Detention of Terrorism Suspects in Britain and France

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Thank you for the opportunity to testify. I've spent the last several years trying to glean lessons from Europe's long and troubled history with terrorism. I think it is a worthwhile effort and I commend this commission for this effort on the issue of detention.

The problem of creating a system of norms and laws for detaining terrorism suspects has been a challenge for every democratic government that has faced a terrorist threat. The system of detention established in the United States after 9/11 has come under much justifiable criticism, but we should not infer from those errors that the U.S. government did not correctly identify an inadequacy in existing laws and practice. Terrorism always challenges existing legal regimes. One result is that effective and accepted standards for the detention of terrorism suspects are not well defined by the laws of war, by international human rights law, or by the domestic law of any democratic country that I have studied. Each democratic country that has faced a terrorist threat has struggled with precisely these issues; most have made very serious errors, embarked on policies that they later repudiated, and engaged in a long, painful process of reform. There are no silver bullets in the experience of other countries.

It is also moreover the case that the threat and the domestic situation in every country are unique and policies cannot simply be transferred from one context to another. One other general lesson, however, does emerge quite strongly from the experience of other democratic countries. Counterterrorism measures, including those regarding detention, need to be rooted in pre-existing notions of law and fairness and they need to have broad support across the political spectrum. In the face of an imminent threat or after an attack, there is always pressure to act quickly and forcefully. But this is a long-term struggle and the record shows that ad-hoc anti-terrorist measures that have little basis in societal values and shallow support in public opinion will not only oppress individual citizens, but they will ultimately fail, even by the standard of preventing future terrorist actions.

With those general lessons in mind, I think it will be useful to look at the experience of two of America's closest allies, France and Britain.

France

France has a long and painful history with terrorism. In the 1960s, the French struggled with both left- and right-wing terrorism stemming from the Algerian War of Independence; in the 1970s, they suffered through attacks by Palestinian terrorists led by Carlos the Jackal; in the 1980s they faced persistent bomb attacks in Paris from groups sponsored by Iran and Syria; and in the 1990s, they dealt fairly effectively with the first deadly stirrings of the Islamist threat, including a 1994 attempt to fly a hijacked airliner into the Eiffel Tower.

French counterterrorism is firmly rooted in the criminal justice system, French officials emphasize that they do use extrajudicial or administrative measures. This commitment reflects some hard-won experience. During the 1960s, De Gaulle created a quasi-military court, *Le Cour de Surête de l'Etat* (the State Security Court) to try national security cases. The court was composed of three civilian judges and two military officers, it conducted trials in secret and offered no right of appeal. While that court was reasonably effective at its immediate task, it was very controversial and seen as a creature of the political party that created it. It lacked the legitimacy of a normal judicial procedure that could sustain it through the inevitable lulls in France's struggle against terrorism. When the opposition socialists came to power in 1981, during a time of diminished terrorist threat, they eliminated the State Security Court.

The current system was developed after the terrorist threat returned to France in the mid-1980s. Although based in the criminal justice system, counterterrorism in France recognizes the special nature of the terrorist crime and creates exceptional and flexible procedures in law for terrorist cases. In the view of the French legal scholar Antoine Garapon, it is precisely the flexibility of the French legal system that has eliminated the need to resort to extrajudicial measures. The French also take a self-consciously pre-emptive approach—they intend to stop terrorist attacks before they happen, not simply prosecute afterwards. They seem to be fairly good at this—there have been no serious terrorist attacks in France since 1996 despite several attempts and despite the frequent denunciations of France by Islamist terrorist groups, including al-Qa'eda.

Detention is an important part of this pre-emptive system. It's important to note that the French system of justice is based on an inquisitorial approach in which an investigating magistrate (an inexact translation of *juge d'instruction*) conducts a judicial investigation of serious criminal offenses. The investigating magistrate, somewhat of a cross between a prosecutor and a judge, has no precise analogue in the Anglo-Saxon system of justice. He is not an advocate for the prosecution or the defense, but rather he is charged with conducting an impartial investigation to determine whether a crime worthy of a prosecution has been committed. Because these magistrates are in theory impartial arbiters, they are granted fairly wide powers to open judicial inquiries, authorize search warrants and wiretaps, and issue subpoenas—powers that in the U.S. would require authorization from a judge. There are seven investigating magistrates in France that handle all of the terrorism cases in the country. In practice, the terrorism magistrates are not impartial investigators, they act like prosecutors but have the powers of a judge—a fact often noted by human rights advocates.

The investigating magistrate can make use of two types of detention, both highly regulated within the judicial system: pre-charge detention (*garde à vue)* and pre-trial detention (*détention provisoire)*. In normal cases, pre-charge detention is allowed for 24 hours, extendible once. But if the case involves terrorism or a few other serious crimes, the investigating magistrates can authorize pre-charge detention for four days and, under some circumstances, six days. Suspects are not entitled to see their lawyer until after 72 hours, and even then the lawyer is usually only allowed 30 minutes with the suspect. The suspect can usually notify his representatives of his arrest, but that privilege can be denied by the prosecutor if he believes it might prejudice investigations and it often is in terrorism cases. He is also not notified of his right to silence and can be interrogated without his lawyer present. As noted, the limitation of these rights is

justified by the supposed impartiality of the investigating magistrate who is not considered an advocate for the prosecution.

If the investigating magistrate recommends that the suspect be charged, he may also recommend pre-trial detention. Such detention is by law recommended only if it is necessary to preserve material evidence, prevent witness pressure, prevent flight, or to protect the accused, but it is quite common in terrorism cases. Pre-trial detention can last for up to four years in terrorism cases with the investigating magistrate effectively determining the pace of the investigation and therefore the trial. Alternatively, the investigating magistrates can also decide on house arrest and other limitations, such bail or the surrender of a passport. There were some well-publicized abuses of pre-trial detention in terrorism cases during the 1990s, so since 2001, all pre-trial detentions must be approved a new type of independent magistrate, the Liberty and Detention Judge (*juge des libertés et de la detention)*. That judge must also hold a hearing every four or six months (depending on the charge) to re-authorize pre-trial detention in which he insures that that the investigation and trial are progressing at a reasonable pace.

There have been many allegations of torture taking place during detentions, particularly of the use extended questioning periods and sleep deprivation, but no accusation of systematic abuse. In response, France created in 2007 an independent authority for the monitoring of all places of detention, the Inspector General of Places of Deprivation of Liberty (*Controleur Général des lieux de privation de liberté),* but it is not yet operational. There are also controls in place to ensure that the suspects are seen by doctors at various points in the process.

French counterterrorism officials view both types of detentions as critical to their success. The ability to hold essentially anybody for four days and to hold charged suspects for four years gives them ample opportunity to assemble a case. The investigating magistrates have occasionally chafed at the short pre-charge detention period, gaining an increase to six days under exceptional circumstances in 2006. But they consider the ability to question suspects for three days without a lawyer as critical and usually sufficient to obtain information about terrorist networks. In the 1990s, there were many instances of mass arrest (50-100 people) for preventative and intelligence purposes, including before the 1998 World Cup in Paris in which people would be arrested in what were essentially sweeps. That technique is no longer used, but the pre-charge detention period is still clearly used as investigative technique in a more individualized fashion. The investigating magistrates also see the pre-trial detention as allowing them the time to assemble evidence from multiple sources, and to find alternatives sources for intelligence information that can't be used in trial.

This system of detention has been roundly criticized by human rights organizations within and beyond France, including in a highly critical report by Human Rights Watch released this month. The role of the investigating magistrates is broadly condemned as too powerful and lacking in procedural checks, even after the reforms to create a Liberty and Detention Judge. Certainly, by American standards, the French counterterrorism apparatus is extraordinarily repressive and intrusive and this repression falls particularly on specific groups, primarily Muslims and Corsicans. During the wave of terrorist attacks in 1995, French authorities detained some 70,000 people for questioning; the vast majority of them were North African.

Given these facts, the criticism of the system, including of detention, in French civil society has been rather tepid. Attacks on counterterrorism enforcement in France have not generally emanated from Muslim civil society groups. There is very little talk about the degree to which this cadre of special anti-terrorism legislation contributes to the frictions between the Muslim community and the state—a debate which is almost glaring in its absence. The Muslim community in France apparently has bigger issues with which to contend—issues of cultural integration and economic opportunity, the plague of "normal" criminal activity in Muslim areas, and the debate over public religious expression. In this generally highly contentious environment, occasional counterterrorism actions that affect the Muslim population do not generate much public outcry from within the Muslim community. This fact that these measures are consistent with French traditions and firmly embedded in law helps to limit public disapproval.

United Kingdom

As in France, the history of detention policy in the UK is a contentious one, but in the British case, the controversy continues. The backdrop for the current debate is the British experience in Northern Ireland, particularly during the 1970s. In response to the violence in Northern Ireland, the British introduced internment, essentially rounding up terrorism suspects in camps without recourse to any judicial process. In a manner similar to the U.S. government after 9/11, the British authorities at the time showed a deep lack of confidence in the courts, especially in the capacity of juries to confront the problem of terrorism and to persevere in an environment of intimidation (and also sympathy for many of the accused.) Hundreds were rounded-up and interned. In part because the internees were overwhelmingly Catholics, the internment system was seen as biased and was very controversial. Internees were interrogated without trials and there were many accusations of torture. The system eventually collapsed under its own weight when a British Commission ruled that internment was contrary to British domestic law. The European Court of Human Rights later determined that the interrogation techniques were not torture but "amounted to a practice of inhuman and degrading treatment." In retrospect, most scholars believe the internment policy accomplished little beyond helping the IRA with recruitment.

After this experience, the British government made a conscious effort beginning from the late 1970s to "criminalize" the terrorism problem. As Margaret Thatcher so eloquently put it, "a crime is a crime is a crime." In a similar manner to France, they created special courts and rules of evidence, but made a conscious effort to model them on the existing criminal justice system and to apply criminal law to the special circumstances of the terrorist crime. Judges were able under this system to authorize detentions. The IRA resisted the criminal label and, in part because of continual abuses of the system in Northern Ireland, in part because it still did not meet the test of living up to British legal traditions, the system did not succeed in de-politicizing terrorism in Britain. It was gradually abandoned, although not finally until 2005.

As a result, the UK had still not found by 9/11 a method for detention that both comports with Britain legal traditions and its international obligations, and also meets the requirements of counterterrorism. In part, this is because the British system is more inflexible in its procedures than the French, but also it is because it doesn't have the procedural options of the American

system. Britain relies on a common law, adversarial system which means that the pace of the process is controlled throughout by the judge who is a neutral arbiter. The system permits post-charge questioning only in very limited circumstances and mostly rules out plea bargaining. The result is that gathering intelligence and evidence, must take place before an arrest, or at least before the charge is laid. In practice, this means that the questioning suspects can only be done in the limited pre-charge detention period. As the needs of intelligence on terrorism have mounted, the result has been a continual expansion of the pre-charge detention period

Originally, the pre-charge detention period was limited to 48 hours. It was extended in stages to 14 days (with a district judge's approval) and then 28 days (with a high court judge's approval). Currently, there is a bill before parliament to extend the period to 42 days for special circumstances (i.e. the Home Secretary declares an exceptionally grave terrorist threat.) The bill will also allow some post-charge questioning in terrorism cases for 24 hours, with five day extensions available with the authorization of a justice of the peace. Each of these extensions has occasioned greater controversy than the last—the 2006 Terrorism Act had originally sought a 90 day detention period, but this was scaled back to 28 days in response to parliamentary opposition.

The current situation is very shaky—the 42 day period will probably pass, but not without great controversy and thus with fairly shallow support. The government remains wedded to the project, insisting that the long detention periods are necessary for terrorism investigations, although they have presented no evidence that this is the case. They will probably seek even greater extensions if there is another terrorist attacks in the United Kingdom. Eventually, the pre-charge detention period will run up against Britain's European Charter of Human Rights (ECHR) Article 5 obligation to inform suspects "promptly" of the charges against them (if it has not already done so.)

A separate but related issue concerns the British government's efforts to detain foreign nationals without charge in a manner similar to that done by the US government in Guantanamo, albeit on a much smaller scale. The Anti-Terrorism Crimes and Security Act of 2001 permitted such detention of foreign nationals on suspicion of being international terrorists. It applied to those who could not be deported and could not be tried because the government claimed that doing so would reveal sensitive and dangerous intelligence. In 2004, the House of Lords ruled such detentions incompatible with Britain's obligations under the ECHR Article 5, which forbids depriving any person of their liberty without due process of law. To avoid freeing suspected terrorists, the Prevention of Terrorism Act of 2005 replaced the detentions with a regime of "control orders" that was immediately applied to the ten individuals detained under the 2001 Act. The Act allows the Home Secretary to subject persons he reasonably suspects to be involved in terrorist activity, including British citizens, to a range of varied obligations including curfews, prohibition on arranged meetings with non-approved persons, prohibition on use of the internet or mobile phones, and a requirement to live at a specified address. Control orders that meet certain rather unclear standards are not considered deprivations of liberty under ECHR Article 5. This regime has also been immensely controversial and has only been applied to at most 16 individuals at a time.

The British case presents a cautionary tale. The British experience in Northern Ireland led them to seek legislative solutions rooted in criminal law to the problem of counterterrorism after 9/11, but they were unable to find solutions that met both the test of efficacy and the test of comporting with British legal traditions and their international human rights obligations. The result has been continuing controversy and a continuing lack, in the views of counterterrorism officials, of the necessary tools for combating terrorism in the United Kingdom. In part, this was because they were too reactive to attacks and failed to think creatively about what modifications to their legal system were most necessary and possible in the long term. But it is also because they began with a very serious lack of flexibility.