



# Executive Memorandum

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## PRINCIPLES FOR SAFEGUARDING CIVIL LIBERTIES IN AN AGE OF TERRORISM

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Americans hear daily about new measures that are meant to enhance their security but are criticized as endangering their civil liberties. Most take it for granted that the events of September 11 require that the government institute new homeland protection measures, yet also believe that some proposals are clearly excessive. The vital question from both a legal and a public policy perspective is what criteria should be applied to sort out what is needed and what is “too much.” Can one, for example, in this age of terrorism still use the “reasonable person” criterion in assessing intrusions into civil liberties, or is that time-honored construct no longer sensible in today’s complex society?

Given that policymakers inevitably will face this question in a variety of contexts regarding many different proposals, it is important to develop a methodology for assessing issues of civil liberty and public safety—some idea, at least, of what are the right questions to ask. One can then derive guidelines to govern the development and implementation of any new anti-terrorism system. These overarching principles should animate the consideration of any new program to combat global terror.

Core American principles require that any new counterterrorism technology should be developed only within the following bounds:

- No fundamental liberty guaranteed by the Constitution can be breached or infringed upon.

- Any increased intrusion on American privacy interests must be justified through an understanding of the particular nature, significance, and severity of the threat being addressed by the program. The less significant the threat, the less justified the intrusion.
- Any new intrusion must be justified by a demonstration of its effectiveness in diminishing the threat. If the new system works poorly by, for example, creating a large number of false positives, it is suspect. Conversely, if there is a close “fit” between the technology and the threat (that is, for example, if it is accurate and useful in predicting or thwarting terror), the technology should be more willingly embraced.
- The full extent and nature of the intrusion worked by the system must be understood and appropriately limited. Not all intrusions are justified simply because they are effective. Strip

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searches at airports would prevent people from boarding planes with weapons, but at too high a cost.

- Whatever the justification for the intrusion, if there are less intrusive means of achieving the same end at a reasonably comparable cost, the less intrusive means ought to be preferred. There is no reason to erode Americans' privacy when equivalent results can be achieved without doing so.
- Any new system developed and implemented must be designed to be tolerable in the long term. The war against terror, uniquely, is one with no immediately foreseeable end. Thus, excessive intrusions may not be justified as emergency measures that will lapse upon the termination of hostilities. Policymakers must be restrained in their actions; Americans might have to live with their consequences for a long time.

From these general principles can be derived certain other more concrete conclusions regarding the development and construction of any new technology:

- No new system should alter or contravene existing legal restrictions on the government's ability to access data about private individuals. Any new system should mirror and implement existing legal limitations on domestic or foreign activity, depending upon its sphere of operation.
- Similarly, no new system should alter or contravene existing operational system limitations. Development of new technology is not a basis for authorizing new government powers or new government capabilities. Any such expansion should be independently justified.
- No new system that materially affects citizens' privacy should be developed without specific authorization by the American people's representatives in Congress and without provisions for their oversight of the operation of the system.
- Any new system should be, to the maximum extent practical, tamper-proof. To the extent the prevention of abuse is impossible, any new system should have built-in safeguards to ensure that abuse is both evident and traceable.
- Similarly, any new system should, to the maximum extent practical, be developed in a manner that incorporates improvements in the protection of American civil liberties.
- Finally, no new system should be implemented without the full panoply of protections against its abuse. As James Madison told the Virginia ratifying convention, "There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

The war on terrorism changes the stakes in fundamental ways. No longer is the United States fighting against adversaries an ocean away—the war has come home to this continent. Yet the war against terrorism is likely to be a long one, and Americans cannot tolerate the long-term substantial degradation of their civil liberties as the price of public safety.

Many see this conundrum as irresolvable: Security must be balanced against civil liberty, and any improvement in one results in a diminution of the other. This is the wrong perspective: America is not limited to a zero-sum game. There are effective ways to limit the ability of the government to intrude into Americans' lives while increasing security. America can and must adhere to fundamental and firm principles of limited government, and it can do so while also answering the terrorist threat. The challenge is not an easy one, but few worthwhile things are.

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