



# Conference Brief

Strategic Studies Institute



*U.S. Army War College,*

*University of Pennsylvania Law School, and*

*Institute for Strategic Threat Analysis and Response*



## Homeland Security and Civil Liberties

Compiled by  
Leonard Wong  
and  
Douglas C. Lovelace, Jr.

### Key Points:

- The Global War on Terrorism (GWOT) is a challenge unprecedented in American history. It dictates a reexamination of the balance between national security and civil liberties to accomplish the dual goals of preventing future attacks and maintaining our commitment to the U.S. Constitution.
- Almost three years into the GWOT, we need to review domestic and international laws and policies to consider their continued viability and long-term implications. This includes the USA-PATRIOT Act and its interaction with the Foreign Intelligence Surveillance Act, U.S. criminal law, and international laws such as the Hague and Geneva Conventions.
- The tension between civil liberties and homeland security is extraordinarily complex with immigration policy, criminal law, privacy, First Amendment, and separation of powers dimensions, among others.
- Americans not only cherish their civil liberties but believe in them as guiding principles for all human interaction. They do not surrender them lightly and any compromises in them will be tolerated only to the extent absolutely necessary and for a finite period of time.

The University of Pennsylvania Law School, the Institute for Strategic Threat Analysis and Response, and the Strategic Studies Institute of the U.S. Army War College conducted a conference dealing with homeland security and civil liberties on June 18, 2004, in Philadelphia, Pennsylvania. The event brought together experts from diverse organizations such as the Federal Bureau of Investigation, Department of Homeland Security, U.S. armed forces, Philadelphia Arab American Development

Corporation and several law schools. The conference examined national security issues related to civil liberties, immigration policy, privacy issues, first amendment rights, and the balance of executive and judicial power in relation to civil liberties and homeland security. Over 175 people interested in the intersection of national security, civil liberties, and associated legal issues participated in the conference. Highlights of their discussions follow.

### **Threats to Security and Civil Liberties**

Widespread agreement existed among the conference speakers that there are determined people in the world, intent on bringing ruin to the United States. At the same time, speakers widely agreed that in the wake of September 11<sup>th</sup>, many civil liberties had been curtailed or suspended. Despite agreement on those issues, differences emerged among the panelists concerning how much risk to national security or civil liberties should be taken. The need to achieve an appropriate balance of these seemingly competing goals was evident. Lawyers from the Department of Homeland Security, Federal Bureau of Investigation, and the U.S. Army called for aggressive prosecution of the GWOT, while lawyers advocating civil liberties argue strongly for the safeguarding of individual rights, lest we cede victory to terrorists through the compromise of principles that define our view of a liberal democracy. Because the GWOT will likely last longer than any war in recent history, some perceive the duration of the potential compromise or suspension of civil liberties to be open-ended and, for that reason, very worrisome. Prophetically, some conference participants suggested that judicial review could and should shed light on the legitimacy of current abridgements of civil liberties, including the rights of detained persons, and help inform domestic and global public opinion. How much judicial review is appropriate was the subject of considerable debate. We need to evaluate many of the actions taken in the aftermath of September 11<sup>th</sup> to determine whether processes currently in use should be viewed as temporary or be

formalized and institutionalized for the future.

### **Immigration Policy and Criminal Procedure**

Discussions concerning immigration policy and criminal procedure brought out a key question to be debated: Should the primary role of law, particularly criminal law, be to prosecute terrorists when captured or to prevent terrorists from executing their next attack? While the body of U.S. criminal law and the potential for prosecution logically serves, to some extent, as a deterrent to criminal behavior including terrorism, criminal law does not spring into action until a crime has been committed. It is reactive by design. Therefore, in the view of some conference participants, the use of criminal law actively to prevent bad acts poses a great threat to the fabric of our democracy. Furthermore, they believe that global anti-Americanism will stem from the perception, or perhaps reality, that foreign citizens' liberties will be traded for the security of U.S. citizens through practices such as profiling or secret arrests. Others believe that the reactive nature of criminal law breeds complacency, which is the greatest threat to U.S. security, and we should be asking ourselves if we are doing enough to prevent future terrorist attacks.

### **Privacy**

Much of the discussion concerning privacy issues and the GWOT centered on the Foreign Intelligence Surveillance Act (FISA) of 1978, and later reinforced with the USA-PATRIOT Act. To some, the USA-PATRIOT Act is exemplified by librarians having to surrender data on library users and a shift from foreign intelligence to domestic law enforcement. To others, the USA-PATRIOT Act is the first step in updating FISA, which was created in an environment where communication via cellphones, chat rooms, and email was unknown. Some conference participants argued that reactions to the USA-PATRIOT Act should be directed at Congress, which created the legislation, not at the Administration. Many conference participants agreed that it is time to review the provisions of

the USA-PATRIOT Act to reassess the extent to which intelligence information can and should be collected and used for criminal prosecution.

### **First Amendment Rights**

In the GWOT, certain materials or activities (e.g., a book on explosives) may be potential evidence as an instrument of criminal activity. Nonetheless, the First Amendment of the U.S. Constitution protects ownership and use of many forms of printed material and speech. Furthermore, the use of evidence gathered in violation of an individual's First Amendment rights to possess it may be prohibited. Excluding this evidence based on the First Amendment may incur costs; e.g., not preventing an incident that could have been stopped or having an anti-terrorism policy that could be very effective but is only marginally so. One view of the First Amendment issue is that once we acknowledge that there is indeed a cost to society in either preserving or abridging First Amendment rights while fighting the GWOT, then society must decide how to allocate that cost, either through legislation or through the courts.

On the other hand, another perspective maintains that the government has a voracious appetite for information. As the government develops digital dossiers on its citizens by compiling data from a wide range of sources, how to deal with such information emerges as a critical issue. One possible solution is to parallel the intelligence community's "need to know" restrictions and only allow viewing of certain elements by certain people. Another approach would be to develop audit trails and oversight for any agencies "mining" and analyzing the data. In any case, the focus of this perspective is minimizing the dilution of First Amendment rights resulting from increased governmental collection of information due to security concerns since September 11<sup>th</sup>.

### **Separation of Powers**

Panelists pointed out that while the Congress has the Constitutional power to take the nation to

war, the President has the power and responsibility to protect the nation from attack through operation of the "Commander-in-Chief clause." Many question whether this balance of power between the Legislative and Executive branches remains true to the intent of the Founding Fathers, given recent events. One perspective maintains that the current administration has over-emphasized the Commander-in-Chief clause. This view maintains that too much legal work is being conducted to find loopholes through which the President can usurp Congressional powers; e.g., opting in or out of international law, including treaties ratified by Congress. A differing perspective asserts that the nation is currently at war and the Commander-in-Chief should be free to exercise his Constitutional powers to their fullest extent to protect the nation. He is entitled to request legal advice on current laws and treaties to enable him to do so. Opponents to this far reaching interpretation of the "Commander-In Chief Clause" fear that the clause could swallow up the warmaking powers allocated by the Constitution to the legislative branch..

### **Conclusion**

The Global War on Terror is still in its early stages and has not been sufficiently defined to provide a basis for resolving the many critical issues; continued public and private debate is necessary. Nonetheless, one point emerged clearly from this conference: Americans not only cherish their civil liberties but believe in them as guiding principles for all human interaction. They do not surrender them lightly and any compromises in them will be tolerated only to the extent absolutely necessary and for a finite period of time.

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