

**“Overview of Security Issues in Europe and Eurasia”**

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I want to begin by thanking Chairman Burton, Congressman Meeks, and the members of the subcommittee for this opportunity to appear before you today. The question I will be addressing—whether there is as a significant divergence between how the United States and its closest European allies deal with the Islamist terrorist threat—is one that has important implications for transatlantic relations but, unfortunately, is broadly misunderstood not only here in the United States but also by our allies abroad.

As someone who has worked both as a staff director on a Senate committee dealing with national security issues and in a senior post in the White House handling the same policy area, I am fully aware of the great value that hearings such as these can have in making our policymaking process more deliberative and more substantive. It is one of the great strengths of our constitutional system that we are known around the world not only for having a strong presidency but also the world's most powerful legislature.

Before I begin, and because this is the Subcommittee on Europe and Eurasia, I did want to note the passing of Ron Asmus this past Saturday. Ron, who served in the Clinton Administration as deputy assistant secretary of state for European Affairs, and the past several years as head of the German Marshall Fund of the United States' Brussels office and GMF's director of strategic planning, was a remarkable policymaker, scholar and colleague in transatlantic affairs. His last book, *The Little War that Shook the World*, was a tour de force on the failure of American and European statecraft leading up to the Russian invasion of Georgia in August 2008. Ron was dedicated to the proposition that the promotion of political freedom was America's moral and strategic obligation. He will be greatly missed.

## I.

Turning now to the topic I was asked to address—to give context to United States counterterrorism policy by comparing it with the policies and practices of our European allies – I want to begin by noting that my comments are largely derived from a compilation of studies that I commissioned in previous years looking at how key countries in Europe (the United Kingdom, France, Germany and Spain) were addressing the threat of Islamist terrorism domestically. I then analyzed those studies and set out to compare their respective findings with the post-9/11 counterterrorism regime here in the United States.

The result was a volume published last summer by the American Enterprise Institute entitled *Safety, Liberty and Islamist Terrorism: American and European Approaches to Domestic Counterterrorism*.

There were two principal reasons I undertook the study. The first one was that I wanted to examine the policies and practices of other major democracies that had dealt with a substantial terrorism threat in the past, hence the countries chosen. [In the case of Spain, the Basque separatist group Euskadi Ta Askatasun (ETA); in the case of the United Kingdom, the Irish Republican Army (IRA); in the case of Germany, the Red Army Faction (RAF); and in the case of France, a number of separatist, Algerian and Middle Eastern terrorist groups.] I wanted to see what lessons might be learned from their respective experiences. How did they go about balancing security concerns with civil liberties? The second goal was to analyze the relevance of the criticism made both here and abroad that America's post-9/11 response to the Islamist terrorist threat—shorthanded by the phrase “the war on terror”—was substantially different from that of our closest allies, a difference often described as being more moderate in practice and more constrained by a “rule of law” approach. In short, maybe our European allies had something to teach the United States both in the narrow operational sense of dealing with the threat but also in how they thought about the problem more broadly.

## II.

Somewhat to my surprise, the value of examining and comparing our allies' respective approaches to counterterrorism provided few clear “lessons learned” when it came to actual policies and practices. The reasons for that being the case, however, are not difficult to fathom. The underlying variations among the five countries are substantial. First, there is the difference between legal systems (common law versus civil law regimes), with corresponding differences in how laws are made, how flexible they are likely to be, how cases are tried, standards of evidence, and what role judges may play.

There is also the matter that only the United States is governed under a system whose underlying constitutional principle is separation of powers. The fact that Germany, the United Kingdom, Spain, and France are parliamentary systems, or a mix of parliamentary and presidential, affects not only the discretion allotted the government but also political decisions about the balancing of security and civil liberties, including the level of oversight exercised by the legislature, the courts, and within the executive itself. Each of the five countries also differs in the degree to which authority is centralized, with the United States and Germany retaining strong federal structures. And, finally, there is the fact that Spain, France, the United Kingdom, and Germany are members of the European Union, a

constitutional body that has increasingly weighed in on counterterrorism policies and on how member states have balanced counterterrorism measures with guaranteed liberties.

Equally important is the scale of the domestic jihadist threat each country faces. Although the United States has had its recent share of “home grown” jihadists, the Muslim population in the United States is a significantly smaller percentage of the total population than that found in the United Kingdom, Germany, or France and, according to polls, is more “highly assimilated” and less prone to radicalization than in many European states. And finally, there is the matter of history, with each country having different experiences with terrorism and internal subversion, and two countries with recent memories of having lived under a dictatorship. These unique histories have undoubtedly shaped institutional arrangements, intelligence capacities, and police powers.

Obviously, the four countries analyzed in this volume—the United Kingdom, France, Spain, and Germany—are not the whole of Europe. And, as suggested above, because of the differences in history, political culture, and constitutional structures they cannot be easily collapsed into a single, distinct European approach to Islamist terrorism.

That said, I would take note of two points of comparison worth keeping in mind—one pointing to a convergence of U.S. practices with European ones and, the second, a divergence. With respect to the first, remember the considerable amount of commentary in the reviews that followed the attacks on 9/11 for the government to address “the wall” that seemed to separate law enforcement and intelligence. Examining how France, the United Kingdom, and others have tried to square this circle is instructive. In the case of France, as I note in a later chapter, a key factor has been the investigative magistrate system, in which a few long-serving officials based in Paris have the capacity to draw on intelligence, police, and judicial authorities in terrorist investigations and prosecutions. As for the British, the once relatively distinct line between intelligence collection by MI5 (the United Kingdom’s domestic intelligence service) and the collection of evidence for use in court by the police has been substantially altered: MI5 works much more closely now with the Metropolitan Police to develop usable evidence earlier in an investigation, and new units in London and elsewhere, in which police and intelligence officials work side by side, have been established to promote a more seamless investigative effort.

Neither of these models is directly applicable to the United States. The French *juge d'instruction* exercises powers, as the name suggests, that overlap the executive and judicial spheres—something our separation of powers system would not tolerate. As for the British, the closer integration of local law-enforcement and intelligence efforts is not burdened by the fractionalization present in the American law enforcement community—a community consisting of over fifteen thousand separate police and sheriff departments and forty-nine state police agencies. But the fact that both countries have had to develop means to overcome the divide between intelligence and police work is an important reminder of the permanence of the issue itself.

The second point we need to keep in mind when it comes to operational matters is that the United States is the odd-man-out when it comes to having a separate domestic intelligence agency, which, in turn, raises the question of whether it would be best to take the counterintelligence and counterterrorism elements within the FBI, separate them from the Bureau, and create a new agency altogether. Certainly, there is a degree of focused professionalism that results from an agency having a singular task rather than multiple ones. And, as the recent report by the Senate Homeland Security Committee on the Fort Hood shootings appears to show, there remain problems in the Bureau's attempt to create an intelligence ethos from within.

On the other hand, American civil libertarians of both the left and the right have long worried that a separate domestic intelligence service would be more likely to abuse its powers than one tied to a law enforcement agency which operates under the general supervision of the Justice Department and which ultimately has to present its evidence in a court of law. Moreover, if a key fault line prior to 9/11 was the division between the realms of intelligence and law enforcement, and if the passing of information between the two has been a problem, there is an argument to be made that it is operationally useful to have those two functions under one roof.

### III.

Now, stepping back and looking at the broader picture, conventional wisdom says that the U.S. approach to dealing with the threat of terrorism was overly militarized, while our European allies took an approach grounded more in law enforcement and the rule of law. But, at best, this view is an overstatement and a simplification of how we both approach the terrorist threat at home and abroad.

First, each of the countries examined in the volume has deployed military forces to Afghanistan with the explicit purpose of preventing that country from becoming once again a safe-haven for al Qaeda and other terrorist groups. The French government's 2005 white paper on terrorism, for example, makes it quite clear that the French military has a role to play in countering terrorists, including taking preemptive action where a "clear and established threat" is seen. And, true to the white paper, French Special Forces have also been involved in operations outside of Afghanistan, most recently in operations against Islamist militants in Niger, Mali and Mauritania. Even Germany, which until recently was perhaps the most reluctant of allies to engage in offensive operations within the ISAF mission in that country, had contributed Special Forces to the counterterrorism mission of Operation Enduring Freedom from early in 2001 until just a few years ago, consonant with former German Defense Minister Peter Struck's statement in 2003 that Germany's security would be "defended in the Hindu Kush."

The real difference between the United States and our European allies lies less with the notion that they don't think there is a military component to dealing with the Islamist terrorists than the fact that the U.S. has a much vaster set of capabilities to take the war to them: eliminating the regime supporting al Qaeda in Afghanistan, continuing to strike at its leadership in Pakistan, and attacking its various allied elements in places as dispersed as the Philippines, Indonesia, and the Horn of Africa. The United States has taken this approach in part because the threat comes in large measure from abroad, but also in part because America has the military capability to take the fight to the terrorists. Having such a capability gives Washington options other governments simply do not have—and, perhaps, I might add, a reason for our allies to let us carry the greater burden.

Nor does the "war" versus "law-enforcement" paradigm make sense when it comes to comparing the U.S. with Europe on the law-enforcement front. First, while there is considerable debate over how exactly to deal with suspected foreign terrorist detainees, after 9/11, the United States has not abandoned the use of the criminal justice system to deal with terrorist threats at home. There have been numerous trials and convictions of terrorists here.

Second, as for the countries of Europe, although it is certainly true that they address the problem of terrorism principally through the lens of law-enforcement, it is equally important to understand that in many cases the laws they rely on to combat terrorism domestically are often more hard-hitting than those tied to more typical crimes. It would be a mistake to conclude, as is often said, that because

“Europe approaches the problem of terrorism in the context of crime, not war,” it treats terrorism as just another crime. More often than not, it doesn’t.

Take, for example, France. France has had the most effective domestic counterterrorist regime of all of America’s allies and the cornerstone of this effort is France’s investigative magistrates (*juges d’instruction*). This is an office that combines the powers of intelligence, investigation, prevention, and deterrence in one person. There are some judicial checks, but they appear to be minimal. The only American office that bears even a slight resemblance to the *juges d’instruction* is that of the independent counsels. But unlike an independent counsel, whose mandate is tied to a particular case and is a temporary appointment, *juges d’instruction* often stay in their position for more than a decade. Jean-Louis Bruguière, France’s most famous *juge*, stayed on the counterterrorism beat for over a quarter of a century.

Nor have French magistrates been shy about using their powers of arrest and detention preemptively to disrupt possible terrorist plots, what they call “kicking the ant hill.” Suspects can be sequestered for days, and access to lawyers is only a right that was granted them within the past year. But once charged, they can be held without bail or even being brought to trial for several years. And, once in court, they are tried sans jury.

Moreover, the French government has considerable leeway in retaining all kinds of data and giving agencies within the French security and police services access to these data. French police and security services are also aggressive in monitoring speech, especially sermons and literature coming from Salafist mosques—with the result that dozens of Islamic fundamentalists in France, including imams, have been sent packing since 9/11. Nor is the criterion for the government to engage in electronic surveillance onerous; and independent oversight of the government’s practice is minimal. As with most French investigative methods, the criterion is pretty straightforward: is the investigative tool thought to be reasonably necessary to gather information in furtherance of national security? A specific criminal predicate for surveillance is not required.

As for the UK, the British cop on the beat is unconstrained by Fourth Amendment jurisprudence, and for counterterrorist purposes had, until last year, been authorized to “stop and search” vehicles and persons without a specific criminal predicate. (The law is being redrafted to lessen police discretion but will likely give the police similar authorities within geographical and time restraints tied to threat levels

and events such as the upcoming 2012 London Summer Olympic Games.) Rights groups have also taken notice of the British government's pervasive use of closed-circuit television cameras to monitor public spaces, its creation of the world's largest national DNA database, and the ready sharing of records and intelligence collected by the police and security services. Telephone taps and electronic surveillance are easier to authorize in Britain than in the United States; under the British system, numerous senior police officials may apply for warrants, which do not need to be approved by the judiciary but are issued by the state secretary after being judged both "proportionate" (that is, only as intrusive as the circumstances require) and "necessary" to meet "the interests of national security." All of which has led Privacy International to give the United Kingdom the lowest score among the world's major democracies in its privacy-ranking system.

And as with the French, British law makes it a criminal offense to encourage or glorify terrorism and requires Internet providers to remove any materials that do the same. The British also have instituted a system of detentions. In the case of the United Kingdom, a terrorist suspect can be held in jail, with the court's approval, for up to 14 days before being charged. And, until recently, individuals suspected of involvement in terrorist activity but who could not be tried—typically because the evidence against them was based on electronic intelligence not useable in British courts—or could not be repatriated because of concerns over their being tortured in their home country, were subjected by the home secretary to "control orders" that kept them under a form house arrest. This provision applied to citizens and noncitizens alike. The government has now modified somewhat this policy—now called Terrorism Prevention and Investigation Measures (TPIMs)—allowing suspects a bit more freedom of movement but still under 24-7 surveillance, electronically tagged, with mandatory curfews, and prohibited from visiting certain places or traveling overseas—again, all of which is done without an individual being charged with a crime.

And in Spain, terrorist suspects can be held *incommunicado* (in isolated detention) for up to thirteen days. And an individual charged with a terrorist-related crime can be held in pre-trial detention for up to four years. While being held *incommunicado*, the detainees do not have the right to their own counsel. Court-appointed attorneys are provided, but suspects are not allowed to consult with them in private and, in turn, the attorneys are not allowed to address suspects directly or provide legal advice. Further, an examining magistrate can impose a total restriction on the availability of information (*secreto de sumario*) about the investigation, the initial judicial proceedings, and the specific information

justifying an individual's detention, with that restriction applying to the defense lawyers until virtually the start of a trial. The trial itself is carried out under the jurisdiction of a special national court and without a jury. And, most recently, Spain has passed laws that allow the government to restrict the movement of individuals even after they have served their sentences if convicted of terrorist-related offenses.

Even Germany, which in many respects has been perhaps the major European ally most resistant to changing practices and laws to meet the threat of terrorism since 9/11, has employed police and intelligence techniques at times that are more aggressive than what is found here. For example, in the immediate aftermath of 9/11, when it became clear that Germany had been used as a safe-haven for those plotting the attacks, German authorities resurrected the use of computer-aided profiling programs that had been employed in the past to help dismantle the Red Army Faction to the new problem of radical Islamist cells. According to Manfred Klink, who headed the post 9/11 review in Germany, German authorities “reactivated the *Rasterfahndung*”—a system designed to connect the dots between individuals with similar backgrounds—and applied it to the new situation. As a RAND study notes, “despite the prominence of data protection as a national issue, Germany has historically relied on data processing, data mining, and the use of profiling to identify potential terrorists or their support elements.” Similarly, since the 1990s, the German foreign intelligence service has been able to collect “strategic intelligence” without a warrant; the service can collect international communication traffic, sifting through it with keyword searches and grid analysis, with no specific suspect person or target in mind. And, finally, the German government is now utilizing laws enacted shortly after the end of World War II to deal with neo-Nazi groups to harass radical Muslim groups, even when those groups are not actively involved in plotting terrorist activities.

Now, the point of this brief survey is not to suggest these are laws or practices that the U.S. should employ. Rather, it is simply to point out those European laws and practices are not any less aggressive than those found in the United States. Indeed, in a number of instances, they are more forward leaning in their respective approaches to the jihadist threat. And while for reasons of history, constitutions, and the nature of the threat in each country, there are differences in how each of these democracies goes about protecting its citizens, one broad point stands out: just how much the U.S. and its liberal allies are in the business of “preemption.” Admittedly, for most of Europe, this goal is carried out principally at home—but not exclusively as we have seen.

#### IV.

A final note: this is not your father's Europe. Any consideration of counterterrorism policies in Europe today has to factor in more than the policies of the individual states themselves. The institutions of the European Union and the Council of Europe have had, and will increasingly have, an important role in this field.

On the one hand, there is no question that in the wake of the attacks on the U.S. on 9/11, the Madrid Train bombings in March 2004, and the attacks on London's public transportation in July 2005, the EU has taken any number of steps to enhance Europe's response to the Islamist terrorist threat—a threat that was global in nature and was availing itself of both Europe's safe-haven “soft spots” and the ease within the EU of individuals moving from one country to another. Considerable effort was made to create a common front on measures to be taken to deal with the threat, including agreeing to a common definition of terrorism and creation of a list of individuals and organizations whose funds were to be frozen and access to financial institutions denied. To hasten implementation, in 2004, the EU created the post of counterterrorism coordinator and, more recently, in 2008, expanded its definition of terrorism to cover the broader offenses of public advocacy, recruitment and training. Given how the EU operates on the principle of “consensus,” and we're talking about more than two dozen member states that often have to agree to these measures, it certainly can be argued that considerable progress has been made on this policy front.

Nevertheless, there have been bumps in the road, especially in the area of data-transfer arrangements with the United States. Under U.S. law, data on airline passengers traveling to the U.S. must be provided to American authorities before a plane arrives. Since an original agreement with the EU was reached in 2004, the European Parliament has consistently weighed in, forcing renewed negotiations, with new requirements, with the latest begun in January this year. Similarly, the EU Parliament has played a significant role in the use of SWIFT data, international financial transactional messages done under the umbrella of a Belgium-based banking consortium—a data set Washington believed was critical for tracking terrorist-related financing. The Parliament repeatedly balked at granting U.S. access to the data until last summer when a new agreement was crafted that included new restrictions on access to the data and new oversight of its implementation by Europol.

Prior to the so-called Lisbon Treaty coming into force in December 2009, “home and justice” affairs were considered to a policy arena reserved to the states. Under the treaty, however, that is no longer the case and, when combined with the increased powers of the European Parliament, likely means Washington will have to spend more time and effort reaching out to that body in an effort to avoid further complications in coordinating counterterrorism laws and policies.

Europe’s transnational courts, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) have also weighed in with rulings that touch on counterterrorism laws and practices. Of the two, the ECJ has been more modest in its review of counterterrorism laws, with the most significant rulings tied to overturning decisions by governments to freeze the assets of terror suspects. The ECHR, on the other hand, which acts as court of review in cases involving alleged violations of the civil and political rights set out in the European Convention on Human Rights, has reached decisions that have pared back somewhat individual states’ authorities in the area of deportation, detention authorities, DNA data retention, and stop and search practices. Indeed, in one recent case involving the extradition of radical cleric Abu Hamza al-Masri and three others to the United States from the UK, the court halted the agreed-upon extradition on the grounds that it wanted to review whether his possible incarceration in a maximum security prison in the U.S. and a conviction of life without parole violated Article 3 of the European Convention’s prohibition on torture.

Perhaps it is because the ECHR has been seen as overreaching in its decisions, especially in London, within the past few days the member states to the Council of Europe have issued a declaration that the court should only rule on asylum and immigration cases in “exceptional circumstances.” How the ECHR will interpret the declaration and its import for the wider array of terrorism-related cases that come before it remains to be seen. But, as we have seen with courts in the United States, judicial authorities in Europe—both at the EU and national level—have shown a greater willingness to pass judgment on national security laws and practices than in the past. The fact is, the general deference once given governments—whether in the form of the laws passed by duly-elected legislatures or judgments made by the executive—has been trimmed. No doubt, in some instances, this has been for the good, and when one looks closely at many of these cases, it can be argued the judgments are a bit more nuanced than the newspaper headlines would suggest. Yet courts do put their own reputations and legitimacy at risk when they presume to know precisely what the proper balance should be between the needs of

security and citizen liberties. In this regard, once again, Europe and the United States have something in common when it comes to counterterrorism.

United States House of Representatives  
Committee on Foreign Affairs

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