An Incremental Tyranny

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A treasured friend and a respected colleague, Paul Wilkinson, along with a small number of pioneers in the early 1970s, sought to move the growing phenomenon of terrorism from the realm of emotional political debate into a domain of solid empirical research. However, the application of scholarship did not mean isolation from the real world. For Wilkinson, terrorism was no theoretical matter. In *Terrorism and the Liberal State*, he tackled the practical issue of how liberal democracies, with their open societies and their respect for individual liberties, could effectively combat terrorism without resorting to the brutal oppression seen in police states.

Wilkinson's inquiries resonated with my own concerns. Writing at about the same time, I observed that, owing to technological developments and changes in the political environment, power—defined crudely as the capacity to kill, destroy, disrupt, cause alarm, and compel society to divert vast resources to security—was coming into the hands of smaller and smaller groups whose grievances, real or imaginary, it would not always be possible to satisfy. How democracies would deal with this and remain democracies was, I thought, one of the major challenges we faced in the late twentieth century.

Wilkinson had confidence in democratic values and institutions as the source of democracy's strength. Above all, he believed in the courts that both uphold and enforce the law. But he knew that democracy itself was not a sufficient defense against violent fanatics determined to destroy the threads that hold together the fabric of society. He accepted that, under threat, democratic governments could legitimately impose tough measures to suppress terrorism and could do so *because* they were democracies. At the same time, he warned, 'It must be a cardinal principle that liberal democracies in dealing with problems of civil violence and terrorism, however serious these may be, never be tempted into using the methods of tyrants and totalitarians.… Contemporary history abounds in examples, of "emergency" or "military" rule carrying countries from democracy to dictatorship with remarkable ease.[1]

The issues that Wilkinson raised in the 1970s are just as relevant in the twenty-first century. Indeed, as terrorism has escalated, the tension between democratic values and domestic security seems to have increased. This is especially so in the United States, owing to the devastating terrorist attacks of September 11, 2001.

Terrorism Then

Wilkinson commented on contemporary events. His writings reflect his times. Although four decades ago, terrorists from Buenos Aires to Belfast were rapidly expanding the universe of data on terrorism for analysts to examine, they were strikingly different from today's violent fanatics. The Provisional Wing of the Irish Republican Army waged its campaign to drive the British out of Northern Ireland, while Basque separatists of the ETA continued their campaign of terrorism in Spain. Inspired by Third World urban guerrillas, an assembly of radical Marx-

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[1] Paul Wilkinson, *Terrorism and the Liberal State.* New York: New York University Press, 1977, p. 126.

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ist and anarchist groups in Europe—the Red Brigades in Italy, the Red Army Faction and Revolutionary Cells in Germany, GRAPO in Spain, Action Directe in France—carried out assassinations, kidnappings, and bombings on behalf of a theoretical worldwide revolution.

These were secular political objectives, however vague the definition of the 'oppressed people' on whose behalf the terrorists claimed to fight or disconnected their tactics were from the achievement of their stated strategic objectives. Concerns about self-image and not alienating their perceived constituencies, real or imagined, imposed constraints on their violence.

At the same time, various Palestinian and Arab groups in the Middle East were carrying on a global terrorist campaign against the state of Israel and its Western supporters. Palestinian terrorists created crises for European governments, especially when they hijacked airliners and held European nationals as hostages to demand the release of their jailed comrades, but they did not seek to overthrow those governments. And whatever their political sympathies, European governments generally sought to avoid becoming participants in what they perceived as someone else's war.

There was also growing concern at the time about state sponsorship of terrorism. Each Arab government backed its own Palestinian avatars, while the Soviet Union stood accused of supporting terrorist groups in the Middle East and Western Europe as a continuation of its contest with the West. At the same time, the Cold War imposed constraints on local conflicts. It increased the risk that military action by Western states in retaliation for terrorist attacks would escalate into war between the superpowers.

This was at the beginning of the escalation in terrorism that would mark the 1980s, before terrorist became increasingly determined to kill in quantity and increasingly willing to kill indiscriminately. Suicide bombing on an industrial scale had not been introduced, nor had al Qaeda's global terrorist campaign.

State Terror

It was easy at the time to contrast the responses of democratic states in Western Europe with the brutal repression carried out by military-dominated governments such as those in South America. In a totalitarian police state, power is concentrated in the executive, unchecked by legislative or judicial authority, and supported by a pervasive and powerful internal security apparatus operating beyond judicial review. This apparatus relies on an extensive network of informants and *agents provocateurs*.

Citizens are encouraged to engage in mutual surveillance and to denounce any kind of subversive activity. Guilt may be based solely on association with persons suspected of being subversive.

Limits are imposed on assembly and speech. The news media are subject to censorship. Criticism of the regime is dangerous. Individuals who are merely suspected of substandard loyalty may be denied access to education and jobs, but those suspected of subversive activities face far worse consequences. Authorities have the powers of arbitrary arrest and indefinite detention, unhindered by requirements of habeas corpus. Warrants are not necessary. People just disappear. Those detained have no access to courts or lawyers. There is no judicial oversight. Torture is routinely employed. There are summary executions and secret murders. Troublesome dissidents living in exile may be targets of coercion and assassination.

The Democratic Response

A liberal democracy, Wilkinson admonished, 'must uphold constitutional authority and the rule of law.' In an ideal democracy, executive authority is constrained by the legislature and by independent courts. Rules and guidelines govern intelligence collection. Censorship, if permitted at all, is limited to specific circumstances. Habeas corpus is respected. In countries where legislation permits preventive detention, there are time limits and judicial oversight. Physical coercion during interrogation is not permitted.

Defendants are dealt with by the courts as ordinary criminals, although some countries have established specialized courts for dealing with terrorists. The accused are presumed to be innocent. They have the right to challenge their detention and have access to legal counsel. Prosecution is based upon actions, not political beliefs.

No democracy, no system of justice is perfect. There have been allegations of abuses against the most liberal governments of Europe. And, in fact, there have been egregious departures from the norms described above, but these were sooner or later revealed, and corrective action was taken.

Democracies faced with a serious terrorist threat have changed the rules to enhance security by creating new intelligence and security organizations, allowing security authorities greater search powers. They have facilitated intelligence collection by allowing greater latitude in initiating investigations, reducing restrictions on surveillance, lowering the barriers between intelligence and criminal investigations.

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Democratic governments also have increased police powers, in some countries, allowing preventive detention and house arrest. They have created new domains of crime, proscribing specific groups, expanding the definition of material support of terrorism, allowing convictions based solely upon intent. Some democratic governments have changed trial procedures, creating special courts or even military tribunals to try terrorists. Yet they have remained democracies. Will they be able to continue to do so?

Today's Terrorism

As terrorists' concerns about self-image and constituents' attitudes eroded, terrorist violence demonstrably escalated. The bloodiest terrorist attacks in the 1970s involved tens of fatalities. The numbers grew to hundreds of fatalities per attack in the 1980s. Then, on 9/11, a single terrorist attack resulted in thousands of fatalities, and had the occupants of the World Trade Center not evacuated the towers so quickly, tens of thousands might have died. Terrorist violence had begun to approach the level of a small war.

Looking back from a vantage point of more than ten years, the 9/11 attacks appear to be an anomaly rather than a harbinger of worse to come. Still, al Qaeda has publicly confirmed its ambitions to acquire weapons of mass destruction, and it has commissioned religious rulings that would justify the murder of millions. There is no evidence that al Qaeda has the capabilities to support these ambitions, and no doubt its rhetoric was intended to excite followers and terrorize its foes. Years ago, Paul Wilkinson noted correctly that I considered the threat of nuclear terrorism to be exaggerated—I still do, but the possibility that tomorrow's terrorists will be armed with effective biological weapons or even a crude nuclear device cannot be entirely dismissed.

Another change is the blurring of the distinctions between law enforcement and war. Contemporary conflicts are likely to include combinations of conventional warfare and terrorist campaigns that make no distinction between the front line and the home front or between military targets and civilians. Military responses are more likely today, as combating terrorism has increasingly come to be viewed as war. A law enforcement approach may be preferred where the law prevails, but military force is used to engage terrorist foes when a local government is unable or unwilling to meet its obligations.

Although some past terrorist campaigns persisted for decades, democracies treated them as extraordinary, temporary circumstances calling for emergency measures that would end when the threat subsided. When terrorism is viewed as a perpetual threat, temporary emergency measures become permanent features of the political landscape.

Al Qaeda believes that its conflict with the West began centuries ago and will continue until Judgment Day. At the same time, many in the West perceive today's struggle against al Qaeda and the Taliban as the latest manifestation of a centuries-old conflict between Western Judeo-Christian civilization and an inherently aggressive Islam—a point of view that palaces the continuing terrorist threat in context of a broader armed struggle, which will transcend al Qaeda's fate. It means there is no end to this conflict. The West can never abandon the burden of eternal struggle.

Terrorism is no longer the threat of limited violence carried out by self-constrained antagonists, creating temporary emergency situations—spasms of violence lasting a decade or two, to be dealt with through effective intelligence and law enforcement while preserving democratic norms and values before returning to normality. Terrorists are now viewed as determined to cause catastrophic destruction in wars without end—beyond the capacity of law enforcement, requiring military mobilization and forcing liberal democracies not merely to adopt temporary emergency measures, but to make fundamental changes to ensure long-term survival.

The composition of the terrorist foe has also changed. Italy's Red Brigades were Italians. Germans joined Germany's Red Army Faction. Members of France's Action Directe were French. And while there was undoubtedly English prejudice against the

Irish, the IRA was a Western organization. Extreme in ideology and violent in methods, these groups were still of the culture in which they waged their campaigns. The Palestinians were of the 'other,' but their threat to the West was mostly indirect.

Today's jihadist terrorists represent not only different religious and political beliefs, they belong to a different civilization, one that is more alien to the West—in Western terms, irrational religious fanatics at war with societies whose own religious wars ended centuries ago. Their 'otherness' makes them more frightening and at the same time less human, less deserving of protection. Measures that would have provoked howls of protest if applied to 'our' sons and daughters arouse less protest when applied to men named after Mohammed. The higher priority given to human rights today only partially mitigates this prejudice.

Some argue that these new circumstances require a different response to terrorism—the rules that governed the response of the 1970s and 1980s no longer apply. The Irish Republic Army, the Red Brigades, and the Red Army Faction were pretend armies, but this is real war, not a law enforcement problem. And war requires not civilian courts but a commander-in-chief endowed with extraordinary powers. The pressures on democracy have increased.

Counterterrorism in the United States Since 9/11

Not surprisingly, the greatest changes in the way a democracy has dealt with terrorists have been made in the United States after the worst attack in the annals of terrorism. Therefore it provides the best case study. Wilkinson wrote, 'However much tenderhearted liberals quake at the thought, it is the vital business of a liberal democratic government to amass as much information as possible about extremist political groups both within and beyond its borders.'[2] Following the perceived intelligence failure that permitted the 9/11 attacks, there was a significant expansion of America's intelligence community.

Domestic intelligence collection in a democracy remains a delicate undertaking. The United States rejected the idea of creating a separate domestic intelligence service (the equivalent of a British MI5) and instead allowed the FBI to retain federal responsibility for domestic intelligence collection, working with local police departments. This kept domestic intelligence in the realm of law enforcement.

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[2] Ibid, p. 138.

Domestic intelligence followed a case-oriented criminal investigations approach aimed at prosecution rather than pure intelligence collection. A few major police departments had dedicated counterterrorism units that engaged in intelligence (most notably, New York). The intelligence fusion centers that proliferated at the state and local level after 9/11 did not, for the most part, engage in intelligence collection but acted as venues for sharing information.

Requirements were relaxed to make it easier to open investigations of possible terrorist activity. Surveillance was increased. President Bush asserted his authority to bypass the rules that required judicial authorization to conduct electronic surveillance (even though these procedures had worked well). When the unauthorized wiretaps were revealed, Congress pushed back and reinstated the principle of judicial oversight, but the new legislation suggested greater oversight than existed in fact. It was a victory for executive authority.

Investigations of suspected terrorist activity involved the extensive use of paid and unpaid confidential informants, undercover agents, and 'sting' operations. These were techniques routinely used in dealing with organized crime, drug trafficking, and other ongoing criminal operations, but they prompted claims of entrapment. Generally, the courts rejected such claims. However the fact that terrorism-related cases were brought to the courts at least guaranteed that they would be reviewed by an independent judge and jury.

The decade after 9/11 saw America's watch list of potential terrorist suspects worldwide grow to something like a half-million names—an army al Qaeda could only wish it ever had. The no-fly list alone grew from a few hundred names immediately after 9/11 to an estimated 20,000 names in 2012. The lists proved useful on occasion, but their length virtually guaranteed errors. The lists also could potentially be exploited to create opportunities for interviews and information gathering. It is alleged that in some cases the interviews were used to pressure individuals to become informants.

Determined investigators and prosecutors will always find creative ways to exploit new authority beyond what was originally intended. Prosecutors, for example, have added terrorism charges to ordinary criminal cases that have nothing to do with violent extremism. The accused is more likely to plead guilty to the criminal charges in order to avoid risking the more severe penalties that come with a terrorism conviction.

Civil rights and community activists criticized the intelligence effort for targeting Muslims, but it is the origin of the threat that determined the social geography of the inquiry. The terrorists of greatest concern after 9/11 were self-proclaimed

jihadists motivated by religious faith and the political ideology of al Qaeda. While complaints of discrimination are understandable, it is unrealistic to think intelligence efforts would not look closely at Muslim communities. When investigating the Ku Klux Klan and other white supremacist groups, intelligence efforts focused on white communities where racist sentiments were likely to be found. Groups like the Black Panthers or the Jewish Defense League drew intelligence operations into African-American and Jewish communities.

A parallel secret universe grew significantly after 9/11. The war on terror generated more secret government programs, secret documents, secret interpretations of the law, prepared and reviewed by a growing population of people who themselves had to be investigated and cleared in order to be trusted. The need to rapidly share information did not sweep away classification and clearance procedures that derived from the Cold War era. Hundreds of thousands of people required and were granted top-secret clearances, which raised the question of just what 'top secret' means. It created a large population of people engaged in various forms of surveillance and, by virtue of their security clearances, under greater surveillance themselves.

Vast quantities of personal information were gathered and stored, in part driven by the view that the more information the government possessed, the easier it would be to identify potential terrorists. Technological advances increased storage capacity, which reduced any practical imperative to limit collection or cull information. Collection capacity outpaced analytical capability, increasingly drowning interpretation in a deluge of data. Data-mining through mechanical analysis only partially bridged the gap.

Despite its shortcomings, overall the intelligence effort was largely successful. Unprecedented cooperation among intelligence services and law enforcement worldwide contributed to thwarting numerous terrorist plots. And of 38 known home-grown jihadist terrorist plots between 9/11 and 2012, US authorities failed to uncover only three—a remarkable achievement.

Following 9/11, the public demanded better security against terrorism. Driven by 9/11 attacks and subsequent terrorist attempts (the 2001 'shoe bomber', the 2006 Heathrow plot, the 2009 'underpants bomber'), much of the emphasis was placed on airline security. Increasingly irksome airline security measures, however, may have reached the edge of public tolerance and have provoked a backlash.

Security surrounding surface transportation, a terrorist killing field, which figured frequently into their plots, also was increased, but the federal role was more limited while local resources were constrained by budgets. The government also imposed mandates enhancing security for vital infrastructure, leaving implementation to the private sector. Inner perimeters and security checkpoints (in both public and private facilities) proliferated. The US border with Mexico is gradually being fortified, not just because of terrorism, but in response to growing traffic in drugs and illegal aliens. The biggest change in the United States in response to terrorism was the creation of the Department of Homeland Security, which inherited most of the security responsibilities of existing agencies while adding airline security.

The threat posed by terrorists bent upon mass destruction increased pressure on authorities to replace the traditionally reactive law enforcement approach with a proactive approach aimed at intervening before a terrorist attack occurs. Detention times were lengthened in countries that permitted preventive detention, an idea that Wilkinson reluctantly accepted in the United Kingdom as both necessary and effective. The United States did not adopt preventive detention, although two presidents claimed that they already had the authority to detain terrorist suspects without trial, and Congress later codified this in legislation that allowed indefinite detention and military custody of terrorist

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suspects. Yet this legislative initiative was amended to say that existing law would not be changed for those apprehended in the United States. Existing law, however, was far from settled.

The United States treated most terrorists apprehended abroad as enemy combatants. They were subjected to extraordinary renditions, were held in secret prisons, and faced indefinite detention. The United States also changed its interpretation of international law to allow the employment of coercive interrogation techniques—what many, including me, would regard as torture—although it was applied on a very limited basis. Congress ended the practice, although many Americans continue to argue for its reinstatement.

The United States proscribed a growing number of foreign terrorist organizations and broadened the definition of 'material support' of terrorism. Virtually any form of association became a crime. The accused did not have to have formal membership, physical contact with anyone in a terrorist organization, or even two-way communications.

The U.S. Constitution forbids almost any form of government censorship. There is therefore no censorship of terrorist propaganda on the Internet in the United States. Constitutional protection of free speech, as well as the practical matter of enforcement, has made it difficult to legally ban terrorist websites, which also are a good source of intelligence. However, operating a website on behalf of a terrorist group or facilitating communications is regarded as providing material support. Debate about controlling the Internet continues.

Unlike the United Kingdom and France, the United States did not create special courts or special magistrates to deal with terrorists apprehended on its soil. Terrorists were dealt with as ordinary criminal offenders. (Wilkinson supported ordinary criminal trials in principle but accepted the necessity of special courts in the United Kingdom, because of the intimidation of witnesses and judges.)

U.S. courts proved effective. Many terrorist defendants chose to plead guilty in order to obtain lesser sentences. Others went to trial. Overall, the conviction rate approached 100 percent, and the sentences were severe. Success in interrupting plots and bringing terrorists to justice proved to be a deterrent, although it is hard to count terrorist attacks that don't occur. Looking back, some of the convictions and harsh sentences cause misgivings. Perhaps in a

more tranquil period, there will be some reductions, perhaps based upon renunciation of violence and cooperation.

Dancing on the Edge of Tyranny

Democracy does not preclude voluntary submission to despotism. A frightened populace demands protection. Congress can legislate away liberties just as easily as tyrants seize power— indeed, legislated changes are seen to have greater legitimacy even when they are oppressive.

Civil libertarians were understandably worried immediately after 9/11 that America's war on terror would savage civil liberties. Thus far, that has not happened. Americans do not live in a police state. But increasing executive authority, the creation of a vast state security apparatus, loosening the constraints on domestic intelligence, reducing judicial oversight over electronic surveillance, legislative support for the indefinite detention without trial of terrorist suspects arrested in the United States, and persistent arguments and public support for coercive interrogation collectively lay the foundation for greater repression. We dance on the edge of tyranny.

The 9/11 attacks fundamentally altered perceptions of plausibility. Theoretical terrorist scenarios that would have been dismissed as farfetched the day before 9/11 became operative presumptions the day after. This was understandable when no one knew how many more horrific terrorist plots were in the pipeline, but fears continued to focus on worst-case scenarios, even while counterterrorist operations degraded al Qaeda's operational capabilities. Tomorrow's terrorists, not today's, drive the threat.

Portrayals of the terrorist threat ceased to be based upon evidence. The absence of evidence meant nothing. Of greater risk to those responsible for security was another failure of imagination. Osama bin Laden's last letters from Abbottabad reveal a terrorist leader locked in his own universe of fanaticism, conjuring fantastical terrorist plots to bring down his arch foe, America. His dreams fuel our nightmares. U.S. threat estimates mirrored bin Laden's ambitions. Both transcended reality. Although recent intelligence estimates report that al Qaeda no longer has the capability to launch new 9/11-scale attacks, security planners are unable to escape

worst-case scenarios. Americans are still being told that terrorists inevitably will launch nuclear or large-scale biological attacks, that anarchy will follow catastrophe, martial law will be necessary, and that in such circumstances the Constitution must be put on hold.

Terrorism became a reflector of all fears, a condenser of America's broader anxieties about national decline, Americans' continuing obsession with doom, periodic xenophobia, fears of crumbling borders, of being overrun by illegal aliens, of a chaotic, crime-ridden, mob-ruled landscape that would follow a terrorist-created catastrophe. The United States has become obsessed with security. Providing for the common defense and ensuring domestic tranquility are the primary reasons for government, but increasingly, citizens demand the abolition of all risk, an unrealistic goal that invites overreaction and guarantees failure. Too much security breeds mistrust. Government comes to view the population as filled with fifth columns and would-be terrorists, while public suspicion and cynicism lead to a loss of trust in state institutions. Security ceases to be a cooperative undertaking. Increasingly, it comes to be seen as an imposition by government against its own citizenry. Those being protected become adversaries of the very measures they demand to protect them.

The blurring of law enforcement and war, while understandable given the evolution of armed conflict, nonetheless allows the militarization of domestic counterterrorism, treating the home front as the front line. The danger to democracy rises as battlefield mindsets and practices seep into what should be the domain of domestic law enforcement, leading to assertions that terrorists waging war against the United States should be treated as enemy combatants who, whether captured abroad or arrested at home, can be deprived of the rights of ordinary criminals and subjected to indefinite detention in military custody.

The creation of a single large bureaucracy dedicated exclusively to homeland security can exert a powerful influence on public policy. Dealing with a global terrorist threat has expanded the roles of the Department of Defense and the Department of Homeland Security. These are now two of the three largest federal government entities (the third being the Department of Veterans Affairs). This represents a lot of political muscle. To this must be added a greatly expanded intelligence community. The clandestine world has grown to immense proportions, with much of its work necessarily done in the dark. Secrecy does not automatically make intelligence-gathering a threat to democracy, but the opacity it allows can both encourage and conceal abuse and can further undermine public trust in government, especially in the absence of truly independent and informed audits.

More than a half-century ago, President Dwight D. Eisenhower warned Americans to guard 'against the acquisition of unwarranted influence, sought or unsought, by' what he called 'the military industrial complex.' 'We must never let the weight of this combination endanger our liberties or democratic processes.'

It is not a military industrial complex that gives cause for concern today. It is the possible emergence of a security state, not through collusion or conspiracy, but as an almost imperceptible evolution over time. A democracy eats itself in small bites. The erosion of freedom is an insidious process involving incremental changes and small compromises that have a cumulative effect.

Political pressure is more powerful in one direction than the other. Those who argue for more security have fear at their backs. They can wave bloody shirts, point to infinite vulnerabilities and even foiled plots that prove continuing danger, demanding that something must be done. Arguing against the passage of new laws or deployment of new layers of security risks accusations of substandard patriotism, of exposing the public to danger. The political risks of being branded as 'soft' on terrorism exceed the political benefits of defending liberty of an indifferent public concerned exclusively with its own safety.

The lures of tyranny are understandable during war, as they are when people are faced with the threat of terrorism. Historically, as the threat diminishes, the pendulum swings back and the balance between security and liberty is restored. The perception of perpetual danger requiring endless war alters that. Accumulated emergency powers remain in effect indefinitely. What previous generations saw as extraordinary, the next generation accepts as normal. The baseline of individual freedom is redrawn. ●

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About the Author

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