

Foreword

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On September 11, 2001, the nation experienced an unprecedented act of terrorism and the threat of additional attacks has not abated since. In the words of the National Commission on Terrorist Attacks upon the United States (“the 9/11 Commission”), combating terrorism remains a “generational challenge.” The 9/11 Commission pointed to the need for “national debate” both about “*what to do*—the shape and objectives of a strategy” and also about “*how to do it*—organizing [our] government in a different way.” As we pass the seventh year after 9/11, the urgent need for this dialogue continues. Scholars and policymakers continue to grapple with how the domestic “war on terror” relates to other elements of national security and law enforcement policy. The United States needs a cogent and coherent domestic counterterrorism strategy that is consistent with American values and legal traditions.

National security policies implicate profound questions of national values, of national character—of the kind of nation *we want to be*. Revelations of prisoner abuse at Abu Ghraib, warrantless domestic surveillance by the National Security Agency, and secret CIA prisons have shocked and distressed many Americans. We are reminded of the advice of the 9/11 Commission to “offer an example of moral leadership in the world” and to resolve “to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors.”

This issue of *Advance: The Journal of the ACS Issue Groups*, co-published with the Brennan Center for Justice, stems from a conference held on September 7, 2007, at the New York University School of Law sponsored by the Brennan Center and the American Constitution Society. Governor Thomas Kean and Senator Gary Hart, two of the nation’s most esteemed national security leaders, co-chaired the conference. As former Governor of New Jersey, Governor Kean co-chaired the 9/11 Commission. Senator Hart co-chaired the bipartisan U.S. Commission on National Security/21st Century, which presciently identified the terrorist threat prior to 9/11. These co-chairs brought an unparalleled combination of public service, experience and authority to the conference. This conference brought together leading scholars and practitioners in the field of national security law and policy, and asked them to address some simple questions: How can we safeguard our nation while still preserving the traditional American values of democracy and the rule of law? Can we achieve an effective national security policy that protects our civil rights and liberties? What are the challenges of intelligence gathering and counterterrorism policy? Their answers are reflected in the papers collected here, which provide a range of ideas for the next Administration and Congress to consider in evaluating our current national security policies and charting a course for the future.

In *National Intelligence and the Rule of Law*, Deborah N. Pearlstein examines the critical role that law plays in national security policy, particularly in the collection of intelligence. Professor Pearlstein contends that “law is not an obstacle that powerful

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governments must overcome to meet their objectives—it is a vital tool that power must respect in order to wield successfully. From law’s broad structural role in shaping decision-making and institutional culture to its immediate and instrumental function in constraining behavior and building international partnerships, law helps U.S. policy-makers avoid having to reinvent the wheel every time a terrorist attack occurs. The law exists, and should be designed, to serve America’s long-term interests.”

Judge James E. Baker asks, “[W]here should we be in twenty years, and how do we get there today?” in *The Twenty Year Test: Principles for an Enduring Counterterrorism Legal Architecture*. Judge Baker considers the principles that might inform a legal architecture designed to address the enduring threat of terrorism, including constitutionally inclusive processes for appraising and validating executive action. As he explains, “Practice advises that where there is broad authority, there is increased risk of overreaching and thus a corresponding risk to our constitutional values and process of government. Independent mechanisms of appraisal, by detached executive actors, or through review by different branches of government are the most effective way to appraise options and then evaluate their implementation.”

In *A Global Response to Terrorism*, Professor Ian Shapiro argues that “in order to be effective, U.S. counterterrorism policy must be part of a coordinated, global response, involving building and sustaining international institutions and regional alliances to contain terrorist threats.” Professor Shapiro contends that the Cold War policy of containment “continues to make sense as a basis for U.S. national security policy in the post-Cold War era. Islamic fundamentalism presents no more of a competitive threat to democratic capitalism than did communism.”

In *Restoration, Education, and Coordination: Three Principles to Guide U.S. Counterterrorism Efforts Over the Next Five Years*, Dean Louise Richardson recommends that, in order to respond more effectively to terrorism, the United States must “make a concerted effort to restore our prestige in the world, demonstrate our commitment to multilateralism, and reframe the war against terrorism as a transnational campaign against isolated extremists.” Dean Richardson emphasizes the importance of educating both the U.S. public about the risks of terrorism and the world at large about our policies. Looking to the experience of other countries that have confronted significant terrorist threats, she concludes that, “we should coordinate the actions of our intelligence and security forces, ensuring that their short-term successes are advancing our long-term goals.”

In *The New Domestic Surveillance Regime: Ineffective Counterterrorism That Threatens Civil Liberties and Constitutional Separation of Powers*, Kate Martin explores the difficult issues raised by the government’s growing domestic intelligence capabilities. Martin posits that “there has been no demonstration that such surveillance is likely to yield crucial information and no examination of whether the intelligence agencies are competent or knowledgeable enough to recognize what is crucial and to use such data to stop terrorists, assuming the data can even be found.” She asks whether “the powers being amassed by the government [are] so great that oversight will not be sufficient, that traditional mechanisms should not be counted upon to protect the constitutional system in a time of crisis?”

In *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, Professor Stephen J. Schulhofer argues that the need for a special system of tribunals to handle terrorism cases, “has been wildly exaggerated. The federal courts are already well-equipped to protect classified information and to handle all the other supposed com-

plexities of terrorism trials.” Professor Schulhofer identifies areas where Congress should act to clarify existing legislation, particularly the Classified Information Procedures Act, to address the special difficulties presented in terrorism prosecutions while preserving the role of the federal courts and the adversarial system.

Suzanne E. Spaulding discusses the importance of congressional oversight in *Building Checks and Balances for National Security Policy: The Role of Congress*. She offers specific proposals to increase the effectiveness of intelligence oversight. In Spaulding’s view, “[w]ithout effective oversight, Congress is legislating in the dark. Unless Congress knows what happened in the area of surveillance after 9/11—what pressure those attacks and their aftermath put on the system and how the system responded—it cannot effectively adjust the legal framework both to provide the needed authority to the President and national security professionals to meet the challenges ahead and to ensure the necessary safeguards against abuse in the event of a future crisis.”

Finally, Hady Amr and Peter W. Singer contend in *Engaging the Muslim World: How to Win the War of Ideas* that winning the “War on Terror” requires us to rebuild a foundation of trust between the United States and the Muslim world; “in other words, winning the ‘war of ideas.’” Amr and Singer assert that, “More than merely a lost popularity contest, the deepening divide between the United States and Muslim nations and communities around the world poses a huge barrier to our success on a breadth of vital issues, from running down terrorist groups to expanding economic development and political freedom. Progress on these issues will steer individuals toward or against militant radicalism.” They advocate a new approach to our public diplomacy and strategic communications and offer concrete suggestions for the next administration to improve U.S. relations with Muslim communities and to create a compelling alternative to radical extremism.

Our goal for the September 2007 conference and for this publication is to inspire lawyers, policymakers, advocates and students to look forward and consider how we can better build both domestic security and freedom in the years ahead. These papers reflect not only a variety of opinions on this subject, but also the many different aspects of the challenges we confront. Reading the papers together, it is clear that all three branches of government—the courts, Congress, and the executive branch—have critical roles to play in the conduct of counterterrorism domestically. We invite our readers to examine these important issues and enter into the ongoing public debate that will define who we are as a nation.