

Toward a True Home Front

HOMELAND SECURITY IS a concept with which our nation has struggled and will continue to struggle in the years and decades to come. It is not surprising that we find this struggle difficult. For most of our history, notwithstanding a few tragic exceptions, we have managed to fight our enemies in far-away lands and, happily, to keep them there.

In no other country does the term “home front” carry the somewhat contradictory meaning that it carries in the United States. Particularly in the 20th century, vast oceans and thousands of miles separated fighting American soldiers from the country’s citizenry. The American people supported the troops from afar, as the American industrial behemoth mobilized to supply food, materials, weapons, and whatever else was needed to get the job done. Although this effort involved admirable sacrifice and patriotic spirit, strictly speaking, the home front was not in reality a *front* in the larger struggle.

However, the term “home front” is applied much more accurately today than at any time previously. In our current struggle, those at home are not merely supporting far-off battles. On the contrary, the concept of homeland security is based on the idea that the land within our borders constitutes a real and accessible target for international terrorists. In short, policy-makers believe that our enemies have made our homeland a true *front* in the larger conflict—the global war on terror.

Although the law dealing with homeland security is amorphous and encompasses several different (and seemingly unrelated) areas of law, it is helpful to understand it thusly: a legal regime springing from the homeland’s status as a front in the war on terror. Whether or not one agrees with the wisdom of America’s post-9/11 focus on homeland security, the fact remains that this focus has created an entirely new area of law (or, alternatively, various subsets within areas of law that are already established).

How do we treat suspected terrorists who are caught and held on American soil? How much authority does the government have to wiretap individuals suspected of being terrorists? These questions probably spring to mind when most people think of homeland security law. The answers to such questions, however, directly affect a relatively small number of Americans. What is

surprising to many is the fact that homeland security law is almost incomprehensibly larger in scope, reaching into the very heart of the capitalist economy on which the nation’s prosperity depends.

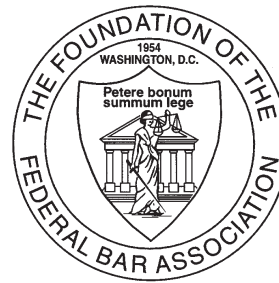
Even though for almost all of us the term “homeland security” conjures images of government endeavors, in truth roughly 85 percent of our nation’s critical infrastructure resides in private hands. What’s more, given the sheer size and scope of our private infrastructure, it would be nothing short of impossible for the government (state or federal) to protect it all. So we are left with a target-rich environment but without the public resources to guard all (or even most) of the targets.

Understanding this, a major thrust of homeland security law and policy is aimed at convincing the private sector to protect itself. Unfortunately, the expenses of security measures in the private sector have traditionally been the first line item to suffer when economic times get tough. This is because businesses do not think strategically when it comes to security concerns; they think of security in terms of personnel and equipment that can be supplemented or removed as necessary. The new homeland security model, conversely, demands that organizations view security as a conceptual piece of their overall business planning.

In pushing this new mode of thinking, the federal government has designated 17 “critical infrastructures,” ranging from the financial sector to nuclear energy to food and water. Of course, each one of these groups is unique, and security measures effectively applied to one might not work for the others. Complicating matters further, some of these industries are not as experienced with federally mandated security regimes and hence are not as receptive to federal regulations.

One area of the private sector that has long been familiar with homeland security-style regulations is the financial sector. The banking industry was long ago required to guard against those who would use banks to launder money. Since the passage of the Bank Secrecy Act (BSA) in the 1970s, banks have monitored customer transactions in order to catch would-be criminals. While the post-9/11 USA PATRIOT Act greatly expanded the BSA’s reach, the foundation was laid years before.

To those who follow developments in homeland security law, the BSA represents the classic “stick” approach to promoting the security of the private sector. As readers will see in this issue, however, the government is getting much more creative in formulating



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“carrot”-type security regimes for other critical infrastructures. One prominent example is the public-private partnership known as the Customs-Trade Partnership Against Terrorism (C-TPAT) initiative. As part of this program, port operators, air freight carriers, ocean transport intermediaries, and the like can get certified by the federal government as C-TPAT “partners.” Certification brings with it several attractive benefits, the most important being a reduction in the number of customs inspections that must be conducted. The steps for certification are not particularly onerous, but certification has three major requirements: (1) a large amount of paperwork and interaction with Customs and Border Protection bureaucracy, (2) expertise in security measures and security assessment and planning, and (3) knowledge of the legal issues associated with federal compliance.

Questions of wiretapping and fading civil liberties dominate the headlines when it comes to homeland security. And the importance of these issues should not be ignored; on the contrary, as Professor James T. O’Reilly argues in this issue, the current obsession with homeland security may ultimately result in a truly comprehensive national privacy regime that will replace our current patched-together framework.

Still, many of the most far-reaching changes brought about by homeland security law are largely invisible to the American public—not because the government is trying to conceal them, but rather because “Government Institutes Public-Private Partnership to Promote Transportation Security” does not make for an attention-grabbing headline. What is lost is a meaningful national debate regarding the extensive costs the private sector must bear when complying with the expanding regulatory regime. Can the American capitalist model continue to stand while shouldering security responsibilities traditionally reserved for government forces? As always, time will tell. But will we be listening? **TFL**

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