

Intelligence, Terrorism and Civil Liberties

by
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INTRODUCTION

It has become commonplace in the literature on terrorism to accept that intelligence is indispensable to successful counter-terrorism¹ but despite some useful efforts² several key issues remain to be explored. This paper will focus on four questions: (1) how different in nature is terrorism from the other threats faced by democratic states; (2) what is intelligence; (3) how can intelligence help in responding to terrorism; and (4) what are the tensions between the role of intelligence in countering terrorism and civil liberties in democratic states?

THE NATURE OF TERRORISM

The view that terrorism can be treated as a form of criminal behavior that requires no more than "normal policing" is particularly stressed³ by those who argue that civil liberties are at grave risk when governments use the 'menace' of terrorism as an 'excuse' for altering the balance of power between the citizen and the state. Frank Donner of the American Civil Liberties Union has argued that terrorists have become the scapegoats for the reactivation of 'political surveillance.' He contends that the FBI and a "highly conservative economic and social order" have an interest in utilizing the public's fear of "unseen foes," first, to justify demands for an increase in domestic intelligence and second, to link legitimate opposition movements with terrorists in order to discredit the former. Donner sees terrorism as the new 'conspiracy theory' enabling conservatives to block reform, to justify surveillance and to restrain opposition. Donner feels that the terrorist threat should be put in perspective thus avoiding the danger of a moral panic. Having so reduced the threat, restrictions could be placed on the surveillance activities of government, limiting investigations to those activities allowed when dealing with 'normal' crime.⁴

Certainly some writers are of the opinion that the greatest menace facing democracy is not terrorism but the reaction to it. The characteristics of terrorism that create such divergent views regarding the nature of the terrorist threat include: the secrecy inherent in terrorist structures; the risk of death; the ideological motivation; the 'indiscriminate' violence; the popularity; the use of publicity; the expressed political aims; and the prevalence of the threat. Without mutual agreement regarding the concept of terrorism, it is impossible to state precisely how terrorism differs from other forms of crime. As with crime, there are different approaches to the problem of definition, ranging from the legalistic to broad concepts of liberation, and a variety of theories exist concerning the origins and dynamics of terrorism.

However, most concepts of terrorism include at least some of the following elements:⁵

- 1) the presence of violence;
- 2) the existence of political motives;
- 3) the introduction of fear or terror;
- 4) the unpredictability and insecurity;
- 5) the use of symbolic targets so that *any* representative of a hated category becomes legitimate prey;
- 6) the brutal methods, unconstrained by the rules of war;
- 7) the feeling of helplessness engendered because compliance with demands does not guarantee a reduction in the level of violence;
- 8) the use of publicity as part of the coercive strategy;
- 9) the clandestine planning and execution of operations;
- 10) the group involvement or collective effort; and
- 11) the possible use of sophisticated weapons.

Some of these characteristics are held in common with other forms of harmful and illegal behavior: secrecy; violence; collective action; and fear. Others are more obviously unique: the political motive; the desire for publicity; and the indiscriminate nature of the violence. In this paper, terrorism will be treated as a unique phenomenon because of these unique elements; it is the only form of illegal or harmful act that is politically motivated, makes demands which are only indirectly connected with the immediate crime, has the objective of instilling fear without a necessary relationship to the achievement of immediate goals, uses weapons and techniques that may be sophisticated, brutal and unusual (letter-bombs, knee-capping, etc.), and may involve the participation of states.

Beyond simply setting terrorism apart from criminal behavior, these elements require a different response from the state forced to deal with terrorism. It is necessary, therefore, to examine each in some detail.

The political motivation of terrorism draws it into the debate regarding the nature and distinctive features of political crime. Traditionally, the political criminal is one who commits a crime such as treason, espionage, or assault on the person of the ruler — thus, a crime against the state. The motive for the action is political, it involves the achievement of a political aim, and can be contrasted with those crimes motivated by personal gain such as robbery. However, motive is often difficult to establish, whether by a court of law or by social scientists, and many criminal acts involving the state may have more than one motive. To circumvent this problem, some commentators have defined a political crime as being whatever the state so defines it to be.⁶ According to this definition the motive of the actor is irrelevant; it is the perception of the state which is all important. For example, a strike can be political, defined not only by the 'real' motive but by the consequences perceived by the government. Other writers come closer to abandoning the concept of political crimes altogether, claiming, instead, that all crimes are political, for all involve a challenge to the established order.⁷ This view argues that the difference between mugging and terrorism is simply one of degree and is a product of the perceived threat posed by such crimes to the existing structure of property and power. As Schafer asserted:

... in view of the political-ideological cradle of all crimes, it might be more appropriate to see the common or ordinary offences as relative political crimes, as opposed to the absolute political crimes where the target of the law-breaking is the ruling power's value system as a whole, rather than a part or an issue of it.⁸

There are a few authors who would maintain that certain crimes have specific qualities belonging to a particular concept which can be labeled political. To make such a determination, one must 1) examine the *conflicts* which give rise to certain types of collective action such as protest, demonstration, and terrorism; and 2) examine the reasons why states identify some crimes/threats as requiring a different *response*. The first seeks to explain all forms of crime/harm in relation to certain social characteristics and focuses on collective experiences to explain collective behavior while the second explains the application of the label political to certain crimes/harms in terms of the interests of the established order. These approaches are not necessarily exclusive, rather, it is often a matter of choice when a writer operates with one more than the other, but they do give rise to different problems.

The first approach focuses upon the need to examine the origins of certain actions by the public and to stress the tensions which exist in societies. Often, this leads to the inference that the proper response to such acts is to alter the structure of society and thus reduce the tensions. Further, one might conclude that state action to repress such behavior is bound to be ineffective and immoral. The second approach examines the historical circumstances in which states apply the label of political crime to particular actions. Frequently, the state may then decide that the threat, which it feels it is facing, is unreal, is a form of 'moral panic.' This may lead one to conclude that democracy is ineffective and that politicians, intelligence officers, civil servants and the military are engaged in a conspiracy to protect their own interests in power and privilege rather than protecting the general public. The solution may be in more effective 'democratic' controls over the state.

Both of these approaches are flawed by the fact that they assume that there are no real threats to public order, to the state or to the social fabric. They either assume that terrorism and mugging are the product of moral panics or that terrorism and mugging require the same response because they are the product of the same cause, social tensions.

One major difference between ordinary crime and terrorism lies in the demands which are made. This is true irrespective of whether the demands are legitimate or not. To demand an alteration in sovereignty or territorial domination cannot be seen in the same light as ordinary crime whatever the nature of the regime. Obviously, a change in sovereignty has implications for other states and may be seen as furthering or threatening their interests. A change in sovereignty may be desired by a foreign power and it may, therefore, act to encourage terrorism. The use of sophisticated weapons and the indiscriminate nature of terrorism make it difficult for normal police methods to control such terrorism

with any success. The nature of the terrorist threat may be exaggerated but one can hardly deny that it poses particular problems for the state. The mere possibility of such a threat leads states to take action for a challenge to the sovereignty of a state cannot be treated in the same way as a mugging, despite any determined cause or the fear that they both inspire.

WHAT IS INTELLIGENCE?

A definition of intelligence should identify those features of the set to which the phenomenon belongs and identify those characteristics that distinguish it from other sets. However, most authors do not define intelligence, they merely list its elements. For example, Roger Hilsman⁹ lists three activities associated with intelligence: the collection of facts, the determination of appropriate actions, and the presentation of these decisions to policy-makers.¹⁰ However, such elements are common to all decision-making whether by business corporations or the social services. In practice, Hilsman actually defines intelligence, not by reference to its activities, but by the type of information which is collected — military, political, and strategic. A more satisfactory definition is offered by Roy Godson of the Consortium for the Study of Intelligence.¹¹ He defines intelligence as:

... the effort by a government, or a private individual or body, devoted to: the collection, analysis, production, dissemination and use of information which relates to any other government, political group, party, military force, movement or other association which is believed to relate to the group's or government's security.¹²

The problem with this definition lies in the concept of security. A businessman may feel insecure because of falling demand or ordinary people may feel insecure in their jobs. It is true that these have something in common with intelligence but what they have in common is so general and everyday that it fails to differentiate a unique phenomenon.

A satisfactory definition of intelligence ought to make reference to the following: threats, states, secrecy, collection, analysis and purpose. The most important of these is the expression of threat since without threats there would be no need for intelligence services. It is the existence of threats, or the possibility of such, to which the government is responding when it collects secret information and makes secret plans to counter threats. A threat is not simply an unknown factor which may affect one's interests but is something capable of causing serious harm or injury. The seriousness of the threat depends on the degree of harm which may arise and the likelihood of the threat being carried out. Governments need to be supplied with a great deal of information about, for instance, the environment but it is the information related to threats which is the province of intelligence services. Furthermore, although the gathering of information from open sources is a vital and significant part of all intelligence activity, it does not form the distinguishing characteristic of such activity. Rather, its unique element is secrecy — the

secret collection of someone else's secrets. A threat may be reduced or even eliminated by the acquisition of knowledge. For example, to have knowledge of the intentions of a hostile power may give one a feeling of security which extra guns or ships could not. It is the acquisition of knowledge of intentions which remains one of the key functions of the traditional spy — human intelligence (HUMINT).¹³ The agent in place is likely to provide the only collection mechanism which can determine whether the Generals in Country X are actually about to stage a *coup* and not simply that they have the capacity to stage such a *coup*.

The intelligence service must, of course, turn information into knowledge, that is, assess its significance, context, pattern, meaning, relationship to other information, history, reliability, and value to the purposes of other members of the executive branch. The process of analysis is fraught with hazards but it is one from which there is no escape. It must be performed, whether by the collection agency, the user or by some intermediate body. If raw data is given to a General on the battlefield, he must still analyze it in terms of the previous knowledge he possesses and other current information relating to the enemy he is facing.

Finally, the user of intelligence plays a key role by specifying his needs. Collecting unnecessary information is wasteful, inefficient, and creates unnecessary risks. Unfortunately, very often the user does not know precisely what information is necessary and the collectors are blamed should the intelligence service be caught unprepared. Occasionally, users deliberately create uncertainty concerning their priorities and their desired information in order to avoid responsibility for any shortfalls or surprises which may occur.¹⁴ Users can very easily blame the collectors for collecting too little information or for providing the wrong kind of information, thus avoiding their own responsibilities. No intelligence service in the world can collect all potentially useful information on any subject. Decisions must be taken based on established priorities. This involves risks to the users of information since they are trying to judge the seriousness of various threats and guess their requirements. Collectors, as well, have an interest in the uncertainty of users for such uncertainties give them more flexibility and room for maneuver. Defining collection requirements can be the least formalized and coherent part of the intelligence process because of the incentive each party, collector or user, has to avoid any blame for deficiencies that may exist. However, to establish the acquisition of all 'useful' information about all possible threats as the objective of collection is to create a bureaucratic monster, producing much employment but little value. This is one of the strong arguments in favor of a decentralized intelligence service with specialized divisions capable of developing a close relationship between collectors and users. To conclude, an intelligence service is an organization devoted to collecting, by clandestine means, the secrets of those who have the capacity and intention to inflict harm on the interests, goals and values of a nation state.

Intelligence services in democratic countries are of two main types, those concerned with domestic intelligence and those concerned with

foreign intelligence. This division reflects the fear in democracies that a single secret service may lead to a concentration of power and because of a democratic reluctance to treat aliens and citizens in the same manner.

The purpose of a security service is to collect information, clandestinely, on threats that exist within the territory subject to the sovereignty of a particular state. The means used to collect information are similar to those used by intelligence services. However, there are variations in emphasis because of the difference in the nature of the threat and the threatened. The interception of communications, the placing of 'bugging devices,' and the use of human agents are common to both services, while the use of spy satellites and the collection of intelligence from radar signals is generally limited to foreign intelligence services. Infiltration, is common to both organizations although perceptions about it differ. In foreign intelligence it is seen as a largely legitimate activity and is given an honorable designation such as 'placing agents' or having a 'human source.' In the case of internal security, such activities are dishonorable and infiltrators are described by terms such as 'informers,' 'stool-pigeons' and *agents provocateurs*.' This difference in terminology does not reflect any difference in method but rather in the attitude towards the legitimacy of using such methods against one's own citizens. However, HUMINT does appear to be a more important method for Security Services than for Intelligence Services.¹⁵ The use of human agents is easier and less risky in the case of domestic operations than in the case of foreign operations. For example, domestically, it will probably be easier to mount a support operation and therefore easier to rescue an agent if an operation goes wrong. Also, recruitment is likely to be more straightforward since it will, no doubt, be easier to find someone able to pass as a member of a domestic group than as a member of a foreign group.

Historically, the missing dimension within security services has been analysis. Neither Britain nor the United States has any permanent committee equivalent to either the Joint Intelligence Committee or the National Security Council which tasks, coordinates or analyzes the information concerning domestic threats.¹⁶ This, as argued in this paper, is due to the association of internal security with law enforcement which links the collection of information to prosecution rather than to evaluation of trends and long-term planning of resources and responses. Furthermore, given the fact that domestic threats are less likely to involve the military, the diplomatic corps, the specialist coding and cryptography departments, this reduces the need for inter-agency cooperation and therefore produces less of an incentive to form specialized analysis bodies. However, these are not good reasons for the neglect of analysis within domestic intelligence and as shall be shown later, this neglect has unfortunate consequences for both the quality of intelligence and civil liberties.

INTELLIGENCE AND TERRORISM

Intelligence can be useful against terrorism in the following ways:¹⁷

- 1) identifying those involved, whatever the level of their involvement;

- 2) building a data-base which can be used to establish patterns of demands, methods, etc. which can improve decision-making in times of crisis;
- 3) identifying those most at risk and the property most at risk, therefore helping to save lives;
- 4) organizing clandestine counter-attacks (covert action);
- 5) establishing the supply routes, safe-houses and sources of recruits, weapons and finances;
- 6) assisting in the development of a counter-propaganda effort targeted either at the support population or those immediately involved;
- 7) spreading black propaganda;
- 8) disrupting the solidarity of a group against which an intelligence effort is directed;
- 9) warning of impending attack and disrupting such attacks;
- 10) influencing the placement of resources such as police, military and hardware;
- 11) disrupting the communications network of those involved through interception or the fear of interception;
- 12) allowing information to be selectively released to win allies or dissuade hostile powers;
- 13) guiding decisions concerning the political reforms which may isolate or discourage the terrorist;
- 14) increasing the amount of information available through exchanges with other services; and
- 15) assisting in the management of crisis situations, offering 'battlefield' intelligence as opposed to strategic intelligence.

For all the above reasons, and there may well be others, intelligence is considered to be at the heart of an effective counter-terrorism strategy. Although none of the above are without risk, all have been practiced by democratic states at one time or another.

However, intelligence is only able to perform the above tasks if it has the capacity, authority, organization, skills and resources necessary. Intelligence will produce few results if little or no use is made of it. Intelligence can only be effective if it has a clear sense of its objectives, the purposes for which it is being collected. Intelligence cannot produce results if it is subject to continual interference, whether from political leaders, legislatures, or other bureaucratic agencies. Good intelligence requires clear tasks, agreed methods, common perceptions and a degree of autonomy. These requirements are rarely met in full. All too often intelligence services are given very general remits, none at all or they are given impossible directions such as 'stop terrorism' or 'collect all information about terrorism.' No guidance is offered regarding the importance of collecting certain information nor can any guidance be offered to the political leadership regarding the threat posed by various types of terrorism or terrorist groups.

Democracies, for reasons outlined above, have feared the concentration of intelligence capacity in a single agency. This may reassure the

public that no spy system is being created but results in problems of coordination, bureaucratic in-fighting, and difficulties in the exchange of information, allocation of responsibility and public monitoring. Intelligence implies the assemblage of information and perspectives in order to analyze the data. If there are several agencies involved, it is likely that each will see information as a scarce resource to be 'bartered' with politicians and other members of the national security community. Competition among agencies, or even divisions within them, may produce over-zealous officials who use unethical methods to scoop their rivals. While it can be argued that centralization is necessary for effective monitoring of adherence to laws and guide-lines,¹⁸ it can also be argued that, without clear policies and a unitary structure to carry them out, responsibility is difficult to allocate and easy to evade.

Though intelligence obviously can be used to fight terrorism, its capacity to succeed is limited by such key factors as the concept of civil liberties. To understand the issues presented by such a concept, one must understand the differences which exist between intelligence work and law enforcement.

INTELLIGENCE, LAW ENFORCEMENT AND TERRORISM

The fears which domestic intelligence has generated are caused by the confusion between intelligence as a preliminary to prosecution and intelligence as an aid to policymaking. Information gathered about domestic threats may be used to support or initiate prosecutions and trials but, in intelligence work, a trial is often a symptom of failure, failure to turn a poor situation to one's advantage or failure to manipulate the information going to a hostile group. The goal of counter-intelligence work is to use an enemy's agents and other methods of collection against him rather than to destroy or punish those involved. Such a utilization is, however, much less acceptable when those caught in such activities are one's fellow citizens, partly because there is a sense of moral outrage, a need to punish the guilty and a need to preserve the principle that those found breaking the law must be treated equally. Moral indignation may appear when traitors are treated differently from ordinary criminals, even though this unequal treatment may be in the best interest of the nation. Such a policy runs counter to the equalitarian ideal of one law for all and not one law for the rich and one for the poor or one for spies and one for shop-lifters. The relationship between law enforcement and intelligence is a major cause of problems for the proper understanding of the nature of security services. In theory, domestic intelligence would be a worthwhile operation even though no one was ever tried or convicted for any offence in a court of law. However, this will only be acceptable to the public where there is a high degree of consensus concerning the nature of the threat faced. Only when such agreement exists would security services be allowed to operate in secret, without the need for the occasional 'show-trial' to present both the threat and the ongoing solution to the public. Given a consensus, one can envision a situation in which the government is entitled to examine the extent of, intensity of, and the effective methods to counter threats without this involving prosecution.

A key question is whether such a consensus exists regarding terrorism. In time of war there has been a tradition within democracies that civil liberties can be eroded in the interest of victory but it is doubtful whether terrorism is perceived in such a way except after some 'spectacular' incident. Without such agreement, the public will see intelligence as an adjunct to the process of arrest and prosecution which necessarily leads to certain policies being adopted on the allocation and management of scarce resources. For example, it may not be seen as legitimate to use the full battery of collection techniques or secret operations against terrorists. The latter could involve spreading false rumors among the groups, disrupting their routine by using intermittent visible surveillance, or by informing their friends, employers or relatives that they are 'unreliable.' It is undoubtedly the case that such methods have been used against domestic targets but the legitimacy of such actions depends upon two related issues. The first concerns the extent to which the state's right of surveillance depends upon an immediate and direct threat of injury or illegal action. The second issue is whether the state's response to a threat must be confined to actions which lead to punishment and trial. The question is the legitimacy of what, in other contexts, is known as preventative policing, that is, pre-emptive actions designed to deter, prevent or reduce the probability of actions harmful to the state. Such actions stand apart from the more acceptable use of the deterrent effect of conviction.

Each of the following passages offer objections to intrusions by domestic intelligence agencies on the grounds that such activities are harmful to civil liberties and that the secrecy associated with such activities means that citizens are unable to object to or control them. The latter point seems to be the main focus of anger and yet without secrecy intelligence is impossible. However, little or nothing is said about many of the activities of security services which do not involve intrusions or intrusive technology. Much intelligence gathering concerns the collecting of public statements of individuals or groups, the clipping of items from newspapers, the sending of agents to attend public meetings, using informers, and finally the deliberate planting of agents inside the group itself. None of these involve any act which is unlawful and only the last two imply any breach of privacy. Yet, the literature on the subject is largely bereft of comment on these practices. Less dramatic, though no less important, their absence leads one to wonder just who is experiencing the moral panic often attributed to the general public:

The emphasis in investigation has changed from evidence gathering after the commission of crime to intelligence gathering in advance of any particular crime being committed. In this 'pre-emptive' view, any citizen, certainly any socially uncharacteristic citizen, is a target for suspicion and observation. This quite explicit development in police planning has virtually put the whole of society under surveillance;¹⁹

What is clear is that democracy has been diminished and individual freedom curtailed without the nation's

knowing what was happening. Even the victims of FBI harassment seldom suspected that the government was behind their difficulties;²⁰

Whereas an arrest should be based on reasonable suspicion that the suspect has committed an offence, the surveillance involved in information-gathering starts several stages before reasonable suspicion can exist — so that someone innocent of criminal involvement, or against whom no evidence exists, may become the target of special enquiries, phone-tapping or mail interception as a result of mixing with the ‘wrong’ people;²¹ [and]

Less obvious intrusion by technology is now possible through the use of various photographic and listening devices. The very unobtrusiveness of such intrusions makes it quite possible for them to be unknown to the individual whose privacy is invaded...²²

All of the above quotations imply that all such secret activities are harmful. It is true that some of the practices of intelligence services are harmful but not all are so clear-cut. If a security service sent a ‘poison pen letter’ to a woman suggesting her husband is having an affair, with the intention of harassing him, the act, clearly, should not be tolerated. However is sending an agent to a public meeting necessarily harmful? Is recording the public statements of a member of a group on the radio or television necessarily harmful? Ironically, it seems these activities, or intrusions, only cause harm if they come to the attention of those concerned or to the public at large. If they remain secret, they cause no harm.

Most people would be willing to concede that if one could show that a particular response by the state was harmless to civil liberties, the state should be allowed wide discretion in its use. More debatable are the circumstances under which the state might be allowed to use intelligence techniques which are harmful to civil liberties or which are illegal, such as sending a letter as described above. A second example might be the use of the law on taxation to carry out an investigation on an individual suspected of links with hostile intelligence services. A third example might be the use of a law relating to the road worthiness of motor vehicles to punish someone believed to have broken into a laboratory carrying out animal experiments.²³ Such actions are clearly harmful and should not be used against citizens except in a situation of virtual war. Once again, one returns to the key question of whether the public sees the terrorist threat as equivalent to war. Or, to be more precise, whether the public sees certain terrorist groups as being involved in a virtual war.

Finally, there is the problem of the proper relationship between law enforcement and security activities. Here, the three key issues are: (1) the relationship between the institutions of policing and of the security service; (2) the extent to which prosecution and trial are the main objects of the security service; and (3) the legal admissibility of evidence obtained by clandestine means. The first issue is crucial since Britain and the United States have adopted differing formulae. Although the CIA has no

law enforcement or internal security functions, the FBI serves as both a security service and law enforcement agency, while in Britain, the Security Service has no law enforcement powers and must rely on the police to carry out this function. The advantage of the British approach is that the methods and goals of intelligence gathering are kept clearly distinct from those associated with law enforcement, thus, the latter are less likely to contaminate the former. In the United States the methods appropriate to dealing with hostile intelligence services and terrorists have spread to areas where they are inappropriate, such as dealing with student demonstrations or riots. The objectives of intelligence gathering are often long-term and precautionary and they should not be allowed to contaminate the much more precise goal of arresting and punishing law-breakers. Although prevention is admirable, whether performed by the police or the security service, preventative policing is not and should not be seen as a justification for massive and indiscriminate collection, infiltration and surveillance of criminal acts however political they may appear to be to 'conservative' policemen.

Intelligence gathering must be based on a clear conception of threat which can command a high degree of public support. Tasking is a matter for political judgement, not for the police. The police in a democratic society are directly accountable to the law, they serve the law, not political masters. In the case of the security service, the exact opposite is the case. That service is amassing information in response to decisions concerning threats to the state. Such decisions are inescapably political and involve the need to weigh public support for the definition of threat, the methods used to collect information and the response made. There is no sense in which it would be desirable to keep the security service free from political interference in the way that this has been seen as desirable for the police.

The methods used in intelligence gathering are not necessarily legitimate when applied to crime fighting. Bugging telephones, intercepting communications, planting informers, and developing a database founded on rumor and gossip are more acceptable when one is dealing with hostile intelligence agents or terrorists than when one is dealing with bank robbers. Occasionally, such methods are put to legitimate use against criminals but the dangers of abusing civil liberties and infringing upon the rights of a defendant are greater when punishment may result. Civil liberties offer protection against the state's ability to inflict harm on the individual, whether through seizure of goods, imprisonment or loss of privilege.²⁴ When punishment is not involved or is not the main objective, then the individual has less need for protection; thus, it may be argued, security services need fewer constraints. Arguments concerning the necessity of greater constraints on security or intelligence services will be dealt with in the following section on civil liberties.

A major protection against the abuse of security service methods has been the willingness of courts to disallow evidence obtained unlawfully. Though British judges have powers similar to American judges to extend this protection, in Britain

The fact that an article or document has been illegally obtained by the police does not prevent its being used in evidence in criminal proceedings.²⁵

The power of the courts to rule certain evidence inadmissible or to strike it from the record offers protection against 'transference' — applying methods appropriate to one situation to another. Civil liberties can easily be threatened when information, gathered for a particular purpose through methods that are justified because they are not intended to result in public prosecution, is then used in a prosecution and trial. Both civil liberties and intelligence work can be maintained and can be effective, first, if the distinction between intelligence methods and law enforcement techniques is clearly preserved, and second, if the courts actively maintain the distinction between that evidence which is admissible and that which is inadmissible within the criminal justice system of trial and prosecution.

INTELLIGENCE AND CIVIL LIBERTIES

In Britain it is more common to speak of liberties rather than rights since there is no Bill of Rights or written constitution establishing positive legal rights to perform certain actions or hold certain beliefs. When lawyers speak of liberties, they are talking of those freedoms that one possesses because certain actions or beliefs are not prohibited by law. People have the freedom to do that which is not unlawful and the state is constrained from interfering with actions that are not unlawful. These differences in the concept of 'basic freedoms' can lead to misunderstandings between nations, particularly between the U.S. and Britain. In the United States, commentators on these matters see rights as being positive possessions which, therefore, imply duties or responsibilities. Most commentators agree that liberties do not imply a corresponding duty whereas rights do. Thus, to say that one has the liberty to work means that no impediment in law exists to prevent one from seeking or accepting employment. To say that there is a right to work would imply not only that persons have the right to seek work but that others have the duty to employ those seeking work, all other circumstances being equal.²⁶ Further, in Britain the citizen owes obligations (duties) to the Crown and not to an abstract concept such as the republic, constitution or Bill of Rights. Of course, many would argue that Britain ought to have a Bill of Rights which would bestow legal rights and corresponding duties.²⁷ However, certain complications would arise, in particular whether such a document would remove the traditional power of Parliament to remove, modify or otherwise alter existing liberties. Traditionally, there have been no limits on the authority of Parliament to legislate on *any* matter.

Using the concepts established above, regarding liberties vs. rights, one can better understand their existence within a particular national legal/political context.

A major anxiety revealed in all of the literature which discusses the problem of the democratic response to terrorism is that democracy can be damaged or even abolished because governments may 'over-react.'

One fear of such over-reaction is a fear of increased state surveillance of citizens. Such surveillance is said to 'chill' citizen willingness to express opinions or to participate in social movements, to damage personal privacy, to lead to the denial of state employment, to concentrate power, to erode normal police and court procedures, and to lead to the use of 'dirty tricks.' This catalogue of fears would certainly seem sufficient to give rise to the need for eternal vigilance if nothing else, yet these fears, in and of themselves, do not form a sufficient reason to justify the restriction of the intelligence activities of a state responding to terrorism. The erosion of civil liberties must be examined in relation to the fundamental liberty of self-preservation and the preservation of a political system within which all these liberties have meaning. This implies that the relationship among terrorism, intelligence and civil liberties is one of balance. Unfortunately, without some basis on which to judge the alternatives, this conclusion is bland and not very helpful. Questions remain: what level of terrorist threat is sufficient to justify what level of state surveillance even when this involves the erosion of civil liberties; what is the actual consequence of particular intelligence activities on civil liberties; and are such responses effective in reducing or containing terrorism? The answers to such questions require empirical knowledge as well as philosophical consideration.

Several criteria may be offered that allow one to make a proper judgement. Obviously, any democracy considering what intelligence it requires, and the value of clandestine measures it might employ, must examine the threat which it faces. However, this process is not as simple as it appears. First, a good intelligence service must be in place in order to be able to make such an assessment. Second, the service must be capable of analyzing existing information and coming to an objective assessment of the threat posed by terrorism very early on. In the early stages of activity, there will be few patterns or trends to assess, thus making it difficult to assess whether the first targets hit or the initial methods used will be indicative of the future. It is even more difficult to assess the level of support such activities may have either within the general population or within a particular sector of it. This difficulty is compounded by the fact that little may be known of the perpetrators, their motives, goals, finances, organization, links to other groups or states, or their personal backgrounds. Despite a lack of information, the intelligence service must decide whether to mount a major investigation using the full range of intelligence techniques or whether to view the action as nothing more than isolated criminal activity, no more dangerous to the state or the general public than drunken drivers. The key issues become the level of activity sufficient to justify labeling a group as terrorist and the degree of terrorist threat sufficient to trigger an all-out response. The temptation is to adopt a 'wait and see' attitude, making no assessment until 'further information is available.' Delay is particularly understandable given the dilemma faced: while an effective response may be mounted during the initial stages, it is at this point that accusations of 'over-reaction' are most likely to be made against the state.

Death becomes the criterion normally considered in order to justify

making a group an object of intelligence activity. When a politically motivated group claims responsibility for the deaths resulting from the group's activity, the interest of an intelligence service is virtually automatic. However, there is still the problem of justifying the degree of intelligence effort. An intelligence service, like any other state bureaucracy, does not possess unlimited man-power and resources. Tailoring people, intercepting communications and planting informers all cost time and money. Decisions still need to be made regarding priorities and where this new threat is to be placed in existing intelligence rankings.

Several factors have to be considered when making such decisions including the extent to which intelligence activity is likely to be the best method to counter the threat. To tap telephones or place people under surveillance is justified if it is the only method likely to produce results, but the response must be the minimum necessary in order to gather information. The danger arises when politicians or the intelligence community exaggerate the threat in order to achieve other goals such as harassment or expansion. The use of intelligence to harass has certainly occurred in the United States, partly because of a lack of political will to control intelligence and partly because of the ambitions of the FBI to become the principle agency for countering subversion.²⁸ Intelligence agencies are not immune from the sin of pride or the sin of avarice. In the literature available, there are two favorite approaches to this difficulty. The first is to construct a set of rules or guidelines which attempts to constrain or limit intelligence services. The second is to construct an effective system of accountability involving the legislature and/or the executive. It is, of course, possible to develop a joint approach in which both tactics are used. However, each has its own problems. A set of rules may not be capable of allowing sufficient flexibility in an area where judgements of degree of risk are inherently uncertain. The danger may be reversed so that the intelligence services hesitate to begin surveillance, even when it is justified, in order to avoid scandal. This, it has been argued, was the result of the guidelines produced by Attorney General Levi following upon the Church Committee investigations.²⁹ The Levi guidelines adopted a step-by-step approach to investigations, involving 'triggers' which would allow an investigation to be opened and if necessary, would allow more intrusive techniques to be used. It was a requirement of the guidelines that the threat of force, an actual criminal act, be alleged before any investigation could take place. Statements by groups that they intended to use force or saw force as justified were not sufficient to trigger an investigation as, it was argued, many groups make statements which are not preparatory to action but are mere rhetoric. Therefore, it was considered unreasonable to use rhetoric as a basis for opening a file. Perhaps the classic illustration of this would be the 'unreasonableness' of opening an investigation into a group of old bolsheviks sitting in a New York cafe, plotting the overthrow of the government, because each had been law-abiding citizen of the country since he emigrated in 1910. These rules led the FBI to restrict its activities, including constraint in the collection of publicly available material,³⁰ since, as it was claimed, the mere

collection of publicly available material by an agency such as the FBI indicates that the group is somehow unlawful or subversive.

The central debate rests on the issue of the 'criminal standard' as the trigger of an investigation. Although that may be appropriate for a law enforcement agency, it is not appropriate for an intelligence agency. Effective intelligence work requires knowledge of a group before the bombs go off and the group retreats fully underground. Furthermore, good intelligence work requires information beyond the criminal activities of a group; it requires information concerning ideology, support groups, front organizations, personnel willing to give active support but not plant bombs, links with foreign powers or overseas groups, and sources of finance and recruits. These activities may be legal, yet information about them is essential for successful intelligence work.

The second approach, monitoring intelligence activities via legislative committees or by an internal system of authority and accountability, places key decisions in the hands of a restricted number of identifiable people. Certainly, some intelligence abuses were a product of decisions being taken by those in the hierarchy who attempted to produce results by using whatever techniques they commanded. Arguably, if operational decisions must be cleared with a figure such as the Attorney General or a court judge, then this temptation is removed. Unfortunately, though, this may make intelligence officers over-cautious.³¹ To ask permission to use a technique or open a file may place an officer in the position of seeming over-zealous, a 'cowboy' who wishes to wield a weapon when inaction and restraint is preferable. One cannot expect lower officers to be too courageous in calling for an investigation when they only have limited information, for example, a piece of gossip, however greatly this information might assist in threat analysis. Given this climate, they are more likely to keep this information to themselves and to ask for an investigation only when they have good hard evidence. By then, it may be too late to act.

Neither of the above approaches forms an adequate solution, for each creates problems for the intelligence professional and risks rendering intelligence ineffective. A more satisfactory solution lies, not in constructing rigid standards for the collection of information in terms of some pre-determined trigger, but in defining the purpose for which it is being collected. There are two distinct, though related, purposes that underlie intelligence work against terrorism. The first objective is to apprehend, arrest and try those suspected of committing a criminal offence and its achievement ought to be limited by the type of information admissible in a court of law. In Britain, this would require a modification to the Judge's Rules so that information collected for intelligence purposes cannot be allowed in a court of law as legitimate evidence. Civil liberties are vital when the state intends to punish a citizen. If the citizen is not breaching the law, then there ought to be special rules governing the use of state power to punish that citizen. There ought, for instance, to be very strict rules governing the use of information to harass a citizen. Quite apart from the due process of law, there are many other

ways of punishing a citizen. This is the key area where the focus of civil liberties ought to be concentrated, not the collection of information or surveillance. It is the *use* of information which poses the greatest threat to the liberties of the citizen.

The other essential requirement of 'democratic' intelligence is that information should be collected for an identifiable purpose, that is, a threat which the state can identify. Furthermore, it is essential that political leaders be convinced that the threat identification is one which can be justified to the public and so gain or maintain public support for the policy. This is both helpful to the collection agency and to the maintenance of civil liberties. The setting of priorities and the tasking of intelligence agencies by politicians are necessary for effective intelligence. All too often problems of intelligence abuse have arisen because of a lack of control by politicians who remain the only ones capable of making a judgement regarding what is, and what is not, a threat to the body politic. Therefore, political bodies, capable of setting priorities and reviewing achievements, must be created. In this area, there is a serious gap in both American and British intelligence. As previously stated, neither society has created an agency such as the National Security Council or the Joint Intelligence Committee to monitor and task domestic intelligence. Domestic intelligence has its own special problems and characteristics and should not be considered in the same committee as foreign intelligence. This is not a problem of operational coordination, which underlies bodies such as the Cobra Committee, but is concerned with long-term intelligence planning analysis.³²

Finally, it is essential that questions of effectiveness and efficiency be taken into account when assessing intelligence. There is little point in eroding civil liberties if by doing so there are no appreciable benefits. Citizens must have the assurance that someone is continuously examining the extent to which collection, operations and analysis are producing results. This, in turn, allows the state to justify such practices by reference to the threats which it faces. Only counter-measures which actually reduce a threat can be successfully justified.

CONCLUSION

This essay has attempted to take a new approach to the problem of terrorism, intelligence and civil liberties. The argument has been that secret intelligence collection about terrorism poses fewer problems for civil liberties than has traditionally been claimed. Many anxieties will be reduced if the public has assurances that information is being collected for a clearly identifiable purpose and is being properly analyzed. Improvements in this area will benefit both civil liberties and intelligence work. Many of the abuses which have occurred and the fears which they have generated have arisen as a result of a lack of clarity over: the nature of the threat which society faces, the purpose for which information is being collected and the uses to which it is being put. The responsibility for this situation lies with legislators and the executive who have failed to give proper guidance in these key areas. An effective intelligence service

is less dangerous to civil liberties since it is less likely to collect information which is not related to a specific goal and for which there is no clear purpose. Intelligence is not gathered simply to achieve prosecutions but to aid decision-makers in such matters as the extent, seriousness, resources, organization, foreign connections and implications of a terrorist group and the response options available to combat the terrorist threat. To have an effective intelligence service capable of performing these functions requires the creation of a consensus on the threat being faced, the tasking of intelligence by decision-makers, and the proper analysis of information collected.

This task is not impossible provided the public is convinced, and it has been explained to them, that terrorism is not merely a form of criminal activity. Although the menace of terrorism should not be exaggerated, it is vital that its unique qualities are understood. Terrorism involves a challenge to a democratic society which is qualitatively different from crime. It poses a challenge first, to the democratic principle of rule by the people and second, to the state which must cope with the problems which generate terrorism without having policies determined by the terrorist. If terrorism is to be properly assessed and responses are to be effective and proportionate, it is essential that intelligence services collect information on terrorism. Without adequate intelligence, panic may be engendered in police forces, intelligence operatives and politicians which is likely to endanger civil liberties. It is also essential to maintain the distinction between collecting information for the purpose of aiding policymaking. Many of the fears and anxieties concerning domestic intelligence activity can be reduced if such a distinction is made. Putting this principle into practice will not be easy but it is no more difficult than living with rigid rules of intelligence gathering or monitoring the separation of powers between Congress and the Executive. All such distinctions involve grey areas and difficult judgements but the redirection of the efforts of academics and policymakers toward consideration of the implementation of this policy would be more fruitful than the continuing debate between the civil libertarians and the advocates of a strong intelligence service. It is inadequate to focus on the constraints which the maintenance of civil liberties impose on intelligence without recognition that many such constraints arise because of the fear of punishment. It is also inadequate to believe that a great effort is all that is required to defeat terrorism. The public must be convinced that intelligence is well-directed toward ends which have been determined by policymakers after the most careful scrutiny. If the public can be assured that the major objective of intelligence is to assist in policymaking, then the fear that civil liberties are likely to be eroded ought to be substantially reduced.

Such assurances will be even more persuasive if three principles are used to guide intelligence work against terrorism. First, intelligence must be collected for a clear and identifiable purpose which has been set at the highest level, that is, by the politicians responsible. Second, the intelligence collected, and the operations it performs, must be continually reviewed by a specialist committee similar in status and role to the

National Security Council or the Joint Intelligence Committee. Third, intelligence activity must be effective and produce results. This requires the monitoring of intelligence with a view to assessing performance as well as civil liberty issues. If these requirements are met, the public may have some confidence that abuses will be less likely to occur in the future and further, that this may be done without reducing the overall significance of intelligence in the struggle against terrorism.

Endnotes

1. For example, J. Bowyer Bell, *A Time of Terror* (New York: Basic Books, 1978): "Nearly all of the threatened or their experts agree that the key to an effective response to terrorism is good intelligence ...," p. 134.
2. Such efforts include: G. Wardlaw, *Political Terrorism* (Cambridge: CUP, 1982), chap. 12; J.B. Wolff, *Fear of Fear*, (New York: Plenum Press, 1981), esp. Part 2 and various articles; S. Gazit and M. Handel, "Insurgency, Terrorism and Intelligence," in R. Godson (ed.), *Counter-Intelligence* (New Brunswick, New Jersey: Transaction Books, 1980); H.H.A. Cooper, "Terrorism and the Intelligence Function," in M.H. Livingston, et al. (eds), *International Terrorism in the Contemporary World*, (Westport, Connecticut: Greenwood Press, 1978); among others.
3. F. Donner, "The Terrorist as Scapegoat," *The Nation*, May 20, 1978.
4. This is the theme of the "Epilogue" to Donner's *The Age of Surveillance* (New York: Vintage Books, 1981), esp. pp. 455-463.
5. This section owes a debt to the excellent survey in A.P. Schmidt, *Political Terrorism* (Leiden: C.O.M.T., 1983).
6. "A crime is not a 'political crime' simply by virtue of the act's natural and direct tendency to disturb the political order of the State. Instead, the 'political' nature of the crime depends on the kind of legal response the act evokes from those in authority," (author's emphasis), in B.L. Ingraham, *Political Crime in Europe* (Berkeley: University of California Press, 1979), pp. 18-19.
7. For example, Stephen Schafer, *The Political Criminal* (New York: Free Press, 1974).
8. *Ibid.*, p. 29.
9. Roger Hilsman, "Intelligence through the Eyes of the Policy Maker," in R.H. Blum (ed.), *Surveillance and Espionage in a Free Society* (New York: Irvington Press, 1973), pp. 163-177.
10. *Ibid.*, p. 163. See also Hilsman's *Strategic Intelligence and National Decisions* (Glencoe, Illinois: Free Press, 1956).
11. Roy Godson, "What is Intelligence?," in K.G. Robertson (ed.), *British and American Approaches to Intelligence* (London: Macmillan Press, 1986).
12. *Ibid.*, p. 4.
13. Although fiction has devoted an overwhelming amount of space to the human agent, the spy, there has been very little serious work done in this area. J. Masterman, *The Double Cross System* (London: Sphere Books, 1973), and William Hood, *Mole* (New York: Ballantine Books, 1983), are two of the few books devoted to "agent handling." Secrecy alone cannot explain this since the interception of communications and code breaking was, and is, a highly significant source of intelligence and yet we know a great deal about Ultra, for example.
14. There is a large amount of literature on 'surprise' but see: R. Wohlstetter, *Pearl Harbour, Warning and Decision*, (Stanford: Stanford University Press, 1976); R. Betts, *Surprise Attack* (Washington, D.C.: The Brookings Institution, 1982); M. Handel "Avoiding Political and Technology Surprise," in R. Godson (ed.), *Analysis and Estimates* (New Brunswick, New Jersey: Transaction Books, 1980); K. Knorr and P. Morgan, *Strategic Military Surprise* (New Brunswick, New Jersey: Transaction Books, 1983); E.R. May (ed.), *Knowing One's Enemies* (Princeton: Princeton University

- Press, 1984); G.W. Hoppole *et al.* (eds.), *National Security Crisis. Forecasting and Management.* (Bowker Essex: Westview Press, 1984).
15. For an interesting insight into the debate within CIA on the relative importance of HUMINT and SIGINT see Chapters 4 and 5 of R. Godson (ed.), *Clandestine Collection* (New Brunswick, New Jersey: Transaction Books, 1982).
 16. The JIC is responsible for making assessments for Ministers and Officials. These assessments are first prepared by the Current Intelligence Groups. These Groups can be tasked by a Minister, Department of State or the JIC itself. The JIC also has a coordinating role which includes the Security Service and the Secret Intelligence Service (SIS). However, given the structure of the JIC, its involvement in security matters is largely concerned with countering hostile intelligence services and not with domestic threats. It has been said that "there is no NSC-level mechanism for coordinating, reviewing or approving counter-intelligence activities in the United States, even those directed at US citizens" Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities (Church Committee), Vol. 1 (Washington, D.C.: U.S. Government, 1976), p. 428.
 17. For other efforts along somewhat similar lines see footnote 2 above.
 18. For arguments on these lines see, National Advisory Committee on Criminal Justice Standards and Goals, *Disorders and Terrorism* (Washington, D.C.: U.S. Government, 1976), sections 7.1 and 7.2.
 19. Duncan Campbell, "Society under Surveillance," in Peter Hain (ed.), *Policing the Police*, Vol. 2 (London: John Calder, 1980), p. 65.
 20. David Wise, *The American Police State* (New York: Vintage Books, 1978), p. 405.
 21. P. Hewitt, *Privacy — The Information Gatherers* (London: NCCL, 1980), p. 65.
 22. James Michael, "Privacy," in M. Wallington (ed.), *Civil Liberties 1984* (Oxford: Martin Robertson, 1984), p. 143.
 23. Such tactics are recounted in: Nelson Blackstock, *Cointelpro — The FBI's Secret War on Political Freedom* (New York: Vintage Books, 1976); M. Halperin *et al.*, *The Lawless State — The Crimes of the US Intelligence Agencies* (New York: Penguin Books, 1976); A. Theoharis, *Spying on Americans* (Philadelphia: Temple University Press, 1978); D. Martin, "Investigating the FBI," *Policy Review*, vol. 18 (Fall 1981); and others cited above.
 24. See P.L. Murphy, *WW1 and the Origins of Civil Liberties* (New York: W.W. Norton, 1979); and David Fellman, *The Defendant's Rights* (New York: Rinehart & Co., 1958), for excellent historical perspectives.
 25. T.C. Hartley and J.A.G. Griffiths, *Government and Law* (London: Weidenfeld and Nicolson, 1975), p. 151.
 26. Paul O'Higgins, *Cases and Materials on Civil Liberties* (London: Sweet and Maxwell, 1980); D.M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980).
 27. The situation is somewhat complicated by the fact that Britain is a signatory to the European Convention on Human Rights but that Convention has not, so far, been incorporated into British domestic law.
 28. A. Theoharis, "The Stretching of Presidential Directives," *Political Science Quarterly*, vol. 91(4), (1976-7); F. Donner, "How J. Edgar Hoover created his Intelligence Powers," *Civil Liberties Review*, vol. 3(6), (1977).
 29. For an excellent account of the rise and fall of domestic intelligence see Richard Morgan, *Domestic Intelligence* (Austin: University of Texas Press, 1980). See also J.T. Eliff, *The Reform of FBI Intelligence Operations* (Princeton: Princeton University Press, 1979).
 30. For example, the number of FBI domestic intelligence operations was reduced by 95% between 1974-1977. The FBI had less than 20 domestic intelligence investigation operations by 1977. See, Tony Poveda, "The Rise and Fall of FBI Domestic Intelligence Operations," *Contemporary Crisis*, vol. 6 (1982), and "The FBI and Domestic Intelligence," *Crime and Delinquency* vol. 28 (April 1982).

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31. Largely based on interviews with professional staff members of the U.S. Congress, House and Senate Select Committees on Intelligence, and with representatives of the FBI. Not all of the FBI bureaucracy shared this view; some saw the new rules as creating greater efficiency.
32. Cobra, an emergency committee of the Cabinet which, for example, supervised the handling of the Libyan Bureau murder and siege in April 1984.