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A Madisonian Approach Towards the Protection of Constitutional Liberties

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Background and Executive Summary

In 2004, Anthony Romero, Executive Director of the American Civil Liberties Union, asked us to offer private counsel to the ACLU on the policy debates that characterized the protection of American liberty during a war on terrorism. During the course of our work, we were privileged to talk with both senior staff of the ACLU and national leaders on this issue. We acknowledge and appreciate the ideas and guidance of these many individuals (to whom we promised that we would maintain the confidentiality of those discussions). In 2005, we submitted an earlier version of this paper to the ACLU and now, with Anthony Romero's permission, we present an updated version of our paper for public review. We thank Mr. Romero and the ACLU for the opportunity to participate in the public dialogue.

It is axiomatic, but nonetheless critical, to emphasize that we wrote this paper originally for internal discussion at the American Civil Liberties Union. All the views within it, including those that invoke the ACLU as an example, are the opinions of the authors only and do not represent any statement of position on the part of the ACLU or its leaders.

We argue in this paper that the best defense against terrorism is the informed exercise of human discretion, which is adaptable and capable of learning. Rules are brittle and the outcome of technology is too uncertain. At the same time, human judgment carries risks -- notably the exercise of arbitrary power or the blindness inherent in the reliance of unexamined assumptions popularly labeled "group think." A policy that wishes to take advantages of the strength of human judgment while limiting its weakness can usefully turn to the constitutional principles of the United States government, particularly the Madisonian view of political power that requires reliance on human discretion but, equally strongly, requires that it be cabined by structural organization, popular opinion and the recognition of fundamental rights. This paper argues that the Madisonian vision provides an effective model for the construction of our governmental defense against terrorist threats -- by both empowering and appropriately limiting the exercise of human judgment.

The background condition is that we are a nation closely, and passionately, divided over the most important issues of politics. We are debating, whether we fully realize it or not, the nature of our political community as it is constituted in basic principles about how one person relates to others. We are heirs to an intellectual tradition -- the Enlightenment -- and that tradition is both fundamental to our nation and under attack. It is fundamental because moving spirits of the Enlightenment -- John Locke, David Hume, Adam Smith -- provided the intellectual framework for the principles of liberty that are embodied in our Declaration of Independence and our Constitution. It is under attack because significant political forces seem to be arguing (and with vehemence) that the central principles of the Enlightenment -- diversity of views, transparent government, limited Executive powers -- represent weakness, not strength. Rather

than understanding that the United States is powerful because its ideals are great, they appear to believe that the United States is great only because it is powerful.

How can such historical revisionism prevail? Because although its primary goal – the eradication of terrorism – is sound, its understanding of America is not.

The stakes are extraordinarily high. Our nation cannot choose between fighting terrorism and safeguarding the Constitution. We must do both. More importantly, we must understand that both stem from the same, basic impulse: To secure our liberty. That is not a religious principle, a moral principle, or even a practical principle. Rather, it is foundational to a political community that wants to achieve central goals in all of these areas of human action.

The critical corollary to this is: We must not fear to say what we are for. We must endorse certain forms of governmental action. The obligation of politics is not just to say “No”; it is to lead.

In the accompanying paper, we detail a positive agenda for the protection and promotion of constitutional liberties based on Madisonian principles. That is why we employ the term “constitutional” rather than the more familiar “civil” liberties, simply to emphasize the extent to which liberty in the United States derives from the constitutional framework that controls both their existence and, just as importantly, their protection.

Our fundamental view is this: The best way to secure a balance between constitutional liberties and national security over time is to make democratic processes work more effectively by improving the process of learning and feedback – not only within government institutions but as importantly within the population at large. How? By enlisting ‘the people’ of the United States as aides in the battle for constitutional liberties. In other words, we believe in something like the triumph of ‘truth’ in an open and broad marketplace of ideas.

Thus, we believe that an endorsement of democracy as a critical governor of abusive governmental action offers an important opportunity to expand the discussion of, and support for, constitutional liberties. Often the battle for constitutional liberties is closely identified with one important means of protection – judicial enforcement of the Bill of Rights and the Fourteenth Amendment. As we have said above, the enforcement of counter-majoritarian norms is, in fact, critical and the work of the ACLU in this regard has been of fundamental importance. We should not leave governmental accountability to the traditional opponents of governmental action, because accountability is not just about limiting power, it is about shaping its use. Rather, we should forge alliances across the conventional political spectrum with people who share the view that government must be accountable.

The embrace of democratic solutions in addition to judicial review rests on an important judgment. Why? Because Madisonian accountability rests on reposing confidence in the public and public judgment.

Of course, we wouldn’t slight the Bill of Rights or the role of judicial review. But in the space where judgment must necessarily substitute for rules, we think it important to say that: “We stand with the public against the potential and past abuse of executive power.”

Much of the energy of the fight for constitutional liberties has been devoted to using the courts to override ill-formed public sentiment. This will and should continue when it is necessary. The goal of the Madisonian approach is to make it less necessary over time. We thus propose an

additional, complementary strategy aimed at enhancing the constitutional liberties efficacy of a political coalition between groups like the ACLU and the counter-force capability of public opinion.

To that end, this paper proposes the general principles of a Madisonian Approach -- a system that attempts to provoke an agenda of action that will:

- **Enforce the Constitutional boundaries beyond which governmental actors may not tread**
- **Establish, within those boundaries, the areas of discretion in which governmental actors must use their judgment**
- **Empower both learning in government and an informed public by barring over-reliance on governmental secrecy**
- **Ensure that democratic mechanisms and processes oversee the discretion of governmental officials so that mistakes may be rectified; errors, corrected; and lessons, learned**

We then review five issues of current importance, including the recent revelations of the secret authorization of the National Security Agency to conduct warrantless electronic surveillance of people within the borders of the United States, including United States citizens.

I. Introduction

The single greatest threat to constitutional liberties that the United States faces in the first decade of the 21st century, and possibly beyond, is the violent, anti-democratic and fanatical infliction of terrorist attacks. Nothing that has happened in the world since the day ended on September 11, 2001 suggests that this threat to our safety has been vanquished.

How the American government, economy, and society continue to respond to this danger will be one of the most important determinants of the kind of country we live in and the kind of social order we create. And that means, of course, that analyzing the constitutional liberties implications and consequences of the 'war on terror' is one of the most important tasks the American political system needs to accomplish.

These may be controversial assertions in their most bald formulation, but they are not going to be far from the truth. And they together constitute a very strong case for organizations like the ACLU to prioritize the constitutional liberties/national security debate in its work.

But *must* there be a constitutional liberties/national security debate at all? Most of the existing arguments acknowledge that there are serious choices to be made – that is, there exist significant security risks from terrorism and at least some and probably many of the things that governments and others might do to mitigate those risks impose costs and may pose real threats to aspects of freedom and civil liberties. This is a realistic starting point, since security always involves trade-offs with other things of value. There may indeed be ways to limit, modify, or soften the harder edges of some of these trade-offs, and we should seek these. In some instances, questions of efficacy may even erase potential infringements on constitutional liberties.

But there is no silver bullet, and there will always be politics in the mix. The politics today and for the likely future are constructed around the idea of a constitutional liberties/national security trade off. Critics of a civil-liberties agenda have a clear interest in promoting and reinforcing that construction. This is the political world in which groups like the ACLU will have to operate.

At the same time it is natural and expected for people and organizations to try to find ways around or out of these tough choices. Particularly when they are operating under severe bureaucratic and time pressure, people turn to the tools that look like a comprehensive solution. Politicians are going to be seduced by technological 'fixes' that are expensive, elaborate, and promise to reduce the need for difficult sacrifices by people. Politicians are also exquisitely sensitive to the need to be seen as doing something, regardless of whether they actually should do anything at a particular moment. Lawyers tend to look for new formulations of rules that constrain and direct action in as many foreseeable circumstances as possible -- and thus can appear to be obstructionist even when something really does need to be obstructed – rather than appear to be promoting accountability. And circling around all of these are huge economic stakes that impact directly and indirectly on broad swathes of the US and global economies.

We argue in this paper for an approach that privileges the power of collective human judgment. We propose thinking of and treating technology and rules as enablers and supportive adjuncts to democratic processes of collective judgment.

If ACLU's iconic phrase "Safe *and* Free" were to be recast to reflect our thoughts, it would sound something like this:

Be Safe
Be Free
Here's How: Make Democracy Work Better

Another way to articulate the general idea sounds like this: "A democratic (small 'd') approach to satisfying the demands of security and constitutional liberties in this very difficult set of issues and threats about which Americans will learn collectively over the next decade."

Why is our emphasis on collective judgment and democracy an interesting addition to the debate over security and liberty?

First, it is novel. As we describe later, the debate thus far curiously has slighted the two most important principles of a functioning democracy – how to make government learn more quickly so that the best policies can be selected and mistakes can be corrected as soon as possible and how to ensure that government is accountable for its actions. Discussions about learning and accountability are not entirely absent from the current dialogue, but they seem to be afterthoughts.

Second, we believe that an endorsement of democracy as a critical controller of abusive governmental action offers an important public opportunity for the organizations like the ACLU. The ACLU is most closely identified with one important means of protecting constitutional liberties – judicial enforcement of the Bill of Rights and the Fourteenth Amendment. The enforcement of counter-majoritarian norms is, in fact, critical and the work of the ACLU in this regard has been of fundamental importance. In no sense do we intend to suggest any derogation in this responsibility. We want to add something to it, something that may seem slightly counter-intuitive but that poses an important intellectual and political challenge that we'd like to see the organization confront head-on. It is this: Accountability rests on reposing confidence in the public, and ultimately in public judgment, empowered and mediated by technology and rules, but ultimately the product of democratic decision-making.

Consider the alternative. Concede the public and over time you'll concede the debate. No institution, not even the Supreme Court, is immune from popular opinion and election results. (If we ever forgot this truth, we may be reminded of it again soon enough.) Madison himself recognized this when he told Thomas Jefferson that a Bill of Rights might erect mere "parchment barriers" that would be swept away by the force of public passion. Supreme Court decisions in cases like Dred Scott, Plessy v. Ferguson, and Korematsu v. United States demonstrate that the judiciary is not immune from turning the Bill of Rights into mere "parchment barriers."

We believe, therefore, that the people must be enlisted as aides in the battle for constitutional liberties, not shunned as either uninformed or unsympathetic. In other words, we believe in the triumph of truth in the marketplace of ideas.

Can the proponents of constitutional liberties say "we stand *with* the public against the potential and past abuse of power" in order to fashion a positive agenda? Our proposed approach, which we outline in three following sections, seeks to make that case. Section II sets the landscape, reviewing the limits as we see them of technological and rule-based approaches. Section III develops the foundation for a positive agenda that seeks to make human judgment, and

particularly collective human judgment, channeled through democratic institutions, work better and better over time. That section also explains in more detail why we think this approach makes strategic sense for organizations like the ACLU. Section IV suggests the core principles that underpin a Madisonian approach. Section V applies that approach to a series of important questions, including the recent revelations about NSA surveillance. Finally, Section VI concludes our paper with an action-oriented proposal for a Madisonian Agenda.

II. The Landscape

The prevailing intellectual frameworks around the constitutional liberties/national security problem tend strongly to rely on either *technology* or *rules* to manage the problem.

Take technology first. The Markle Foundation Task Force, as an example, produced an excellent and widely read report that sketches out the structure of a ‘decentralized network of information-sharing’ that would empower a ‘networked community for homeland security.’ Sensitive to the possible implications for constitutional liberties, the task force went out of its way to embed within its proposals a set of sensible statements about the importance of oversight. Its more interesting conclusions, however, point explicitly to the idea that a properly designed information-sharing network could increase security and protect or even enhance constitutional liberties at the same time – that is, transforming the supposed ‘trade-off’ into a positive sum game.

We understand and are deeply sympathetic to the motivations behind this kind of argument. Developing a technological fix that takes a seemingly insoluble problem and reframes it as a great opportunity is almost the iconic American act – think of Ronald Reagan’s Strategic Defense Initiative. The technological challenges add up to what is sometimes called a “DARPA-hard problem,” a phrase that has a positive valence in Washington. Rally the scientific troops around this issue, and give them the resources they need to tackle it, as a matter of urgency, and the result will surely surprise on the upside. It’s also likely to produce substantial dual-use benefits since any ‘solution’ for the homeland security network would certainly spin-off privacy technologies that could disseminate into common use in the commercial sphere. The bottom line is that Americans would strongly prefer to fight the war against terrorism *in silico* rather than *in vivo*, because that’s where our advantage as a society is thought to lie.

We are sensitive to this mind-set and, of course, believe that technology can, should, and will play a critical role in any future homeland security system. But we are wary of over-reliance on technological concepts that cross the line from ‘adjunct’ to ‘solution.’ It is important to stay very much aware of the limits of any technological ‘fix.’

First, all information-processing systems have an underlying architecture, a set of rules that specify in computer code what data links to what, who is authorized to read from or write to a particular record, and so on. Consider the common example of “Google News”: what appears on this webpage is a result of an algorithm that selects from a variety of news sources and presents them in grouped form to the reader. The problem is not that there exist such rules or architectures; it is that once the rules become deeply embedded in the lower layers of technology the architecture can become troublingly opaque. The existence of a Google News algorithm is not a problem; the fact that it is secret may be.

Secrecy, or even its softer cousin, opacity, is troubling not only because of normative concerns with respect to accountability and democracy (that we will consider later) but more fundamentally because of an efficiency issue and specifically the question of how errors get corrected. An algorithm simply is a prediction about how information will enter the system and how it will be used. And all such predictions are wrong, which is why security that depends on secrecy is brittle. Software engineers understand this intuitively and compensate for it with widespread field-testing, because they know that complex systems fail in unpredictable ways. The essence of good field-testing is *lack* of rigor. The more eyeballs that poke at the system,

the more likely that 'bugs' will be surfaced and characterized. Secrecy in these kinds of settings allows people to hide problems. It shuts down the information flow that tells you what you need to fix. It allows institutions to soft-pedal or hide from their own weaknesses rather than deal directly with external challenges. A critical value of transparency is simply that it puts pressure on the guardians of a system to fix identified holes, rather than simply pretend that they don't exist or leave them for some future encounter.

Second, distributing information to those in need of it is only partially a fix. Distributed information, of the kind that the Markle system wants to facilitate, and that would clearly (from the lessons of the 9-11 Commission Report) have helped to alert more possible nodes to the 'planes operation,' certainly is a desirable goal, subject to appropriate privacy and authorization provisions. *But distributed information is not the same thing as distributed responsibility, or for that matter, distributed sensing.* Having information and not knowing what you can and should do with it is, in many situations, not helpful and is potentially detrimental. The local policeperson on a city beat can proceed on the knowledge that the subject of her traffic stop is a person of interest to the Department of Homeland Security, if she also knows what actions to take on the basis of that information. (Indeed, the failures of 9/11 do not come just from the distribution of information – they also include the question of how systems react to information that includes incomplete visa applications and second-level security screening.)

Probably an even more valuable use of the policeperson's energy is to be a part of a distributed sensor system, since she is going to be encountering data on events and patterns of behavior in a community and a location that she knows as well or better than anyone. And so a distributed network needs to be set up so as to 'upload' her information into the system as well. How, then, does the network remain 'trusted'? The 'law of large numbers' may work when it comes to stressing a system and identifying points of failure, but it is much less clear that it works when it comes to raising the signal to noise ratio in massive databases. Wikipedia (www.wikipedia.org) is a good example of a case where distributed knowledge can be added without discrimination to an 'open' database. There is simply no basis of verification or trust in this kind of system. Of course, decision rules, reputation schemes, or other means of weighting contributions that are built into technological systems can compensate somewhat (and over time) for naïve versions of the law of large numbers, but this takes us back to the previous problem of embedded algorithms.

Third, the kinds of technology we are talking about are still under development and are likely to be brittle as a result. Continued research on small scale experimentation with things like biometric authentication, one-way hashing systems that allow matches between separate databases to be located without identifying the subject of investigation, and privacy appliances of various types makes very good sense. Reliance on 'beta' systems for significant contributions to homeland security does not make such good sense. It is not a Luddite perspective but a prudent one, to recognize that in no field of endeavor that we know has information technology succeeded in displacing human judgment. When it comes to technology we should think adjunct, not substitute.

Consider separately the limits of rule-based approaches. To rely on a set of rules, particularly during periods of rapid change when people may have an emotional sense of lurching from crisis to crisis, is often reassuring. Rules are pre-commitments; a prophylactic against excess in the moment, an *ex ante* defense against overreaction and arbitrary decisions that wouldn't stand the test of time and *ex post* scrutiny. We are just as sympathetic to these points and believe, again, that rules will play a critical role in any future homeland security system. But as with

technology, we are wary of over-reliance on rules and want to set a strong alert to the limits of any rule-based 'fix.'

Rules are by definition slow. Rules take time to create and often as much or more time to modify. That is precisely why democratic systems rely on rules to slow down the pace of events and compensate for the momentary excesses of passion and prejudice. The problem is, systems that rely on rule-making face a great deal of pressure to 'get things right' up front, at the first iteration. It is now taken for granted, even by many of its supporters, that the Patriot Act happened too fast. But the pressure to create rules is real, even though rule makers know that once in place rule-based systems find it challenging to deal with unintended consequences. Rules simply do not anticipate - they deal with what we know about the past and what we can imagine about the future at any given point in time. They can be no more effective than our imagination turns out to be accurate and complete. Thus, as our understanding of the past changes and our view of the aperture of the future expands, rules start to fall behind, their relevance and efficiency corrode. And rules do not 'learn.' To have in place statistical procedures for modifying rules on the basis of incoming data is better than not, but mechanistic recalculation of probabilities is not intelligent learning – and that is why statisticians speak of “*Bayesian updating*” not *Bayesian learning*.

Second, rules are obviously not the same thing as incentives. New rules insert themselves into complex institutional landscapes where there is a lot of existing infrastructure, often with cross-cutting incentives. Telling someone they can or cannot do something is never the same, in a behavioral sense, as making it in their interest to do or not do that thing. Security specialists often say, “Follow the money, or force it to follow what you want to achieve.” What this means is that there is no use enacting security provisions or rules unless they are deeply and thoughtfully integrated with financial incentives and liabilities (which is of course just one, but an important, kind of incentive). This is one of the reasons why organizations that rely excessively on rules find themselves to be lacking in creativity; people within these organizations lack the support they need to take appropriate risks. Moving from a strictly rule-based regulation of some institutional investments to the 'prudent man' rule opened up a wealth of experimentation that, along with many failures of course, stoked a revolution in the sophistication, depth, and overall success of US financial markets.

Third, all bureaucracies suffer from the problem of managing complexity. Intricate and sophisticated rule-sets that demand subtle application to granular circumstances inevitably suffer over time as people and organizations distort and simplify them towards 'rules of thumb.' Worse still, the simplifications and distortions tend to get normalized into institutional repertoires and become poorly visible (if visible at all) pieces of standard operating procedures. The 9-11 Commission Report is filled with examples of this phenomenon, particularly concerning 'the wall' between law enforcement and intelligence collection. What was once a reasonable set of rules and protections, over time took on the patina of an inflexible, dysfunctional and misunderstood barrier that in some significant ways stood in opposition to its original goals.

Finally, rule-based systems are biased toward negative performance evaluations when they depend for their robustness on any significant degree of secrecy. Rules may work 99% of the time, but if success is kept secret or is otherwise invisible, the people who evaluate the rules will see only the failures. Even an open-minded and well-intentioned critic in these circumstances is likely to mistake what is really a 1% failure rate for a significantly higher rate of failure. This means that rules held in secret tend to 'ratchet up' over time since the system over-reacts to failure because it under-reports success. The selection bias is particularly dysfunctional when

dealing with an adaptive adversary. Since they get to know the rules as openly as anyone else does, an intelligent adversary can design *around* the rules by probing for weaknesses and reading the feedback from the system directly. One of the ironies of the current secrecy surrounding who U.S. authorities may be holding in 'secret detention' is that the identities are almost certainly not secret to the terrorist groups or cells from which these individuals will have notably disappeared.

III. Building The Positive Agenda

In Parts I and II, we have sketched out a general approach. The starting proposition is that we must defeat terrorism without the sacrifice of constitutional liberties. Neither complete reliance on rules nor the passionate embrace of technology will do the whole job. As we pointed out in Part II, both approaches have significant limitations.

But it's not enough to say that rules and technological approaches are insufficient. What should be the attributes of a successful system and, in particular, what does it mean to take a Madisonian approach? And how should rules, technology and democratic processes be deployed in such a system? Part III addresses, in turn, each of these questions.

A. Introducing a Madisonian System

James Madison's philosophy deeply informs our overall goal and approach to the construction of a democratic, self-correcting system that effectively fights terrorism while protecting constitutional liberties. We take, both from his advocacy of the Constitution in its original form and from his subsequent drafting of the Bill of Rights, the key principles on which a system to fight terrorism should be constructed.

In particular, we believe that Madison correctly understood the problem of managing human behavior within formal systems of power and, equally important, the strength of human judgment. His goal in crafting the Constitution (and, of course, we are emphasizing Madison without intending to slight the extraordinary contributions of his fellow Founders) was neither to grant arbitrary power nor to eliminate all potential discretion. Rather, he favored a structural approach in which people would be induced to do their best – and watched carefully to see if they were succeeding. And that approach was based, at bottom, on the belief that “the people will have the virtue and intelligence to select [representatives] of virtue and wisdom.” He understood the critical nature of this view for, he said, if there is “no virtue among us” than “[n]o theoretical check, no form of government, can render us secure.” (Gary Wills, James Madison, Times Books, 2002, p. 36)

A Madisonian approach seeks, first and foremost, to combine the strength of popular consent with the safeguards of the Bill of Rights. It recognizes that government is, as Madison said, “the greatest of reflections on human nature” and that “[i]n framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” To achieve that end requires “[a] dependence on the people” but it also requires “auxiliary precautions” to ensure that each part of government “may be a check on the other – that the private interest of every individual may be a sentinel over the public rights.”

As Madison explained in perhaps the most critical passage of his Federalist No. 10, no person “is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” Yet, he reasoned, governmental officials are asked all of the time to be a judge of their own ideas, interests and ideologies. And he recognized that it is “vain to say that enlightened statement will be able to adjust those clashing interests and rend them all subservient to the public good.” How to reconcile this seeming paradox? The only available response, he concluded, was to rely upon a “republican remedy for the diseases most incident to a republican government.” To rest, in other words, on the structure of government and upon the Bill of Rights.

Thus, a Madisonian approach recognizes the Constitution as providing the fundamental limits on human discretion. Madison recognized, in a time before the modern conception of judicial review existed, that the “political truths” of the Constitution might acquire “the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.”

Indeed, when he introduced the Bill of Rights in the House of Representatives on June 8, 1789, Madison was careful to explain that the Bill of Rights would safeguard constitutional liberties from abuse of the executive power, abuse of legislative power and “against the majority in favor of the minority.” Because he viewed the Executive Branch as weak, Madison was most concerned with the ability of majorities to operate against minorities.

Yet, his fear of popular factions did not persuade him that the Bill of Rights would prove to be unenforceable. Rather, he emphasized at least three bulwarks of liberty: “independent tribunals of justice,” state legislatures, and, of course, the bully pulpit of public opinion. True to his time, Madison did not repose all power in a direct democracy – rather his constitutional system attempted to seek the advantages he saw in a Republic. And yet, he took seriously the underlying notion that authority rests on the consent of the governed. In his typical understated language, Madison told the House of Representatives that the Bill of Rights would “have a tendency to impress some measure of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community...”

Or, as he wrote on an earlier occasion, in times when evil may spring from the Government, a Bill of Rights would stand as a “good ground for an appeal to the sense of the community.”

What does this mean in practice? First, and foremost, a Madisonian system meets the standards outlined above – a system that tries to work with human nature and employs human judgment, consistently and effectively reviews the actions and decisions of governmental actors, learns from its mistakes and rests on bedrock principles of liberty.

Second, a Madisonian system embraces the ability of democratic processes to correct human error, rather than attempting to stifle all opportunities for error in the first instance. This is a big proposition. A technological approach will seek to substitute machinery for humans. A rules-based approach will attempt to substitute black-letter law for human judgment. A Madisonian approach recognizes the importance of human creativity and deploys the Bill of Rights to establish the boundaries of discretion and, within those boundaries, to use democratic processes to provide the best learning and the best methods of error-correction.

In fact, we think the bottom line is very different than just the eradication of mistakes (which is how our system of checks-and-balances is often portrayed). An effective democratic system to fight terrorism will both reduce over time the incidence and gravity of errors and increase the speed at which positive lessons are learned.

In some sense, the challenge we are posing can be cast as a historical counterfactual. *What would we do to protect constitutional liberties if the Bill of Rights had never been added to the Constitution of the United States?* What would be the (small “d”) democratic approach to convincing people and institutions that fundamental natural rights of the type recognized by Thomas Jefferson and embedded in the Declaration of Independence must be recognized by non-judicial processes? How would we act upon Madison’s admonitions to protect the Bill of Rights by appealing to state and local governments, and to the public generally?

This imaginary set of questions is important not because it is practically necessary (after all, courts will continue to enforce the Constitution). It is important, we believe, because it leads us to a wise approach that supplements resort to the courts. As Madison envisioned, it is critical to complement the principles of judicial review with the power of public action. Ultimately that is where the legitimate authority to make these decisions resides. It is necessary, in other words, to take the battle to the source.

It is possible to argue, of course, that democracies are not good at finding solutions that protect constitutional liberties and that, therefore, the protection of constitutional liberties requires a single-minded focus on the counter-majoritarian hallways of the federal courts, particularly the Supreme Court. And there is no question that the Supreme Court has through history, and even recently, played a critical role in limiting abuse of executive power, such as the decisions in 2004 requiring access to the federal courts by detainees at Guantanamo Bay.

It would be wrong, however, to conclude that democratic processes are always opposed to individual liberty. Indeed, we believe the opposite. Admittedly, this is a very optimistic perspective on the United States as a polity; it places a great deal of faith in the public's collective judgment and ability to learn over time, IF the public is given the information it needs to make intelligent assessments AND mediating institutions do their job of reviewing and proposing policy (or, in the case of courts, of enforcing legal standards).

After all, the United States can be seen as the biggest, most successful self-correcting political mechanism in the history of world politics.

We began with a Constitution that severely limited the scope of liberties and, over two centuries, we have successively broadened its reach through war and constitutional amendment (not just through judicial interpretation). Men and woman of all races benefit from constitutional protections that, since the Civil War, apply to both federal and state governments. They do so, not through the courts (indeed, in spite of the Supreme Court decisions in Barron v. Baltimore and Dred Scott) but through the power of constitutional amendment - first the Civil War Amendments, then the suffragette movement that culminated in the enactment of the 19th Amendment in 1920.

We rejected the Alien and Sedition Acts, which prohibited spoken or written criticism of the government, first by forcefully criticizing the infringement of liberties and then, in the first transfer of powers between politically opposing Administrations in our history, replacing the Administration of John Adams with that of Thomas Jefferson. Under Jefferson's presidency, victims of the Act were pardoned, their fines were repaid and the Acts were repealed or allowed to expire.

We came to reject the internment of our Japanese citizens, although upheld by the United States Supreme Court in Korematsu v. United States, through the passage of legislation in the 1980's that included reparations to each person that had been evacuated.

We rejected the politics of Senator Joe McCarthy when Margaret Chase Smith, a Republican senator from Maine, stood on the floor of the Senate to remind her colleagues that "The American people are sick and tired of being afraid to speak their minds lest they be politically smeared"; when an attorney asked McCarthy, on television and in front of the jury of the American people, "Have you left no sense of decency?"; when courageous journalists, like Edward R. Murrow, spoke out against his tactics and when the United States Senate formally condemned him.

We rejected the excesses of FBI domestic spying, enshrined in the acronym COINTELPRO, which was designed to suppress political dissent and which targeted individuals such as Dr. Martin Luther King and Cesar Chavez and groups that included the NAACP and the American Friends Service Committee. This rejection came principally not through the courts but through the disinfectant of public examination and congressional oversight.

In the post September 11 environment, public opinion continues to offer evidence that Americans will stand up to preserve liberty. Consider the fate of programs like CAPPs II, MATRIX, and John Poindexter's proposal for Total Information Awareness. In Spring 2006 we see a new surge of public concern over NSA domestic surveillance. The arcane details of the program aside, the American public understands that there is something called a FISA court with legal authority to issue the relevant warrants and that the NSA could have, under executive order from the President, chosen to make use of that pathway – but did not.

Of course, we also know that democratic learning can be slow and that, as we have waited, real abuses have occurred. For much of our history, it took too long to get it right and people suffered a lot and for a long time before abuses ended. A woman born in the year when the suffragette movement began would have been in her 70s before she acquired the right to vote. African Americans were enslaved for generations. Along the way to freedom and respect, many dreams were destroyed and many others, deferred.

We believe this means that democratic forces must be strengthened, not shunned. We believe our nation needs a democratic system that, as we have described it, works better and faster. In other words, the goal of an effective political system should be to supply the information needed to hasten self-correcting actions while taking advantage of human wisdom and the American passion for liberty.

We believe this because more than ever the scope of constitutional liberties is now at stake. We are a nation closely, but passionately, divided. We are debating, whether we fully realize it or not, the nature of our political community as it is constituted in basic principles about how one person relates to others. We are heirs to an intellectual tradition – the Enlightenment – and that tradition is both fundamental to our nation and it is under attack. It is fundamental because moving spirits of the Enlightenment – John Locke, David Hume, Adam Smith – provided the intellectual framework for the principles of liberty that were embodied in our Declaration of Independence and our Constitution. It is under attack because significant political forces appear to believe that central principles of the Enlightenment – diversity of views, transparent government and limited Executive powers – represent weakness, not strength; require abandonment, not protection; serve enemies, not friends. Rather than understanding that the United States is powerful because its ideals are great, they seem to believe that the United States is great merely because it is powerful.

How could this view prevail? Because its primary goal – the eradication of terrorism – is sound even as its understanding of America is not.

The stakes could not be higher. We cannot choose between fighting terrorism and safeguarding the Constitution. We must do both. More importantly, we must understand that both stem from the same, basic, impulse: To secure our liberty. That is not a religious principle, a moral principle, or even a practical principle. Rather, it is foundational to a political community that seeks to achieve all of these ends.

The Strengths of a Successful and Robust System To Combat Terrorism

It is our core contention that all of the mutating challenges of terrorism cannot, at any instant, be fully identified or defined. Like an electron traveling in a world governed by the principle of uncertainty, we will never know both the precise position and exact trajectory of terrorist ambitions. Indeed, unlike great armed conflicts of the past, we may not, quite literally, see the enemy approach before the combat begins.

To fight successfully such a threat requires a unique set of characteristics – particularly for a governmental structure. That structure, we believe, can be built upon Madisonian principles. Such a system contains the following attributes:

1. Understands human nature and rests on the best human judgment,

James Madison famously asked, “what is government itself, but the greatest of all reflections on human nature?” (Federalist Papers, No. 51) After all, he explained, “[i]f men were angels, no government would be necessary.” (Ibid) But it is equally true that the men and women who serve in our government are not all devils, though mistaken acts may result from ill motives and bad actions.

What we know of humans in action teaches us that fallibility is a cost but that the abolition of space for human judgment is no cure. To be sure, we are surprised again and again to see the corrosive effects on government – and its people -- of stupidity, malice, opportunism, narrow self-interest, partisan rage and fundamental misunderstanding of American principles.

But, again and again, we are amazed to see the power of human judgment – and the fortitude of human courage. The 9/11 Commission Report tells us of the intuitive judgment of customs agents spotting the millennium terrorist (p. 178); Secret Service agents and the D.C Air National Guard improvising procedures in order to scramble the only jets over the D.C. area with full authorization to protect the nation’s capital (p. 44), quick action by FAA workers to notify military authorities – out of the chain of command -- and to ground all aircraft quickly and safely. (pp. 20 & 25) New York’s police, firefighters and emergency responders rushed into mortal danger to find and usher workers out of the World Trade Centers. (Chapter 9) And, of course, the last barrier to the possible destruction of the White House or the Capitol was raised when civilians took the fate of United Flight 93 into their own hands. (p. 13)

Human judgment is the greatest strength of democratic systems. On September 11, 2001, the best of human judgment was betrayed by lack of imagination, inadequate rules and faulty technology. To succeed against current and future threats, we need a well-functioning system that relies on human capacity, while inviting into action “the better angels of our nature”. (Lincoln, First Inaugural Address)

In sum, to defeat terrorism, we need to strengthen the operational flexibility and creativity of human judgment. Any system that fails to empower the creativity of individuals to get it right will inevitably get it wrong.

2. Consistently and effectively review the actions and decisions of governmental actors

For human judgment to be effective and to be trusted, the outcomes of action must be communicated to the people who will oversee and “vote” on that system, as a consistent matter over time. Humans have the capacity to get it right, but we cannot rely only on government

insiders to decide if that has been accomplished. And this principle has two critically important implications for the construction of a robust system.

First, we, the people, must know what our government is doing. Information is the lifeblood of democracy even if it is the bane of many politicians.

Of course, we do not expect – nor would we desire – that the identity of covert intelligence agents be revealed, that the unknown surveillance of terrorist communications be made prematurely public, or that the most sensitive deliberations of security tactics be disclosed.

And yet, at the same time, we have seen again and again how official secrecy can obstruct – not empower – systemic review of governmental action. Consider again the cumulative impact of the publication of the 9/11 Commission reports, the reports of Senate and House committees examining 9/11 and the lead-up to the war in Iraq and the reports that have been issued concerning Abu Ghraib. We now know more than we might have imagined about the actions of our government and about the information made available to our senior leaders, including the president. We even possess the actual text of an item appearing in the tightly protected Presidential Daily Brief of August 6, 2001 entitled “Bin Laden Determined to Strike in US.” And we have viewed, to our national disgust, the horrific photographs from Abu Ghraib prison. There have been systematic reviews of information processing biases, within the intelligence community and in policy maker–intelligence relationships, that led to faulty intelligence in the run up to the Iraq War.

The knee-jerk instinct to make things classified and secret is deeply ingrained. Consider just one example of attempted secrecy that is so extreme as to be nearly absurd. Recently, we learned that intelligence agencies have been re-classifying documents at the National Archives that have been public for many years. The historian Mathew Aid discovered, for example, that a 1948 memorandum on a C.I.A. scheme to float balloons over countries behind the Iron Curtain and drop propaganda leaflets had been re-classified in 2001 even though it had been published by the State Department in 1996. What was in the mind of the civil servant who decided that the present security of the United States would be threatened if the world, including even the most hardened and evil terrorists, were to discover this Truman-era plan to sway opinion behind the Iron Curtain?

Political leaders are fiduciaries, exercising the political power that belongs to all of us – not to them personally. And they must, therefore, remember that we are stronger for the fact that we now know more. We can move forward with reform because the disclosures of the past few years form a kind of factual brief – a Brandeis brief as it were -- for political reform and the protection of constitutional liberties. For now it is sufficient to state the general proposition that the public and its institutions must know the direction, principles, rules and standard techniques employed by its government. This can certainly be put forward as a normative position but we are emphasizing here its importance as an efficient oversight and information correcting mechanism. Put simply, secrecy does not enhance the efficiency or speed of learning.

Second, as we emphasized above, information about our war against terrorism must be sufficient to allow us to judge success, and not only failure. Without an adequate understanding of the places where we have succeeded we may be inclined to assume that our systems have consistently failed. And that bias in the data may lead to us make bad judgments about the efficacy of our defenses. In our discussion of the current controversy over NSA electronic surveillance we will note specifically the relationship between good information and good decisions.

3. Learns from its Mistakes

In all probability, we remain in the early days of our war on terrorism. We face a shadowy, elusive enemy that lacks the traditional indicators of an organized military foe – one that represents a geographically-bordered nation-state, wears instantly recognizable uniforms, aims its tactical fire chiefly at combatants and musters its forces at specific moments for events called “battles.” Add to all of that the fact that even the term “war” as we have traditionally known it is somewhat of a misnomer. Given the nature and organization of terrorist organizations we may not even be able to tell for a long time whether the war is over or when it was definitively won.

These new challenges simply illustrate that we have a long way to go to know exactly how to challenge terrorism, and to suggest that we may never know exactly when the tipping point came. All democratic systems need to learn. But in this system learning is not just a sign of progress, but also a hallmark of preparedness.

We need, in other words, a system in which learning is central and fundamental. In which, as a matter of politics, we all get a better sense of what is acceptable and in which, as a matter of problem-solving, we can figure out what works. Any system that takes on the goal of fighting terrorism should recognize that it is dealing with a long-term challenge created by an adaptable and elusive foe. In such a world, we will not get it totally “right” at any moment and, if we do, we’ll probably be “wrong” tomorrow. (And this itself is an important public education issue.)

Consider, for example, the identity of suicide bombers in the Middle East. The conventional wisdom, widely disseminated, was that suicide bombers would be unemployed young men without a strong sense of identity, likely estranged from their families, who had become identified with terrorist causes.

That wisdom offered a keen sense of the future – until the sponsors of suicide bombing mutated to another demographic. Indeed, the third female suicide bomber to act on behalf of Palestinians stood out because she defied virtually every previous description – as one observer noted, she was “not male, she was not overtly religious, not estranged from her family, not openly associated with any radical groups... She was young, she was a good student, and she was engaged to be married...” (Anne Applebaum, “Girl Suicide Bombers” April 2, 2002 <http://slate.msn.com/?id=2063954>) On a similar note, the suspects of the attempted terrorist attack in London on July 21, 2005 were males from Somali and Eritrean descent – not Pakistani, or Middle-Eastern, males like the majority of those who carried out the deadly London terrorist attack in early July that same year.

Change is not, in this perverse form of social Darwinism, a pathway to a higher form of social achievement. But it is a hallmark of the world in which we find ourselves. With adaptive adversaries, employing non-traditional and sometimes unimaginable tactics, acting in a rapidly changing environment, survival of the fittest is not enough. To optimize our defenses against today’s threat would mean being vulnerable to tomorrow’s threat. The key is to think in terms of survival of the most adaptable.

We have adapted before. The early years of the Cold War required a great deal of new learning about the nature of Soviet expansionism and about the best tactics to defeat it – tactics

that involved military assistance, diplomatic initiatives, economic alliance and the effective advocacy of democratic values.

We face a similar challenge today. Pushing back against the emergence of an over-emphasis on executive authority in American government in a time of war is something we've experienced before. To be successful, we need to learn, adapt and improve at an even faster and more effective rate.

4. Rests on Bedrock Principles of Liberty

A self-correcting and adaptable system of the kind we suggest might, in time, reach a public consensus. But public consensus is not always commensurate with individual rights. Although we believe strongly in the strengths of a democratic system, we also recognize the perspective expressed by the 19th Century British biologist Thomas Henry Huxley that “[g]overnment by average opinion is merely a circuitous method of going to the devil; those who profess to lead but in fact slavishly follow this average opinion are simple the fastest runners and the loudest squeakers of the herd...”

In other words, even in a democratic system, the truth is not just the average of all possible beliefs. Segregation was wrong even when it was popular. McCarthyism was wrong even when many opposing voices were silenced by fear. Limited rights for women were wrong even when it was socially acceptable.

In our system of government, the touchstone of our constitutional liberties is, by definition, the Constitution. Any successful system to fight terrorism must ensure that our Constitutional guarantees are fully and fairly enforced.

IV. Implementing a Madisonian Approach

Part III outlined the general principles of a Madisonian Approach -- a system that attempts to:

- Make realistic assessments of human nature and rests on the best human judgment
- Consistently and effectively review the actions and decisions of governmental actors,
- Learn from its mistakes and
- Rest on bedrock principles of liberty

Part III also detailed some general means by which a Madisonian system could be effectively implemented. In Part IV we will drill down to discuss more specifically what that would require. Along the way, we will explain how we believe that technology and rules can be deployed as adjvants, to strengthen a democratic approach.

Thus, we must take the principles set forth in Part III and implement them effectively. We must take the following action in order to

Enforce the Constitutional boundaries beyond which governmental actors may not tread.

Establishing the permissible boundaries of acceptable action is the most important function of “rules,” by which we mean substantive rules of behavior that governmental actors, on their own, have no power to modify.

The establishment of such boundaries is absolutely necessary. As a matter of constitutional law, boundaries enforce the mandate of the Bill of Rights. As a matter of policy, boundaries create efficiencies in the system by removing the need for continuous debate and discussion on questions that we regard as well settled. As a matter of law, rules avoid the need to question, on a case-by-case basis, the intent or motivation of the governmental actor. As a matter of international relations, these kinds of boundaries exemplify and place on display some core values of our nation. As a matter of politics, boundaries establish the procedural mechanisms by which their “location” can be verified or even adjusted.

The last point deserves clarification. Boundaries are designed to remove the day-to-day exercise of judgment to preserve fundamental values. The requirement that police give “Miranda” rights when they arrest a suspect is a good example. But even fundamental boundaries may incorporate processes to explore their precise meaning.

Consider, for example, the constitutional prohibition against the government taking actions based on race. As a technical legal matter, of course, the rule is not that such judgments will always be impermissible; it is that a court applying the “strict scrutiny” standard of review must review such decisions. It is possible, but rare, for a racial classification to survive “strict scrutiny.” Imagine, for example, the circumstance of the CIA deciding that it will only consider people of Chinese origin as candidates for covert operations in which agents have to post as Chinese nationals. Is that a circumstance in which the use of race is justified by a compelling state interest?

So the point about boundary processes is this: Because boundaries reflect fundamental values, any processes used to examine their application must be extra-ordinary and must not be vested

in the unchecked discretion of a single executive officer, or even agency. Recourse to the federal courts would be the preferred mechanism.

Thus, it would be important in a Madisonian system to establish the boundary lines. A non-exclusive list would include prohibitions on:

- racial classifications,
- chilling and suppressing First Amendment rights,
- avoidance of the domestic criminal system and its constitutional standards (including the Fourth, Fifth and Sixth Amendments)
- torture and other means of violating well established human rights

In addition, of course, constitutional boundaries protect the structural integrity of the Madisonian system – the president may not enact laws or adjudge controversies.

Boundary lines serve the critical purpose, as well, of ensuring that similarly situated individuals are treated the same. Rules establish norms and baselines that ‘work’ over long periods, not just in crisis, and without regard to the bias of the decision-maker or the discrete and insular characteristics of the person to whom the rule is being applied. That is why it was so disturbing when the United States Supreme Court decided the outcome of the 2000 presidential election in a decision whose reasoning was “expressly limited to the present circumstances.” Bush v. Gore, 531 U.S. 98 (2000)(per curiam) It is precedent, the consistent application of the same principles to all comers, that guards against arbitrary, ad hoc, and politically biased outcomes. Precedent can be overturned, as Brown v Board of Education overruled the ignominy of Plessey v. Ferguson, but the rule of law is shaken when it is not applied at all or when decisions are made with the caveat that they should not be treated as having precedential value. Consistency forces history into the moment.

Establish, within those boundaries, the areas of discretion in which governmental actors must use their judgment

Within the boundaries sits the “playing field” of day-to-day policy. It’s like football. A quarterback can’t run out of bounds. But, on the field, he can decide whether to call a running or passing play. In fact, we want him to understand the existence of the boundaries but not to be obsessed by them. Within the rules, we want to encourage boldness and innovation.

So, too, on the field of fighting terrorism. We want our governmental actors to be encouraged to use their imagination while being respectful, but not obsessed by, boundary conditions. So, for example, the 9/11 Commission Report recommends that “[t]he burden of proof for retaining a particular power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive’s use of the powers to ensure protection of civil liberties.” This strikes us as a sensible approach. Madisonian principles imply that no power should be granted to a government without material justification and, of course, the presence of boundary conditions requires their effective enforcement.

But the 9/11 Report also illustrates the problem when the system reduces the incentive and desire of people to use their best human judgment. In the days leading to the September 11th attack, the Minneapolis FBI office was engaged in a battle with FBI headquarters over the treatment of Zacarias Moussaoui. The Minneapolis office wanted to obtain a FISA warrant to search Moussaoui’s laptop computer, but FBI headquarters disagreed. At one point, a

headquarters agent complained that “Minneapolis’s FISA request was couched in a manner intended to get people ‘spun up.’” The Minneapolis supervisor responded that it was precisely his intent in “trying to keep someone from taking a plane and crashing it into the World Trade Center.” The 9/11 Commission suggests that “Minneapolis may have been more concerned about Moussaoui’s intentions because the case agent and the supervisor were both pilots. They were, therefore, more highly sensitized to the odd nature of Moussaoui’s actions and comments regarding flying.” (p. 275 & n.101)

That story may strike some as uninteresting and unrepeatable serendipity, or dumb luck if you prefer. But smart serendipity is precisely what we have to encourage. The simple fact is that knowledge and understanding is distributed widely and more or less randomly among human beings, and that harnessing that knowledge to the end of combating terrorism means doing things to increase the chances that the people who have bits of understanding come into contact with the partial data and noisy signals that are being generated by a potential terrorists’ behaviors. This kind of imaginative reasoning by human beings will certainly, for the foreseeable future, out-perform any kind of machine algorithm applied to a data-mining expedition.

The legal merits of the Moussaoui FISA application to one side, the answer to the question about deploying personal judgment is emphatically “Yes.” Yes, we do want agents and supervisors to apply their particularized knowledge to make judgments about the intended actions of possible terrorists. Because if they do not, the system is more likely than not to lapse into the “group think” that bedeviled the intelligence community’s analysis of whether Saddam Hussein had possession of Weapons of Mass Destruction in late 2002 and early 2003. (As was so clearly explained in the 2004 Report on the U.S. Intelligence Community’s Prewar Intelligence Assessments on Iraq issued by the U.S. Senate Select Committee on Intelligence). We do want our governmental actors to “Question Authority” or, at the least, we want them to question “Authoritative” Worldviews.

How do we institutionalize imagination and the exercise of judgment? First, we remove barriers – like rigid rules that purport to turn intelligence analysis into a paint-by-numbers exercise. Second, we guard dissent, perhaps most notably by protecting whistleblowers. Third, we create and support internal structures that provoke “checks and balances.” For example, the Senate Select Report in its discussion of “group think” emphasizes the absence of “red teams, devil’s advocacy, and other types of alternative or competitive analysis” that might have challenged the underpinnings of conventional wisdom. Fourth, and this may be the hardest, we demand of management that it reward initiative and those who search for the truth – no matter how uncomfortable the political ramifications of their discoveries. Finally, we enlist the public on behalf of a government that seeks analysis of future threats not confirmation of preconceived assumptions.

Empower both learning in government and an informed public by barring over-reliance on governmental secrecy

The idea of democracy is a statement not only about the power of decision-making, but also about the flow of information that informs decision-making. Information is of little use if it is not processed, questioned or understood. This and the next of our principles thus require both information flow and its effective use.

We believe there should be in government systems a structural bias towards the free dissemination of information in the most public way instead, as has characterized the current

system, a systematic bias towards keeping information tightly controlled. Put differently, the default position should be “make it public” unless there are very compelling reasons not to.

We have, in earlier portions of this report, explained why secrecy is a very brittle and unreliable way to seek security. Although we recognize that some data must be kept highly classified (such as the identity of covert agents or the identity of captured terrorists who are participating in on-going “sting” operations), it is startling to realize how much data has been made public (much less produced to FISA courts or classified congressional committees) about the on-going terrorist threat. Indeed, warnings about the risk to buildings in the New York and D.C. areas in August 2004, the Department of Homeland Security clearly concluded, correctly we think, that the presence of on-going threats should be publicly communicated. Moreover, the debate that immediately followed that announcement demonstrated that public disclosure requires public evaluation – which meant that not just the fact but also the specifics of data and the age of information proved to be critical. In February 2006, President Bush disclosed some details about a late 2001 plot to crash hijacked planes into the tallest building in Los Angeles. It is hard to see how this disclosure damages national security, and easy to see how it contributes to a more informed public discussion of appropriate government policy. In this case, for example, we learned that Al-Qaeda was in fact considering another airplane hijacking and thus that enhanced airport security measures were not simply closing the barn door after the horses had already escaped.

Of course, disclosure often leads to debate – and will surface ambivalent attitudes towards the best means of reconciling security and constitutional liberty. A Madisonian approach rests on the proposition that the public can work with the ambivalence and still be energized to demand the preservation of constitutional liberties. This, in our view, depends on a deeper understanding of the notion that security is never an absolute good but is always a *negotiation* of costs and benefits among affected players.

The public is deeply affected by the outcome of government decisions in this area. To be an effective negotiator, the public needs to be empowered with information. This is what we mean by creating a more sophisticated demand function in the bargaining process. Thus campaigns like the ACLU’s “Be Safe. Be Free.” advertisements play a vital role in ensuring that public citizens are cognizant of the implications of government decision-making. It is critical that these kinds of efforts continue and that associated efforts, like voter registration and voter education, be seen as important to the cause of liberty. *Secrecy is the single largest impediment to an informed demand function.*

It is also important to remember that a majority is not always necessary for the public to have an impact. Disclosure itself, especially when amplified by media channels and opinion leaders, can often serve as a disinfectant even between elections and without regard to public-opinion surveys. That is why continued, and continuous, public dialogue is required.

Ensure that democratic mechanisms and processes oversee the discretion of governmental officials so that mistakes may be rectified; errors, corrected; and lessons, learned

Democracy is, of course, the central goal of our approach. In addition, the institutions of oversight must do their job. And their job is neither merely to rubber-stamp nor only to second-guess; it is to become active participants in the process of learning. Just as courts must do their jobs of enforcing boundaries, so, too, internal supervisors, Inspectors General, cross-agency working groups, White House principals committees and congressional committees must

do their part to anticipate, assess and alter the way that governmental officers fight terrorism. And the media, although free of governmental responsibility, must have the information it needs to play its constitutional role of questioner, prodder and critic.

Much can be said about how each of these governmental responsibilities plays out but a special word is warranted on the role of Congress. We believe that Congress plays a unique role in a system of accountability around homeland security. Unlike judges, members of Congress are selected precisely to make policy decisions. Unlike public observers, members of Congress have access to the most sensitive classified information. Unlike their constituents, members of Congress have access to the most distinguished public forums our constitutional system provides --- the floor of the Senate and the House of Representatives. For all of these reasons, an effective system of accountability simply cannot function without an effective Congress.

In a set of conversations we held in 2004 with experts about the war on terrorism, we heard a surprisingly large number of discouraging observations about the role of Congress. Questions were raised as to whether Congress simply had become too partisan to engage in searching inquiries; whether individual members of Congress were unwilling to spend the time necessary to become substantive experts; whether the advent of fund-raising and modern campaign techniques had eviscerated the ability of members of Congress to confront serious issues and whether elected politicians were willing to descend from the dais and take real responsibility for their decisions.

We hope that is an overly pessimistic view. But we hope as well that the 9/11 Commission's conclusion that current congressional oversight is "dysfunctional" receives adequate attentions and its recommendations for congressional reform are swiftly adopted.

But structural reform, although a necessary precondition, is not enough. Members of Congress must look carefully at the classified information they receive to ensure that excessive secrecy does not frustrate public scrutiny. They must resist the urge to micro-manage specific judgments but they must be willing to take responsibility for ensuring that "groupthink" and strategic inadequacies do not blind effective executive action. And individual members must remember that they have the opportunity to attract the attention of the nation even if a majority of their colleagues are unwilling to challenge existing and conventional wisdom.

It is tempting for legislators to become Monday morning quarterbacks, especially when the Executive Branch won't let them listen into the huddle. But the Madisonian vision requires that Members of the Congress take responsibility for their oversight functions the way that a good Board of Directors takes responsibility for the strategic vision of a corporation.

James Madison believed that legislative bodies would "refine and enhance the public views by passing them through the chosen medium of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." (Federalist Papers, No. 11) The nation requires a Congress that will make that vision so.

Employ the appropriate tools of technology and rules of behavior that will service, but not unduly restrict, human decision-making.

We have set forth above our views of what technology and rules should not do and we have explained how rules should be used to create boundary conditions. But what is the positive role for technology and rules on the playing field of the war against terrorism?

As we have said previously, technological advances will play a crucial role in securing our homeland defenses. We believe that technology can aid the fight against terrorism in the following ways.

The great value of Information Technology is, of course, that it speeds up analysis and action. Technologies can ensure the widespread distribution of information to places, like local law enforcement, where it can be effectively used. Technology can spur on our most basic form of learning – analyzing patterns of data that add to trajectories of action. Technologies can detect activities, through distributed sensing, more quickly than would otherwise occur – perhaps in time to prevent terrorist attacks. Technology can increase the efficiency of operations.

Technologies can enforce procedural rules, for example, by compartmentalizing private information so that it is not abused and ensuring that people are who they say they are and have the authorization to see what they want to see (or go where they want to go).

Finally and importantly from our perspective, technology can improve the feedback loops that allow the Madisonian system to learn and to correct errors. Technology can expose to the light for discussion and management important value conflicts – not hide them. If security is thought of as a bargain among competing desires and values, then when technology is used to disseminate information to the public, it can enhance the ‘efficiency’ of the demand function in that bargaining process, by reflecting more precisely public preferences for liberty and security.

Moreover, we believe that there is an important distinction to be made between development and deployment. Many forms of technology can raise critical issues of constitutional liberties - new forms of remote sensors and robust forms of data mining are just two examples. It is critically important that intrusive new systems of surveillance not be deployed until and unless constitutional liberties concerns are answered. But development is another issue. We believe it is equally important that new innovations be developed without first deciding how – or even whether – they will be ultimately used. That is because R&D seldom follows a straight-line, entirely predictable path (if it did, it wouldn’t have to be done) and because we are in our early days of combating an adaptive foe. We realize this may be a controversial position, but we think that the knowledge of what is indeed possible is a necessary input into the discussion of what we want to do and why.

As to rules, we would prefer that the playing field be governed, as much as possible, by rules of process, not the kind of substantive rules of behavior that form the boundaries. Data mining provides one illustration. There should be rules of process for how information is obtained, used and disseminated. For example, we favor an approach that, to the maximum extent possible, maintains information on individuals in anonymous form and, where individual identification is necessary, establishes a process that both justifies the initial use and provides for review and correction of an individualized judgment that is questioned. It is also important that the burden of questioning and correcting incorrect information not fall ultimately on the damaged party – as is often now the case when it comes to victims of ‘identity theft’. Government must, in other words, always provide the process that is due and procedural rules are the best mechanism for ensuring due process. Or, to turn back to the analogy of a football game, the rules on the field should guard against jumping offside or unnecessary roughness but they should not try to dictate the game plan.

Procedural rules have, of course, their own requirements. Just like substantive rules, they must be consistently applied. As we have mentioned before, there is a danger that rules will fail to

adapt to changing circumstances and mutating foes; that they will “lock-in.” That is why they should be subject forms of periodic review, such as sunset provisions.

V. Applying a Madisonian Approach

In this section, we will address three practical questions in order to illustrate how a Madisonian approach might translate into real world policy outcomes. The first issue we examine – the creation of a National Intelligence Director – leads us on a path somewhat different from the current position of the ACLU. The second – examination of a scenario that explores both racial profiling and the distribution of “secret” information – helps to explain how accountability concerns can be used to guide discretionary governmental judgments. The third issue – data mining – raises significant issues about the protection of privacy.

These issues are not comprehensive but representative and we do not offer anything like an exhaustive view of each. Rather, we use these four issues as a starting point to provoke discussion and as an illustration of some of the core implications (and complications, of course) of a Madisonian approach.

A. Secret Authority to the National Security Administration To Conduct Warrantless Domestic Surveillance

The recent revelation by [The New York Times](#) that the National Security Agency had been given the authority to conduct electronic surveillance on Americans and others within the United States without the need to obtain a judicial warrant obviously challenges the approach that we advocate. Rather than a process of political participation, congressional oversight and judicial scrutiny, the Administration unilaterally empowered the National Security Agency to engage in activities that fell within the orbit of the special FISA judicial process, which permits warrantless surveillance to begin prior to judicial approval, and without explicit congressional authorization. For the first time, the Executive Branch assumed the unilateral power to monitor electronic communications involving a person inside the United States and one beyond its borders, so long as one of the parties is a possible terrorism suspect.

The existence of this program sparked immediate – and negative – political response. The ACLU's Executive Director Anthony Romero put it this way: "The fundamental issue at stake with the warrantless NSA spying program is respect for the rule of law that is the cornerstone of our democracy." Members of Congress, from both major political parties, offered proposals for reform, ranging from mechanisms to permit the constitutionality of the effort to be adjudicated by the FISA court, to a means of FISA review, to a congressional authorization that would expressly exclude the NSA program from the FISA judicial process, while authorizing congressional oversight.

The first question simply is how can we obtain the information necessary to make an informed decision about a secret program. Granted that full publication of the details of surveillance would be harmful to our anti-terrorism efforts. President Bush has been explicit on this point: "Unfortunately, we're having this discussion," he said recently, "It's too bad, because guess who listens to the discussion: the enemy."

And, yet, of course, even consideration of the proposal the White House apparently favors, Senator DeWine's legislation to exempt the NSA from FISA processes, requires a public decision by lawmakers. And it is far from clear that the Congress, much less the public, has the data from which to decide that question intelligently. Senator Rockefeller has argued, for example, that "No member of the Senate can cast an informed vote on legislation authorizing,

or, conversely, restricting the N.S.A.'s warrantless surveillance program when they fundamentally do not know what they are authorizing or restricting."

From the perspective of our Madisonian agenda, the NSA controversy illustrates three key points. First, that the empowerment of public scrutiny works at a rough level – if information is disclosed that permits the propriety of governmental actions to be scrutinized. Second, the application of that information to preserve constitutional boundaries is the foundation for our entire system of reposing confidence in the discretion of officials. Third, Congress can in principle act with vigor and self-scrutiny of its own role and responsibilities.

We argue that democratic mechanisms and processes are created to oversee the discretion of governmental officials. The public is not all of one view but, as we have noted elsewhere, we are not suggesting that democratic discourse requires a sort of “flash poll” plebiscite on every important issue in order to be effective. Rather, what the NSA episode illustrates is that the values of constitutional liberties continue to find deep resonance among the public and with politicians of both major political parties. This is supportive of our notion that, at the end of the day, protection of constitutional liberties neither can, nor should, be merely a judicial function seemingly isolated from politics. Ironically, the administration could have escaped public scrutiny of the program by using the FISA court from the start.

With the revelation of the NSA monitoring, the constitutional question arose – does the authorization violate the 4th Amendment protection against warrantless searches and seizures? That is not the only question - indeed much of the early debate concerned the Administration’s argument that various congressional actions or inactions provided authorization for the action. Both of these issues concern the boundary condition that we have discussed – no President may ignore the Constitution and, in any event, the Congress has power to make the playing field narrower than the Constitution requires. There are, in other words, two distinct facets to the issue of presidential authority – what does the Constitution permit and what has the legislature permitted.

The construction of the FISA court apparently failed to contemplate a circumstance in which judges would learn of a constitutional question stemming from the Executive Branch’s determination not to apply FISA. So we were left with the slightly curious circumstance, if news reports are accurate, that the branch of government generally deemed most competent to apply the Constitution was informed (through the FISA court) of the NSA program but apparently concluded that its charter did not extend far enough to permit it to apply its usual expertise. At the same time, those few members of Congress who learned something about the issue were not empowered to take any official action.

We have emphasized in this paper the importance of information. But information without the ability to act on it is meaningless. (What if a tree fell in the forest and the only people at the scene were judges who thought they didn’t have the power to try the lumberman and members of congress who were effectively blindfolded?) From our perspective, the NSA example illustrates the fundamental importance of our emphasis on boundary conditions. We should do whatever it takes to ensure that judges have the power to examine the constitutionality of actions that are revealed by information they are given. The system of human discretion that we have proposed requires absolute enforcement of its boundaries – else we will lose both constitutional liberties AND the ability of people to make intelligent judgments.

At the same time, some in Congress knew something, but not much. There is a place – indeed an important place – for the review of classified information by Congress. There is not much of a place for a game of “tag, you’re it” that turns a highly classified briefing of a few individuals members into a contention that Congress, as an institution, somehow countenanced the NSA program. We question whether members of Congress should even be willing to listen to highly classified information in their individual actions if that is not coupled with the opportunity to take institutional action. Again, because legislative authorization is a fundamental boundary condition of a Madisonian system, a great danger to principles of accountability exists when information gathering is de-linked from the concomitant exercise of oversight or review.

After the NSA program was revealed, Congress has displayed significant attention to its oversight function. Whatever legislative remedy one favors and even given the debate about whether Congress is doing all it should to learn about this warrantless monitoring, Congress’ quick, institutional action struck exactly the right chord. That’s because the focus has largely been kept on the *right* question – whether power had been allocated and used in a constitutional fashion – and not on the *obvious* one – whether some of the surveillance conducted was useful. Vice President Cheney emphasized, for example, that eavesdropping without warrants “has saved thousands of lives” and the FBI Director told a congressional hearing that the gathered information helped identify “individuals who were providing material support to terrorists.”

We assume, for purposes of our analysis, that both statements are true. But neither, by themselves, explain why the Administration could not have used FISA or, if that was insufficient, sought to amend FISA, or, if that was too time-consuming, have proposed classified congressional oversight while FISA amendments were pending or, if Congress, exercising its constitutional responsibilities had concluded that the new authority was not justified, complied with the legislative judgment. These arguments have gained significant traction in the public debate and have motivated Congressional action, which is precisely what we would have hoped for. It is clear that in grave circumstances presidents have made appropriate tough decisions – Abraham Lincoln’s treatment of habeas corpus is an example – but it is equally clear that extra-constitutional assumption of authority does not safeguard liberty. Rather, it threatens liberty twice – first when constitutional rights are infringed and then, later, when the inevitable public outcry results in static, unimaginative and inflexible rules that prevent the subsequent exercise of sound discretion to promote constitutional means of safeguarding security.

B. The Creation and Powers of a National Intelligence Director

The 9/11 Commission Report argued forcefully for the creation of a National Intelligence Director who would oversee (with budgetary authority) the national intelligence agencies, including the intelligence activities of the Federal Bureau of Investigation. In a white paper, the ACLU criticized this proposal, arguing, in particular, that the FBI Intelligence Divisions should not report to this office and that this office must not have any operational control over domestic surveillance. (ACLU White Paper “Civil Liberties and the 9/11 Commission”) In reaching this conclusion, the ACLU relies on the historic reasons to separate extra-Constitutional foreign surveillance from domestic activities and notes the unacceptable history of domestic spying by the FBI.

In 2005, Congress resolved the issue by creating a Senate-confirmed officer, the Director of National Intelligence, with oversight of both domestic and foreign intelligence activities. (“The bill defines national intelligence to include information gathered in the U.S. or abroad that pertains to more than one agency and involves threats to the U.S., its people, property, or

interests; the development, proliferation, or use of weapons of mass destruction; or any other matter bearing on national or homeland security.”)

The Madisonian approach counsels a slightly different emphasis from the approach adopted by the ACLU.

First, it requires serious consideration of the democratic advantages of the creation of a single NID. The 9/11 Report argued that the present divisions of responsibility created serious operational problems: “[N]o one was in charge of managing the case and able to draw relevant information from anywhere in the government, assign responsibilities across the agencies (foreign and domestic), track progress, and quickly bring obstacles up to the level where they could be resolved.” (9/11 Report at 400) In other words: “Responsibility and accountability were diffuse.”

Moreover, the Commission concluded that “[s]ince 9/11 these issues have not been resolved.” Thus it found three reasons for the creation of a centralized structure: the virtue of joint planning, the advantage of having someone in charge, and the simple shortage of experts with sufficient skills.

From the perspective of accountability, this is very strong reasoning. No one can be held responsible when no one is in charge. But responsibility is critical if democratic processes are to assess what has been done wrong – and what has been done right. Responsibility is critical not just for assessing how the war on terrorism has been waged, but for ensuring that the public knows precisely who in the governmental structure is responsible for the safeguard of human rights – in both domestic and foreign arenas.

The ACLU White Paper did not discuss these questions of accountability. By contrast, our Madisonian approach weighs them very heavily and begins with the presumption that we want to create effective governmental mechanisms that allow Americans to know precisely who is in charge.

The ACLU White Paper did note the most important objection to the plan – the danger that the creation of a single NID will lead to the use of foreign surveillance techniques on domestic soil and a return to the “rampant abuse of domestic intelligence activities.”

This is the right concern. But the objection does not answer the resulting question: Is it possible to have both a system of accountability and a system that protects against abusive domestic actions?

Our initial view is that it is possible – that this is a place where accountability need not be sacrificed in order to protect constitutional liberties. Thus, our Madisonian approach would have supported the creation of a NID to exercise discretionary judgment on the playing field but equally importantly to establish a clear boundary line for domestic activities, which make clear that all domestic surveillance must be in accord with domestic, Constitutional requirements. That is, of course, the case with the President of the United States, a single executive who oversees both domestic and foreign intelligence activities. We see no reason why it is inherently impossible to imagine that such a strict structure could also work for another senior officer of government.

Moreover, we actually believe that the establishment of an NID may advantage constitutional liberties. Why? Because domestic and foreign intelligence activities *will* come together

somewhere in government – in the Oval Office, in the Situation Room, in the provinces of Principals Committees. It is a better thing for democracy for the eventual melding of that data and those activities to be transparent, rather than to be relegated to the interstices of hidden White House deliberations.

Thus, the creation of a NID has the potential to provide the American public with a single individual to look to if and when suspicions arise that any agency of government was using domestic powers to spy on or chill legitimate political activities. After all, the current system is not immune from improper domestic actions – as the recent controversy over NSA wiretapping illustrates. The creation of a single NID, more effective in the war on terrorism and expressly charged with the protection of constitutional liberties, in our view, allows such critiques of intelligence activities to be laid on the doorstep of one, answerable Executive Branch officer. In some circumstances, having this single point of accountability below the level of the President will usefully lower the political threshold for public response.

Indeed, another critical means of oversight would, we believe, be enhanced by the creation of a transparent system of intelligence management. The 9/11 Commission recommended the creation of a privacy and constitutional liberties oversight board that would be empowered to watch over Executive Branch activities in order to ensure that liberty is protected. That is, in our judgment, a very wise approach because it recognizes, consistent with our earlier discussion of rules and technologies, that absolute boundaries will not answer every question about the best way to reconcile any tensions between security and liberty. And so, in the best Madisonian tradition, it builds a structure in place of an answer – an appropriately empowered institution, publicly accountable to itself, with the task of shaping admittedly discretionary judgments. Our view is that such a board should evolve so that it is structured not simply as a governmental countervailing power, but as an aperture that opens up to and seeks input from public opinion. (The DNI enabling legislation provided for the appointment of a “Civil Liberties Protection Officer” reporting to the DNI, which we find by itself insufficient. More important was the legislation’s establishment of a five person Civil Liberties Oversight Board with responsibility not just for scrutiny of DNI activities but of the entire executive branch. We would be more confident about the operations of this board if at least some its members were appointed by and served at the pleasure of the Legislative branch rather than solely at the discretion of the President.)

In other words, and to adopt the football metaphor, the critical boundary here is the Constitution. As in the NSA example discussed above, it is critical that these boundaries be recognized. Here too, and without regard for the manner in which authority for intelligence activities is structured and no matter what the relationship between foreign and domestic intelligence activities, constitutional requirements must be followed. But once that boundary is established, we believe that the “on-field” activities can be structured to permit the creation of a strong intelligence “quarterback.” In other words, we believe that it is not necessary to choose between an effective intelligence system or enforcement of the Constitution - the fact, as we state earlier, that tradeoffs sometimes exist does not mean, in other words, that they always exist. And, even where discretion is exercised on the field, an independent board devoted to protecting constitutional liberties will act as a sort of referee able to “blow the whistle” on any activities that are objectionable, even if not unconstitutional.

C. The Super Bowl Scenario

This is an imaginary but not entirely fanciful story that places in sharp relief several core issues of racial profiling, accountability, and secrecy. Consideration of a scenario is a useful way to

stress test and wind-tunnel general principles. Though the particular scenario we lay out did not happen in early 2006, it's likely that situations very much like this will arise and pose similar kinds of decision dilemmas.

Imagine the following scenario:

You're the head of the ACLU regional affiliate in Detroit in 2006. It's Sunday morning and the Super Bowl is being played in Detroit that evening. You get a call from the Detroit Police Chief who says the following:

"I've just received information from the Department of Homeland Security that two people of Arab descent are traveling to the Super Bowl and intend to carry out some sort of terrorist incident when they're inside the stadium. We don't know any more about their nationality or what kind of weaponry they might use or even, if they intend to use weapons, whether those weapons will be moved into the stadium separately from the terrorists.

"I don't know anything more than this right now. But I want you to know what I am going to do about it.

"Here's what I'm going to do. Of course, I'm going to search the stadium for weapons and everyone who enters will have to go through a metal detector. In addition, I'm instructing my police department to deny access to the Super Bowl to anyone who appears to be of Arab descent. I understand that, because of the large Arab population in Dearborn, this will surely mean that we stop U.S. citizens and lots of innocent people. But we are not going to arrest anyone, unless we have more information that justifies treating an individual as a suspect, and we're not going to detain anyone on the basis of their appearance. We're just going to turn them away from the stadium and send them home to watch the game on TV.

"In order to prevent panic, we're not going to publicize this threat. But we're also not going to cancel the Super Bowl. It's important we go forward with normal activities.

"I did not have to tell you any of this, so consider this a courtesy call. I am sympathetic to the concerns you will likely raise about my actions but I think they are overridden by other considerations in this case. I am asking you to keep what I have told you completely confidential.

"And I am asking you something else in addition to that. Please do not try to stop me from doing this. Please do not try to get a court ruling on this today, while we are in the midst of the threat. Give me the time that I need to do what in my judgment is the right thing. You can go to court tomorrow and force me to defend my actions. You can get a ruling that I violated the Constitution. But don't get in my way today. I'm promising you that if I get more specific information that allows us to narrow our actions, we will act on it immediately."

What do you tell the police chief?

At 2 pm, you get a call from an Arab-American who has been stopped by the police. He says he has a ticket and a legal right to enter the stadium. He hasn't been told why the police won't let him in but it appears to him that only he and his Arab American friends were turned away. In

fact, a friend of European ancestry was admitted. He wants you to go call the police and demand that he be admitted and, if that fails, to go to court to get an injunction before the game begins.

What do you tell him? What do you do in response to his request?

At 4 pm you get a call on your cell phone from the police chief. He tells you that he's been informed by the Department of Homeland Security that the terrorists are traveling on foreign passports. So he's going to admit anyone who can produce a U.S. passport and only block access to people who appear to be of Arab descent who cannot produce a U.S. passport. You tell him that most Americans don't carry passports, certainly not to football games, and ask if a driver's license will suffice. He says, no, they are too easily duplicated.

What do you do?

This scenario is a story about human judgment and a particularly micro kind of politics. Technology – even if there were to exist a technology that could help -- is essentially off the table as a solution because there are only a few hours of warning. Substantive rules are not going to deal explicitly with a situation that is this granular. Instead, we have a political bargaining game that is played out on a very micro level, essentially between two people, the police chief and the ACLU lawyer.

What would the Madisonian approach try to achieve in this scenario?

We want to find a way to 'expand' the politics so as to take advantage of a greater swath of human judgment about the longer-term implications of what we do in this case. We want to stretch out the effective time frame of the decision and its consequences to link it to a broader process of learning and error correction. We want to make the best use of distributed human judgment that can be brought to bear on the immediate problem of providing safety at the Super Bowl. And we probably do not want the politics to emerge slowly out of an ad hoc series of these kinds of events since terrorists can, in fact, control that lever to our disadvantage.

Rules as boundary conditions are immediately implicated in this scenario. Racial classification falls outside the playing field so the only real question that remains is whether there is a temporal exigency that justifies an exception. A court could in fact make that decision on the afternoon of the event, but is that the best solution? Consider an alternative trajectory that stays within the politics of the interaction between the police chief and the ACLU lawyer but focuses on making those politics function more effectively.

The un-altered micro-politics of this situation illustrate powerfully the brittleness of secrecy. There are a number of reasons why we do not want the politics kept tightly between these two people. There is a clear power asymmetry between them. The police chief can say (whether justified or not) 'if you only knew what I knew, but I can't tell you what I know.' If kept between the two of them, there is very limited accountability for what they decide to do and when. And finally there is the issue of precedent. Do we as a society want these two people, because of a random throw of the dice that leaves them situated in a particular place at a particular moment, to be empowered to set a significant precedent?

Recognize that we are not assuming any evil or opportunistic motives on the part of either

player in this game. The police chief knows that what he is doing is problematic. He is not trying to block any litigation against his move; he just wants to postpone it until the threat has passed. He is trying to solve an immediate problem and do so in a way that does not aid potential terrorists or grant them a huge victory of sorts by forcing a cancellation of the Super Bowl. The ACLU lawyer is not trying to embarrass or damage the police chief. He is not interested in placing the safety of the public at risk. He does not want the ACLU to be blamed for forcing cancellation of the game. At the same time he does not want to step back and simply look the other way as explicit racial profiling takes place.

There are at least two clear reasons why secrecy is detrimental to the kind of politics we want to promote in this case. The police chief needs to know that he will be able to make public the information that came to him, even if that happens “tomorrow” when the ACLU will likely challenge his actions in court. He will have to be in a position to establish the credibility and defensibility of his judgment – even his decision to place the call to the ACLU lawyer and ask him to hold off on trying to get a court order. If the police chief is not confident that he will be able to release information that shows his decision to have been a reasonable one, then he will probably not place the call to the ACLU in the first place. And we want him to be incentivized to place that call.

On the other side, we want the ACLU lawyer to be able to have confidence that the police chief has made him a legitimate request, if that is in fact the case. For that to happen, we need to allow the police chief to tell the ACLU lawyer as much as he possibly can at the moment. And we need to assure the ACLU lawyer that tomorrow, the police chief will be accountable to an unbiased third party so that his judgment will be tightly scrutinized – and have the confidence that because the police chief knows this *ex ante*, he will have thought hard and carefully about his options before making up his mind. In fact the politics are more balanced for both sides if the decision has to face oversight the next day.

This is the kind of ‘hard case’ that may, to paraphrase Justice Holmes, make good or bad law. During our work on this paper, we presented this scenario to a number of people whose careers bespeak their concern for the protection of constitutional liberties. Their responses were instructive. The usual response is to deny that the choice needs be made at all – for example, by asserting that the Department of Homeland Security would never have such generalized, non-specific information about a terrorist threat. Others were more comfortable with a rules-based approach – the principle of judicial review that trumps any other consideration (a view leavened with some suspicion about the true motives of law enforcement officials). None of the people with whom we spoke were prepared to accept the suggestion of our hypothetical police chief.

We don’t claim to know the answer either. But we wonder whether there is a principle about information flows and secrecy that (1) requires the kind of disclosure that ensures effective accountability *and* (2) allows and incentivizes outreach to the ACLU. Is it possible to insert a process rule that turns on the nature of the information about the threat?

Assume that different kinds of information will need to be screened *post hoc* for accountability in different settings. That is simply to say that there attach to particular pieces of information a level of sensitivity and confidentiality that needs to be respected for national security reasons.

The challenge is to devise a process that respects the implications of information – in a timely manner. We do not endorse the following, but we offer it for discussion. Could one envision a system of review to guarantee that *accountability should take place at the lowest possible level of*

secrecy, a kind of subsidiarity principle for information flow?

What would that look like in practice? Consider the mechanics of a tiered system of review that might be able to enact this principle. At the lowest level of secrecy would be a citizen review board, much like civilian review boards that attach to police departments, with very little or no special security status. One step higher might be a state-appointed board of citizens who have some minor level of security clearance. Another step higher might be a state court with FISA-like configuration. Yet another step higher, a congressional select committee meeting behind closed doors. And so on.

Two things have to happen to make this system work. First, someone has to decide what is the appropriate venue for any particular information to be brought to bear on accountability. Confidence in this step is critical to assure confidence in the overall system. Obviously the person or body that makes the original decision as to venue would have to sit at the highest level of clearance or secrecy. The best solution is probably a FISA-like court made up of several judges. The sole purpose of this first review would be to choose the venue in which the substantive review can take place. Since there is really no way to make this body directly accountable while removing the risk of political pressure, we need another mechanism to check that they in fact are following the principle of subsidiarity. One way to do that, is to place on the body that sits at each level of review, a single individual who is specifically tasked to specify what it is in the information he or she receives that could not be released to the body one tier below. If that cannot be done, then the case moves down one step in the tiered system, where the same review would take place.

We recognize that this imagined system of review is, like all such systems, imperfect and not undefeatable in its outlined form. We do think that a properly constructed and fully articulated system along these general lines could meet the test of a reasonable level of confidence.

Perhaps just as important, we believe that the general principles are defensible and consistent with what the United States public and government institutions have been learning over the last several years about the nature of secrecy in the fight against terrorism. The US has found, in practice, that as we push on the question, 'what really needs to be kept secret' in this battle, the answer is generally and rather consistently 'much less than we thought.' The 9-11 Commission report is striking for how much information it reveals. The intelligence agencies are similarly learning that the instinctual jump to more secrecy after the 9-11 attacks has hurt rather than helped their efforts. The principle of subsidiarity we are proposing makes that experience concrete, by explicitly changing the default from 'keep it secret' to 'make it public unless there is a compelling reason not to.' In the medium and longer term, this is the core energy behind our Madisonian alternative. Without judging how the Super Bowl scenario ought to turn out, we think the debate over what the police chief and the ACLU lawyer decide together (or not) is most important for what it says in the long run about secrecy.

What, in this scenario, are the boundaries and what is on the playing field?

One boundary is the prohibition against racial profiling – by which we mean law enforcement decisions that are made solely on the basis of a person's race or ethnicity. This boundary is important and it should be strengthened over time – one little observed conclusion of the 9-11 Commission is that the ostensible need for law enforcement to rely on racial profiling is much, much less than commonly perceived. (Cite from 9-11 Report to come)

So the first question this hypothetical poses is how to handle those rare instances in which a governmental official proposes to breach some boundary condition. This is not inherently improper but it is historically dubious. One possibility is that the government should never be permitted – even in exigent circumstances – to breach boundaries without some sort of judicial review. That would mean that the appropriate answer of the ACLU attorney is to tell the police chief that he must seek at least a “warrant-like” review for his actions. Warrants are granted on expeditious bases and more than one observer has told us that the FISA warrant requirement has a real deterrent effect on illegitimate requests, even if almost all that come before the court are granted. Another approach would be to require a public hearing, unlike the application for a warrant, albeit one that, like the motion for a temporary restraining order, does not require a full hearing on the merits.

The second important question raised by this scenario concerns the flow of information about impending, potential, terrorist action. Again, we believe that a structural solution imposing a process is the best, Madisonian, solution. Thus, a tiered system of review, applying the subsidiarity principle, speaks directly to the need in a democracy to push information down as many levels towards public disclosure as possible. And the system of tasking individuals at each level of review creates a structure of accountable individuals expressly charged with making the system work for both security and accountability.

To return to our structural approach, racial profiling is a boundary but information flow is not. Rather than using rules or technology to try to control information flows without the intrusion of human judgment, we favor the creation of a process that applies discretion, but does so with the appropriate accountability and transparency so that the folks in the stands can judge for themselves whether the correct decisions have been made – and react accordingly.

D. Data Mining

The final problem, management of data-mining capabilities and constraints, illustrates how the ACLU might early and constructively enter into the process by which norms and practices that will come to define what is legitimate discretionary behavior in data-mining practices will evolve.

Two parameters frame this issue at present. First is simply the recognition that some degree of further integration of databases is nearly inevitable. Technology is making it easier to cross-link data (think of Google desktop search as a free, publicly available hint of what is possible not to speak of what is going to be possible, particularly in high end applications), integration is extremely valuable to many private sector actors, and although government may act in some instances to slow down what the private sector can do in this space, technology will move faster and possibly much faster than regulation. And, it seems obvious that better detection of patterns of criminal behavior can pay off in more successful law enforcement. It is no wonder that the U.S. intelligence community is said to be in the hunt for a more sophisticated way to extract leads from large quantities of data. (“Taking Spying to Higher Level, Agencies Look for More Ways to Mine Data,” John Markoff, The New York Times, February 25, 2006.)

Second is that the somewhat artificial distinction between public-sector databases and private-sector databases will continue to be challenged. While Americans generally worry a great deal more about government intrusion on privacy than corporate intrusion on privacy, the TIA notion of compiled databases that include lots of commercial data is almost necessarily a part of our future, even though the specific form that it took in TIA may not be. It is almost certainly not a sustainable situation in the coming decade, where any moderately savvy ten year old can collect from the web a fairly intricate profile of her neighbor but the FBI cannot.

Data mining presents a series of hard problems for the creation of boundary rules, some of which are already visible, and some of these problems are very demanding on technology. For example, a functional database that is essentially a distributed information system – that is, where data is entering from many different kinds of sources – will by necessity have within it data carrying different privacy restrictions and different levels of quality assurance. (This is true regardless of whether the data sits in a single database that is held by the government, or whether the data sits in distributed databases all over the place – for example, including Wal-Mart and Safeway -- and is pointed to by a central directory.) The decision about how to ‘label’ these pieces of data and how the data should carry that label, or to what purposes derivative data can be put (i.e. if you combine two pieces of data with different qualities and different privacy restrictions, what quality and privacy parameters does the derivative piece of data carry?) is extraordinarily complex. The technological problem of updating across the system – by what algorithms – is similarly complex.

In concrete terms, imagine a situation where local police engaging in a normal traffic stop run a vehicle identification number through a link to a homeland security system and determine that it is not in fact registered to the ‘person of interest’ that DHS thinks it is. Does the local police department have the right or the responsibility to ‘correct’ the database? How far back into the trajectory of that data to DHS does the correction reach? (Should DHS now be required to investigate the full chain of data, from DMV employees who touched the registration to the auto dealer from whom the car was purchased?) What matters in these kinds of stories is the technical issue of ‘permissions’ – who is authorized (required?) to do what (read, write, annotate, etc.) to what data under what circumstances, and not the chimera of on whose hard drive the bits that make up a data record happen to sit. There is no simple rules-based solution that stands any chance of keeping up with technology in this space. Even at present it is common to hear from practitioners that privacy law and practice are so complicated that no one really understands what is possible and what the boundaries are – which tends to make people either overly conservative, or haphazard and careless (or both).

And this problem is almost certainly going to get worse in the foreseeable future. Part of this of course comes from the enabling power of new technologies. But the more fundamental pressure comes from the shift in mindset from a defensive posture to a pre-emptive posture and the related move to find patterns in data that indicate the possibility of terrorist plots and plans as early as possible. Predictably, this will manifest in several different ways. There will be constant incentives to collect and link more data (for example, the reasoning ‘if there is no pattern, perhaps it is because we are missing the critical piece of data that ties the dots together’). There will be incentives to engage in increasingly aggressive searches through databases, looking for the ‘unknown unknowns’ (‘if there is no pattern, perhaps it is because we are not asking hard enough questions to the data’). And there will be incentives to blur the distinction between searching for additional information about the activities of a person who is already a suspect, and a more traditional notion of data mining where the search is aimed at patterns of behavior that might then be connected to people who are not yet seen as suspect. The latter course obviously runs up against the legal problem of random search. But if the system does not permit some data mining on patterns, then it creates enormous pressure instead to identify individuals as engaging in suspected terrorist activity precisely so as to open up the database for additional searches. And these are just some of the first order risks that we can identify now.

There are no comprehensive solutions. Anonymization tools, data minimization, audit trails, sophisticated authorization systems, and ‘sensitivity training’ programs that raise the level of

awareness among government officials who will have access to data will all be part of the evolving solution. None is by itself sufficient to protect privacy over time. Recognizing this, and recognizing that the capabilities will likely be expanding at a rapid rate over the next years, there is a strong and compelling case for sustained public discourse around the boundaries of discretion for data mining practices.

The core of this case lies in the efficiency of oversight, not just a normative view of public engagement. Many of the privacy concerns that can be raised today are in fact 'theoretical' – put differently, it's possible for a creative civil libertarian to imagine how protective systems could be broken by either a sloppy or a determined government official with significant access, even though there may be no evidence that a breach has ever occurred. That obviously is not a reason to take these concerns less seriously. It is instead a major argument against maintaining secrecy around data mining practices. Secrecy breaks the essential feedback loop in the learning process. If practices are secret, how will we ever know if theoretical abuses become real abuses? Or, equally important, if they do not – and thus if we are protecting ourselves against the wrong threats to privacy, possibly in cases where the government has a legitimate interest in aggressively searching for data patterns.

The IRS does not, and should not, publish to the public the details of its 'discriminant function' – the decision algorithm by which it chooses which tax returns to audit. Elements of the function are, of course, widely known by accountants. The fact that there is such a function is widely known by the public. What is not as widely known are the limits of discretion permitted to individual IRS agents. Much more of this information could and should be disclosed to the public. The same argument applies to homeland security. Secrecy almost guarantees a widely swinging pendulum. The IRS went through a period of over-aggressive behavior, which was reined in after a series of high profile public exposes of abuse. By almost all accounts the pendulum has now swung too far in the other direction, leaving IRS enforcement emasculated.

The point of public accountability is to decrease the amplitude of these cycles, which are themselves a function of human nature. This is another case where it is possible to construct a more ambitious agenda than simply responding to revealed abuses – a strategy that may protect the public from some intrusions at the cost of increasing the amplitude of the cycles. There will be significant value in public education and engagement in the process. The next few years will likely see a rather ambitious set of experiments – TIA and the proposal to set up a 'futures market' for trading in expectations of terrorist events were just two to have burst on the public scene.

We believe it is important that defenders of constitutional liberties have a seat at the table in the design phase of as many of these experiments as possible. Groups like ISAT have raised the possibility of building sophisticated 'privacy simulators' – essentially, computer simulations where players could mock up a change in rules or practices and observe second and third order effects on privacy. Concerns about infringement of liberty should lead to support of this research agenda in order to engage as closely as possible in the design and development of these simulations. Indeed, the congressional decision in 2003 to end financial support for the TIA is said also to have ended funding for a research project that would have attempted to reconcile data mining with privacy protection. One of the authors of this paper was engaged for a short time in an attempt to develop just such a technology, which would have aggregated data to permit the identification of patterns and to provide highly-targeted information of interest to specific individuals while preserving the anonymity of each individual by, for example, masking certain information that would have made personal identification possible. In our judgment

research into such tools is important – precisely because of the possibility that privacy-enhancing technologies can be imbedded within successful law-enforcement efforts.

Part VI: A Madisonian Agenda

We have attempted in this paper to set forth a Madisonian approach to the preservation of security and constitutional liberties, to explain why its core rationale – reliance on (closely watched) human judgment - is an indispensable element in the fight against terrorism, and to apply the Madisonian approach to policy questions of current relevance.

The remaining question is, of course, what to do about it? What set of actions would best advance the cause of building support for a Madisonian approach? What would be, in other words, the components of a Madisonian agenda?

That is a subject worthy of additional input and extended discussion. But we believe that an action agenda would include the following as critical elements:

Public

A Madisonian agenda might begin with a 'Madisonian Manifesto' – a statement of the principles for which public support, and on-going public participation, must be garnered. Those principles, consistent with the reasoning of this paper, would form a template by which to encourage public participation, and assist the public in reviewing governmental actions.

- **Public Involvement – at Every Level and at All Times – Must be Cultivated.** And this does not just mean that we should make well known the views of those who currently favor the protection of constitutional liberties (although we should). It is our goal to build a governing majority of citizens who understand that our Constitution is a source of strength in the battle against terrorism and that the battle must be won.
- **The Goals of the Madisonian Approach Must Become Widely Known.** A public education/involvement effort must emphasize the principles that underlie the twin goals of security and civil liberty. It must make plain to citizens their own responsibilities in securing a system of governance faithful to the Constitution. The core message here is that no body, no technology, and no set of rules is going to take care of this problem for us – we have to do it ourselves. Most importantly, it must teach our citizens that the securing of liberty is not a restriction on democracy but rather an essential attribute of its strength.
- **The Term is Long, Not Short.** When faced with immediate threats, immediate responses are necessary. But the principal threat – that Americans will fail to understand and undertake their own responsibilities to preserve the Madisonian system – is not short-term. Efforts at public involvement must be on-going and untethered to legislative battles, election cycles or specific controversies. To paraphrase a Chief Justice, it is a Constitution that we are maintaining.

Players:

For a Madisonian Approach to be successful, the various branches and levels of government would be subjected to a test of both structure and function: how well do we empower discretion and maximize accountability?

- **The Executive Branch:** In a system that prizes the exercise of discretion, the most important organizational principle is that the exercise of discretion be visible. That is why we favored the creation of a National Intelligence Director, with express authority to direct intelligence authorities, both domestic and foreign, rather than leaving the work of coordinating and combining domestic and foreign intelligence to some multi-headed inter-agency committee or to some shadowy subalterns of the National Security Council. More broadly, we favor express structures of delegated authorities in order to ensure that missions are given to persons who are held responsible for their execution. And that includes offices charged with ensuring that constitutional liberties are neither ignored nor violated, including privacy officers, Inspector Generals, Cabinet-rank officials and, of course, new entities like the Privacy and Civil Liberties Board.
- **The Congress:** Anyone who has pondered the possibility of reform of the Executive Branch knows that a great obstacle to change lies in the organization of the Congress's Authorization and Appropriations Committees, not in the structure of the Executive Branch itself. The 9-11 Commission hit the mark on this point, although this aspect of its recommendations has gotten much less public attention. The public needs to be brought in on this debate and educated as to why Congress must lead. The general shape of a successfully reformed system is relatively clear: Congress would need to organize the funding process with much greater efficiency, it would need to take responsibility for the actions of the Executive Branch that (sometimes in classified committee sessions) it approves; it would need to understand and act on the principle that it can deeply discourage the exercise of discretion by indulging in ex post facto games of "gotcha"; and, most importantly, it would need to work, as the peoples' eyes and ears, towards transparency. Congress will not do any of this until and unless its constituents demand it.
- **The Judiciary:** In addition to the critical role of the Judiciary in enforcing constitutional guarantees, judges must consider, with exquisite care, the manner in which their powers are exercised and the second and third order implications for discretionary authority and public oversight. When operating in camera, judges have an obligation to ponder the advocacy they would hear in open court; when asked to maintain secrecy in an adversarial proceeding, they have an obligation to consider how best to ensure that the public remains informed. Courts must not be subject to public passion, but they do have obligations to the public that transcend the argumentation of the parties before them: To separate themselves from political rancor, to explain the reasoned basis for their actions and always to ensure that their processes are disrobed.

Principled Process:

The Madisonian approach seeks to combine the best of principles and process. A Madisonian Agenda must, therefore, reinforce not just the participants but also the process itself.

- **The Borders:** We have tended to discuss the borders in terms of constitutional limits because constitutional prohibitions are good, and easily grasped, examples of the limits of appropriate governmental action. But we must not fall into the trap of believing that the only appropriate borders are those decreed by the Constitution. Consider, for example, the treatment of foreign prisoners by U.S. military forces operating on foreign battlefields. Even where the Constitution provides little guidance (and entirely apart from international obligations), we must, as a society, use discretion that is consistent with our fundamental values. It would be a sop to legalism to believe that those values

are always concurrent with and enforced by the law. They come from within us, as a people. Put simply, would arguments like those in the Yoo torture memo survive the light of *ex ante* public scrutiny? Our bet is that they would not.

- **The Judgments:** It is unfortunately rare to hear a political partisan say that the judgment of a political adversary was wrong but understandable. The zero-sum political climate that we live in today has taken away much of the room for discretion because every judgment is portrayed as either courage or calumny. The impact on government, especially on civil servants, is deeply corrosive. In a world in which nothing matters but political partisanship, governmental officials will have one of two incentives: To stay out of the line of fire or to trim the shape of their views to comport with prevailing orthodoxy. Both are bad for America and particularly bad for the constitutional liberties /national security debate. We need a constituency for the exercise of judgment. We must, in the words of a former president, “Trust, but Verify.” We must entrust our officials with responsibility. We must verify that they exercise that responsibility well. In the long term, the people get the political climate they demand, not the political climate they deserve. Empowering the demand function is the single most important thing we can do to change the climate.
- **The Procedural Protections:** In our discussion of a National Intelligence Director, we considered the importance of a civil liberties board; in our discussion of the “Super Bowl” scenario, we suggested a means of ensuring the widest transmission of information about terrorist threats; in our discussion of data mining, we emphasized the importance of the “design” function. Each of these exemplifies the importance of making the system work. Within the borders, and as a means of encouraging the exercise of discretion, we need to create processes that will encourage learning and accelerate the rate of error-correction. As we have emphasized, not every circumstance can be foreseen by rules, nor every threat overwhelmed by technology. The principles of process themselves are simple: Create vested stakes in promoting the interests that are important (like the civil liberties board); ensure that actions are, to the maximum possible extent, transparent; and, most importantly, encourage learning.

We are optimists. We believe in technology. We believe in the efficacy of rules and of law. But the ultimate source of our optimism lies in our beliefs about politics. We see the Madisonian creed as, at bottom, similarly optimistic. Not utopian – it rests on a hard assessment of the weaknesses of human nature -- but dedicated to the proposition that the people will bring reason and good judgment to the shared exercise of political power. The goal of the approach in this paper is to prompt more discussion about how Madisonian principles can be made to work better, faster, and more efficiently in this central issue about the evolution of the on-going project that is American democracy.