

Catastrophic terrorism and civil liberties in the short and long run*

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DRAFT

I have some bad news, some good news, and then an ambivalent forecast.

The problem in the long run

Forget Al Qaeda, and even Islamic fundamentalism. Catastrophic terrorism – attacks using weapons of mass destruction or more simple methods to kill thousands of civilians for political pressure, political theatre, or crazed self-expression – is a technological threat that will remain after Al Qaeda is just a memory (should we be so fortunate).

In the long run, the central problem is that the progress of science and technology makes it easier and easier for ever smaller groups, and in the limit individuals, to obtain the means to wreck unspeakable destruction. It is only getting easier to make nuclear weapons, and to render them small and transportable. More and more people, all over the world, know how to build them or could easily learn. It is only getting easier to produce anthrax and other deadly toxins, and to modify existing pathogens to make them cause new, unstoppable plagues. Counterterrorism experts often sit down and try to think up lower-cost, lower-skill methods of causing massive harm and destruction to our highly interconnected modern societies. They find it so easy to do that their question quickly becomes, Why haven't terrorists tried any of these yet?

A friend of mine, a journalist, quips that we seem to be heading in the direction of a world in which every individual has the capacity to blow up the entire planet by pushing a button on his or her cell phone. Obviously this exaggerates, but it is useful to consider as a sort of limiting case. How long do you think the world would last if five billion individuals each had the capacity to blow the whole thing up? No one could plausibly defend an answer of anything more than a second. Expected life span would hardly be longer if only one million people had these cell-phones, and even if there were 10,000 you'd have to think that an eventual global holocaust would be pretty likely. 10,000 is only two millionths of five billion.

Another valuable point this example makes is that in the long run our salvation cannot lie in addressing and alleviating political and other grievances. Certainly the U.S. government and other governments should try to redress legitimate grievances. They should do this as a matter of justice independent of its value for preventing catastrophic

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terrorism. It is also plausible that in some cases addressing grievances might reduce specific terrorist threats.¹

But in mass societies, no feasible government policies can stop there from being a constant trickle of angry, bloody-minded individuals and groups, often in the grips of crazy ideological constructs, eager to kill and destroy for some ideal or cause. If the progress of science and technology makes it easier and easier for them to do this, then we face a very real and serious dilemma.

The debate on terrorism and civil liberties since 9/11 has been too focused on the short-term, with hardly any serious discussion about this long-run dilemma. The debate quickly became partisan in a predictable and boring way. Most liberals and a few of the more libertarian conservatives decry the PATRIOT Act as a dangerous and unconstitutional instrument, a knee-jerk overreaction that subverts the freedoms we are trying to defend for no good reason. Most conservatives and a few of the more statist liberals counter that the Act is mild when compared to the U.S. government's response to past threats of a similar order (such as during World War II), and that it contains many sensible provisions that have minimal impact on civil liberties.

I believe it may be more enlightening to start by thinking about the long-run problem, and then work backwards to what it makes sense to do now.

Three models for responding to the threat of catastrophic terrorism

So let's visit again this scary future world in which individuals or small groups can fairly easily acquire the means to kill thousands. Civil liberties in the sense we have known them are inconceivable in such a world. It would be simply insane if, in this world, government did not have the power to undertake secret investigations of individuals and groups that give off warning signs, if government did not have the power to collect information about what individuals were doing on the basis of mere suspicions or indicators that correlate with a disposition to undertake terrorism. I think there could also be a strong case, in such a world, for extending the requirement of security clearances to people who acquire forms of knowledge that could easily be used for mass destruction, particularly in biochemistry and nuclear engineering. There is no denying that such a system could have major costs in terms of freedom of inquiry and the social benefits this freedom brings.

Two common analogies people use to think about the threat of terrorism suggest that such restrictive and anti-liberal measures would not be necessary. But both analogies are highly misleading applied to the problem of catastrophic terrorism as it is likely to develop in the coming decades.

The first analogy might be called the *war model*, and is constantly invoked by President Bush and other politicians in the phrase "the war on terrorism." As many have pointed out, in a conventional war you know who the enemy is and where to find his forces. The central problem in war is to figure out when and how best to attack. This is

¹ However, it is also reasonable for governments to worry that if they respond to terrorist attacks by changing their policies, they will encourage more attacks on different issues.

not the case with catastrophic terrorism, where the central problem is to figure out *who* the enemy is and *where* they are, before they strike. Once you know these things, “attacking” is relatively easy because of the huge disparity in power between the state and terrorists groups (once you know who and where they are).

The second model might be called *the crime model*, which wants to think about terrorism as a conventional problem of crime that our current criminal justice system can and should deal with. With ordinary crime, the idea is that the police investigate crimes *after* they take place, producing a high enough probability of apprehension to *deter* prospective criminals, so keeping the crime rate at tolerably low levels.²

Ordinary crime is indeed more analogous to terrorism than is interstate war. For example, the enemy in a war can be defeated, whereas both crime and terrorism are more like “technological” problems that can be reduced but never completely eliminated. All in all, however, crime is also misleading as a template for thinking about terrorism.

In the first place, with catastrophic terrorism we are talking about crimes so enormous and socially devastating – a nuclear bomb in New York City, for example – that apprehending the criminal after the fact is cold comfort. The costs of such an attack are just too high. Almost all of our effort must go into preventing it from happening at all, rather than tracking down the culprits *ex post*. Liberals (and I count myself among them) are just sticking our heads in the sand if we go around exclaiming that “We must not compromise civil liberties!” without ever engaging the problem posed by the necessity of preventing this sort of crime (catastrophic terrorism) *ex ante* rather than *ex post*.

The second problem with the crime model is that if terrorists are willing to die to commit these crimes, or if an individual or group can reasonably hope to strike and escape detection or punishment, then deterrence does not operate. Of course, we should spend serious resources on tracking down the culprits after the fact, to get whatever value we can out of deterrence and the disruption of future operations. But we can’t count on deterrence to prevent catastrophic terrorism, the way that it makes sense, arguably, to depend on mutual deterrence in relations between states with nuclear weapons.

A lawyer might point out that our criminal law actually does have resources to investigate and prosecute crimes that have not yet been committed, under the heading of “conspiracy.”³ This is true, and this is the part of the law that needs to be debated,

² In an recent op-ed in the *Wall Street Journal* (“Surveying the World Wide Terrorism Battleground,” October 7, 2003), George Melloan manages to run the war and crime analogies straight together, while throwing in “business” for good measure: “But in the final analysis, the war on terrorism requires a recognition that it is in fact a war. Protestations of religious or political motive notwithstanding, these groups are, on the whole, criminals. Nothing will serve but to hunt them down and put them out of business.”

³ As David Cole points out, “Omar Abdel Rahman is currently serving multiple life sentences for his role in planning to bomb the tunnels and bridges around Manhattan—the bombs never went off, yet we were able to prosecute the planners on conspiracy charges and incarcerate them for the rest of their lives.” Cole, “The New McCarthyism: Repeating History in the War on Terrorism,” *Harvard Civil Rights-Civil Liberties Law Review* 38 (2003).

developed, and used as we increasingly face the long-run threat of catastrophic terrorism. It is also true, however, that defining the standards for investigating and prosecuting “conspiracy” are problematic on civil liberties grounds. This is precisely the part of the law that has been most abused in past U.S. episodes of fear of invisible attackers (as in the persecution of alleged Communist Party members after both world wars). What constitute effective procedures for investigating possible conspiracies to commit terrorist acts that are maximally consistent with the Bill of Rights is really the crux of the civil liberties problem we now face. More on this below.

There is a third way of thinking about terrorism and how to respond to it, which I will call the *counterinsurgency model*. If we define terrorism as violent attacks on noncombatants intended to coerce an opponent or influence third parties, then the vast majority of the world’s terrorism takes place not in the U.S., in developed countries, or even in Israel, but rather in what are mainly very poor countries wracked by civil war. Since the end of World War II, long-running civil wars have become remarkably common, and they have been concentrated in the world’s poorest countries.⁴ With few exceptions, these have been rural guerrilla wars characterized by the techniques of insurgency and counterinsurgency. In guerrilla war, civilians are routinely targeted by both rebels and government forces. Especially in poor countries, both sides tend to use collective punishment. Government forces massacre whole villages in attempts to “drain the sea” (in which the guerrilla “fish” swim) and to dissuade other villages from giving passive or active support to rebels. Likewise, rebel forces often massacre villages whose members are suspected of helping the government; they do this largely to influence other villages.⁵ Terrorist attacks in Northern Ireland, Basque Country, or Israel have killed dozens in the worst cases. Terrorist attacks in civil wars in Angola, Algeria, Sudan, Indonesia (East Timor and Aceh), Peru, Sri Lanka, and Sierra Leone – to name just a few poor-country civil wars – have killed hundreds and sometimes thousands.

The problem we face in responding to the threat of catastrophic terrorism is structurally similar to the problem faced by a state trying to run a counterinsurgency. How to distinguish the active rebels from the rest of the population in which they are hiding? If you arrest or kill the wrong people, or if you abuse the civil liberties of many to get very few, you may actually worsen things by increasing support for the guerrillas.⁶ But if you fail to prevent guerrilla attacks and assassinations before they happen (deterrence being problematic because of the low odds of *ex post* apprehension and the high motivation of the attackers), then you lose control of territory and tax revenue, while also suffering the political consequences of severe public displeasure.

How have states fared in confronting this dilemma? For the most part, I would say “terribly.” The problem of counterinsurgency is extremely difficult, if not intractable. In poor countries with administratively weak, badly financed states, the state frequently adopts scorched-earth tactics that end up being counterproductive and at any

⁴ James D. Fearon and David D. Laitin, “Ethnicity, Insurgency, and Civil War,” *American Political Science Review* 97, 1 (February 2003), 75-90.

⁵ Stathis Kalyvas gives excellent examples and an analysis in “Wanton and Senseless? The Logic of Massacres in Algeria,” *Rationality and Society* 11, 3 (1999), 243-85.

⁶ Or by rendering the economy so dysfunctional that rebellion becomes relatively more attractive as a job prospect for young men.

rate morally horrific. In wealthier or more democratic states, such as Britain in Northern Ireland and in the Malayan Emergency, Spain in Pais Vasco, Israel in the Occupied Territories, or India in the Punjab (“Khalistan”), mass killing has largely been avoided but civil liberties greatly abused, often in quite bloody ways.

Based on what I have read about insurgency and counterinsurgency since the end of World War II, I believe that the following two, slightly contradictory propositions are both true:

(A) It is highly unlikely that a state can defeat or minimize an insurgency without committing significant abuses of civil liberties and human rights. These will include legal changes that give the state powers of detention and investigation that go well beyond what is necessary to counter ordinary crime. Counterinsurgency *always* appears to be a messy business. Most likely this reflects the nature of the problem it confronts, as opposed to resulting solely from government stupidity.

(B) At the same time, abuses of civil liberties and human rights by state forces can hurt rather than help counterinsurgency, by increasing support for the rebels while undermining support for the government.

In sum, I see two arguments in favor of the view that in the long run, civil liberties as we have know them will have to be compromised, or significantly altered in their implementation, in the face of the growing threat of catastrophic terrorism.

The first argument is basically from common sense: As technological developments make it increasingly easy for small groups or individuals to cause incredible devastation, it becomes more likely that some individual or group will try, even if the vast majority views government policies as largely benign. The only feasible way to counter this threat is by increasing the ability of government to monitor and investigate individual behavior, however distasteful this may be.⁷

The second argument is from the experience of insurgency and counterinsurgency, which I have argued provides the closest analogy for thinking about the strategic problem posed by catastrophic terrorism. Quite possibly all counterinsurgency efforts in the past 50 years have depended on major changes in laws that worked against civil liberties and often led to human rights abuses. While these changes have often been pushed to the point of being dysfunctional, successes in defeating guerrilla rebels have often clearly depended on the state’s ability to detain and investigate suspects who had not yet, or not clearly, committed any crime.

Some good news: We have time, and there are “fixes” in the spirit of liberalism

In the long run, then, the news is bad for our traditional civil liberties. We should recognize good news, however, in the fact that the argument made above only really

⁷ I did not consider the option of hardening targets, which obviously should be pursued when feasible. When it is feasible, this is a great way to gain security without trading off civil liberties. But terrorists just shift targets when some are hardened, and it is difficult to imagine that we can have anything like the society we do now without having many targets that are vulnerable to the kinds of attacks that technological advance will make increasingly possible.

applies to the long run. The nightmare, “limiting case” world of nuclear-detonating cell-phones is still a long way off.

In the short and medium run, it remains quite difficult for individuals or non-state groups to develop or acquire nuclear weapons, and virtually impossible to do so without the active assistance of a state. States, moreover, may have strong incentives not to let nuclear materials out of their own control. (Nonetheless, I am terrified that North Korea’s leadership might sell nuclear bombs to the highest bidder, and the fact that something is not in the interest of a state overall doesn’t mean that it will be smart or competent enough to prevent it from happening.) Weapons-grade anthrax is hard to make and hard to deliver in such a way as to kill thousands (although we have seen that it may not be necessary to kill thousands to have a big negative impact on society). This appears to be true as well for a variety of other biological and chemical weapons that have been mentioned as horrible terrorist dangers.

This means that in the short run there is simply no good reason to rush into changing the laws in ways that greatly compromise civil liberties. If you face a fundamentally long-run problem, it makes more sense to think about the best feasible long-run outcome and then work backwards to draw out implications for what to do now. How best to change the law and law enforcement to respond to the threat of catastrophic terrorism is a great candidate, I would argue, for analysis and recommendations by a presidential commission composed of constitutional lawyers, congressmen, and law-enforcement experts empowered to make recommendations to relevant congressional committees. This would be far better than the current approach, in which, after each major terrorist attack on U.S. soil, our representatives compete with each other in proposing legal changes to “get tough” on terrorism, the effect of which has been to run roughshod over the Constitution. There is no thinking here about the long-run problem, only the frenzied passing of “position taking” bills, whose actual positive impact on preventing terrorist attacks is often dubious.

I would be way out of my depth to try to anticipate what such a commission would or should come up with. But in broad and vague terms, there is an obvious type of solution to the long-run problem of how to enable effective counterterrorist operations while preserving something in the spirit of our traditional civil liberties.

The arbitrary use and abuse of government powers can be checked in two ways, either by constitutionally prohibiting certain actions, as the Bill of Rights does, or by creating alternate institutions within the government to monitor and balance the actions of other arms of the government.⁸ If effective defense against catastrophic terrorism ultimately requires more intrusive law enforcement that employs suspensions of habeas corpus, racial profiling, secret searches, and the like, then these actions should be subject to monitoring by enhanced judicial powers or new judicial bodies.

This type of solution is so natural that it has already attempted in the implementation of the Foreign Intelligence Surveillance Act (1978). This law set up Foreign Intelligence Surveillance Courts in which a panel of federal district court judges hear Justice Department requests for authorizing secret searches, originally in cases

⁸ Of course, the first strategy ultimately depends on the second. There must be an institution within the government empowered to rule on whether the government’s actions violate the Bill of Rights.

involving foreign espionage. The Patriot Act has now vastly broadened the range of cases for which the government may request authorization of a FISA court. Essentially, if the government claims that “terrorism” may be at issue in a case, they can ask for secret search and wire-tapping powers via the FISA act.

Though little is known about their performance, the FISA courts appear to have been largely toothless. Only 5 out of 14,000 requests were denied between 1978 and 2001, the proceedings are not adversarial (the court hears only the government’s argument), and there is no follow-up to check whether the government is using the authority appropriately or well. Of course it may be that these courts have had some good effect by marginally influencing what search requests the Attorney General is willing to put forward in the first place. But overall it is reasonable to be concerned that, given the weakness of the FISA courts, the Patriot Act vastly expands the ability of the government to violate 4th (and probably 1st and 5th) Amendment rights of U.S. citizens, simply by declaring that they are being investigated in connection with a terrorist threat.

Despite the apparent weakness of this particular implementation, the idea behind the FISA courts is a good one. The idea is to try to limit new government powers that are greatly needed but subject to great abuse by creating institutions and judicial procedures to monitor their application. I have no expertise in constitutional or criminal law, but it does seem to me that the natural way to go is to try to develop FISA-like courts that have some real bite. For example, give them the power and duty to conduct *ex post* audits of randomly chosen warrants that they previously authorized. Make such audits available to the public after a decent interval of time in redacted/anonymous form. Develop a new court or appeal system to audit and monitor the government’s treatment of aliens, who are presently being treated as if they had no rights at all.

In sum, we have time to work out new police and judicial arrangements that will minimize the growing risks of catastrophic terrorism while at the same time checking and monitoring the increased government and police powers this will require. Liberals should stop issuing blanket Chicken-Little objections to any legal change that could arguably restrict civil rights, and instead propose a positive program that explains how to best preserve the spirit of our civil liberties while honestly facing up to the dilemmas posed by catastrophic terrorism. Conservatives should stop suggesting that anyone who decries the Patriot Act is “pro-terrorist,” and should recognize that the Act has opened the door (even further?) to just the kind of abuses that conservatives have traditionally worried about a great deal. Conservatives should also recognize that in catastrophic terrorism we face a long-run problem with major constitutional implications, and thus that even they should not accept the present administration’s short-run proposals without skepticism and debate.

A mixed forecast: Cycles of civil rights abuse and constitutional restoration

What will our politicians do? Will they judiciously consider how to construct and reform our institutions to monitor and control the application of the new government powers that will be increasingly necessary to reduce the risk of catastrophic terrorism? Or will they respond in a disconnected and frenzied fashion, ratcheting up arbitrary and

unchecked government powers of surveillance, investigation, and detention with each new attack?

I suspect the answer will depend on a largely unpredictable factor: the pace and success of terrorist attacks in the coming years. If we manage to go for five years or so without another major homeland terrorist attack, then prospects are relatively good that Congress and the country will recover some equanimity and confront the problems of legislative and judicial reform from a more long-run perspective. If and when a Democrat wins back the White House, and if the Republicans still control part or all of Congress, then the Republicans are sure to want to revisit the powers granted to or assumed by Bush since post 9/11. I would hope that the Democrats would be more willing to go along as a matter of serving their constituents' preferences.

If, on the other hand, terrorists of whatever stripe "get lucky" one or more times in the near future, then we will see more of what Laura Donohue calls "the counterterrorist spiral."⁹ After a dramatic terrorist attack, politicians face extremely strong pressures to "do something," which for reelection purposes needs to be highly visible and easily explainable to voters. Changing laws to give greater powers to law enforcement fits the bill, and has almost always been the immediate response of democratic governments to major terrorist attacks. Donohue notes that in the case she knows best, Northern Ireland, counterterrorist laws put on the books in reaction to big attacks have tended to stay on the books. Politicians don't want to risk being called "soft on terrorism" in the midst of a conflict. The result has been a ratchet effect, or spiral, to the great detriment of civil liberty.

Over the course of the last century, the United States has faced a succession of apparent domestic security threats that led to spasms of legislation and police action. In retrospect, these spasms were widely viewed as having been misguided and unconstitutional. It is instructive to consider these in thinking about the likely future course of civil liberties law in the face of catastrophic terrorism.

In a hysterical response to a few package bombs, the Palmer Raids of 1919-20 locked up thousands essentially on the presumption that they were communists or anarchists. During World War II, citizens and non-citizens of Japanese ancestry were locked up as potential traitors in camps in the western deserts. After World War II, suspected association with the Communist Party was, for a time, grounds for active government persecution and FBI harassment. Most recently, after the 1996 Oklahoma City bombing and after 9/11, Congress passed a series of acts of questionable constitutionality, while the president has used executive authority to detain thousands of unnamed noncitizens who have no legal recourse or representation, both noncitizens living in the U.S. and hundreds captured in "non-war" in Afghanistan.

The constitutional lawyer David Cole points to a pattern, or evolution, in these several episodes.¹⁰ In the midst of each one, the U.S. courts and judicial system acquiesced to or deliberately authorized laws that, shortly afterwards, they and many

⁹ Laura Donohue, "Fear Itself: Counterterrorism, Individual Rights, and US Foreign Relations Post 9-11," in Russell D. Howard and Reid L. Sawyer, eds., *Terrorism and Counterterrorism* (New York: McGraw Hill, 2002).

¹⁰ Cole, "The New McCarthyism."

others saw as clearly unconstitutional. After the great fears had waned, the courts crafted and fleshed out new constitutional doctrines intended to prevent future abuses along the lines of the last episode.

Thus, during and after World War I, U.S. laws explicitly criminalized advocating certain political views, such as communism or even opposition to the draft. In the 1917 Supreme Court opinion known for the famous line about there being no constitutional right to cry fire in a crowded theatre if there was no fire, Oliver Wendell Holmes was actually arguing (successfully) that the state could jail a person for distributing leaflets opposing the draft for “the Great War.”¹¹ Later rulings clarified that such laws were simply inconsistent with the First Amendment right of freedom of expression. Understanding these judicial precedents, in the McCarthy era the state criminalized not opinions and speech, but *associations*. “Are you now or have you ever been a member of the Communist party?” After the hysteria subsided, Supreme Court rulings in 1957 and 1961 asserted what should have been asserted from the start – that this was clearly unconstitutional.

Cole argues that in the present episode, since Oklahoma and 9/11, government has evolved new tactics for restricting civil liberties that do not criminalize speech, and that target freedom of association only indirectly. He focuses on laws that make it a criminal act for one to provide “material support” to a “terrorist association,” *even if* one does not intend that the support supplied be used for terrorist purposes. The executive branch (via the State Department) decides what a “terrorist organization” is, according to no legally defined or justiciable criteria. Cole notes that since 9/11, almost every criminal “terrorism” case brought by the government has charged the defendant under the “material support” provisions.¹²

Cole finds depressing this historical pattern of Fear-induced civil rights abuses, post-Fear judicial action to prevent the repetition of such abuses, and then, with the next Fear, government invention of new ways to get around the Bill of Rights. He says there is no “progress,” just the repetition of history. To the contrary, I would view it as notable progress if, over time, our political system is able to improve itself by forcing government abuse of the constitution to take ever more subtle forms.

The more interesting question is whether the self-correction part of the cycle will continue to operate in the present case, with the threat of catastrophic terrorism. In the past, the Fear had to subside for self-correction to occur. But if the risk of catastrophic terrorism is a technological problem that will grow more and more pressing over time, then will the Fear ever subside enough to allow the political space necessary for our political class to come to grips with it in an intelligent way? Or will periodic major terrorists attacks produce a permanent condition akin to counterinsurgency, in which both public and politicians acquiesce to what would once have been considered massive civil rights violations by a more powerful and arbitrary state?

¹¹ Discussed in Russell Hardin, “Civil Liberties in the Era of Mass Terrorism,” unpublished paper, New York University.

¹² Cole also takes aim at the increased assertion and use of executive authority in what are arguably major civil rights violation of noncitizens.

All I can say is that I certainly hope not, and that I hope that U.S. foreign policy is revised in ways that will genuinely lower rather than possibly increase the short-run risk of more attacks. But, unfortunately, I'm not sure if we have all that much control here. To a great extent we are hostage to the terrorists' luck, or lack thereof.