3. Id. at 18.
4. Id.
5. Id. at 19.
6. Id. at 20.
7. Id.
procedures, and with "bulwarks of liberty" to prevent needless limitations? A successful effort to do so would require at least these four elements: (1) adoption of legislation authorizing activities necessary to protect society; (2) the preservation of norms of conduct in preexisting laws and treaties intended to apply in emergencies; (3) enough transparency to enable Congress and the courts to perform the tasks of oversight and review of executive conduct; and (4) officials in all three branches prepared to perform their duty to uphold the Constitution by protecting the United States without unnecessary limits on liberty.

Judged by these standards, we started off poorly in the war on terror. First, we failed to adopt laws early in the crisis with standards and procedures to deal with such problems as holding prisoners seized in Afghanistan, detaining terrorist suspects, interrogating individuals in custody, and using surveillance based on modern methods different from conventional wiretaps. The need to legislate on these problems was clear before September 11, 2001; many other democracies had done so. In the legislative vacuum that resulted, the executive branch acted unilaterally, restricting liberties in many ways, and seeking to maximize the president's authority to adopt any measure that the administration concluded might help combat the terrorist threat. Among the policies adopted were:

- detention without charge, hearing, or judicial supervision;
- surveillance programs without judicial review; and
- interrogations with maximum physical pressure allowable under aggressive legal interpretations.

Particularly disheartening from the viewpoint of building a jurisprudence for dealing with crises was the adoption of measures that sought to overturn standards and limitations established in laws or treaties, and intended to govern in times of emergency. Several preexisting "bulwarks of liberty," including the United Nations Convention Against Torture and aspects of the Geneva Conventions, were reinterpreted and limited in unprincipled ways. Executive orders and opinions of the Department of Justice limited the rights of illegal enemy combatants, the meaning of torture, and the application abroad of the prohibition on cruel, inhuman and degrading treatment.

Secrecy, or a lack of public disclosure, meant that some of these limitations on liberties were revealed only years after their adoption. Only recently, for example, did the Bush Administration reveal that some individuals have been held for several years in secret prisons without any charge or hearing, under the custody of an intelligence agency. These practices have substantially delayed necessary oversight and review.

Finally, the performance of U.S. officials protecting established civil liberties has been deficient. A widely held and articulated position of officials in the executive and legislative branches during the last five years has been to
allow the most aggressive executive branch officials to set the agenda, reasoning that the courts would ultimately determine what is lawful. This posture was not only irresponsible, but it also allowed indefensible positions to be adopted. Overall, these policies gave a fascist face to an administration ostensibly committed to advancing freedom. The President has sincerely sought to protect Americans from genuine dangers, and I have long supported his view that fighting terrorism is a national security problem, not a mere matter of criminal enforcement. But he has been ill-served by lawyers prepared to disregard principles established after careful consideration by previous administrations and legislators committed to the nation’s security.

Thus far, the only good news is that our poor initial performance has been corrected in significant respects over time, as Justice Brennan predicted might occur. Many of the restrictions on established rights implemented by the administration were reversed or modified to more acceptable forms. Some executive orders and opinions issued by administration attorneys concerning illegal combatants and the meaning of torture were withdrawn after external and internal criticism. An overwhelming, bipartisan majority in Congress rejected the Justice Department opinion purporting to limit application of Article 16 of the Torture Convention to U.S. territory. The Supreme Court invalidated the secret policy of detention without charge or hearing for alleged terrorists. And Congress has passed laws establishing standards and procedures for detention, interrogation, and other treatment of terrorist suspects.

The United States has yet to develop a system robust enough to enable the country to defend itself effectively while adequately protecting the established individual rights required in peaceful times. It is clear, however, that the length of the current crisis has, as Justice Brennan predicted, enabled the nation to vest important powers gradually in the executive to deal with the crisis while insisting on standards and procedures that limit deprivations of civil liberties. This process will continue, and further improvements will be made, bringing the United States closer to the type of system Justice Brennan would have wanted to see.

It is essential to remember that a determined and demented enemy created the current crisis. Nothing will help to create a sound jurisprudence for emergencies more than success in confronting and defeating that enemy. Nothing will jeopardize our liberties more, in the end, than failing to prevent new attacks on America and its allies. Failing to prevent new attacks could create a deeper level of crisis than the one we currently face, and we will likely be even less successful in managing it. History has taught us to be skeptical of claims that established liberties must be compromised, and we seem to improve

8. Having presented the Torture Convention to the Senate for ratification, it was clear to me that the Bush Administration’s position—that Article 16’s prohibition of cruel, inhuman, and degrading treatment applied only within the territorial U.S.—was indefensible. See Abraham D. Sofaer, Editorial, No Exceptions, WALL ST. J., Nov. 26, 2005, at A11 (2005).
over time at responding to such claims. But history has demonstrated yet again that insecurity remains liberty's greatest threat and government's greatest responsibility.