Constitutions, Democracy, and the Rule of Law

Terror and Civil Liberties
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Catastrophic Terrorism and Civil Liberties in the Short and Long Run

The Problem in the Long Run

James Fearon: I'd like to begin by thanking the organizers for inviting me to participate in this event. A great celebration of a great university. And for giving me the opportunity to think through a set of issues that I haven't thought enough about and for giving me the opportunity to be corrected and possibly humiliated by an outstanding set of critics this afternoon. I'm going to talk today about civil liberties in the United States and the threat of catastrophic terrorism, not terrorism in general but catastrophic terrorism. By catastrophic terrorism, I mean not suicide bombings that kill five or twenty people or snipers or anthrax mailers who kill a few people at random here and there, but big-time stuff, using weapons of mass destruction or simpler methods to kill hundreds or thousands or possibly even millions of people.

At this scale, debates about the meaning of what terrorism means are largely beside the point, but just for the heck of it, let me say that by terrorism I'll take that to mean violent attacks on noncombatants, civilians, for the purpose of political pressure, political theater, influencing some third parties, or possibly kind of crazed self-expression.

The Bad News

The talk will have three parts, which can be summarized very simply. First, there's bad news. Next, there is some good news, and then there's a forecast, which is probably bad. So it's generally, I would say, a depressing talk. Okay. Bad news. Forget about al Qaeda. I think we can even forget, in a certain sense, about violent Islamic fundamentalism. More broadly, these are just short-run or medium-run problems. The real bad news, I think, is that catastrophic terrorism is a long-run problem and it is a technological problem more than it's a political problem. And as such, I think it's going to remain and probably grow more
dangerous long after al Qaeda is just a memory, if we should be so lucky. Why is it a technological and not so much a political or social problem? On the long run, the progress of science and technology and education are making it easier and easier for ever-smaller groups, possibly even individuals, to develop or acquire weapons of mass destruction. It's easier and easier to get what you need to make nuclear weapons. Thanks to great universities like Columbia, more and more people know how, every year, all over the world. Likewise, it's getting easier and easier and we're learning more and more about how to do biochemical engineering so as to modify pathogens and toxins to make new, possibly unstoppable plagues.

I have a journalist friend who quipped in a conversation about this subject that we seem to be heading in the direction of a world where every single person has the capacity to blow up the entire planet by pushing a button on his or her cell phone. Now, this obviously is a big exaggeration and such a world will never exist, but it's useful to think about as a limiting case because such a world couldn't exist, right? It's immediately clear when you think about it because it's just not a feasible world. It would blow up immediately. You know, even if one million—as opposed to five billion—people had these cell phones, or even ten thousand people, you'd have to think that your expected life span would be a great deal shorter than it is now.

I think that the important point that this example makes is that in the long run we simply are not going to be able to save ourselves by redressing political or social grievances. This is the sense in which, I think, the problem is in the long run more technological than political or social. Of course, when there are legitimate grievances, governments ought to be redressing these in any event as a matter of justice and it could also be that in specific cases this could reduce a short-run or a short-term immediate threat of catastrophic terrorism. But in the long run, there will always be a constant trickle of angry, hate-filled individuals and messianic or ideologically crazed groups who are eager to kill and destroy for some kind of ideal or cause.

If the progress of science, technology, and education makes it easier and easier for them to do this, then we face a very real dilemma. And I think that this dilemma has not been acknowledged or even seriously dealt with in the debates on terrorism and civil liberties since September 11. The public debate and also the academic debate, at least what I've read of it, has been quite partisan, quite predictable, and I think pretty boring.

On the same side, you have traditional liberals who are up in arms and scandalized by the PATRIOT Act and the Bush administration's multiple transgressions against civil liberties. But they generally fail to acknowledge that there’s a serious and new problem developing, let alone offer any serious or constructive suggestions about how to deal with it. Conservatives, on the other hand, tend to defend the PATRIOT Act, leaving aside some of the more
libertarian conservatives. They tend to defend the PATRIOT Act, as they say well it's actually mild compared to U.S. responses to past threats of a similar order or less. And sometimes they insinuate that—they might even insinuate that—liberals are helping terrorists if they scream too much about civil liberties. They too, I think, are highly focused on the short-run politics and the implications of this specific argument for this Republican administration.

Responding to the Threat of Catastrophic Terrorism

In this talk, what I want to do is consider the long-run problem of catastrophic terrorism and then work backward to try to say something about what it might make sense to do now in the short run. Now, before getting to possible solutions to the long-run problem though, I'm going to say a bit more about the nature of the problem. In particular, why is it or how can I be so sure that in the long run we won't be able to protect ourselves without violating our traditional civil liberties, at least in their traditional form? Basically, I have two arguments here: One is an argument from common sense and the other is based on some evidence from a domain that I think provides the best analogy, the closest analogy, for efforts to counter the threat of catastrophic terrorism.

Okay, so first argument, the one from common sense. This is basically illustrated in a very extreme form by the nuclear cell-phone example. As it becomes easier and easier for small groups to acquire the means to kill thousands and thousands, it seems to me that it would be simply insane if government did not have the power to undertake secret investigations of individuals and groups that are giving off some kind of warning signs. It would be insane if government couldn't engage in some kind of preventive detention or collect information about individuals on the basis of suspicions or group-level indicators. In other words, engage in various forms of profiling. It might even make sense if we go far enough in the direction of this scary world to acquire security clearances for learning kinds of scientific knowledge and procedures.

Now, many traditional liberals, I think, seem to want to deny that the problem of terrorism will require anything new or different in terms of law enforcement and investigative powers. The idea or the analogy that's often used on this side of the argument is that terrorism is a form of crime and it can and it should be handled properly by the criminal justice system as it stands right now. But I think ordinary crime is just a bad analogy for the problem that's posed by the threat of catastrophic terrorism. The model for ordinary crime works something like this: It's basically that the model is that the police investigate crimes after they occur and by doing so, if they do it effectively, they get a high enough probability of catching the criminals that future crimes and future criminals are deterred from committing crimes.

Now, with catastrophic terrorism, we're talking about crimes that are so enormous and so horrible, a nuclear bomb in New York City, for example, that
catching the criminals after the fact is just too cold a comfort. Liberals—and I count myself in this crowd—we would just be sticking our heads in the sand if we go around saying, "We must not compromise any civil liberties," if we don't actually engage the dilemma posed by the necessity of preventing this sort of crime before it actually happens, not after the fact. In addition, the deterrence model for ordinary crime prevention just breaks down when you have terrorists who are willing to kill themselves or think they can escape detection, which is not implausible in the case of nuclear weapons, for example, secretly delivered to a major city.

There's another common analogy that we encounter all the time in the press, and from politicians, from thinking about terrorism and this is terrorism as war, or as the president says, the war on terrorism. This tends to be deployed more often by conservatives. I think if anything, this is an even more misleading analogy than the crime analogy. With an interstate or classical war, you know who the enemy is and where to find him. The problem in war, classically understood, is when and how to attack the enemy's forces. With terrorism on the other hand, the central problem is figuring out who and where the enemy is. And if you can do that, once you've done that, the problem is simple. The attacking part is easy because of the huge imbalance between the resources and power of the state versus small numbers of terrorists. The problem is figuring out who and where they are.

So neither the crime analogy nor the war analogy seems to be very helpful. A much better one for thinking about this problem is the analogy to counterinsurgency and civil wars. I believe that the vast—this isn't widely understood this way, but I think if you apply sort of the standard or a poor notion of what terrorist attack is—then the vast majority of terrorist attacks in the last fifty years, or for that matter in the last five or two years, have taken place not in the United States or Israel or developed countries, but rather in very poor countries where there are civil wars going on. Poor country civil wars.

Most civil wars, in the post-World War II period, and especially those in poor countries, have been fought as rural guerrilla wars, or insurgencies. Terrorist attacks appear in these when you have either the government or rebel forces massacring villages, it happens very often—civilians in villages who are suspected of supporting or helping the other side. And typically, they do this to deter other villages from doing the same or the alleged transgressions or to scare other villages into compliance with the government or the rebels' agenda.

Terrorism, when our media covers it, or when it kind of implicitly defines it, may kill one or five or ten or twenty people at a time, except in very rare cases like September 11. Terrorism in poor country civil wars, on the other hand, like in Sri Lanka, Angola, Sudan, Sierra Leone—there's a very long list, many more than that—regularly kills hundreds, even thousands or tens of thousands over the course of fairly short periods of time. The problem we face in confronting the
threat of catastrophic terrorism, I think, is structurally similar to the problem that governments face in trying to conduct counterinsurgency operations.

In a nutshell, okay, what's the problem? In a nutshell, the problem is how do you distinguish the active rebels, or active combatants, from the rest of the population if you kill or arrest too many noncombatants or the people who aren't actively involved in the rebellion? You may actually increase support for the other side and undermine support for your own. But on the other hand, if you don't kill or arrest active combatants, then you lose control of territory and you lose public confidence and support very quickly.

So the second reason why I think that in the long run, the problem of catastrophic terrorism has to be addressed in part by changing laws and law enforcement practices in ways that would cut against traditional, our traditional civil liberties, comes from this analogy to counterinsurgency. I've been studying civil wars in this post-World War II period for several years now and in the course of that have developed the impression that the problem of counterinsurgency is just an extremely difficult one for governments to solve. Most of them have a terrible time with it, even the relatively most bureaucratically, militarily competent and well-financed states have had tremendous difficulty with it—the U.S. in Vietnam, Britain in Northern Ireland, the [former] Soviet Union in Afghanistan, for example. It's a hard problem. I think on the basis of this evidence that the following two empirical claims are both accurate, even if they may at first glance seem a little contradictory.

So first, it's highly unlikely, I think, that a state can defeat or minimize an insurgency without committing significant abuses of civil liberties, including legal changes that are going to go well beyond what's necessary to counter ordinary crime. But at the same time, second claim, it seems clear that too much or too indiscriminate abuse of civil liberties and human rights can hurt, rather than help, encounter insurgency. So it seems there's this very tricky delicate balance to be struck, of which we have no great knowledge or rules and there probably aren't any for how to strike it. But I think how much to abuse or what's the optimal level and optimal ways to minimally restrict civil liberties in combating the problem faced by, you face in, an insurgency. Okay, on the basis of these two arguments, the one from common sense and the other from the grim experience of states with the problem of counterinsurgency, I think that in the long run the news has to be bad for our traditional civil liberties. The fact that technology and education are making catastrophic terrorism ever easier to carry out moves us in the direction of having to conduct, in effect, a continuous low-level counterinsurgency, and historically, if the analogy is right, this has been very bad for civil liberties.
The Good News

That's the bad news, okay? Now, some good news. The good news is that these arguments really only apply in the long run. And if I had to be pinned down, I'd say that starts in ten or 15 years and gets increasingly long after that. This kind of nightmare scenario of nuclear cell-phones, that's clearly a long way off if it's not just a complete fantasy. In any event, in the short run, it remains extremely difficult for individuals, maybe impossible, to acquire nuclear weapons without the active help of the state. It remains quite difficult to deliver biological or chemical weapons, or at least the ones that are currently known and feasible, in a way that would kill thousands.

What this means is that in the short run there's simply no good reason for our government to engage in a spasm of law-making that restricts civil liberties as our government has after both the Oklahoma City bombing and September 11. The threat is not orders of magnitude greater the day after the attack than it was before. If you face what's a long-run problem, it makes sense to think about, you know, not to panic but to think about the long run and work backward from there.

Obviously this would not be anything like the sole solution but it does seem to me that the nature of this problem is such that it would make sense. It's a great candidate for a presidential commission of constitutional lawyers, congressmen on the relevant committees, law enforcement officials, to make report recommendations to the relevant congressional committees about what we ought to do in the longer run, in terms of changing the laws and possibly also developing new institutions. This, it seems to me, would be much better than the correct de facto approach in which after each attack our representatives and the executive engage in a kind of mutual competition to see who can get toughest on terrorism. This produces bills and reforms and policies of dubious value for actually preventing further terrorist attacks and has also just run roughshod over parts of our constitution.

Now, I have no idea what such a commission would propose. This is far from my area of expertise. But I do think that there's an obvious type of solution to the long-run dilemma, which addresses the problem of how to prevent catastrophic terrorism while at the same time preserving something that's at least in the spirit of our traditional constitutional rights. And that's this. So basically, in the abstract you can think of two basic ways to check and balance the arbitrary use and abuse of government powers. First, there is just flat-out prohibiting certain actions in your constitution as we do in the Bill of Rights. Second, you can build multiple institutions within a government that are structured to check and monitor and balance each other. Our constitution famously does both of these things. If effective defense against catastrophic terrorism ultimately will require more
intrusive law enforcement, that employs suspensions of habeas corpus, racial profiling, secret searches and the like, then these actions ought to be authorized and monitored and evaluated by new judicial powers and bodies.

This type of solution is so natural that we have already attempted it in the 1978 Foreign Intelligence Surveillance Act (FISA). This act set up some secret courts of federal district judges that hear Department of Justice requests for authority to conduct secret searches, I think. I believe also some wiretapping, in cases that involve claims of foreign espionage.

With the PATRIOT Act, one of the things it did was vastly broaden the authority or the potential use of these courts by saying that any case where the government claims that terrorism might have something to do with it can request authorization through these courts. Now at present, and even more a sense of the PATRIOT Act, I think if you look at the record—and so far as we can tell, they're very secretive—the record of these courts is not very good. I mean, they seem basically toothless. They rejected only five out of fourteen thousand requests between 1979 and 2001, for example. They aren't adversarial proceedings. There's no one arguing. The judges hear only the government's side, and so on. But it does seem to me that the idea's right and that reforms could give them some real bite. Have the courts randomly audit after-the-fact cases they've authorized to see if the authority was properly used or successfully used. Have the cases and search requests made available to the public after a decent interval of time, possibly in redacted form.

So to sum up on the good news, it seems to me we have time to work out new police and judicial arrangements to address the real dilemma of catastrophic terrorism while at the same time checking and monitoring the increased government powers that this is going to require. That's the good news. Okay. Now finally, a mixed forecast. What are our politicians actually likely to do? Will they carefully build new judicial institutions to monitor and control the application of new government powers? Or will they keep reacting in a spasmodic fashion, reacting to each new attack, with a new set of often ill-considered laws that just each time ratchet up, or spiral up, government powers of surveillance and investigation and detention?

A Mixed Forecast

Now, as a political scientist, you might expect me to say, well, of course they're going to do the stupidest thing possible, the most short-run thing possible. And of course, you know, I wouldn't by any means dismiss that. It's entirely possible. But I actually do think that our political system does have the capacity to confront this dilemma in a reasonable and effective way. Congress has the capability, I think, in certain circumstances to do a reasonable job with it. The ambivalent forecast is that I think whether it does so depends largely on the factor that's outside of our control or Congress's control or the president's control, and that factor is how
successful will terrorists be in the next few years by carrying out big attacks on U.S. soil?

So, if we go for five years or so without another big attack, it seems to me that Congress and the public are going to calm down enough that Congress and the courts will revisit the PATRIOT Act and associated things that have happened, executive branch orders and so on, in a more measured way, and hopefully—and possibly—in a more constructive way in terms of building some new judicial institutions or beefing up accords or things of that sort. On the other hand, if there are more successful attacks in the short run, the great fear will continue and politicians will continue to face very powerful pressures to get tougher on terrorism each time an attack occurs.

And a scholar named Laura Donohue has documented in a couple of cases, especially in Northern Ireland, a sort of spiral, or ratchet effect, where with each new attack we've got to get tougher and you just kind of very quickly pile on and ratchet up these provisions. And as long as insurgency or a conflict is going on tend to stay on the books because no one can ... you know, if you say, "Well, I think we ought to tone this down a little bit," you're at risk of being accused, if you're a politician, of being soft of terrorism.

Now, this is actually an old pattern in the United States, what I'm describing, and it's worth briefly, very briefly considering how it has played out historically.

**When the Fear Subsides**

In the last hundred years, the United States has faced a succession of apparent domestic security threats that led each time to spasms of legislation and police action. So after the First World War, there were a fairly small number of package bombings that led to what are now known as the Palmer raids, in 1919 and 1920, which locked up thousands of people, almost entirely noncitizens, on the presumption, basically, that they were communists or anarchists.

During World War II, as Professor Fletcher mentioned, the government interred thousands of people of Japanese descent in desert camps in the West. After World War II we had McCarthyism, which made alleged association with the Communist Party grounds for government harassment. And most recently, with Oklahoma City and September 11, these have inspired Congress to pass laws that look plainly on constitutions with regard to civil liberties and it's led the executive under Bush to arrogate powers of detention applied to noncitizens, mainly, that are truly frightening.

Now, for the first three of these historical cases. The three cases, except for the most recent episode, there's been an interesting pattern, a sequence which goes like this: During the time of the fear, public, government, and judges all largely support, or don't contest, these spasms of legal restrictions on civil liberties.
Then, after the fear subsides a bit, the courts and judges start to revisit cases based on these legal restrictions and they declare them unconstitutional. In the course of which, they flesh out new constitutional precedents and clarifications that are intended to make further abuses of the same sort that had just happened much harder to do.

So in effect, when the fear subsides, the courts actually start doing their job of protecting the constitution, the Bill of Rights, by more or less fighting the last war. So, for example, the laws during and immediately after World War I criminalize speech very directly. You know, in one case they came to the Supreme Court, when the Supreme Court supported the government's right to pass a law which made it illegal to distribute pamphlets opposing the draft for World War One.

Later the Supreme Court says, "Well, you just can't do it. It's directly contradicts the First Amendment. McCarthy-era law on politics criminalized—instead of speech directly—associations. You know, so think of the question: "Are you now or have ever been a member of the Communist Party?" Subsequent rulings in the late fifties and early sixties said, "Well, you just can't do that. It's against freedom of, you know, it contradicts freedom of association."

Now after Oklahoma City and 9/11, we have laws criminalizing the provision of material support, which is the phrase that has been used in almost all of the criminal prosecutions of terrorist activities. These laws make it illegal to ... well, it's somewhat unclear but it seems you can be put in jail for contributing to a group that undertakes activities that the State Department has deemed terrorist. The criteria for that have been declared and are not spelled out or justiciable. You can be put in jail for this, even if you had no intention that the money should be used for terrorist purposes. Now this pattern that I'm describing has been pointed out, and I basically take it from an article by a constitutional lawyer named David Cole. And he finds in this article ... he says, "This is just depressing. And it's awful. We're just repeating history. The government just keeps sneaking up new, more clever ways to subvert the constitution. There's no progress here. Just repetition of history."

I had a much different reaction to it, which is that it actually seems to me like notable progress if our political system is able to correct itself gradually over time by forcing government abuses to take ever more subtle forms. No, seriously. You know, that's better than if we were criminalizing speech. The interesting question, I think, is whether the self-correction part of this cycle is going to continue to operate in the present case with the threat of catastrophic terrorism? Will the fear subside enough that a political space opens up to allow the courts and Congress to think about the long-run problem in a way that pays attention to preserving the spirit of our traditional civil liberties? Or will periodic attacks produce a permanent condition like counterinsurgency in which basically everybody—courts, judges, the public—acquiesce to civil rights violations or laws that would formally have
been thought to be massively inconsistent with the constitution and by a more powerful and arbitrary state?

All I can say, and I'll say in conclusion, I certainly hope not. And I hope U.S. foreign policy has changed in the short run in such a way as to lower rather than possibly increasing the risk of more short-run attacks. But, unfortunately, I think the matter's largely out of our hands and depends on the luck, or, I hope, the bad luck of the terrorists. Thank you.