

# Introduction

*Harvey Rishikof*

It is with great pleasure that the Standing Committee on Law and National Security (SCOLANS) presents *Patriots Debate*. This series of debates is a sequel to our earlier volume, *Patriot Debates: Experts Debate the USA PATRIOT Act*, published in 2005. The first book in this series was mainly concerned with the USA PATRIOT Act—the Uniting (and) Strengthening America (by) Providing Appropriate Tools Required (to) Intercept (and) Obstruct Terrorism Act of 2001. It was widely acclaimed for promoting serious public discussion about the more controversial sections of the Act.

The idea to reprise the format for some of today’s “hot” issues in national security in the debate structure should be largely credited to Bernie Horowitz, one of our co-editors. Bernie approached SCOLANS with the idea of a new book and we settled on the following 10 issues—Executive Power; The Threat From Within: Homegrown Terrorism; Interrogations; Third-Party Information; National Security Letters; Einstein 3.0; the Communications Assistance Law Enforcement Act of 1994 (CALEA); a Legal Framework for Targeted Killing; Cyberwar; and Detention Policies.

As one can see, the issues fall into three general discrete categories. Part One, the War on Terrorism (or the struggle against violent extremism), has generated a broad assertion of executive power by two administrations over the last 10 years. The case for expansive executive power hinges in part on the definition of the threat. The debate between John Yoo and Louis Fisher focuses on what authority should be accorded to the President in exercising his war powers—the fear of the imperial presidency is contrasted with the concept of executive ne-

## Patriots Debate

cessity and authority in the face of the inherent powers of congressional control of the purse.

The second debate in this section is “The Threat From Within.” Gordon Lederman details the potential insider threat posed by violent Islamic extremism fueled by Internet-based radicalization and cites the recent case of Major Nidal Hasan as one of 32 cases since May 2009 that have increased the FBI’s focus on domestic terrorism. Kate Martin, in her response, questions the scope of the threat and addresses which resources ought to be utilized and trade-offs made, and raises the issue of risks to ethnic or religious minorities.

Part One of *Patriots Debate* ends with an exploration of terrorism interrogations. Norman Abrams argues in favor of an exigent circumstance *New York v. Quarles*-based model for interrogations, weighing the relative “coerciveness” of the interrogation with the potential for catastrophic consequences. In response, Christopher Slobogin contends that current law already grants enough leeway for interrogating suspects; “guile and graft” are sufficient, he says, and such an exception would make for bad policy given the tendency for “mission creep” issues.

Part Two of *Patriots Debate* focuses on data, technology, and privacy. Increasingly in the modern age, surveillance and data processing have become the *sine qua non* for the prevention of terrorism. Concomitantly, new technology has challenged old laws. In this section we explore how government has responded to these challenges in four different but related exchanges. The Third-Party Information debate between Greg Nojeim and Orin Kerr raises critical Fourth Amendment questions in a new age where seas of information held by third parties are left unresolved in *United States v. Jones*. What constitutes a reasonable expectation of privacy as technology expands its power to penetrate physical objects? How do we distinguish between “non-content” and “content” information? When third parties are mere conduits for information, does the individual still retain a right of privacy?

## Introduction

The privacy theme is continued in the controversy over National Security Letters (NSLs) generated by their expansion with the changed standards for issuance of “relevance” by the original PATRIOT Act under Section 505. The debate is conducted on one side by Michael German and Michelle Richardson, with Valerie Caproni and Steven Siegel on the other. Citing Department of Justice IG reports, German and Richardson catalogue the abuses and misuses of the NSLs by the FBI. Caproni and Siegel stress the limited nature of NSLs, the reforms made in the wake of the IG reports, the critical nature of the Attorney General’s Guidelines in national security investigations, the types of information gleaned from third parties, and the new “gag” rules in the wake of recent case law.

Rounding out Part Two of *Patriots Debate*, chapters are devoted to debates examining Einstein 3.0 and the Communications Assistance Law Enforcement Act (CALEA). The active protection of the federal cyber infrastructure forms the heart of the Einstein 3.0 discussion between Paul Rosenzweig and James Dempsey, a debate over who should monitor privately owned and operated networks for cybersecurity risks.

Does the federal government have the capabilities and agility to undertake these functions? If so, would that be appropriate? Is the Defense Industrial Base the harbinger of the future? Finally, in this section, Tony Rutkowski and Susan Landau debate the future of CALEA and explore the issue of determining electronic telecommunications surveillance standards in the evolving world of telecommunications technology and the problem of “going dark.” How the FCC can technically and legally solve legitimate law enforcement requirements without increasing cybersecurity vulnerabilities is part of the riddle in this vibrant discussion.

Part Three of *Patriots Debate* explores the legal frameworks for how America projects force and how we will go forward with the detainment issue. We begin this section with the Targeted Killing debate between Amos Guiora and Monica Hakimi, who examine the criteria and standards informing

## Patriots Debate

the elusive legal concepts of “imminence” and “self-defense,” which constitute the heart of the targeting issue. This exchange is followed by Stewart Baker and General Charles Dunlap, USAF, ret., who debate how to reconcile operations in cyberspace with the laws of armed conflict. The advantages, disadvantages, and consequences of a “no-legal-limits” approach are explored and reviewed. We conclude this section with the problem that has been with us since the first prisoner was captured. Stephen Vladeck and Greg Jacob debate the effects of *Boumediene v. Bush* and *al-Maqaleh v. Gates* on targeted killing, indefinite detention, and whether the courts have struck the right balance for the standard of judicial review of combatants.

This project was supported by many people. In particular, we would like to thank Stewart Baker, editor of the first *Patriot Debates*, for his assistance in pulling this together. We also wish to express appreciation to the authors, some of the best in the field, for their time and commitment to a passionate and civil debate. We would also like to thank the *ABA Journal* for serializing a number of the debates in the magazine. Over the last 50 years, it has been and continues to be the goal of SCOLANS to foster expert-led public discussions on hard issues to improve the understanding of the principles at stake. We hope *Patriots Debate* upholds this tradition. As part of our goal to continue to stimulate debate on these subjects, we have dedicated a section of the committee website—[www.americanbar.org/natsecurity](http://www.americanbar.org/natsecurity)—to give readers the opportunity to participate in the debates by sending comments to [patriotdebates@gmail.com](mailto:patriotdebates@gmail.com). Some of these comments will be displayed on the book’s companion website. We encourage you to send your thoughts and responses to this moderated website so that in the end the best policies will prevail.