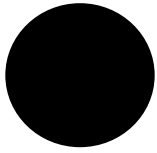


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Whittling Liberties

Britain's Not-So-Temporary Antiterrorism Laws

Ian Cuthbertson

As we adjust to living in the shadow of September 11, 2001, it is vital to understand both the nature of the assaults on the United States and the steps we can take against their perpetrators. The long-term planning, ingenuity, and sheer fanaticism involved in mounting the attacks grimly confirm that terrorists have improved their capabilities exponentially. We must respond with an even greater improvement in counterterrorism.

In this fight, the United States can directly benefit from examining the lessons others have learned in their own struggles. Among Western democracies, few countries have more experience in coping with terrorism than the United Kingdom. The British have waged a prolonged, low-key, yet deadly struggle against both international and domestic terrorism for 30 years. Not all of Britain's lessons are positive. Despite firsthand experience and a raft of antiterrorist legislation, the country is still capable of reacting viscerally to new outbreaks. The government recently introduced a sweeping new antiterrorism bill, which it expected Parliament to approve by the end of 2001 (after this article goes to press). It is being touted as a key component of a concerted effort to expand the government's arsenal to prosecute the war against international terrorism. Paralleling steps already taken in the United States, the British government is proposing to detain indefinitely immigrants, visitors, and refugees suspected of supporting or involvement in terrorism.

Once again, therefore, the government may resort to internment of suspects without trial, a punitive measure previously employed against alleged German spies during

the Second World War and against suspected members of the Irish Republican Army early in the "Troubles" in Northern Ireland. This measure is being pressed despite its well-proven past ineffectiveness in preventing terrorism and even though it inevitably involves sweeping up the innocent along with the guilty, thus contributing to the alienation of key domestic constituencies. The government, bending to heavy political, media, and public pressures, is willing to adopt such sweeping instruments to present at least the appearance of responding strongly and effectively to a widely perceived threat. This even though the legislation clearly breaches important provisions of the European Convention on Human Rights, a treaty to which Britain is now a party.

With this in mind, it seems a good time to examine the British experience in order to inform our own debate. Perhaps the most important is that, as with many government initiatives, once a policy or program is in place, it becomes progressively harder to control or limit. The initial curtailment of civil liberties in Britain turned out to be the starting point of a dynamic and—as the latest initiative confirms—continuing adjustment in the way the law is viewed as a tool in the struggle against terrorism. Key to understanding this cycle is to grasp that after almost every upward ratchet in the level of terrorist violence, the government's response has been to seek greater powers, the better able, it is always claimed, to render the nation safer. More often than not, Parliament has obliged. And through it all, British governments of varying political tendencies have

enjoyed overwhelming public support in pressing for ever-stronger laws.

The British Context

From 1970 to 2000, the mainland portion of the United Kingdom, which does not include Northern Ireland, experienced more than 350 terrorist incidents. Those responsible for the attacks on the British mainland ranged from domestic political extremists, left and right, to Middle Eastern states and groups, to various factions from Southwest Asia, to the Provisional Irish Republican Army (IRA) and the Irish National Liberation Army (INLA). Few, if any, of these incidents ever posed any direct threat to the stability of the U.K. itself. They did, however, present an indirect but nonetheless insidious menace to the country's overall sense of security, and the new laws, rules, and regulations introduced in response to these attacks have had a direct impact on the civil liberties of every British citizen.

Britain's response to international and domestic terrorism has taken place within the context of British constitutional practices. Key to grasping the dynamics of the British approach is an understanding of how democracy functions without a written constitution to enumerate individual rights. "The Queen in Parliament is Sovereign" is the principle underlying all legal decisions in the United Kingdom. There is no higher authority. In practice, this means that laws derive their legitimacy from an ad hoc, sometimes contradictory, agglomeration of historical and legal precedents, specific legislation, and common law, along with long-standing traditions and custom. The net result of this sometimes strange admixture is that the balance between the exercise of raw power and the protection afforded by the established rights of British citizens exists within a volatile, inherently flexible political culture, one that constantly subjects all legislation to regular review, reinterpretation, and revision by government, courts, and police.

Only recently has the European Court for Human Rights in Strasbourg begun to assert its authority in the security arena, and its pronouncements and judgments can, in some instances, supersede British domestic law. However, such instances have so far been rare and have mainly focused on the treatment of terrorist suspects and their handling in police custody. British governments have also, in common with a number of others in Europe, grown adept at circumventing the court when it believes vital interests are at stake. At no time have the court's rulings proved a serious impediment to the British government's prosecution of its war against terrorists with tools of its own choosing. This is not a situation that is likely to change in the near future.

Of particular importance is the fact that the peculiarities of the British system give the executive branch an unusually high degree of unfettered power. Although Britain has a two-chamber parliament, with both an elected House of Commons and an unelected House of Lords, it is the leader of the governing party in the House of Commons who becomes prime minister. It is in that office that real power is concentrated. The internal discipline and strong ideological imperatives of British political parties, in contrast with those of the United States, means that except in wholly exceptional circumstances, the government can depend on its majority in Commons for reliable support.

The government was fairly quick to develop a coherent strategy for tackling terrorism, within which a wide range of countermeasures, passive and active, have been slotted. All these policies have at their core the government's determination not to be merely reactive in the face of a terrorist threat. The belief is that the best defense is an active offense. This is manifest in the aggressive use of the security forces to counter a variety of terrorist threats, more often than not without prior reference to Parliament.

Despite minor terrorist incidents perpetrated on British territory, and the start of the “Troubles” in Northern Ireland in 1969, the sea change in British attitudes did not occur until 1972, when the impact of a terrorist war came home with a vengeance. Irish Republican Army bombs exploded in cities and towns throughout Britain that year. The immediate catalyst for government action was a bomb attack in 1974 on a bar frequented by off-duty soldiers in Birmingham that killed 21 people and injured more than 180. Parliament quickly adopted the nation’s first antiterrorism legislation, the Prevention of Terrorism (Temporary Provisions) Act (PTA). Initially, the PTA was seen as a temporary measure and was designed only to address Irish Republican terrorism. The legislation contained strict sunset provisions and was to be subject to regular review and revision by Parliament. Despite these safeguards, and sometimes because of them, the act’s provisions were regularly expanded every five years, as the IRA periodically renewed its mainland campaign, until they became solidly embedded in the British legal system.

It is important to stress what a radical departure from the existing laws the act represented. At a stroke, it gave police forces sweeping new powers. Britain, whose legal system had served as a model for so many other countries, including the United States, now permitted police to arrest, detain, and conduct search-and-seizure raids against suspected terrorists without a warrant. The act also made it illegal to belong to a terrorist organization, with the designation of such groups left in the hands of the government and not subject to review by Parliament or the judiciary. It allowed a suspected terrorist to be body searched without a warrant. It allowed the government to ban certain organizations and made it illegal for an individual even to wear clothing or insignia indicating support for a banned organization. It also made it illegal for words in direct support of banned organizations to be

broadcast on television or radio, although they could still be quoted in the print media. In Northern Ireland itself, as a result of the intimidation of jurors, jury trials in cases involving politically inspired violence were abandoned. Judges sitting in Diplock Courts (named after the jurist, Lord Diplock, who recommended them), determined guilt or innocence. In these courts, coerced confessions were routinely admitted into evidence, along with the unsubstantiated evidence of terrorist turncoats, dubbed “Grass” and “Super Grass.”

While the Prevention of Terrorism Act introduced fundamental change into the British legal system, some approaches remained the same. Unlike the Bush administration’s decision to try captured terrorists before special military tribunals, British authorities decided, albeit after some initial hesitation, to treat both accused and convicted terrorists as common criminals, rather than dignify their acts by acknowledging the prisoner-of-war status they claimed for themselves. This was a clear assertion of Britain’s common law tradition. In this context, it is also important to note that the PTA was the sole piece of legislation enacted to deal specifically with the terrorist threat. Otherwise, police and prosecution rely on regular criminal statutes to pursue suspects. In this regard, the sentencing of terrorists, both of the domestic variety and their international counterparts, remains inexorably linked to the oft-stated policy that terrorist acts are, first and foremost, breaches of the common law and are to be prosecuted and sentenced as such. The political motivation behind the criminal act is treated as an irrelevance, with the result that no special pleading is permitted when it comes to sentencing offenders.

The sweeping prerogatives that have accrued to the government through the operation of the PTA in its various manifestations, while often successful in combating terrorism, have provoked criticism. Beyond the stated provisions of the law, critics claimed,

were a range of other activities that the government initiated to give itself more power. Critics asserted that the government carried out a variety of illegal clandestine operations with impunity. Government agents, it has been suggested, routinely broke into homes and offices, and removed property at will. Known Republican supporters lost their jobs and had great difficulty securing unemployment or even social security benefits for themselves and their families thanks to officially encouraged obstructionism. Assassinations were supposedly carried out against both alleged terrorists and their supporters, including their criminal defense lawyers. Wiretaps were installed without warrants or judicial oversight. Perjured testimony was offered in court by intimidated witnesses, paid informers, soldiers, and policemen. It was also claimed that interrogation centers routinely tortured suspects.

The Second Wave

After recurring cycles of attacks on the British mainland, which took place against a backdrop of continuing sectarian violence in Northern Ireland for nearly 20 years, there began desultory secret peace negotiations between a changing cast of British officials and IRA representatives. The failure of the most promising public negotiations, in 1996, led to the end of a 17-month ceasefire with the detonation of the most powerful Republican bomb ever used against mainland Britain, in the heart of London's Dockland's business district at Canary Wharf, which seriously injured more than 100 people. This renewed assault shocked a public that had again grown complacent about the apparent end of the campaign of violence, causing Parliament to give police even broader authority to combat terrorism.

The Prevention of Terrorism (Additional Powers) Act of 1996 gave the police unprecedented new powers. When intelligence information indicated that terrorist activities were to be expected in a particular area, police were empowered to cordon off the

area for 28 days and declare it a "special zone." Within this zone, police were authorized to stop and conduct body searches on any passerby, even in the absence of any clear suspicion of involvement with terrorist activity. One side effect of the new law was to further blur the distinction between ordinary powers routinely exercised by the police and the extraordinary powers they supposedly held in reserve to fight terrorism. The ability of the authorities to unilaterally create special zones effectively shifted the focus of policing from its traditional concentration on the actions of a particular individual or group to a blanket approach that put everybody in a particular area under suspicion.

With the signing of the Northern Ireland Peace Accords in 1998, and the IRA's announcement of the end of its campaign of violence, there were high hopes that the tight security measures to which the British had become adjusted could be relaxed. Then came the Omagh bombing in Northern Ireland by the dissident Republican group, the Real IRA (RIRA), which aborted this expectation. The bombing left 28 dead and over 200 injured. There was a clamor in both the print and electronic media for immediate suspension of due process and to give the police the power to arrest and imprison suspected perpetrators and their supporters even absent direct proof of involvement in the attack itself. During a visit to the scene of the attack, Prime Minister Tony Blair announced that Parliament would be asked to implement legislation that abridged long-standing rights of British citizens in general and of terrorist suspects in particular. Blair said the "draconian and fundamental" changes were essential to combat terrorism. Thus the Terrorism Act 2000 was intended to demonstrate definitively the U.K.'s long-term commitment to the struggle against international terrorism and to make it easier for police and prosecutors to initiate effective action against all involved in terrorism by listing proscribed groups.

The bill represented a wholly new kind of antiterrorist legislation. The initial 1974 Prevention of Terrorism Act, along with its successor and adjunct legislation, was designed primarily to combat the activities of the IRA. It was originally designed as an emergency measure that Parliament was required to renew annually. In contrast, the Terrorism Act 2000 was intended as permanent law and is not subject to routine review.

The antiterrorism legislation is partly a response to the concern expressed by foreign governments, including the United States, that Britain might be a haven for terrorists. Of the 21 groups added to the list of proscribed terrorist organizations, 16 are predominantly Arab or Islamic in origin. The measures to be used against anyone belonging to, or supporting, these proscribed groups follow the precedents set in the 1996 and 1998 antiterrorist legislation. It is now illegal to "support" any of these 21 groups in any way. While the British government has strenuously claimed that the act will not be used to restrict genuine freedom of speech, or to curb lawful support for political opposition or change, critics point out that the sweeping nature of the measure makes such restrictions inevitable and that parts of the act are in direct contravention to the European Convention on Human Rights.

Britain has experienced a noticeable erosion of civil liberties enjoyed by ordinary citizens and criminal suspects, terrorist or otherwise, over the past 30 years. In addition, revelations of spectacular miscarriages of justice involving alleged IRA terrorists have surfaced over the last 15 years, exposing the British criminal justice system to justifiable criticism. Public campaigns to review convictions have focused on the cases of the Birmingham Six and the Guildford Four. Both cases involved the conviction of accused IRA terrorists who allegedly committed bloody attacks against civilian targets during one of the IRA's periodic bomb-

ing campaigns. However, it was later demonstrated, following a campaign by journalists and civilian groups, that the wrong men had been sent to jail. The Court of Appeal released the Birmingham Six in 1989, after it became clear their confessions had been coerced by police officers who lacked compelling evidence tying the six to the attack for which they were tried. The decision to overturn these convictions caused a reexamination of the cases of dozens of other IRA prisoners who had been protesting their innocence for years. As a result of this review, a significant number of individuals have had their convictions overturned.

A variety of reasons lay behind these miscarriages of justice. They ranged from nondisclosure of evidence by the police or prosecuting attorneys to the fabrication of evidence by security forces, misplaced reliance on supposedly expert testimony, poor identification by eye witnesses, false confessions given because of psychological instability or police interrogation tactics, and judicial error.

In response, the Criminal Cases Review Commission (CCRC) was created by the British government to investigate fully all charges of miscarriage of justice. Its 14 members include prominent lawyers, business people, and journalists. Critics have charged that the CCRC is not sufficiently independent of governmental interference, that it is underfunded and understaffed, and that it has a huge backlog of cases waiting to be examined. However, the CCRC's effectiveness can be gauged from the fact that 73 percent of the cases it has referred to the Court of Appeal for review have resulted in convictions being overturned.

The Price to Be Paid

All of this turmoil in Britain's political and legal system is the price paid for trying to eliminate what was always the statistically small risk of being killed by a terrorist and give the public a greater sense of security.

In a little over two decades, the United Kingdom compromised many of its traditional civil liberties and is today a significantly more restrictive country than three decades ago. Yet it is arguable that the odds of being blown up by a bomb at a bar or anywhere else in the U.K. during one of the IRA's periodic mainland bombing campaigns were not significantly less before the most recent cease-fire than they were 30 years earlier. However, the possibility that individuals might be victimized by the state or have their civil liberties curtailed is much higher now than it was before the Troubles began.

The struggle faced by Western democracies in trying to protect their security from terrorist assault requires a delicate balance between deploying political, policing, and military capabilities to maximum effect while trying to prevent these same security measures from adding to the disruption caused by the terrorists themselves. This has not always been an easy balance for the British government to achieve. Irish Republican terrorism, always pervasive in Northern Ireland itself, has on occasion overwhelmed the mainland as well. By comparison, the threat posed by other varieties of international terrorism has only occasionally had the same impact.

It is also hard to judge just how effective the British response to terrorism has been. This is not an idle question. While the threat from Irish terrorists of all hues has faded, the danger from other brands of international terrorism has grown exponentially. Assaults on the NatWest Tower and Buckingham Palace are just as easy to visualize as the attacks on the World Trade Center and the Pentagon. Yet it is hard to conjure up any kind of terrorist assault, short of the widespread use of weapons of mass destruction, that would fundamentally threaten the stability of the country itself.

Despite everything, the U.K. survived 30 years of Irish Republican terrorism with its society, government, and commercial and civil institutions largely intact. The British

government's reaction to the threat posed by international terrorism can best be described as a judicious combination of deterrence and containment. The extensive powers of investigation, arrest, and proscription contained in the various terrorism acts no doubt served as a deterrent to many non-Irish terrorists who might otherwise have been attracted to Britain, either as an unwilling host or as a target. And when deterrence failed and international terrorism did occur, as in the siege of the Iranian embassy by Iraqi terrorists in 1980, the proactive, indeed aggressive, responses developed by the government and its security forces were effective in limiting damage and often in killing or capturing the terrorists involved.

Thus a combination of effective countermeasures, aided by the restrictive form of terrorism practiced by the IRA, itself a reflection of the Irish Republican movement's own military and political limitations, served to contain the impact of their various campaigns on the daily lives of ordinary citizens to the level of an irritant rather than a clear and present danger. But the struggle against terrorism, both domestic and foreign did undoubtedly undermine, to an identifiable extent, the basic civil liberties of British citizens. Pervasive electronic surveillance and security checks became part of everyday life. In a major departure from long-established legal principle, a presumption of guilt now attaches to an accused's decision to remain silent. Warrant-less searches, the muzzling of the electronic media, and restrictions on freedom of movement are all costs of Britain's response to terrorism.

However, it is important not to overstate the impact of all of this on the overall health of British society. The complaints of civil libertarians aside, all of these changes, innovations, mistakes, and restrictions were broadly supported, or at the very least accepted, by a large majority of the population. Both major political parties, albeit at different points, added new restrictions to

the ever-lengthening list of prohibitions. All saw them as the price to be paid for carrying on the fight against terrorism and achieving a reasonable level of security for ordinary citizens. Despite these restrictions, in most respects the United Kingdom remains a highly vibrant, not to say raucous, democracy. It is hard to identify ways in which even the most sweeping powers held by the government under the terrorism acts have irreversibly damaged the country's core democratic values and beliefs. The government and police have used their powers sparingly and usually in response to a widely perceived danger.

The hard lesson to be learned from the British experience is that the initial curtailment of civil liberties in the fight against terrorism turned out to be the starting point of a dynamic and continuing evolution in the way the law is viewed and implemented. As we embark on a new war against international terrorism, we should be mindful of the British experience. The price of defeating, or at least containing, terrorism will likely be not only in blood and treasure but in the loss in no small measure of our traditional liberties. ●