

Protecting Civil Liberties and the Rule of Law in the Age of Terrorism

HOW CAN THE WORLD DEAL WITH THE THREATS OF TERRORISM WHILE ADHERING WITH THE RULE OF LAW?

Countries all over the world need to fight terrorism – citizens face mass surveillance, no-fly-lists and limited privacy rights as a consequence. Are these developments in line with the rule of law? Who protects our data collected by governments and how is it used? How do the laws of the U.S., Russia, Poland, Hungary and France approach the new threats of terrorism and other recent developments? Trying to find answers to these questions the Woodrow Wilson Center hosted a conference in Washington, D.C. and invited several experts to discuss civil liberties and the rule of law in the age of terrorism.

The Think Tank event, cosponsored by the Henry M Jackson Foundation, focused on civil liberties and the rule of law in the age of terrorism – a topic which is not only of an abstract, academic interest, but also has great value in current debates and the election campaigns. The event was divided into two panel discussions, one titled "Law, Liberty, and Security in the United States", the other, "International Strategies for Balancing Civil Liberty and Security", which gave a European perspective on the issues. Each panel consisted of three speakers, presenting different aspects of the topic at hand. They were followed by a keynote speech by Rosa Brooks from Georgetown University.

How can the U.S. deal with Guantanamo?

The first panel dealt with "**Law, Liberty and Security in the United States**". The first speaker, **Jennifer Daskal**, an Associate Professor of Law at American University, started by addressing an issue which is relevant for the ongoing presidential campaigns: Guantanamo. She introduced the topic by giving a brief history of Guantana-

mo as a detention base outside US territory and outside the rule of law as well as an institution not subject to the US Constitution or international law. Daskal mentioned important case law in this context, such as *Hamdan v Rumsfeld* and *Boumediene v Bush*. Daskal noticed that Guantanamo remains a black spot on American reputation and that both Obama and McCain supported closing the detention center. It is a well-known fact that Obama was not able to close Guantanamo within a year, as was his initial plan. However, he reduced the numbers of detainees significantly. During its peak time, Guantanamo had 800 detainees, whereas nowadays there are only 61 detainees. Daskal explained that these detainees are subject to periodical reviews, which reveal that only 19 to 31 of them could not be transferred out of Guantanamo.

But what could be Guantanamo's future? It is Trump's plan to populate Guantanamo further, whereas Clinton supports a potential closing of Guantanamo and does not want to bring any more detainees to the camp. At this point, Daskal made clear that she strongly recommends that no more detainees are brought to Guantanamo. Furthermore, Daskal says that she thinks it would be a huge mistake to bring uncharged detainees to U.S. territories as this would further the idea of possible detentions without charging the suspects of a crime.

Daskal then turned to the issue of law enforcement and data access. Here she stressed that it is difficult for U.S. officials to access data located outside the US, as warrants do not have extra-territorial reach. She gave the Microsoft Island case as an example, criticizing the time-consuming process needed to request data and, in this case, the lack of a foreign government with whom to file a request. The speaker stated that increased access would not make US citizens less secure as high standards still would have to be fulfilled in order to get access. She also talked about difficulties of foreign governments to access information, as they also have to request a mutual assistance agreement. This process takes an average of ten months.

The Patriot Act – outbalancing national security and privacy laws

Robyn Greene from the Open Technology Institute at New America began by stating

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that the government is not keeping pace with new privacy laws. According to her, the U.S. is no role model for privacy rights. Greene especially criticized the fact that there is no judicial oversight for the FBI when requesting National Security Letter (NSL). These powers were especially abused after the PATRIOT Act was passed. As a reaction to limit the FBI's powers under the PATRIOT Act, the Freedom Act was passed. According to Greene, the Freedom Act failed to address other issues properly and the FBI still uses the NSLs to get extremely revealing electronic communication transactional records (ECTRs) which include detailed information on when and where a person accessed which websites etc. Greene described these actions as outside the scope of what the law allows and notes that many are not well-informed enough to demand a court order before handing over such information.

Greene continued with the example of Yahoo. In order to comply with a surveillance order from the FBI, the company developed a new spyware, which she describes as a violation of privacy rights under the 4th Amendment of the US Constitution. Greene furthermore stressed the importance of encryption so that law enforcement cannot access private information. However, she stated that the FBI has ways to circumvent such encryption and that there are no absolutely secure ways to ensure that data are secured from third party access. Greene closed her speech by stressing the fact that stricter laws are needed for the protection of privacy rights.

Limitations to the right to travel – are no-fly-list in line with the rule of law?

The third speaker of the first panel, **Jeffrey Kahn**, professor for law at Southern Methodist University, focused on the right to travel and especially on issues regarding no-fly-lists. Kahn described how the former terrorist watch list, which actually focused on *watching* terrorist suspects turned into action lists. The fact that the old term of "watch lists" is still used but now has different consequences and blurs legal boundaries, says Kahn. Kahn criticizes the lack of political resistance and states that the only support for government restrictions in this regard comes from litigation. Kahn continued by describing the work of the Terrorist Screening Center and that before 9/11, the no-fly-list only included 16

people. After the attacks, the list expanded rapidly and now includes 64.000 people. The database of the Terrorist Screening Center is used to create different kinds of sub-lists and suspects are not informed if they are on such a list. It is also particularly hard to get off these lists or to sue for legal remedies since it is not clear whom you can sue as there are differences as to who created and who uses the list. It is not uncommon, Kahn explains, to get responses like "We don't use the list, we just made it" or "We did not make the list, we are just using the information we got from someone else". The law professor found harsh words for the standards which are applied in order to put a person on the list. Kahn said that "a reasonable suspicion that the individual is known or suspected" would constitute to "a reasonable suspicion to a reasonable suspicion" – which is clearly not a sufficient standard. Kahn stresses that there is hope and that litigation has led to disclosure of information like the standard test, so people can reasonably challenge the decision that they are on the list. However, Kahn also described that there is no real hurdle to put someone on such a list and that a clearer separation of powers is needed in order to check on those creating these lists and to ensure people's rights are not violated.

The second panel was titled "**International Strategies for Balancing Civil Liberty and Security**" and gave insights in the approaches in Russia, Turkey, Hungary, Poland, and France and the role of the EU in this context.

The first panelist, **Maria Kravchenko** from the SOVA Center for Information and Analysis, talked about the **Russian** federal counter terrorism law and its consequences. She criticized that the law makes no distinction between extremist and terrorist acts. One consequence of this is that many religious organizations are banned for extremism and their members are prosecuted even if such actions are not justified. This law affects not only Muslims but also other for Russia unconventional religious groups.

Henri Barkey, the director of the Wilson Center's Middle East Program, presented his views about the newest developments in **Turkey**. Barkey mentioned the recent arrests and shutdown of schools and education centers, media, and hospitals within the last three months, describing them as an attack on free speech. He then continued laying out the events of July 15th, 2016, the day of the attempted coup in Turkey and

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the alleged involvement of Fethullah Gülen, who is currently living in self-imposed exile in the U.S. Barkey described him as a religious person, continuously working on his network. The law professor also informed the conference members about the cooperation of Erdogan and Gülen, which eventually fell apart over the Kurdish question. Following this split, a slow start of prosecution of members of the Gülen movement could be witnessed. The coup however, was not only used to "clean" out the members of the Gülen movement, but was also intended to be much more far-reaching, targeting all kinds of critics in Turkey. Barkey closed by stating that the Kurdish question is the single most important question in Turkey, exceeding the issues of ISIS and the refugee crisis.

The last speaker of the second panel, **Melissa Hooper**, director of Human Rights and Civil Society at Human Rights First, gave an overview and comparison of the approaches of Hungary, Poland, and France towards anti-terrorism law.

In regards to **Hungary**, Hooper described the way Prime Minister Orban used the migration crisis and the islamophobia sentiment in order to win a referendum. In the government's information letters, migrants were equated with terrorists. Hooper talked about the constitutional challenges to the Hungarian constitution, as well as the constitutional court, leading to the fact that a state of crisis can be declared when facing mass migration. Consequently, it is legal to build fences, establish transit zones to Hungarian soil, and send refugees back to safe countries of origin. Furthermore, people who have illegally crossed the border into Hungary will have to live under constant fear of prosecution.

When turning to the EU's response to these developments, Hooper underlined the fact that there is no procedure for kicking a member state out of the EU. However, there are sanctions for not complying with the values set out in Article 2 in the Treaty of the European Union. Although a committee was founded in order to deal with these issues, it rejected potential sanctions under Article 7. Hooper admitted that it is very difficult for the EU to find the appropriate next steps, but stressed the fact that the EU needs to keep pursuing potential actions.

Hooper then turned to the recent developments in **Poland**, stating strong demonstrations but also increasing hate, especially towards refugees, who are sent back with-

out a legal basis for it. Similar to Hungary, Poland experienced some changes to the constitutional court, including the fact that it cannot hear any new cases and consequently is not able to review new anti-terror laws. Some of these are introduced late at night or by secret procedures and enable the police to conduct broad surveillance without judicial review. Under these laws, all foreigners are considered terrorist suspects. Hooper said and informed the conference members of her own experience of strong surveillance when visiting Poland.

The last country Hooper talked about was **France**, where the state of emergency is applicable until January 2017. The state of emergency includes broad terms under which surveillance and laws targeting Muslims are expanded. A commission reviewed this emergency status and came to the conclusion that it only has a limited impact on security. It must be noted, that the emergency status does not change the judicial system and France still has a functioning constitutional court. This must be seen as a decisive difference when comparing France to Poland or Hungary.

The panel was followed by a discussion about the different approaches the members of the conference have seen. Thereby, connections between the different components were made. One of the guests asked whether there is a good example of anti-terrorism laws not violating civil liberties. It became clear that there is no easy answer to it and that law makers still have to strive for better solutions.