The Brits Do It Better

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By David Cole

The Cost of Counterterrorism: Power, Politics, and Liberty
by Laura K. Donohue
Cambridge University Press, 512 pp., $99.00; $28.99 (paper)

Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?
by David Bonner
Ashgate, 371 pp., $124.95

1.

In August 2006, the United Kingdom arrested two dozen suspects in what was described as a plot to blow up passenger airplanes flying from London's Heathrow Airport to US and Canadian destinations. They were held without criminal charges for up to twenty-eight days, under a preventive detention law that had been expanded following the July 7, 2005, London subway and bus suicide bombings. Attorney General Alberto Gonzales promptly announced that he would send a Justice Department team to study the United Kingdom's approach to antiterrorism. After all, the Brits had foiled the plot; we had not. Gonzales seemed especially interested in the power to lock up suspects without charges for up to twenty-eight days.

One month later, the Senate Subcommittee on Homeland Security held a hearing entitled "Catching Terrorists: The British System Versus the US System," featuring Judge Richard Posner and Professor John Yoo, two of the country's most prominent conservative legal scholars. Posner and Yoo, like Attorney General Gonzales, were particularly taken with Great Britain's ability to detain suspects for twenty-eight days without charges—although Yoo pointed out that the Bush administration's "enemy combatant" authority permitted indefinite detention without charges. Both Posner and Yoo stressed the limitations of the American law enforcement model in combating terrorism, and urged instead an aggressive preventive approach, including the use of military force. Subcommittee chairman Senator Judd Gregg welcomed these views, and eagerly joined in criticizing the FBI for its "reactive" law enforcement mindset.

The senators also invited the former British counterterrorism official Tom Parker to testify. While his tone was diplomatic, his message was in fact quite at odds with the conventional wisdom in the room. Parker insisted that the most important thing about the British approach was its determination to treat terrorism as crime—not as an extraordinary military threat. And he argued that the success of Scotland Yard turned in large measure not on intervening preemptively, but on patiently keeping individuals under surveillance as long as possible before arrest, in order to gather valuable intelligence about the operation and develop a strong case that would support criminal prosecution.

Parker noted that the British had initially tried a more military and preemptive approach in the 1970s in Northern Ireland—sending in troops, interning large numbers of suspects without trial, and employing coercive interrogation tactics to gather intelligence. But those methods failed. They only inspired support for the Irish Republican Army and united the Irish Catholic population against the British. The principal
lesson we should learn, insisted the only British citizen in the room, was not the poverty of the law enforcement model in response to terrorism, but the absolute necessity of that model. Needless to say, this was not the message that advocates of the Bush administration's "preventive paradigm" wanted to hear.

At the time of the Senate hearing, I was living in London, having arrived shortly after the Heathrow terror suspects had been arrested. I was spending a semester at University College London's School of Public Policy, located about a block from where one suicide bomber blew himself up on a bus on July 7, 2005. While my trip had been planned long before Attorney General Gonzales and the Senate showed interest in the British approach, my plan was to do just what the attorney general wanted—to compare the United Kingdom's approach to fighting terrorism to our own. What I found surprised me: the English have learned from their mistakes in fighting terrorism. The question for the United States is whether we can learn from ours.

2.

There are many reasons to believe that the United Kingdom would be considerably less protective of civil liberties than the United States. The UK has no written constitution, the document in our system designed to ensure that individual rights are protected from political passions. Parliamentary supremacy means that British courts have never had the power to declare national legislation invalid. Separation of powers, a structural safeguard of liberty under the American Constitution, is much weaker in Great Britain, where the executive is chosen by the majority party in the legislature.

In addition, while it is customary to worry about what will happen in the United States after "the next attack," the UK has already been the victim of a long, bloody, and quite relentless series of "next attacks" in the course of its thirty-year struggle with the IRA. It has not suffered any single attack on the scale of September 11. But in a country with only one fifth the US's population, the IRA killed 1,800 persons and injured 20,000.

Terrorism remains a serious issue. As the "homegrown" attacks of July 7 and the disrupted Heathrow plot illustrate, Great Britain has a much more serious problem with its domestic Arab and Muslim populations than the United States does. Arab and Muslim communities in England are, as a general matter, poorer, less educated, more alienated, and more vulnerable to radicalization than in the United States, where Arabs and Muslims, on average, have higher education levels and income than the average American, and have shown little sympathy for radicalism.

So I was prepared to find the UK a more authoritarian society, perhaps a warning of what the US might become if we were to suffer a series of follow-on terrorist attacks. Two recent books on the subject, Laura Donohue's *The Cost of Counterterrorism* and David Bonner's *Executive Measures, Terrorism and National Security*, demonstrate that the UK has indeed, like the US, compromised civil liberties in the name of confronting post–September 11 terrorism. Bonner shows that the Blair government, like the Bush administration, emphasized unilateral executive action and sought to evade the safeguards associated with the criminal process. Donohue argues that both countries have adopted counterproductive policies on the financing of terror, detention of suspects, intelligence-gathering, and restrictions on speech. Still, reading these books largely confirmed what I found in my time in London: namely, that the UK has been considerably more restrained and sensitive to rights in its response to terrorism since September 11 than the United States.

Consider first the issue of detention. The US has authorized and carried out disappearances of alleged al-Qaeda members into secret prisons, and conducted mass roundups and secret arrests at home and abroad. It claims, and exercises, the right to detain without trial anyone the President labels an "enemy combatant." By contrast, the most extreme and controversial of the UK's post–September 11
anti-terrorism measures authorized indefinite detention of foreigners suspected of terrorism who were illegally present in Britain but could not be deported, usually because they faced a risk of being tortured if returned to their country of origin. The law was invoked against only seventeen people. In 2004, the Law Lords, Britain's highest court, declared the law incompatible with the European Convention on Human Rights because it discriminated between foreign nationals and British nationals. Since Parliament had not authorized detention of British terror suspects, the Law Lords reasoned, it could not detain foreigners. [2]

In response, Parliament chose to let the law lapse, and replaced it in 2005 with a measure authorizing "control orders," equally applicable to British and foreign terror suspects. Control orders impose a range of restrictions on the freedom of movement of suspected terrorists, including confinement to home for certain hours of the day, strict limits on associations and communication, and electronic monitoring. In October 2007, the Law Lords upheld the restrictions as a general policy, but ruled that control orders requiring people to stay home for eighteen hours at a time were excessive, and that imposing such orders on the basis of secret evidence was impermissible.

The UK's other detention controversy concerns the length of time that suspects may be held before being charged with a crime. After the July 7 bombings, Prime Minister Blair sought to extend the time period from fourteen to ninety days, but encountered surprisingly strong resistance, especially in the House of Lords, and had to scale back the proposal to twenty-eight days. Gordon Brown is now seeking to extend the period to forty-two days, but his effort has been opposed not only by the usual human rights groups but also by England's current top prosecutor, Sir Ken MacDonald; Blair's former attorney general, Lord Goldsmith; and the influential and highly respected bipartisan Parliamentary Joint Committee on Human Rights.

Donohue and Bonner convincingly criticize control orders and pre-charge detention as infringements on basic liberties. But these measures pale in comparison to US detention policies.

The two countries also differ dramatically on interrogation. After September 11, US officials infamously approved coercive interrogation tactics, including waterboarding. After the revelations of abuse at Abu Ghraib, the military limited the most controversial of its interrogation methods, but President Bush vetoed a bill in March 2008 that would have imposed similar limits on the CIA. To this day, no high-level official has been held accountable for the policies that encouraged systematic abuse, notwithstanding recent evidence that the tactics were approved in microscopic detail in White House meetings attended by Vice President Dick Cheney, Defense Secretary Donald Rumsfeld, Attorney General John Ashcroft, CIA Director George Tenet, Secretary of State Colin Powell, and National Security Adviser Condoleezza Rice. [3]

By contrast, the principal coercive interrogation issues that have arisen in the UK since September 11 concerned the permissibility of deporting someone to a country where he faces a risk of cruel and inhuman treatment, and the admissibility of evidence obtained by another government's torture. In an amicus brief filed with the European Court of Human Rights in 2006, the UK argued that where a foreign national subject to deportation faced a risk of "cruel treatment" abroad, but not torture itself, the state should be able to balance that risk against the risk to its own security in permitting the person to remain within its borders, and in some cases should be allowed to go ahead with the deportation. In 2007, the European Court of Human Rights rejected the argument.

The UK government also argued, in its own highest court, that as long as British authorities had no part in another country's torture, and there were independent indications that the statements obtained in such an interrogation were reliable, those statements should be admissible in non-criminal proceedings. In December 2005, the Law Lords unanimously rejected this contention. Lord Bingham, the Chief Justice, wrote:
I am startled, even a little dismayed, at the suggestion...that this deeply-rooted tradition and an international obligation solemnly and explicitly undertaken can be overridden.

Thus, while the UK government sought to limit the effects on its own security interests of other countries' torture and inhuman treatment, the US deliberately authorized its own officials to engage in torture, while also secretly rendering suspects to third countries in order to have them tortured there. And while the UK openly sought to modify the law through public adversarial procedures, the US implemented its policies in secret in order to evade the law, and has stubbornly resisted efforts to make its actions—and the legal reasoning it used to justify them—transparent.

The differences between the two countries are also captured in the tone of the debates. Where John Ashcroft accused those who criticized administration efforts as "only aiding terrorists," the UK's top prosecutor, Ken MacDonald, has insisted that

the fight against terrorism on the streets of Britain is not a war. It is the prevention of crime...a culture of legislative restraint in the area of terrorist crime is central to the existence of an efficient and human-rights compatible process.

Lord Steyn, a former law lord, famously labeled Guantánamo a "legal black hole," and Lord Falconer, the lord chancellor, speaking for Tony Blair's government in 2006, called the prison camp a "shocking...affront to the principles of democracy."

This is not to say that British authorities have done everything right. As Donohue shows, UK policies on speech, pre-charge detention, control orders, and terror financing continue to raise serious human rights concerns. The UK was the most prominent country to back the US in the invasion of Iraq, the gravest error yet in the so-called "war on terror." And there is one particularly glaring exception to the general pattern—in carrying on surveillance of suspects the UK seems to have far weaker protections of privacy than the US, as discussed in more detail below. Still, when viewed as a whole, the United Kingdom's response to terrorism seems to have been more measured, nuanced, and carefully tailored than that of the United States.

3.

Two factors seem especially noteworthy in accounting for these differences. The first is the UK's longstanding experience with terrorism, which demonstrates that exposure to a long series of attacks need not necessarily produce a downward spiral toward authoritarianism. The nation's leaders grew up hearing firsthand accounts of the German bombing raids during World War II, and came of age during the ensuing struggle with the IRA. Donohue and Bonner agree with Tom Parker—and virtually every Briton I interviewed—namely, that the primary lesson of the IRA experience is that overly repressive responses are counterproductive.

That experience has led to a deep-rooted understanding of the importance of restraint. In 2006, Lord Lloyd, who had been appointed by the Conservative Party to review terror legislation in 2000, concluded a speech at an international conference in London that I attended by insisting that Britons must resist the concept of a war on terror, spread "friendship, not fear" in immigrant communities, treat terrorists as criminals, and, above all, not overreact. Sir Adam Roberts, a distinguished professor at Oxford and leading authority on the laws of war, suggested at another conference that the best way to confront terrorists is with a "sea of indifference." That attitude has helped to make the UK more cautious in its response to terrorism.

This restraint may have contributed to the UK’s apparently greater success at disrupting terrorist plots and bringing terrorists to justice. On March 30, 2004, British authorities arrested eight Britons of
Pakistani origin. Police seized 1,300 pounds of ammonium nitrate fertilizer in the raids. Scotland Yard had the group under surveillance for some time, and only moved to arrest them after the Madrid train bombings. In April 2007, five of the men were sentenced to life in prison.

In August 2004, British authorities arrested eight other men for conspiring to detonate a "dirty bomb" in London, after keeping close watch over them for more than a year. All eight were convicted and sentenced to lengthy prison terms. And in August 2006, British authorities disrupted the Heathrow bombing plot. Again, the men involved had been under extended British surveillance before their arrests. In each instance, the plots were disrupted not by using rendition, torture, disappearances, or indefinite detention without trial, but through the kind of old-fashioned police work that is commonly dismissed in the US these days as "backward-looking."

A second telling distinction between the UK and the US concerns their relation to international law. The Bush administration is and has been openly hostile to international legal constraints. By contrast, the UK has been subject for more than fifty years to an enforceable international human rights regime under the European Convention on Human Rights. As a result, UK authorities must justify their actions to an external authority less likely to be captive to local fears and passions. The European Court of Human Rights has declared invalid Britain's use of coercive interrogation tactics to interrogate IRA suspects, as well as its attempt to deport suspected terrorists to countries where they face a risk of torture, and its unregulated use of wiretapping. And the European Convention was the basis for the Law Lords' rulings against indefinite detention in 2004 and against some aspects of control orders in 2007.

Critics of international tribunals often complain of their "democratic deficit," because they are not directly accountable to an electorate. But this distance from democracy may have the same salutary effect as life tenure for federal judges in the United States. It provides an institutional oversight mechanism that, precisely because it is less susceptible to the political exigencies of a particular national system, is better suited to taking the long view.

The legitimacy of the European Convention on Human Rights in the UK was dramatically underscored in 1998 by Parliament's enactment of the Human Rights Act, which gave British courts the power to rule on claims that British executive actions and laws contravened the European Convention. Before that legislation, aggrieved citizens were unable to pursue such claims domestically, and instead had to wait and take their case to Strasbourg—a time-consuming and expensive process that was not feasible for many. As Bonner demonstrates, this development has in turn dramatically altered the role of British courts, which have recently shown much greater propensity to protect individual rights from security measures than in the past.

The Law Lords' decision declaring indefinite detention of foreign nationals to be impermissible discrimination under the European Convention illustrates an especially important feature of oversight under international law. A similar ruling would be almost unthinkable under the US Constitution, at least as the current Supreme Court understands it. In 2003, the Court stated that "Congress may make rules as to aliens that would be unacceptable if applied to citizens," expressly invoking a double standard to uphold a statute that authorized preventive detention of foreign nationals without a finding that they posed any risk of flight or danger to others. An international human rights treaty is less likely to tolerate such distinctions, both because it is founded on a universalist conception of human dignity and because the document itself is transnational. And a nation that must treat foreign nationals and its own citizens alike is certain to be more measured and sensitive to individual liberties.

4.

Still, UK law seems far less protective of rights than our own in matters of privacy and surveillance. The
differences may be relative. Donohue describes both countries as "courting the shadow of Big Brother." A 2007 report by the UK nonprofit Privacy International and the US-based Electronic Privacy Information Center characterized both countries as "endemic surveillance societies," ranking them with Russia, China, and Malaysia. And so much surveillance is secret that comparisons are necessarily tentative. But at least on the surface, the US has considerably more substantial protections for privacy.

In the US, the Fourth Amendment requires that in most cases judges must issue warrants based on probable cause before the police may search homes, persons, or effects, or place wiretaps on phones. Evidence obtained illegally may not be used to prosecute the person whose rights were violated. The UK, by contrast, has no Fourth Amendment. It regulates searches and electronic surveillance by statute. Its standards are more lenient, and illegally obtained evidence is generally admissible in court.

The UK's Terrorism Act of 2000 authorizes British police to designate geographical areas in which officers may stop and search any pedestrian or vehicle without any suspicion whatever. The entire metropolitan area of London has been so designated ever since that law came into force, in February 2001, rendering all Londoners vulnerable to suspicionless searches.

Electronic surveillance in the UK is authorized entirely within the executive branch, without judicial oversight. At the insistence of the security services, wiretap evidence is not admissible in court, further insulating wiretap practices from judicial review or public accountability. And the standard for wiretaps is lower than in the United States—warrants may be issued wherever the secretary of state deems them necessary for national security, to detect or prevent serious crime, or to safeguard the UK economy. By contrast, wiretapping in the US must be approved by a judge, who must find probable cause that the target is engaged in crime or is an agent of a foreign power.

The UK has a domestic intelligence service, MI5, devoted to spying in the homeland. Some commentators have advocated that the US create a similar institution, but an unlikely alliance of the FBI and civil liberties groups have thus far blocked such proposals.

The UK is the world leader in closed-circuit television cameras, or CCTV. The cameras are so ubiquitous that the average Londoner is likely to be captured on video approximately three hundred times a day. There has been little conclusive evidence that the cameras actually reduce crime—one report suggests that streetlights are a more effective deterrent—but the cameras received a big public relations boost when authorities were able to identify the July 7 terrorists by CCTV images shortly after the attacks occurred.

Europe generally has more privacy protections than the US with respect to commercially held data such as credit history and other financial records, and the UK is subject to those protections. British law nonetheless authorizes government officials to gather such data for the broadly defined purposes of national security, detecting or preventing crime, promoting public health, or protecting economic well-being, so the extent of protection citizens actually have from government access to such information is less clear.

Why is it that the UK is simultaneously more protective of liberty and less protective of privacy than the US? One possibility is that there are tradeoffs between liberty and privacy; increased privacy may come at the cost of reduced liberty. John Ashcroft has written that after September 11, the administration felt enormous pressure to prevent the next attack, but "didn't yet know who the terrorists were, or where we could find them." The administration accordingly detained over five thousand foreign nationals in the United States in the first two years after September 11; none of them stands convicted of terrorism today. Similarly, the Bush administration brought approximately 775 persons to Guantánamo, about five hundred of whom have since been released.

Such widespread sweeps may be more likely when the government does not know where the threat lies.
As Sir David Omand, head of security and intelligence for the Blair cabinet from 2002 to 2005, said at a terrorism conference in 2006, "Without good intelligence, you're driven to use a bludgeon rather than a rapier." Good intelligence, he suggested, may "take the pressure off tinkering with the rule of law."

But the notion that reduced privacy is the cost of preserving liberty is too simple. What enables the state to use a rapier is not less privacy but "good intelligence," and the two do not necessarily go hand in hand. According to the 9/11 Commission, the principal problems that plagued US intelligence and law enforcement agencies before September 11 were that they failed to devote sufficient attention or resources to al-Qaeda, ignored clear warning signs, had far too few Arab speakers and experts as agents and analysts, were reluctant to share information across agencies, and failed to analyze adequately the voluminous data they did have. All of these problems could be solved without reducing protections for privacy.

There is, however, a second, more political, sense in which privacy and liberty may be opposed. One of the striking features of the American politics of security since September 11 is that invasions of privacy have prompted far more public resistance than intrusions on liberty. The Patriot Act provisions that aroused the most public concern were search provisions—such as those authorizing roving wiretaps, "sneak-and-peek" searches, national security letters, and demands for records from third parties, including libraries—demands that librarians and other employees are not allowed to reveal to others. Other Patriot Act provisions were far more egregious, but received little attention, including one that permitted preventive detention of foreign nationals without charges, and another that authorized the Treasury Department to freeze an organization's assets and effectively shut it down on the basis of secret evidence without finding any violation of law.

The first three post–September 11 security initiatives to face real congressional resistance also involved intrusions on privacy—identity cards; Operation TIPS, a Justice Department plan to recruit millions of citizens to spy on their neighbors and report suspicious activities to the FBI; and Total Information Awareness, a data-mining program run out of the Pentagon. Congress cut off funding for all three.

By contrast, Congress took no action on Guantánamo or the issue of detaining "enemy combatants" until 2006, when the Supreme Court declared the President's military tribunals illegal—and then Congress largely ratified what the President had been doing, with minor modifications. Congress has never taken any action to close the secret CIA prisons, bar disappearances, challenge rendition, or demand fair proceedings for enemy combatants. Congress did reject the Bush administration's view that a treaty barring cruel, inhuman, and degrading treatment did not apply to foreign nationals held abroad, but the rejection was largely symbolic, since it included no enforcement mechanism.

Americans' apparently greater sensitivity to privacy than liberty may be attributable to the perception that intrusions on privacy potentially render everyone vulnerable. Because surveillance is nearly always carried out in secret, there is often no way of knowing whether one's own privacy is truly at risk. One fears the worst. By contrast, torture, rendition, preventive detention, and Guantánamo have been reserved almost exclusively for foreign nationals. Apart from John Walker Lindh and Jose Padilla, there have been no reports of American terror suspects being tortured or otherwise abused in interrogations. It may be easier to sacrifice liberty than privacy because most people are confident that their liberty will not be targeted. And if intrusions on privacy arouse more popular resistance, officials may seek out sacrifices in matters, such as liberty, less likely to trigger opposition.

Our experience with domestic spying—revealed in all its shocking details by the Church Committee's investigation in 1975—has sensitized the American public to privacy in ways that the British public has not yet confronted. The Church Committee's findings dramatically illustrated just how broadly national security spying can spread when not subject to tight controls. UK surveillance authorities seem even more shrouded in secrecy than our own and less subject to oversight, and without publicly available evidence of widespread abuses, the British public may simply be less concerned.
Near the end of my time in London, Sir David Omand came to my office after a morning undergoing chemotherapy at a local hospital. He had spent the weekend with American and British intelligence officials, and remarked that the biggest difference between our countries' approaches may result from the fact that the US was attacked from without, while the UK was attacked from within. When you are attacked from without, the natural reaction is to fight back with all you have—and to quickly divide the world into us and them. In those circumstances overreaction is almost inevitable. When one is attacked from within—by cancer or terror—one tends to search for a cure, and as a result the response is almost certain to be more measured. The challenge for the next administration will be not only to learn from our own mistakes but to respond to terrorist attacks from without with the kind of restraint the British have for the most part shown in dealing with attacks from within.

—May 14, 2008

Notes

[1] Seventeen of the twenty-four men were charged with crimes, while seven were released. Eight of the men are now standing trial for the Heathrow plot.

[2] In November 2001, the US Justice Department quietly issued a regulation unilaterally granting itself the same power of indefinite detention over foreign nationals that the Law Lords had deemed a violation of fundamental human rights. The US regulation has received virtually no attention, and remains on the books.


[9] This may change for some transnational communications if Congress approves current proposals to amend the Foreign Intelligence Surveillance Act.
