Book Review

National security and civil liberty: A chronological perspective

Michael Geary

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The terrorist attack at a holiday office party in San Bernardino on 2 December 2015 was the most lethal in the nation since 9/11. Like 9/11, it has prompted calls for a more robust response to terrorism, including registries, travel bans and intensified online surveillance. Such proposals raise fundamental questions about the relationship between citizens and the state: Are there circumstances that justify restricting civil liberties to improve national security? What is the right overall balance between civil liberty and national security?

In ‘National Security and Civil Liberty’, Michael Geary reminds us that the tension in America between national security and civil liberty is nothing new and argues for the value of a historical perspective in understanding how to best resolve it. In clear and accessible prose, each chapter examines national security and civil liberty through the lens of various incidents that have affected the balance between the two. The book is divided into nine periods of American history, starting with the American Revolution (Chapter 2), the Civil War and Reconstruction (Chapter 3), World Wars I (Chapter 4) and II (Chapter 5), the Cold War years (Chapter 6), 1960s and early 1970s (Chapter 7), 1970s through the 1990s (Chapter 8) and from 9/11 to the present (Chapter 9).

Geary, an associate professor of criminal justice, lawyer and former New York City police officer and first-responder on 9/11, is at his best when drawing attention to historical footnotes. Many will know that one of the main causes of the American Revolution was colonists’ frustration with taxation without fair representation. Fewer will be familiar with colonists’ rage over ‘writs of assistance’, which were general search warrants issued to British tax officers on the merest suspicion – enabling them to search business and homes for untaxed goods. Many will know something about Aaron Burr and his duel with Alexander Hamilton. Fewer will know about his attempt to establish his own country on the western frontier, and that to stop him Thomas Jefferson hauled him to Washington DC to stand trial for treason – trammeling his 6th amendment rights. Many will know that Abraham Lincoln suspended *habeas corpus* during the civil war. Fewer will be familiar with the fact that so, too, did Jefferson Davis, President of the Confederate States, in numerous locations in the South.

Geary is also skilled at drawing out historical parallels. President Wilson imposed severe restrictions on Germans living in America during World War I, requiring them to turn in their guns, register with states and limit their movement; those who violated the restrictions were interned.

After Japan attacked Pearl Harbor, President Roosevelt imposed even harsher restrictions on Japanese Americans, which led to the internment of more than 100 000 citizens. When German spies were captured on our shores during World War II, the government prosecuted them not under civilian law but military tribunals devoid of meaningful due process protections. Later, President Bush prosecuted suspected terrorists, Americans included, in military tribunals with similarly watered-down due process protections. During the 1960s, 1970s and 1980s, various federal agencies targeted American citizens for surveillance – nominally to protect us from domestic enemies, especially those with communist sympathies. After 9/11, federal agencies were again employed to collect intelligence about Americans; this time, Muslim attendees of American mosques.

But Geary is not merely a chronicler of America's woes, satisfied that we have had the best of all possible governments. Instead, he often enters his own verdict on whether a government restriction of civil liberty has gone too far. His judgments are based on several straightforward criteria. First, he contends that any perceived civil liberty violation must be viewed in its full historical context. In this way, he allows for the possibility that American values have evolved over time, so that a civil liberty violation that is obvious today, might have been less clear in the past. He points out, for instance, that the perceived fairness of 'military tribunals' may well depend on which side of the 1960s due process revolution – which engendered the exclusionary rule, right to counsel in criminal trials and Miranda rights – a person is standing. In this regard, President Roosevelt's actions to protect the nation during World War II (pre-revolution) fare better than President Bush's effort to prosecute the War on Terrorism (post-revolution). Second, he judges government limits on civil liberty based on whether they are 'the most common sense and minimal restrictions possible, given the magnitude of the threat being encountered' (p. 13).

To Geary's way of thinking, then, there is no doubt that there *are* circumstances that justify limiting civil liberties in the interest of security; the question is a matter of finding the right equilibrium. Thus, Geary appears to agree with Justice Holmes's argument against civil liberty absolutism: that the character of every act depends on the circumstances; and with respect to speech, even the strongest civil liberty protections would not absolve a person who falsely yells 'fire' in a theater. Such liminal cases are instructive. And what we learn here is that the proposition that liberty interests should be protected without exception is not sound.

That said, Geary's analysis of *how* to balance liberty and security can benefit from additional reflection. Often overlooked in the liberty–security debate is the fact that not all exercises of a liberty interest are equal. To return to Justice Holmes's example, preventing a person from yelling 'fire' does not limit 1st amendment rights to the same degree as stopping political speech. Is there a rational way to classify and compare the magnitude of various civil liberty restrictions? This question merits additional consideration in the book. Also, Geary's attempts to assess whether civil liberty restrictions actually improved security require further analysis. For example, Geary points out that law enforcement failed to prevent the 2009 Fort Hood and 2013 Boston Marathon attacks, notwithstanding their use of the latest intelligence-gathering technologies. These attacks, he claims, should prompt us to question whether it is 'worth repeatedly giving up liberty when the desired result cannot be achieved?' (p. 11). But is the desired result to stop every terrorist attack? Or is the aim to prevent harm insofar as possible? And how can we be certain that these technologies were not responsible for preventing other attacks? Alternatively, suppose that these two attacks never occurred. Would this justify the opposite conclusion that these technologies were

effective? These are claims about causal relationships that require more than historical and legal arguments for support; they require careful empirical inquiry.

Despite these minor weaknesses, Geary's book is a well-researched and thoughtful contribution to a topic of perennial importance. And it could be used effectively as a primary text to add a historical and/or legal dimension to an undergraduate or graduate course concerning Security Studies, Terrorism Studies, National Security Law, Laws of War or Military History, or as secondary reading, and would be of interest to any scholar in the area of the same. At a minimum, it helps to inoculate against historical amnesia's main symptom – namely, that forgetting history condemns us to repeat it. And for those who cannot imagine us repeating some of our worst civil liberty abuses, it would be useful to pay heed to one of the book's most chilling reminders: The Supreme Court's decision in *Korematsu* upholding the constitutionality of Japanese internment camps has never been overturned, after all.

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