

Defense, Liberty, and the Constitution:

**Exploring the Critical National
Security Issues of Our Time**

Ronald J. Sievert

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DEDICATION

To Guy and Sara
And John, who started it all
To Marcia for everything
And, as always, to my three daughters and grandchildren
With a prayer that they inherit the free,
peaceful and secure world they deserve

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ABOUT THE AUTHOR

Ron Sievert obtained a Bachelor of Arts in History from St. Bonaventure University in 1970 and, after serving four years as a military officer, graduated from the University of Texas School of Law in 1977. He has more than twenty years of actual experience working on law enforcement, intelligence, and national security issues, and has received numerous awards for his efforts. Since 1999 he has taught a popular course on U.S. Law and National Security as a visiting professor at the University of Texas School of Law. Mr. Sievert is a nationally recognized speaker on current topics related to both law enforcement and national defense.

THE FOLLOWING REPRESENTS THE OPINIONS OF THE AUTHOR AND DOES NOT NECESSARILY REFLECT THE POSITION OF ANY U.S. GOVERNMENT DEPARTMENT OR AGENCY.

PREFACE

It is not difficult, in the first decade of the twenty-first century, to perceive the multitude of national security threats that may seriously challenge U.S. policy makers in the years to come. At the moment we are, rightly, preoccupied with terrorism. But China still covets Taiwan, North Korean leadership is both opportunistic and unstable, and poverty, corruption, and dictators continue to dominate the third world. Over all looms the threat of nuclear proliferation as well as chemical and biological weapons, unfortunately advanced, in many instances, by western technology.

It is perhaps only human nature to focus on the present, but the inability of the nation as a whole to anticipate the likely conflicts and obvious issues of the immediate future is always somewhat surprising. The terrorists who bombed the World Trade Center in 1993 were not simply trying to blow a hole in the parking garage, and Sheik Omar Abduhl Rahman and his followers certainly had mass casualties in mind when they planned to blow up New York City tunnels and bridges that same year. Most of us, however, let their failure obscure their determined and devastating intent. In late 2000 the National Commission on Terrorism issued a report concluding that “Today’s terrorists seek to inflict mass casualties and they are attempting to do so both overseas and on American soil.” This warning, however, was largely ignored by the media, politicians and the public. The follow-up attacks on September 11, 2001 were, of course, dramatically successful. When, in 2004, the 9/11 Commission castigated the government (although with excessive and detailed 20/20 hindsight), one could only recall the 2000 Commission’s inclusion of the following haunting quote from Roberta Wohlstellar’s book on Pearl Harbor:

Surprise, when it happens to government, is likely to be a complicated, diffuse, bureaucratic thing. . . . It includes the contingencies that occur to no one, but also those that everyone assumes somebody else is taking care of. It includes straightforward procrastination, but also decisions protracted by internal disagreement. It includes, in addition, the inability of individual human beings to rise to the occasion until they are sure it *is* the occasion—which is usually too late.¹

Everyone now understands that we will be confronted with potentially large scale Islamic terrorism for at least a decade or more. This is because the heart of the problem is not simply poverty in the Arab world or any lack

of concentrated effort to locate, kill or capture individual terrorists. It is the widespread objection to Western (and Israeli) presence in the Middle East combined with the militant and intolerant belief by many that the entire region (if not the globe) must be completely dominated by fundamentalists. It will take years to replace this philosophy with one of progressive moderation. Yet at the same time, we will also have to contend with China, North Korea, Iran and any other nation or group that decides that now it can take advantage of the West.

Each chapter in this book was written with an intent to identify in advance and thoroughly discuss many of the important legal issues that are likely to emerge as a result of these national security threats. They constitute the author's attempt to "rise to the occasion" and encourage solutions before it is too late to proceed with deliberation and logic. Some of the passages (such as those relating to enemy combatants, profiling and forced interrogation) were written long before contemporary events temporarily brought them to the public's attention. Unfortunately, these issues quickly receded from public consciousness without final resolution as soon as other events grabbed the headlines. Additional sections are devoted to questions that will almost certainly take precedence in the future, but have yet to be really faced by the government, the courts or the people.

These are not easy questions. What are the permissible bounds of interrogation? Should suspected terrorists be provided with the full range of constitutional rights? What protections do U.S. citizens and aliens have against searches and wiretaps by American agents overseas? How much access should the government have to Internet communication or student records? What controls should we place upon U.S. industry to insure that our innovations and technology are not used by our enemies against us? How do we provide flexibility to the president while preserving the right of the people, through their elected representatives, to decide upon war?

In analyzing each problem, one often reflects on the two opposing examples of judicial wisdom quoted in their entirety in the first chapter:

In times of distress, the shield of military necessity and national security must not . . . protect governmental actions from close scrutiny and accountability. . . . (In times of danger, government must) protect all citizens from the petty fears and prejudices that are so easily aroused.²

On the other hand,

While the Constitution protects against invasions of individual rights, it is not a suicide pact.³

This book attempts to recognize throughout the divergent views that are reflected by these conflicting philosophical approaches. There is no

political agenda, and, with one major exception, the reader should generally find the discussion to be fairly dispassionate as befits an objective analysis of U.S. law and policy. There is a definite change of style in the chapter on the PATRIOT Act which strongly rebuts some of the critics of the act who appear to have not taken the time to understand either the statute or its relationship with prior law. But overall the writing is directed toward one goal. That is, to find the proper balance that will make the nation more secure while preserving to the greatest extent the blessings of liberty enshrined in the Constitution.

One would hope that, after three million years of evolution, humans would not continue to plan violent attacks against their own species. By the dawn of the next millennium, scientists may have found a way to safely eliminate this disturbing and potentially catastrophic genetic trait. In the meantime, we must live in the present, and determine how to manage today's reality and the immediate future with intelligence and foresight. Only then will we be able to achieve the highest possible degree of peace and freedom.

Ron Sievert
Austin, TX, August 2004

Notes

1. National Commission on Terrorism, H.R. Doc 106-250 at 4 (2000).
2. *Korematsu v. U.S.*, 584 F. Supp 1406, 1420 (N.D. Cal. 1984).
3. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) at 159.