

# Counter Terrorism: Weighing the Price of Liberty

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**“Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”**

- Benjamin Franklin, November 11, 1755.

## Introduction

While Benjamin Franklin’s famous quote may not mean what he intended, it still captures the central problem of counter terrorism: what amount of atrocity are we willing to suffer as the price of liberty? Certainly the deaths of innocent civilians at the hands of terrorists are an atrocity. On the other hand, are they sufficient to justify infringing our civil liberties? So let us examine what it means to be a terrorist, what the country is doing to fight terrorism, what further actions are being debated, and what the nation is willing to pay for the price of liberty.

## Terrorism

Terrorism is a crime defined in Title 18 United States Code, Section 2331, as Acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, that appear to be intended to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping.” In essence, terrorism is a crime distinguished by its motive. The particular crime is assault. There are many different types of assault, all of them generally illegal. What distinguishes terrorism is the motive behind the assault; an intention to intimidate or coerce the U.S. population or government.

Terrorists, accordingly, are people guilty of the crime of terrorism. They need not execute the crime to be guilty of it. Merely planning the crime makes them guilty of criminal conspiracy, which makes the planners terrorists. Similarly, even though terrorism is a crime under U.S. law, it does not just apply to U.S. citizens. Anybody guilty of planning or committing a crime on U.S. territory is subject to U.S. law, and may therefore be brought before U.S. justice. Interestingly, terrorists may be mass killers, but mass killers may not necessarily be terrorists. The distinction lies in the motive, not the act. The act of “mass killing” is defined by the 2012 Investigative Assistance for Violent Crimes Act (28 USC 530C) as “three or more killings in a single incident”. Thus the 1999 shootings that killed 13 at Columbine High School CO, 2012 shootings that killed 26 at Sandy Hook Elementary School CT, and 2007 shootings that killed 32 at Virginia Technical University, VA may be labeled “mass killings”, but no evidence indicates that the shooters harbored terrorist motives. They were not terrorist incidents. However, the greater concern today is that terrorists might inflict mass murder and suffering on a scale dwarfing any mass killing to date. The beginnings of this concern may be traced back to the 1995 Tokyo Subway Attacks.

In March 1995, cult members from Aum Shinrikyo deployed bags of liquid Sarin during morning rush hour, exposing thousands of Tokyo commuters to the chemical nerve agent. The attack was meant to bring down the Japanese government and initiate an apocalypse from which Aum Shinrikyo would emerge to lead a new world order. It was also hoped that the attack would end an ongoing police investigation against the cult. Twelve people were killed in the attack. Over 5,500 sought

treatment. If the bags had been more properly deployed, experts believe the death toll could have risen into the thousands [1].

The March 1995 Tokyo Subway Attacks caught the attention of the U.S. government because it was the first time a non-state group used a weapon of mass destruction (WMD) against civilians. In February 1993, a truck bomb detonated inside the World Trade Center awoke the U.S. to the realization it was susceptible to international terrorist attack on its own soil. In April 1995, a truck bomb killing 168 innocent civilians in the Alfred P. Murrah Federal Building awoke the U.S. to the realization it was also subject to domestic terrorist attack. The Oklahoma City Bombing occurred within a month of the Tokyo Subway Attacks, prompting a dramatic shift regarding the perceived threat of WMD terrorism: suddenly the unthinkable became thinkable [2].

No longer were chemical, biological, radiological, and nuclear (CBRN) weapons exclusively available to nation states. The Tokyo Subway Attacks demonstrated the ability of non-state actors to also produce such weapons. Furthermore, experts generally agreed that the collapse of the Soviet Union in 1991 had proliferated the availability of CBRN agents, placing the means to produce or acquire WMD within reach of terrorist organizations. Designed to deter and defend against nation state threats, the U.S. national security apparatus was unprepared for this new threat from non-state actors. Moreover, the potential consequences from terrorist WMD attack could not allow the U.S. to just sit and wait [2].

## Counter Terrorism

In the aftermath of the Tokyo Subway and Oklahoma City attacks, on June 21, 1995, President Clinton issued Presidential Decision Directive No. 39 (PDD-39) stating U.S. Policy on Counterterrorism.

*“The United States regards all such terrorism as a potential threat to national security as well as a criminal act and will apply all appropriate means to combat it. In doing so, the U.S. shall pursue vigorously efforts to deter and preempt, apprehend and prosecute, or assist other governments to prosecute, individuals who perpetrate or plan to perpetrate such attacks”- 1995 PDD-39 [3].*

The Pentagon defines counterterrorism as actions and activities to neutralize terrorists, their organizations, and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals [4]. Counterterrorism includes antiterrorism, which the Pentagon defines as defensive measures used to reduce the vulnerability of individuals and property to terrorist acts, and contain them should they occur [5].

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PDD-39 placed responsibility for U.S. counterterrorism efforts with the Department of Justice (DOJ) and the Department of State (DOS). PDD-39 made the Federal Bureau of Investigation (FBI) under DOJ responsible for preventing and responding to domestic terrorist attacks. Conversely, PDD-39 made the State Department responsible through its ambassadors for coordinating response to attacks on U.S. interests overseas. PDD-39 assigned the Federal Emergency Management Agency (FEMA) responsibility for coordinating the Federal response to a terrorist attack on U.S. cities, including those involving weapons of mass destruction [3].

Unfortunately, PDD-39 wasn't enough. On September 11, 2001, nineteen terrorists hijacked four passenger jets and turned them into guided missiles. They killed 3,000 people and caused an estimated \$40 billion in direct damages, including the toppling of the Twin Towers at the New York World Trade Center [6]. 9/11 was largely seen as a failure of coordination between Law Enforcement and the Intelligence Community. As stipulated in PDD-39, the FBI was responsible for reducing the nation's vulnerability to terrorism through an expanded counterterrorism program. PDD-39 also charged the Central

Intelligence Agency (CIA) with reducing the nation's vulnerability to terrorism through aggressive foreign intelligence collection and analysis, and covert action [3]. In the lead-up to 9/11, pertinent clues slipped past the FBI and CIA when 1) the known al Qaeda operatives crossed U.S. borders, 2) an FBI field agent issued a memorandum warning of a potential strike against U.S. civil aviation, after which 3) Zacarias Moussaoui was arrested for suspicious behavior in flight school, and 4) other members of the plot, in the country illegally, were ticketed for speeding. The 9/11 Commission attributed the attacks to a "failure of imagination". If only one of the many FBI and CIA agents had conceived the possibility of a suicide hijacking, they might have "connected the dots" that became so obvious afterwards [6].

The failure to coordinate was attributed to "the Wall" that had been built up between intelligence and law enforcement to protect the constitutional rights of those under criminal investigation. In October 2001, just weeks after 9/11, Congress passed and the President signed the USA PATRIOT Act containing provisions to reduce this barrier. The USA PATRIOT Act effectively removed impediments to the exchange of information about terrorism or other national security threats between intelligence and law enforcement personnel [7].

While not exactly the WMD terrorist attack that had been feared, 9/11 was worse because it exposed the vulnerability of critical infrastructure, in this case the transportation infrastructure, to achieve WMD effects at little or no cost compared to the Tokyo Subway Attacks. The 9/11 Commission observed the most significant feature of the attacks was their "surpassing disproportion". The critical infrastructure necessary to sustain urban society also provided the means to destroy it. Not only was the means accessible, it did not require the resources of a nation-state to wield it. 9/11 demonstrated how all urban societies were vulnerable to attack by small groups or individuals acting on their own behalf [6].

To contend with this new, unprecedented threat to national security, the President proposed and Congress debated the role of a new Department of Homeland Security (DHS). The 2002 National Strategy for Homeland Security defined homeland security as "a concerted national effort to prevent terrorist attacks within the United States, reduce America's vulnerability to terrorism, and minimize the damage and recover from the attacks that do occur." Written before DHS was formed, the 2002 homeland security strategy identified "Intelligence

and Warning" as one of six critical mission areas necessary to prevent terrorist attacks [8]. Congress briefly considered subordinating both the FBI and CIA to the new DHS to fulfill this role. However, concerns over potential breaches to civil liberties quickly put an end to these discussions. Instead, DHS was assigned a role of bridging the gap between the Law Enforcement and Intelligence Community. The bridge was formed by establishing Fusion Centers in each State and selected urban areas across the country [9].

After 9/11, the FBI also expanded efforts to bridge the historical divide between Law Enforcement and the Intelligence Community, and undertook reforms to make the agency more proactive, agile, and flexible [7]. Among the changes, the FBI established more Joint Terrorism Task Forces (JTTFs) across the nation, increasing cooperation between State, Local, and Federal agencies. The FBI also established new guidelines making it easier to open terrorism investigations. And of course, the USA PATRIOT Act facilitated closer cooperation with the Intelligence Community, which in 2004 was reorganized under a new Director of National Intelligence (DNI) with budgetary authority over all seventeen members of the Intelligence Community, including the CIA [7].

In November 2002, President Bush signed the Homeland Security Act creating the Department of Homeland Security. As the new Department was about to go operational, the President issued Homeland Security Presidential Directive No. 5 (HSPD-5) in February 2003, making DHS responsible for coordinating the Federal response to domestic incidents, including terrorist attacks. Otherwise, HSPD-5 preserved the roles of the FBI and State Department established in PDD-39; the FBI remains responsible for preventing and prosecuting acts of domestic terrorism, and the State Department continues to protect U.S. interests overseas [10].

### Bringing terrorists to justice

As part of its counterterrorism mission, the FBI working in cooperation with State, Local, and Federal agencies (including DHS), seeks to arrest and apprehend terrorists before they strike. Under HSPD-5, the FBI is also responsible for investigation following a terrorist attack. For terrorist suspects within U.S. borders, State and Local agencies may take the lead in pursuing and prosecuting suspects until such time as a terrorist motive is established. For terrorist suspects taken into custody outside the U.S., the Department of Justice may work with foreign governments to extradite them for prosecution in the United States. In the case that a foreign government refuses or is incapable of surrendering a suspect, the U.S. might conduct a "rendition" forcefully taking them into custody.

In the case where a foreign government is incapable of surrendering or otherwise controlling a terrorist threat, the President might decide to employ military force to neutralize or eliminate it. The first well-known rendition case involved the Achille Lauro hijackers in 1985: after they were given a plane and were enroute in international airspace, U.S. Navy jets forced it to land at Naval Air Station Sigonella where the hijackers were given over to the Italian Carabinieri [11]. After 9/11, what had been a limited program expanded significantly; some experts estimate that 150 foreign nationals have been taken by the CIA. According to reports, the terrorist suspects were transported to detention and interrogation facilities in Jordan, Iraq, Egypt, Diego Garcia, Afghanistan, Guantánamo, and elsewhere [12]. Suspects were reportedly arrested, blindfolded, shackled, and sedated, or otherwise kidnapped [11]. The practice became controversial during the Bush Administration because the destination countries were known to employ harsh interrogation techniques rising to the level of torture. In

January 2009, President Obama issued an Executive Order creating a special task force to review U.S. transfer policies, including the practice of rendition, to ensure compliance with applicable law [13].

Where rendition is impractical, terrorist suspects may be subject to U.S. military force. Military force may be delivered in all shapes and sizes, and not just by the Department of Defense (DOD). The CIA has an extensive paramilitary capability of its own. By DOD definition, paramilitary forces are distinct from the regular armed forces of any country, but resembling them in organization, equipment, training or mission. The CIA typically takes on missions that must be clandestine or covert to avoid directly implicating the U.S. Government. Examples of CIA covert operations include the 1961 Bay of Pigs invasion of Cuba, and interdiction missions along the Ho Chi Minh Trail in Laos, a neutral country during the Vietnam War. While the record of these actions is mixed, the CIA is credited with helping depose the Taliban government after they refused to surrender Bin Laden following 9/11 [14]. Units from the CIA's Special Activities Division (SAD) were the first U.S. forces to enter Afghanistan in September 2001. They joined with the Afghan United Front (Northern Alliance) to prepare for the subsequent arrival of U.S. Special Operations Forces (SOF). Together, the United Front, SAD, and SOF combined to overthrow the Taliban by November 2001. The campaign was noted for its minimal use of conventional military force and correspondingly low casualty count among allies [15].

The CIA was also instrumental in developing the Predator drone, which saw its first combat use in Afghanistan. In November 2002, Qaed Salim Sinan al-Harethi, an al-Qaeda operative and Yemeni citizen suspected of involvement in the October 2000 bombing of the USS Cole, was killed by the CIA using a Predator drone firing a Hellfire missile. The attack was controversial because it also killed Kamal Derwish, a U.S. citizen accompanying al-Harethi. The Bush Administration defended the action citing a presidential finding that permitted worldwide covert actions against members of al-Qaeda. Despite the controversy, the use of Predators to kill suspected terrorists has become common practice [16].

The DOD employs Special Operations Forces to deliver military capability in hostile, denied, or politically sensitive areas of the world. Special operations are distinguished from regular military operations by the degree of physical and political risk, operational techniques, and mode of employment. DOD special operations are frequently clandestine, designed in such a way to conceal them, but not necessarily covert, that is, designed to conceal the identity of the sponsor [14]. SOF teams helped provide the Afghan United Front with airpower during the early months of Operation enduring freedom.

Joint Terminal Attack Controllers (JTACs) using laser range finders helped direct precision guided munitions dropped from orbiting U.S. Air Force B-1 and B-52 bombers onto Taliban targets. This use of airpower proved instrumental in helping the United Front capture the northern city of Mazar-e-Sharif in November 2001 [17] Supported by CIA operatives on the ground, Navy SEALs mounted the raid into Pakistan that succeeded in killing Osama bin Laden on May 2, 2011 [18].

Interagency coordination for counterterrorism operations is accomplished through the CIA National Counterterrorism Center (NCTC). The NCTC was established in 2004 to ensure that information from any source about potential terrorist acts against the U.S. could be made available to analysts and that appropriate responses could be planned. According to the NCTC Charter, the NCTC serves as the principal advisor to the Director of National Intelligence on intelligence operations relating to terrorism, and provides strategic operational plans for

military and civilian counterterrorism efforts and for effective integration of counterterrorism intelligence and operations across agency boundaries, both inside and outside the United States. The NCTC Director is appointed by the President of the United States. And though the Director reports to the DNI, in practice the NCTC Director works through the National Security Council and the White House staff [19].

Interagency coordination for counterterrorism policy is orchestrated at the highest level of Federal government by the National Security Council (NSC). The National Security Council is the key integrator of the President's whole-of-government counterterrorism policy and strategies requiring interagency coordination at the Principals Committee, Deputies Committee, supporting interagency policy committees, and the NSC Staff. The key interagency policy committee for counterterrorism is the Counterterrorist Security Group led by the Assistant to the President for Homeland Security and Counterterrorism [4].

## The New Debate

While the United States has mercifully not endured another 9/11 attack, the November 2015 terrorist attacks in Paris that killed 130 people and injured 368 more renewed domestic concerns about terrorist mass killings back home. [20]. In December 2015, those concerns appeared justified after 14 people were killed and 22 injured in what appeared to be a terrorist attack in San Bernardino CA [21]. The two incidents renewed debate on what more could be done to reduce the nation's vulnerability to terrorism. Given all that is already being done for counterterrorism, the new debate seems more focused on measures that infringe American civil liberties.

Both incidents have renewed arguments for tighter gun control. The United States undisputedly leads the world in both gun ownership and gun homicides. Certainly a case can be made that tightening gun control would reduce the number of gun deaths in the United States [22].

But the Paris attacks themselves prove that even in Europe where gun controls are strong, criminal elements will find a way around them. Tighter gun control will not halt terrorism. Both incidents have revived consideration for stronger domestic surveillance. In June 2013, leaked documents revealed that the National Security Agency (NSA) had been eavesdropping on domestic phone calls since 2001, and domestic internet traffic since 2007 [23]. While both the Bush and Obama administrations insisted citizens' rights were adequately protected, in June 2015 Congress voted to end the programs amidst court challenges that ultimately ruled the practices illegal [24].

Not only were the practices illegal, they were also ineffective. When asked if the programs stopped any terror attacks, a White House review panel was told "no" [25].

As the Paris attackers reportedly came from Syria, there have been calls to curtail further immigration to the United States for those fleeing the Syrian civil war. The underlying concern is that Islamic State (IS) operatives might infiltrate the country and carry out similar terrorist attacks in the United States. The concern seems disproportionate since the 10,000 Syrian immigrants authorized by the President represent less than 0.08% of the estimated 12.2 million illegal immigrants already living here [26,27]. In other words, we don't know what terrorists are already here. More importantly, it doesn't matter. You don't have to live in the United States to attack the United States.

Following the 1995 Tokyo Subway Attack and Oklahoma City Bombing, President Clinton commissioned a panel to examine the

security of U.S. critical infrastructure. As 9/11 would later prove, the nation's critical infrastructure could be subverted to inflict damage or destruction on a scale comparable to WMD. The Presidential Commission Report released in October 1997 found no direct physical threat, but did warn of an emerging potential for cyber-attack to disrupt or destroy U.S. critical infrastructure. That report prompted President Clinton in May 1998 to issue PDD-63 making critical infrastructure protection a national priority [28]. Today, critical infrastructure protection is a basic mission of the Department of Homeland Security, and cyber-attack a priority concern [29]. Chief among these are shutting down the North American Electric Grid, compromising the Federal Reserve System, or instigating simultaneous meltdowns across multiple nuclear power plants. The consequences of any such incident could far exceed any disaster the United States has ever experienced previously, either natural or manmade. Nobody's saying it would be easy, but many agree it could be possible either directly or indirectly through the Internet, from anywhere around the world.

### Weighing the Price of Liberty

The fact of the matter is that suspending American civil liberties is all too common of a practice during times of national crisis. President Roosevelt interned 110,000 Japanese Americans during World War II; President Wilson enthusiastically enforced the will of Congress to suppress any dissident views after the United States entered World War I; President Lincoln suspended the right of Habeas Corpus, allowing Southern sympathizers in the North to be arrested without charge; and most famously, President Adams, a founding father, endorsed the Alien and Sedition Acts which also suspended the right of Habeas Corpus and strongly curbed freedom of speech [30]. These actions were taken, though, under threat of war. Does the current crisis rise to this magnitude?

It is estimated that 46 Americans have lost their lives to terrorist actions since 9/11. During this same period, about 1,000 Americans were killed in 250 mass shootings [31]. The national outrage incited by 1,046 senseless deaths is certainly justifiable. However, consider that over this same period 2,961 Americans were electrocuted by appliances, [32] 7,682 were killed by All-Terrain Vehicles (ATVs), [33] and 427,547 fell victim to traffic fatalities. [34]. These deaths were senseless too, yet they do not generate similar outcry. Some might argue that these deaths were avoidable, and indeed that might be the case for ATVs. Some might point out that electric appliances are not malicious, and a similar absence of malice may be associated with traffic deaths.

But then how do you explain the 175,744 deaths by murder over the same period? [35] These were no less avoidable and arguably just as malicious as terrorist attacks, yet they do not generate similar calls to restrict civil liberties. Apparently, not all causes of death are equal, and death tolls by themselves are insufficient to explain a perceived need to alter civil liberties. With what then do we weigh the price of liberty?

### Conclusion

Perhaps the most poignant observation is the fact that so few Americans have died from terrorism; the average American has a ten times greater chance of being killed by lightning than by terrorism [36].

Does that mean the nation's counterterrorism strategy is working? It is difficult to make such correlations, and the absence of evidence does not equate to evidence of absence. Moreover, we know that our critical infrastructure remains vulnerable, and the threat of cyber-attack is ever growing. Certainly, protecting U.S. critical infrastructure from attack, terrorist or otherwise, should remain a priority concern.

It also has the advantage of not requiring any infringements to civil liberties: in this case it is easier to protect the known targets rather than try and find the unknown terrorists. Of course, that is the "holy grail" of counterterrorism, finding the terrorists before they strike. Unfortunately, psychologists have found no common traits that could help root them out. They can be anybody. Accordingly, we will have to contend with the problem of terrorism and corresponding pressures on our civil liberties for the foreseeable future.

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