

The Rule of Law in the Age of Terrorism

This article is based on presentations delivered at the “Protecting Civil Liberties and the Rule of Law in the Age of Terrorism” conference, cosponsored by the Henry M. Jackson Foundation and the Wilson Center’s Kennan Institute, Middle East Program, and Rule of Law Initiative.¹

The rule of law is an enduring core value in Western civilization. We value it for protecting us from the arbitrary exercise of state power, and for allowing us to live by well-defined and established laws. That core value always comes under stress when national security emergencies arise. During times of war, individual liberties and certain protections under law may be limited. Society accepts this temporary loss of rights as a reasonable cost to defend the homeland and defeat an adversary. But what happens when a national security emergency is extended with no clear end in sight? The modern era’s struggle to address the threat of terror attacks now provides us with this precise challenge.

Terrorism has existed for well over a century, emerging as a tactic of nationalists and anarchists in the 19th century. The threat perception of terror changed forever with the 9/11 attack on the United States. That attack launched our nation into a “War on Terror,” and over time that war mentality has only spread abroad in the wake of coordinated and “lone wolf” terror attacks in Paris, Brussels, London, Moscow, and many other cities. In the past fifteen years, state responses to the threat of terrorist attacks, here and abroad, have not just pulled at the fabric of the rule of law, the fear of terrorism has eroded public demand and expectation for the rule of law.

The United States and the European Union have set the global standard in seeking to balance civil liberties and national security, although they admittedly face different problems when formulating their respective responses. Yet the post-9/11 world has posed two direct challenges: (1.) Has the U.S. and the EU lived up to their own ideals in terms of defending civil liberties in an age of terrorism; and (2.) To what extent have alternative strategies put forward by other countries provided an alternative, and more authoritarian, approach that uses a national security crisis to accumulate state power at the expense of basic civil liberties?

This article highlights the alternative national security policies of Russia and Turkey, as well as the difficult road ahead for both the U.S. and the EU in confronting what has become one of the most contentious issues of the early 21st century, namely how to maintain the delicate balance between the rule of law and national security. The article first focuses on U.S. developments, and the consequences of its post-9/11 legal policies both domestically and abroad. The article then takes an international look at these issues to better understand global trends in fighting terrorism and how this struggle has often rebounded against the defense of basic civil liberties around the globe.

The United States

The United States is the self-proclaimed international leader and role model for individual rights and the rule of law. Our Bill of Rights, enacted in order to enshrine certain individual rights into our constitution, was largely a reaction to the excesses of British rule. Americans secured the right to free speech and assembly, freedom from self-incrimination, from search without warrant, and from cruel and unusual punishment. These rights were demanded by the nation’s founders, a

generation with direct experience of state repression, as a precondition to approving a stronger central government. But we should also recall the British policies that inspired the Bill of Rights were largely enacted in response to the security challenge to the British state from these very founders.

Now it is the United States government that must contend with unprecedented security challenge from non-state actors. The 9/11 attacks ushered in a new era of necessary security requirements. But certain U.S. policies enacted immediately after these attacks, and sustained through the present day, diminish both the rights set forth in the U.S. founding Constitution and the reputation of the U.S. around the world.

Guantanamo Bay

The most visible and symbolic U.S. action in the War on Terror for many is the prison in Guantanamo Bay in Cuba. At its peak, Guantanamo held over 700 “detainees.” It was intentionally created as a zone outside both U.S. and international law, where neither American *habeas corpus* rights nor Geneva Conventions would apply. The camp now holds 60 individuals, about half of which have yet to be judged eligible for transfer to another country or outright release.

Guantanamo has proved to be much more than a prison. It now serves as convenient short-hand for authoritarian governments to dismiss U.S. objections to violations of individual rights. It has also served as a potent recruiting and propaganda tool for the very terror networks that the U.S. is fighting. Terrorists routinely execute hostages and prisoners wearing the same style of orange jumpsuits worn by Guantanamo detainees. According to Jennifer Daskal, former counsel to the Assistant Attorney General for National Security at the Department of Justice, another danger Guantanamo represents is that its very existence increases the temptation to expand detention without charge.

Even by the metric of successfully judging and imprisoning those who attack the United States, the Guantanamo system has been a failure. Terrorists, ranging from the 1993 bombing of the World Trade Center to the Boston Marathon bomber, have been captured, held, tried, and sentenced within the United States justice system. By contrast, those still at Guantanamo are trapped in a legal limbo that is a constant drain on our nation’s resources and reputation.

The Surveillance State

One aspect of state security that has expanded over time is the state’s mass surveillance of the internet. As the internet has grown as a medium of communication and exchange of information, it has provided law enforcement with an increasingly powerful tool to monitor and build profiles of individuals.

The FBI now has the power to issue “National Security Letters” to internet providers. These letters can be issued without judicial oversight, and internet companies are prohibited from revealing the request to anyone. Once issued, there is no oversight on this surveillance from the judiciary or any third party in government. According to Robyn Greene at New America’s Open Technology Institute, there have been reports of nine separate National Security Letters that target over 10,000 people. The only metric for placing an individual on an NSL is that the “target should be relevant to the investigation.”

Reuters has reported that in 2015, Yahoo was ordered by the U.S. government, in secret, to scan every incoming email for certain information and turn those emails over in real time to intelligence agencies.² In order to comply with this directive, Yahoo was forced to build spyware to monitor millions of its own customers. The Yahoo story emerged two years after Edward Snowden first revealed mass email surveillance by the National Security Agency. In both instances, the U.S. public learned of the extent of surveillance only through leaks, harming not only America's reputation internationally, but also the value and reputation of American companies like Yahoo that comply with secret orders.

The debate over state access to private information carries over into the complex issue of commercial encryption. American agencies and other governments have long sought a "back door" to break encryption. Yet U.S. experts and policymakers, in considering the issue, have come to the conclusion that there is no secure way to give a third party access to encrypted data without compromising the encryption itself, with catastrophic consequences for online commerce and communication. Greene contends that the encryption issue can be expressed in cost/benefit terms: "we can spend hundreds of millions of dollars to upgrade law enforcement capacity, or risk hundreds of billions in economic loss."

Watch Lists to Action Lists

A third arena in the security vs. law debate concerns the evolution of watch lists into action lists. The example most familiar to the public is the "no fly" list. Once a list maintained by the Federal Aviation Authority to guard against threats to aviation, the responsibility for this list passed, in accordance with the recommendation of the 9/11 Commission, to a newly created Travel Security Agency. Now the TSA "no fly" list includes those deemed a threat to national security as well as aviation, and has grown from 16 to over 64,000 people. The list has not proven entirely reliable: Senator Ted Kennedy (who shared a name with a suspected IRA terrorist) found himself on the list, while the infamous shoe bomber (Richard Colvin Reid) and underwear bomber (Umar Farouk Abdulmutallab) were not on the list. Both Reid and Abdulmutallab were tried and convicted in the U.S. court system, and are now serving multiple life sentences in the Colorado Supermax prison.

Another recommendation of the 9/11 Commission was for government agencies to share intelligence and data. This sensible recommendation led to the creation of the Terrorist Screening Center (TSC), which allows U.S. agencies and intelligence services to pool data on individuals. The TSC takes that data and provides various sub-lists to government agencies. In addition to TSA's "no fly" list, there are lists of individuals who cannot obtain a passport, commercial license, or work with hazardous materials. Today, there is a political debate over whether those on the "no fly" list should automatically be on a "no buy" list for guns.

Data collection and interagency cooperation are unquestionably reasonable precautions. Yet, according to Professor Jeffrey Kahn of Southern Methodist University, the problem lies in the low threshold for inclusion on one of these lists, and the lack of remedy for being placed on one.

Right now, the threshold for inclusion on a list is whether there is a "reasonable suspicion" that an individual represents a threat. Kahn observed that the dedicated officials who work at the TSC pass a memorial made from a steel beam taken from the wreckage of the World Trade Center.

With such a stark reminder of what is at stake, Kahn wonders, “how can you err on the side of not acting by putting a name on the list?”

Such lists, Kahn suggested, will always expand over time from targeting “them” to “us.” When Americans are caught up in a watch list, it can be difficult to discover it, let alone fix it. Senator Kennedy was able to enlist plenty of assistance from government officials to get his name removed from the “no fly” list. Most people do not enjoy access to that remedy. Aside from some cases of successful litigation, there is no real way to appeal inclusion on a TSC terror watch list. Given that there is no legislative or judicial review of these lists, law enforcement effectively has sole discretion over it. There have been reports that government agencies have offered individuals removal from the list in exchange for cooperating with investigations, raising new questions about abuse.

International Perspectives

How other nations deal with the tension between security and the rule of law provides lessons for our own society. Clearly, different states have different perspectives on the correct balance between individual liberty, state power, law, and how to counter external threats. Some states believe the best guarantee for security is state supremacy over the individual. Just as there is a range of philosophy on the balance between the state and the individual, there is a continuum of state response to the threat of terrorism—and also to the very idea of what constitutes a terror threat.

The European Union

The European Union is a political entity established with values of liberty and law very similar to the United States. Sovereign states formed, and later joined, the EU not just for trade benefits, but as an expression of social and political values, including for individual rights and a shared vision of the rule of law. According to Melissa Hooper of Human Rights First, that framework of shared values is under increasing strain caused not only by a string of terror attacks, but also an unrelenting refugee crisis resulting from the Syrian civil war.

Recent EU member Hungary is now ruled by a political movement steeped in nationalist sentiment. It conflates the refugee crisis at its border with the threat of terrorism, and in so doing builds a very real democratic legitimacy based on fear. “Should the EU govern our borders?” is one cry; propaganda claiming major European cities have “no-go” zones because of radical Muslims another. The underlying message is: The Hungarian government will keep you safe.

The policies that flow from this rhetoric directly confront EU legal standards. Legislation is under consideration that will give Hungarian law preference over EU law. Hungary has established “transit zones” for refugees that places them outside of both EU and Hungarian law, in a move that echoes Guantanamo Bay. In short, the government of Hungary can and does use fear to sustain its political power, and has succeeded in stoking fear to suspend or circumvent law.

According to Melissa Hooper, Poland provides another example within the EU of the refugee crisis eroding EU standards of law. Today all foreigners are considered potential terror suspects,

and Polish companies hesitate to employ foreigners out of fear of coming under official suspicion. The Polish government is also increasing its surveillance and paramilitary capacity.

The EU has lodged protests and issued challenges over these and other laws and policies taking root in Poland and Hungary. But protests from the EU do not change how politically popular these state responses have been.

EU charter member France's current national security response to terror also demonstrates the tension between security and sustaining the rule of law. The French government imposed and has sustained a State of Emergency since November 2015. It has passed laws prohibiting certain types of speech as supporting terror, and it has directly targeted Muslim communities for expanded surveillance and security sweeps. These measures have not ended terror attacks, but they have driven up anti-Muslim sentiment within French society. Security is job one for any national government – but what is the national security justification of prohibiting head coverings or even beach wear favored by Muslim women?

State-Centered Societies

Both Turkey and Russia have civic traditions that favor the state over the individual, and offer a different approach to reconciling the rule of law with state response to terror.

Turkey faces the same security challenges as the EU and the United States—only to a greater degree. It borders Syria, with its continuing civil war and transit of refugees and fighters across the Turkish border. Turkey also wrestles with a long-standing conflict with its Kurdish population and a Kurdish PKK movement that has mounted terror attacks inside Turkey since the 1980s. Finally, there is a battle within Turkish society for control over the state and its direction—a battle recently exacerbated by a failed coup attempt over the summer of 2016.

Turkish Prime Minister Erdogan has capitalized on the failed coup attempt by imprisoning tens of thousands of people, and purging thousands more from positions in the courts, the army, the education system, the government, and elsewhere. The coup, in essence, provided Erdogan with the political cover to broaden what had been his policy since taking power: conflating political rivals with terrorists, with the ultimate goal of cleansing the Turkish government and ultimately society of his critics. Erdogan did not introduce this practice, according to Henri Barkey, Director of the Wilson Center's Middle East Program. The Turkish state has always conflated terror with free speech. As for the rule of law, he observed, "Turkish justice is to justice what military music is to music."

Russia has likewise suffered from a tremendous number of devastating mass-casualty terror attacks including plane hijackings, bombings in the Moscow Metro and apartment buildings outside of Moscow, as well as hostage crises at a school in Beslan and at a Moscow theater. Most, if not all, of these attacks were perpetrated by home-grown terrorists such as Chechen separatists or radicalized Muslims.

The Russian response, first to the Chechen Wars and later repeated terror attacks, was to pass increasingly strict laws against "extremism" and implement increasingly tough tactics by Russian special services. Russian law enforcement and prosecutors increasingly began to target

not only violent radicals, but also political opponents of the federal or local government, as extremists.

The most recent manifestation of the Russian state response, or overreaction, is the Yarovaya Laws passed in 2016, said Maria Kravchenko of the SOVA Center for Information and Analysis in Moscow. These laws are aimed at increasing Russia's capacity to conduct internet surveillance through requirements on telecom companies to save email, phone, and texting data for up to 3 years and to provide encryption "back doors" on emails and texts to state security agencies. The law also makes it a crime to fail to report the planning or perpetration of a terrorist act. Finally, the law regulates evangelism or missionary work, confining such activity to registered churches and forbidding them at private residences.

Russia and Turkey are prime examples of how the fight against terrorism can be used as a convenient cover to go after basic civil liberties as well. These countries also view this struggle through a historical and regional lens that takes them further away from western attempts to manage (however imperfectly) the relationship between national security and civil liberties. The test going forward remains whether the authoritarian response strategy spreads to more countries in light of the contradictory signals being sent by the U.S. and EU.

Conclusion

Terrorism has emerged early on as the scourge of the 21st century. The threat from non-state actors poses a particular challenge to the nation state, as these attacks not only inflict casualties, they erode the social fabric of the targeted countries and communities. The ability of terrorism to disrupt society has been magnified by the massive growth of refugees fleeing conflict areas in Syria, Iraq, and Afghanistan. These populations, themselves the victims of terror and war, are suspected of harboring potential radical terrorists in their midst by many host countries.

When confronted with the challenge of terror attack or refugees, there is a range of state response, as demonstrated by the panelists at the "Protecting Civil Liberties and the Rule of Law in the Age of Terrorism" conference. Societies that privilege state power over the individual tend to conflate external terror threats with internal political opponents. Most states have demonstrated that political factions will use the threat of terror attack as a tool to gain or retain political power by promising to keep the people safe from terrorists—or migrants.

The only check on a government's abuse of national security powers are the institutions which uphold the rule of law. Even states with a strong tradition of rule of law, such as the United States or members of the EU, must remain vigilant in ensuring that state institutions and branches both cooperate with and monitor each other.

At the end of the day, the reason to maintain a strong rule of law, even in the face of a continuing national security emergency, is not just to preserve a "national value." A strong rule of law is essential to providing a society with the national security it demands.

Yet as Professor Rosa Brooks of Georgetown University noted in her keynote address at the conference, it is not just national legal systems that currently are at risk. The self-proclaimed war on terrorism also has undermined the accepted international rules of war, since the former knows no boundaries, involves irregular combatants, is inherently secret and never ends. Other states

inevitably will take notice when the United State asserts the unilateral right to use force and ignore traditional notions of state sovereignty in the name of fighting terrorism. The inevitable result of such “trickle down” conflicts is the destabilization of the international rules of war, to the detriment of basic rule of law principles as well.

U.S. efforts to bolster national security that are designed with the intention of circumventing U.S. or international law often erode both security and law. The unanticipated and negative consequences of Guantanamo, secret surveillance, and government “lists” assembled and utilized in secret have demonstrated, to varying degrees, the corroding effect of secret laws and policy. Secret laws undermine the rule of law, and damage our society’s capacity to confront the very real threat of terrorism by eroding trust in our government both at home and abroad. As Robyn Greene observed, “Secrecy is okay. Secret laws are not.”

¹ <https://www.wilsoncenter.org/event/protecting-civil-liberties-and-the-rule-law-the-age-terrorism>

² <http://www.reuters.com/article/us-yahoo-nsa-exclusive-idUSKCN1241YT>