

Combating Terrorism: Lessons Learned from London
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I would like to thank the Committee for inviting me to testify on this important subject. We can begin the discussion by noting that those who wrote in the 1990s that we had reached the end of history because of the emergence of a remarkable global consensus on the values of liberal democracy were somewhat premature. In fact, we are now in a fierce new ideological conflict with an entirely new kind of opponent. We are not fighting another country, we are not leading an alliance, and there are no opposing armies. Our opponents hope to win the war of ideas by using terror. The jihadis remain skillful and inventive. They use the commercial networks created for travel and communications to create a global presence, allowing them to plan and coordinate an attack in Britain from Pakistan. And the supply of recruits among the disgruntled and confused for religiously-motivated murder and suicide remains large.

Winning this ideological struggle will take years. In the interim, the U.S. and other nations must be able to protect themselves from the irrational blows launched by jihad. The UK's success in August in stopping the planned attack against several airliners can provide useful lessons. First, the reliance of the jihadis on global travel and communications is a vulnerability that can give the U.S. an advantage in preventing terror attacks. The UK arrests show that surveillance – of travel, finance, and communications – is essential for effective counter-terrorism. The commercial networks that provide these services allow al-Qaeda and its sympathizers to have a global presence, but this also creates the opportunity for Western intelligence services to intercept and disrupt their operations. The West built these networks and must find ways to use them against terrorists more effectively than the terrorists use them against us.

Second, many countries have refocused the work of their intelligence and security services to meet the threat posed by jihad. The work of these services, particularly in domestic intelligence activities, is the main defense against terror attacks. Domestic intelligence – the collection of information within a nation's borders for security purposes, often involving clandestine method, and including collection on citizens who have not violated any law – is a central element of counter-terrorism. The ability to identify and disrupt terrorist plans before they get to the airport or train station is the key to countering attacks, not more screening at airports or harbors.

Third, the arrests also show that international cooperation – in the London case, between the UK, Pakistan and the U.S. - is much better than it was five years ago. A national counter-terror effort will not by itself prevent attacks by a jihad that spreads across the Middle East, Europe and Asia. Building this cooperation has been one of the unspoken successes in response to terrorism, but sustaining this cooperation in the face of the growing hostility to the U.S. found in Europe and the rest of the world will be a major challenge for the United States.

This combination of network surveillance, domestic intelligence, and international cooperation is what thwarted the plan to blow up twelve airliners over the Atlantic. This success is encouraging

and points to the ingredients of a defense that can frustrate the attacks of global jihad. Britain's success in stopping the airline plot has also led to renewed calls for an American MI5 (the former name of Britain's Security Service). The desire for an American MI5 has appeared regularly since the 9/11 attacks. The Report of the Commission on Iraqi WMD came closest to such a recommendation when it called on the president to establish a National Security Service. This recommendation led President Bush to direct the FBI, using existing authorities and resources, to merge its counter-terror and counterintelligence division into a new National Security Branch.

Expanding the FBI's role in domestic intelligence avoids many problems concerning oversight, court authorization, and the relationship between intelligence gathering and police powers that a new domestic intelligence agency would face. It also avoids the upheaval that creating yet another major new agency would cause. However, some doubt the FBI's ability or enthusiasm for this task – these doubts explain the recurrent calls for an American MI5 - and it is unclear whether simply restructuring the FBI will be sufficient for effective counterterrorism.

That said, restructuring the FBI might be as far as the U.S. can go towards having its own MI5 without significant challenge to constitutional protections. The differences between how the U.S. and the UK conduct counterterrorism grow out of very different constitutions. While both countries share a heritage of common law, there have been significant divergences. The drafters of the Constitution were careful in the Bill of Rights to forbid many Crown activities used against them as colonials – arbitrary search and seizure, arrest without a warrant, and detention without recourse to a court. These Constitutional amendments explain in part why U.S. practice has developed in a different fashion from that found in the UK, such as why the U.S. gives more authority to judges and courts, why the relationship between local police and national security services in the UK is closer and unencumbered by Federalism, and why the UK approach to counterterrorism would be difficult to duplicate in the U.S.

Difficult as it may be for Britons to believe, UK counterterror efforts may be better organized than that of the U.S., and a federal system of government and the constitutional separation of powers prevent us from matching this organization. Whereas counterterror responsibilities in the U.S. remain diffused among several agencies, even after a series of legislative reforms, the Home Secretary's dual responsibilities for police and domestic intelligence (something not matched in the Department of Homeland Security) provide a greater degree of focus in the UK.

The doctrine of the separation of powers is much less of an issue for a parliamentary system where the Prime Minister and his cabinet are at the same time sitting members of the legislature. British laws give the Home Secretary (whose formal title is the Secretary of State for the Home Department) great discretion in approving electronic and physical surveillance in a terrorism investigation. The Home Secretary heads the Home Office, a Ministry that combines many of the functions of the U.S. Departments of Justice and Homeland Security and has authorities that in the U.S. are usually reserved for the courts.

The UK's approach to domestic security also has very different precedents. MI5 was founded in 1909 to watch for German spies and saboteurs. Its twin, MI6 (now known as SIS – the Secret Intelligence Service), was created at the same time to collect foreign intelligence. This common

background makes for agency cultures that are very different from the FBI and the CIA. Until recently, the two U.S. agencies were often seen as competitors. While cooperation between the Security Service, SIS and the Government Communications Headquarters (GCHQ, the British equivalent of the National Security Agency) is not seamless, it has faced fewer obstacles than has cooperation between FBI, CIA and NSA.

The relationship of the Security Service to the local police is also very different. Britain's Home Office funds the police and has "overall responsibility as overseer and coordinator for the police service." The Security Service has a long experience in working with the police 'special branches' and with GCHQ to protect against terrorism from the conflict in Northern Ireland. This experience of cooperation among police and intelligence agencies is hard to duplicate. Oversight of the police services are divided among chief officers for each force, regional police authorities - committees whose members include magistrates, elected officials, and community representatives, and the Home Office. The Security Service also reports to the Home Secretary. This means that the same Cabinet Minister has a considerable control and oversight for both local police and domestic intelligence. This combination of national and local agencies is unthinkable in the U.S. given our Federal system. There are several thousand independent police forces in the U.S., reporting to mayors, councils, governors and others. The relationship between local police and security services is impossible to duplicate here.

The Security Service may also have an advantage over its American counterparts given its status as an intelligence agency that reports to an elected Member of Parliament, rather than a law enforcement agency that gets some of its directions from prosecutors and judges. Prosecutors want to build a case and go to trial. This may bias them against the long-term intelligence activities that are essential for understanding an opponent's nature and intentions, but which may not lead to a court case. The distinction between legislative and executive is much less pronounced in the UK, and the smaller size and parliamentary nature of the British government may also give it an advantage.

Perhaps more importantly, in the face of the long threat of Irish terrorism, the UK has gone through several efforts to refine and adjust its anti-terror and domestic intelligence laws. The most important laws are the Security Services Act of 1989, the Intelligence Services Act of 1994; the Regulation of Investigatory Powers Act of 2000; the Terrorism Act of 2000; the Anti-Terrorism, Crime and Security Act of 2001 (passed in response to 911); and the Prevention of Terrorism Act of 2005, which was revised in the Terrorism Act of 2006 to meet civil liberties objections.

The Regulation of Investigatory Powers Act of 2000 (known as 'RIPA') is the key UK law for domestic intelligence. RIPA spells out the conditions under which both electronic and physical surveillance may take place in the UK. It gives considerable authority to the Home Secretary – rather than to courts and judges - to initiate such actions. It establishes independent oversight bodies (one for communications surveillance and one for physical surveillance – including what the British call 'intrusive surveillance') to ensure that the conditions and safeguards imposed by the Act are being met. In contrast, U.S. oversight bodies are usually housed in the agency they are overseeing. RIPA even created an independent body to which British citizens can complain if they feel they are the victims of unwarranted surveillance or if an error has been made.

The UK's Prevention of Terrorism Act of 2005 also provides important authorities that are likely unmatched in the U.S. The Act authorizes the Home Secretary to impose 'control orders.' These orders restrict the movement and activities of suspected terrorists. The Home Secretary can use intelligence information to apply to a court to impose a control order, and in an emergency, he can impose an order on his or her own authority for up to a week. There is an annual review of control orders, again by an independent reviewer, and the Home Office must report to Parliament every year on the implementation of the Acts authorities. The Terrorism Act of 2006 creates new authorities designed to prevent terrorist acts before they occur. Acts preparatory to terrorism are illegal, as are the encouragement of terrorism, and the dissemination of terrorist publications or terrorist training documents or activities. Groups that glorify terrorism can be proscribed. The Act allows police to detain suspected terrorists for two days on their own authority and up to 28 days with the approval of a court. The Act is controversial in the UK, and Parliament is likely to revise some provisions.

One crucial difference with the U.S. is that the UK's laws do not have the rigid separation between foreign and domestic intelligence. Watergate-era concerns over the use of intelligence and law enforcement assets for domestic political ends led to reforms in the 1970s, which split domestic and foreign intelligence. The increased importance of domestic intelligence in the fight against terrorism erodes the effectiveness of the 1970s legal structure the U.S. has used to govern domestic intelligence activities. Effective counterterrorism must avoid cumbersome handoffs between foreign intelligence and domestic law enforcement. For this reason, the line between foreign and domestic intelligence that the U.S. put in place in its laws and policies no longer makes sense. At the same time, since our safeguards for domestic intelligence depend on these 1970s reforms, an effort to reduce the foreign/domestic divide to meet the challenge of borderless terrorism could put civil liberties at risk unless some alternate form of protection is devised. This makes any effort to refine and adjust U.S. anti-terror and domestic intelligence laws more complex.

An effort to duplicate RIPA and the Terrorism Acts would produce objection (if not consternation) in the U.S. The Judicial branch might be reluctant to surrender this degree of authority. Civil libertarians would point out that control orders, suppression of publications and broad surveillance power raise serious and perhaps insurmountable constitution objections. In a similar vein, calls for an American equivalent of the Official Secrets Act could face civil liberties and constitutional objections. In any case, the U.S. already has laws that criminalize many leaks of classified information and it is not clear that adding more laws would change anything.

Not that the British approach is foolproof. The UK's difficulty in assimilating Muslim immigrants has created a major vulnerability. A third of British Muslims, according to some polls, believe jihad against their fellow citizens is acceptable and that the UK would be better off operating under sharia law. UK immigration policies were badly managed for many years, and like other European countries, there appears to have been an unspoken agreement that let Muslim radicals reside in the country as long as they confined their attacks (usually verbal) to targets outside the UK. Now there are reportedly several hundred potential terrorists living in the UK, mostly radicalized UK citizens, and it is difficult for the police and Security Service to monitor

them. The recent success in London must be weighed against these larger problems in immigration and assimilation, and in this, the U.S. may have an advantage.

Our federal system, the rigid separation of powers, and a different history for domestic intelligence, mean that the U.S. cannot duplicate Britain's Security Service. That said, it is worth drawing lessons from the UK's combination of a lower threshold for approving terrorist surveillance, a greater dependence on legislative rather than judicial oversight, a better integration of intelligence, police, and communications surveillance, and expanded authorities for detention and other restrictions on terrorist-related activities. We cannot recreate the British system, but we can learn from their more extensive experience to identify useful authorities and civil liberties safeguards that would benefit our own counter-terror efforts. Despite the Patriot Act, the Homeland Security Act, and the Intelligence Reform and Terrorist Prevention Act, the U.S. has not come up with a formula for domestic intelligence. Some would say this is for the best, but this delay only prolongs the conflict with terrorists and increases the risk of a successful domestic attack.

Americans do not like the idea of domestic intelligence. This dislike drives our public debate. However, the threat posed by terrorism, as 9/11 made clear, is very different from previous challenges. We are not fighting a traditional war against other nations, and changes in technology and the global economy increase our opponents' capabilities and shorten the time available to prevent attacks. While the FBI has authorities for domestic surveillance that are very similar to the UK's Security Service, the process for authorization and oversight of surveillance is very different. There is now a much greater need to use the National Security Agency's communications surveillance capabilities to support domestic intelligence and counter-terrorism. A reliance on the judiciary alone for oversight may not be enough to address public concern. An intelligence system designed in the 1970s to operate against other government's intelligence bureaucracies is ill-suited for the opponents we face today. Reorganization and consolidation of agencies is not reform, although it can provide an opportunity for change. Further reform is still essential for better domestic intelligence.

The combination of surveillance, domestic intelligence, and international intelligence cooperation can provide for effective counter-terrorism. We should recognize, however, that defeating terrorism will require more than an effective defense. It will require convincing both jihadis and western skeptics that the ideology of an Islam oppressed by the West whose only defense is terror is false, and that restoring the Caliphate or Sharia is no solution. Airline bombings are a symptom of this larger ideological struggle and, as in the previous struggles against fascism and communism, the obstacles to success include not only the beliefs of our opponents but our own self doubt about the values of the West.