Comparative Legal Responses to Terrorism: Lessons from Europe

Jeremie J. Wattellier
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By Jeremie J. Wattelier*

Introduction

After September 11, 2001, the U.S. Congress and President initiated legal changes to combat terrorism. In the late 20th century, Europe also experienced terrorist attacks on its soil and initiated legal adaptations. Europe's legal history with terrorism shows that harsh procedure-stripping rules do not stop terrorism and come at great cost to civil liberties and legal clout. More procedural safeguards would bring the U.S. legal response back in line with its traditional legal values while still providing a way to fight terrorism. This note investigates the European legal responses to its terrorist attacks in order to ascertain the prudence of the current U.S. legal response to terrorism.

I will begin by looking at the Western European legal reactions to their terrorist problems. The focus of the comparison will be on Algerian Islamist terrorism in France, Basque terrorism in Spain, and Irish Republican Army (IRA) terrorism in England. Though Europeans have made recent legal reforms since September 11, I will focus on their older terrorism-related legal reforms because it is too early to evaluate the merit of their more recent post-September 11 reforms. Next, I will briefly examine the American response to terrorist incidents (other articles have looked at the American response in depth†). Third, I will compare and contrast the two

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continents' terrorist problems in order to see if there are enough similarities to warrant a comparison of their legal responses. Fourth, I will compare the two legal responses. Fifth, where possible, I will analyze the success of the European measures and gauge the costs of the measures. Finally, I will evaluate the prudence of the current U.S. reaction in light of Europe’s history.

I. Terrorism in Europe and European Legal Responses

France, Spain and the United Kingdom share similar political, cultural and legal traditions with the United States. Although national differences exist, the commonalities among these Western democracies provide a useful basis for comparison of legal responses to terrorism.

A. France

France has more significant experience with terrorism than most European countries. Most terrorist attacks in France have been staged by Middle Eastern or Islamist groups. For example, the Armed Islamic Group and the Salafist Preaching and Combat Group (the two main Algerian terrorist organizations) among others, have been active in France.

As a response to Middle Eastern terrorism in the 1980s, France enacted anti-terrorist legislation. The central piece of legislation was the September 9th Act of 1986. The Act created harsher legal procedures for terrorist acts, enhanced the government’s ability to obtain accomplice evidence and gave jurisdiction to the Paris Regional Court. The prolonged detention period gave authorities more time to collect evidence and to prevent flight. Although the detention period was extended, procedural safeguards were put in place to protect the suspects. These safeguards included a requirement that authorities petition with adequate grounds, that the

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3. Id.
4. Id.
7. Antonio Vercher, Terrorism in Europe: An International
detainee be seen by a magistrate\textsuperscript{8} and that the detainee be seen by a doctor\textsuperscript{9} so as to avoid physical abuse.\textsuperscript{10}

The 1986 Act also enhanced the government’s ability to get accomplice evidence.\textsuperscript{11} Article 463-1 exempts punishment when a member of a terrorist group informs authorities of an attack and the attack is avoided.\textsuperscript{12} Article 463-2 reduces punishment when a participant of a terrorist group helps the authorities identify or arrest those responsible for the terrorist attack.\textsuperscript{13}

The 1986 Act also placed terrorist cases in the jurisdiction of the Paris Regional Court because of their national importance.\textsuperscript{14} A consequence is that a small group of Parisian magistrates presided over all terrorist cases that dealt with organized groups.\textsuperscript{15}

\textbf{B. Spain}

The Basque separatist organization \textit{Euskadi ta Askatasuna} (ETA) desires an independent homeland for Basques in four northern Spanish provinces.\textsuperscript{16} ETA advocates violent action to achieve political autonomy, and 800 people have died at the hands of the ETA since 1968.\textsuperscript{17} Under Franco’s regime, authoritarian measures were used to suppress Basque dissidents.\textsuperscript{18} However, after Franco’s death in 1975, Spain transitioned to democracy and was forced to balance its security interests with its desire to leave authoritarian policing in the past.\textsuperscript{19}

Under Article 17.2 of the 1975 Spanish Constitution, detentions

\begin{footnotes}
\item[8] Id. at 240 (citing Law No. 86-1020 of Sept. 9, 1986, art. 706-16, D.).
\item[9] Id. at 239 (citing Law No. 86-1020 of Sept. 9, 1986, art. 706-23, D.).
\item[10] Id. at 239-40.
\item[11] See id. at 281.
\item[12] Id.; Law No. 86-1020 of Sept. 9, 1986, art. 463-1, D.
\item[13] Vercher, supra note 7, at 281; Law No. 86-1020 of Sept. 9, 1986, art. 463-2, D.
\item[14] Vercher, supra note 7, at 320 (citing Law No. 86-1020 of Sept. 9, 1986, art. 716-17, D.).
\item[15] Id.
\item[16] Id. at 168.
\item[17] Van de Linde, supra note 2, at 94.
\item[18] See infra notes 28-34 and accompanying text.
\item[19] But see Paddy Woodworth, Spanish Crackdown Has Deprived Radical Basques of Political, Irish Times, June 18, 2003, at 16 (explaining how Spain is cracking down on the ETA by banning the Basque political party Herri Batasuna).
\end{footnotes}
were generally limited to seventy-two hours, after which the detainee
was to be freed or presented to a judge. Spain made exceptions to
this rule in Article 55.2, which allowed lawmakers to suspend
constitutional rights when terrorism was involved, and gave
authorities ten days to detain a suspect and investigate his case.
Terrorist suspects were held incommunicado but had the right to a
lawyer. Detainees were given the right to habeas corpus
proceedings and statutes were implemented protecting them from
torture. Spain also rewarded "repentant" terrorists. Under Spanish law
in the 1980s, penalties took into consideration whether the terrorist
renounced his past activities and whether he had prevented possible
terrorist acts by providing information or evidence. Spain also
implemented a policy of reinserción, which allowed exiled terrorists to
re-integrate into Spanish society conditioned upon their cooperation
with the government. After Franco’s death, Spain created a national court, seated in
the capital, which had nationwide jurisdiction in several fields,
including terrorism. Thus, a terrorist suspect in the Basque country
would have to travel to Madrid to be heard, thereby burdening the
suspect by separating him from his family, friends and community.
Spain also had experience using military courts under Franco. In most countries, military courts’ jurisdiction is limited to military
questions. However in Spain, at various times, the crime of military
rebellion was extended to political offenses, banditry and other acts
unrelated to the military. Military trials had less procedural

20. VERCHER, supra note 7, at 228; CONSTITUCIÓN ESPAÑOL [C.E.] art. 17.2 (Spain).
21. VERCHER, supra note 7, at 229; C.E. art. 55.2.
22. VERCHER, supra note 7, at 230 (citing LEY DE ENJUICIAMIENTO CIVIL
[L.E.CIV.] art. 506 (Spain)).
23. Id. (citing Law of Habeas Corpus 6/1984 (Spain)).
24. Id. (citing Código Penal [C.P.] art. 204 bis (Spain)).
25. See id. at 258.
26. Id. at 268; Organic Law 9/1984, art. 6 (Spain).
27. See VERCHER, supra note 7, at 275.
28. Id. at 315 (citing Ley Orgánica del Poder Judicial [L.O.P.J.] art. 65 (1985)
(Spain)).
29. Id. at 306.
30. Id.
31. Id. at 308-09.
safeguards than normal courts. Summary procedures were particularly harsh: for example, the accused did not have a lawyer and his representative only had a few hours to draw up a written defense. In 1976, as Spain transitioned to democracy, the use of military courts was abandoned.

C. United Kingdom

The United Kingdom also experienced terrorism well before September 11. Decolonization in the 1950s through 1970s led to terrorist activities against Great Britain. However, Northern Ireland has been the primary source of terrorism in the United Kingdom: the IRA has killed over 1,800 soldiers and civilians since 1969.

The United Kingdom has used internment to combat terrorism. "Internment is an executive measure meaning detention without trial of persons believed to be a danger to the state." The Detention of Terrorists Order of 1972 allowed anyone "suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism" to be detained for twenty-eight days. After twenty-eight days, the detainee was released or referred to a commissioner, someone with legal experience appointed by the secretary of state. The commissioner would hear the case, but the hearing was primarily an executive procedure and not a judicial one. For example, the detainee could be excluded from the proceeding if national security was at stake. The hearing could be based on

32. Id. at 309.
33. Id.
34. Id. at 310 (citing Code of Military Justice art. 927 (Spain)).
35. Id. at 311.
36. Id.
37. Id. at 103.
39. VERCHER, supra note 7, at 9.
40. Id. (citing E.T. McGovern, Internment and Detention Without Trial in the Light of the European Convention of Human Rights, in FUNDAMENTAL RIGHTS 219 (J.W. Bridge et al. eds., 1973)).
41. Id. at 20 (citing Detention of Terrorists (Northern Ireland) Order, Statutory Instrument (Northern Ireland 15) No. 1632, art. 4(1) (1972)).
42. Id.
43. Id. at 20-21.
These measures denied defendants traditional common-law rights. At various times the procedure was modified, but internment was ultimately abandoned in 1980.45

The United Kingdom also had experience with exclusion orders.46 Exclusion orders prevented someone from entering or remaining in the country.47 They were preventive measures, not punitive measures.48 As with internment proceedings, there was little judicial oversight of exclusion orders in Britain.49 Courts were mostly concerned that the exclusion proceedings follow the statute.50 Under the various statutes,51 those subject to exclusion orders had few rights.52 For example, they had no right to know what evidence the exclusion order was based on or to appeal.53 Thus, by failing to limit the executive's procedure-stripping, British courts have proven reluctant to infringe upon the executive's security interests.54

Special powers of arrest have been used to gather information and to prevent terrorism in the United Kingdom.55 These powers have infringed on traditional civil liberties, such as the right to due process.56 For example, under the Northern Ireland Act of 1978, a constable had the power to arrest, without a warrant, anyone he suspected of being a terrorist and could detain him for seventy-two hours.57 Another example of special anti-terrorist powers is found in the Prevention of Terrorism Act of 1984, which applied throughout the United Kingdom.58 Under this act, if a constable had reasonable grounds for suspecting someone was involved with terrorism, the

44. Id. at 21.
45. Id. at 21-22.
46. Id. at 32.
47. Id.
49. See id. at 39-42.
50. See id. at 45-46.
52. See VERCHER, supra note 7, at 35-39.
53. Id. at 44.
54. Id. at 46.
55. See id. at 53.
56. See id.
57. Id. at 53-54 (citing Northern Ireland Emergency Provisions Act, § 11(1), (3) 1978 (U.K.)).
58. See id. at 56 (citing Prevention of Terrorism Act, § 12(1)(a)-(c) 1984 (U.K.).
constable could search any place that a terrorist suspect might be.\textsuperscript{59} Moreover, the suspect could be rearrested a number of times, even if it only related to the same matter.\textsuperscript{60} The United Kingdom also used methods of gathering information developed in colonial times.\textsuperscript{61} These methods included mass arrests and interrogation, where high-pitched noise, sleep-deprivation, starvation and other techniques were used to extract information from suspects.\textsuperscript{62} The United Kingdom also has an extensive network of video surveillance.\textsuperscript{63}

In order to gather evidence, immunity and other privileges are offered to accomplices—in return for cooperation with the government on terrorist matters.\textsuperscript{64} One problem with accomplice evidence is its reliability.\textsuperscript{65} Because the accomplice is receiving advantages in exchange for information, there is an incentive to make up information.\textsuperscript{66} Therefore, corroboration of the evidence can be required in order for the defendant to be convicted on this type of evidence.\textsuperscript{67} However in Northern Ireland, people have been found guilty based on uncorroborated evidence.\textsuperscript{68}

The United Kingdom also set up special Diplock courts, named after the chairman of a commission that designed them, to deal with terrorism.\textsuperscript{69} The goals of the courts were to ensure a high number of convictions and to de-politicize the crimes in Northern Ireland.\textsuperscript{70} In order to bypass the limitations of the traditional common-law rules, Diplock courts do away with the jury and have less stringent rules of evidence and proof.\textsuperscript{71}

\textsuperscript{59. Id.}
\textsuperscript{60. Id. at 62 (citing \textit{Ex parte Lynch}, [1980] 126 N.Ir. 133).}
\textsuperscript{61. See id. at 66; cf. Mark Bowden, \textit{The Persuaders}, \textsc{Observer} Magazine, Oct. 19, 2003, at 28 (noting that the United States is now also confronting the fine line between torture and "coercion" (also known as "torture lite" or "torture light") in its own war on terror).}
\textsuperscript{62. See \textsc{Vercher}, supra} note 7, at 66.
\textsuperscript{63. see id. at 84-85.}
\textsuperscript{64. See id. at 86.}
\textsuperscript{65. See id. at 94-95.}
\textsuperscript{66. See id. at 96 (citing R. v. Graham, [1984] 2 N.I.B.J. 18).}
\textsuperscript{67. See id. at 96.}
\textsuperscript{68. Id. at 96-97.}
\textsuperscript{69. Id. at 120.}
\textsuperscript{70. Id. at 120-21.}
\textsuperscript{71. Id. at 120.
D. European Institutions and European Cooperation

European countries have cooperated in order to fight terrorism. In the 1960s and 1970s, Europeans created the European Convention on Extradition and the European Convention for the Suppression of Terrorism, which made it easier for states to extradite suspected terrorists to other countries. Nevertheless, states were still able to find exceptions to the conventions and impede extradition. In the 1980s, several European countries created the Schengen system, which established a central database on criminals and aliens. Judicial cooperation gained further recognition in the 1992 Treaty on European Union, where such matters were deemed to be one of three pillars of the Union. The 1997 Amsterdam Treaty further defined judicial and police cooperation. Nevertheless, police activity remains under the control of the several states of Europe. Police cooperation in Europe is still in many ways a matter of international cooperation rather than of federal cooperation.

International agreements and European institutions have limited Western European member states’ legal response to terrorism. The European Convention for the Protection of Human Rights and Fundamental Freedoms “provides for judicially enforceable human rights obligations through an international treaty.” France, Great Britain and Spain are parties. Between 1959 and 1989, the European Court of Human Rights (ECHR) found twenty-three

73. See VERCHER, supra note 7, at 351.
75. Id. at 203.
77. See Skinner, supra note 74, at 218-20.
78. Id.
human rights violations in the United Kingdom and two human rights violations each in France and Spain.\textsuperscript{82}

The European Convention on Human Rights declares that everyone “has the right to liberty and security of person” and that an individual can only be deprived of this liberty right under certain circumstances, none of which mention suspected terrorism.\textsuperscript{83} If a member state violates these rights, an individual has a right to compensation.\textsuperscript{84} However, the Convention allows states to derogate from Article 5 in emergency situations and in times of war.\textsuperscript{85} The ECHR has ultimate jurisdiction to decide whether a derogation was proper.\textsuperscript{86}

The cases of Fox and Brogan set limits on anti-terrorism measures when there is no derogation (i.e., when the country is not in an emergency situation).\textsuperscript{87} In Fox, police arrested and detained two people upon “suspicion” that they were terrorists under a 1978 British anti-terrorist law.\textsuperscript{88} The Convention, however, requires “reasonable suspicion.”\textsuperscript{89} The Court found the United Kingdom in breach of the Convention because the suspects’ prior terrorist convictions seven years earlier did not create a reasonable suspicion.\textsuperscript{90}

In Brogan, terrorist suspects were detained for at least four days under a 1984 British anti-terrorist act without access to a judge.\textsuperscript{91} Article 5(3) of the Convention requires that detainees be brought “promptly” before a judge.\textsuperscript{92} The ECHR found that the United Kingdom had breached the Convention because four days detention was too long under the plain meaning of the word “promptly.”\textsuperscript{93}

\begin{flushright}
82. JACKSON, supra note 80, at 17.
84. Id. art. 5(5).
85. Id. art. 15.
86. Id. art. 32.
\end{flushright}
following cases look at the limits on anti-terrorism measures in times of national emergency.

In the case of *Lawless v. Ireland*, the ECHR was asked whether Ireland's detainment of individuals, without trial, under an emergency powers regulation was a legitimate derogation from Article 5. The ECHR looked at three factors to decide if the derogation was legitimate: (1) whether Ireland had properly communicated its derogation; (2) whether there existed a public emergency threatening the life of the nation; and (3) whether Ireland's derogation was proportional in light of the circumstances. The Court found that the presence of terrorist organizations threatening Ireland's domestic and foreign relations was adequate cause for declaring an emergency. The ECHR found that Ireland's derogation was proportional because the "application of the ordinary law had proved unable to check the growing danger" and because there were a "number of safeguards designed to prevent abuses in the operation of the system of administrative detention." The procedural safeguards included the fact that Parliament was kept abreast of the act's enforcement and could annul the act at any time; a three-person detention commission, two of which were judges and the third being a defense officer; and the judiciary's power to compel the detention commission "to carry out its functions."

In *The Greek Case*, the European Commission of Human Rights (Commission) put forth more criteria for establishing whether a state of emergency was validly declared. A 1972 Greek military coup was challenged, in part, under the derogation clause of the Convention. The Commission, concluding there was no emergency that would excuse a derogation, held that an emergency must be actual or imminent; its effects must involve the whole nation; the continuance of the organized life of the community must be threatened; and the crisis or danger must be exceptional, in that the normal measures or

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95. Id. at 16.
96. Id. at 31.
97. Id. at 33.
98. Id.
99. Id.
101. See id. at 19-20.
102. See id. at 71-86.
restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate.\textsuperscript{103}

In the case of \textit{Ireland v. United Kingdom}, the Commission was again asked whether a derogation in a time of emergency was valid.\textsuperscript{104} In this 1971 case, Ireland alleged that the United Kingdom’s detentions without trial were not proportional to the emergency.\textsuperscript{105} The Commission, siding with the United Kingdom, recognized that "the national authorities are... in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it."\textsuperscript{106} While the states’ power to derogate is not unlimited, the Commission does grant states a significant "margin of appreciation."\textsuperscript{107}

In the cases of \textit{Brannigan} and \textit{Aksoy}, the ECHR defined the limits of anti-terrorism measures even when the conditions for derogation are met.\textsuperscript{108} The complaint in \textit{Brannigan} was similar to the one in \textit{Brogan},\textsuperscript{109} such that the question became whether four-day detentions without access to a judge were permissible in times of derogation.\textsuperscript{110} The Court held the United Kingdom had not exceeded their margin of appreciation because of the safeguards provided by the government.\textsuperscript{111} These safeguards included a right to a habeas corpus remedy, the right to an attorney after two days, the right to inform someone about their detention and the right to see a doctor.\textsuperscript{112}

In \textit{Aksoy}, Turkey also argued that a prolonged detention was justified by a state of emergency, this time a national emergency involving Kurdish terrorism.\textsuperscript{113} Nevertheless, the ECHR found that

\textsuperscript{103} See id. at 71-72.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 92.
\textsuperscript{107} Id.
\textsuperscript{108} Brannigan v. United Kingdom, 17 Eur. Ct. H.R. 539, 543 (ser. A) (1993) (A policeman, who attacked Sinn Fein Headquarters in Belfast, shot and killed McBride, one of the parties.); Aksoy v. Turkey, 23 Eur. Ct. H.R. 553, 561 (1996) (Aksoy was executed before the ECHR could hear his case. His family alleged the government killed him; the government—held by the court to have tortured Aksoy—alleged it was a rival Kurdish faction.).
\textsuperscript{109} See supra notes 91-93 and accompanying text.
\textsuperscript{110} Brannigan, 17 Eur. Ct. H.R. at 554.
\textsuperscript{111} Id. at 563.
\textsuperscript{112} Id. at 562.
\textsuperscript{113} Aksoy, 23 Eur. Ct. H.R. at 578-88.
Turkey had breached the Convention, despite the state of emergency deemed to exist, because the two-week detention without access to a judge was "exceptionally long" and because there were "insufficient safeguards." In particular, the court noted there was "no speedy remedy of habeas corpus and no legally enforceable rights of the access to a lawyer, doctor, friend or relative." The contrast between this holding and that of Brannigan, demonstrates that the ECHR considers procedural safeguards like habeas corpus and access to the outside to be requisites for an acceptable derogation of the Convention.

Thus, at the very least, the ECHR and other European institutions have put pressure on states that insisted on implementing harsh legal measures to combat terrorism. In Fox and Brogan, the ECHR limited member states' rights when there is no national emergency. Through its holdings in Lawless, The Greek Case and Ireland, the ECHR and the European Commission of Human Rights have placed limits on when states can infringe on civil liberties in times of emergency. Finally, in Brannigan and Aksoy, the ECHR defined the limits placed on states in times of national emergency.

II. American Legal Response to Terrorism


The Antiterrorism and Effective Death Penalty Act provided new definitions and enhanced penalties for terrorist crimes, revised immigration procedures to streamline deportation of criminals, and authorized increased funding for law enforcement to fight terrorism. The Defense Against Weapons of Mass Destruction Act of 1996 addressed the threats posed by biological, chemical and nuclear weapons. Several congressional committees also responded to specific terrorist threats by creating targeted programs within federal

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114. Id. at 589-90.
115. Id. at 590.
agencies.\textsuperscript{118} During the time these acts were being put into place, blue-ribbon commissions found that the government's ability to fight and prevent terrorism was inadequate.\textsuperscript{119} At the time, civil liberty concerns prevented Congress from acting on some of commission's recommendations.\textsuperscript{120} These recommendations would be addressed after September 11.\textsuperscript{121}

After September 11, Congress responded with the Patriot Act (Act).\textsuperscript{122} The Act made it easier for agencies like the FBI and CIA to share information.\textsuperscript{123} The Act made broad espionage warrants available and permitted the authorities to engage in substantially more aggressive electronic surveillance.\textsuperscript{124} Next, the Act gave the government stronger anti-money laundering abilities to prevent funds from getting to terrorists.\textsuperscript{125} Finally, the Act allowed the detention of non-citizens for indefinite periods of time and the detention of citizens designated as "enemy combatants" by the President, with little or no judicial review.\textsuperscript{126}

The U.S. Immigration and Naturalization Service also responded to September 11 by implementing a registration program for Muslim non-citizens over sixteen years of age.\textsuperscript{127} Moreover, the U.S. Immigration and Naturalization Service became a sub-agency of the new Department of Homeland Security,\textsuperscript{128} emphasizing a shift

\begin{itemize}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 439.
\item \textsuperscript{123} Id. at 440.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id.
\item \textsuperscript{126} Id.; Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003), cert. granted, 72 U.S.L.W. 3434 (U.S. Jan. 9, 2004) (No. 03-6696); Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564, 607-08 (S.D.N.Y. 2002), cert. granted, 72 U.S.L.W. 3488 (U.S. Feb. 20, 2004) (No. 03-1027) (holding that the President had authority to order prisoner's detention despite his U.S. citizenship and that the President's determination could be sustained by meeting the "some evidence" standard).
\end{itemize}
towards security concerns for the agency.

President Bush also issued an executive order enabling military commissions to try individual terrorism suspects. Here, the accused do not have many procedural safeguards. They have a right to counsel, but counsel must have security clearance. The accused are entitled to be informed of the charges against them and can examine the evidence presented against them before trial, but only if their counsel has security clearance to view the evidence. The trials are closed to the media and there is no independent judicial review. Everyone else involved in the trial is an active-duty or retired member of the armed forces. In sum, the procedural rules offered appear to be largely for show.

III. Differences and Similarities Between the Two Continents’ Terrorist Problems

Before we analyze the prudence of the U.S. legal response in light of European experience, we must first determine if the United States can learn from Europe at all. If the two continents’ problems are too different, a legal comparison might be unwarranted.

In matters of domestic terrorism, the United States and Europe have considerably different terrorist problems. Europe’s domestic terrorism stems from ethnic and regional desires for autonomy. In the United Kingdom, Irish Catholics want an end to the United Kingdom’s control over Northern Ireland. In France and Spain, the Basques seek independence. Additionally, France deals with claims of independence from Corsicans. The roots of terrorism in Britain, Spain, and France are based on long-standing ethnic and regional identities and are therefore deeper than those in the United States.

Domestic terrorism in the United States, on the other hand, has not come from ethnic minorities or regional groups. Instead, members of the ethnic majority have committed terrorist acts in an

130. Id.
131. Id. at 1417.
132. Id.
133. Id. at 1410.
134. Id. at 1417.
135. Id. at 1418.
attempt to lessen the power of the federal government. Domestic terrorism in the United States is also a smaller problem in comparison with Europe. Fewer people have died from domestic terrorism in the United States than in Europe. Domestic terrorism in the United States has a much more recent history.

In matters of international terrorism, Europe and the United States have more in common. On both continents, the principal source of terrorism has been the Middle East. In particular, the terrorist acts have had a connection to the Western government’s involvement in the Middle East. For example, Iranian terrorism in France was in response to France’s sale of arms to Iraq during the Iran-Iraq war. Osama Bin Laden claimed that the World Trade Center attacks were in response to the U.S. support of Israel and its military presence in the Persian Gulf. On both continents, terrorists targeted civilian areas. Whereas some domestic acts of terrorism have been aimed at government or military installations, France’s Metro and New York’s Twin Towers were targeted by international terrorists.

International terrorism in Europe and the United States also has its differences. International terrorism has a longer history in Europe. Germany experienced Palestinian terrorism as early as the 1970s at the Munich Olympic Games. The United States, long thought to be out of reach of international terrorism, experienced its first significant act of international terrorism on its own soil with the first World Trade Center bombing in 1993. While the history of international terrorism in the United States is shorter than in Europe, it is already deadlier. No European country has sustained the casualties the United States did on September 11. Another difference


is that Europe has more Muslims than the United States does.¹⁴¹ This would make religious profiling more difficult in Europe. Also, there is probably more global animosity towards the United States than towards Europe today. As the world’s lone superpower, the biggest supporter of Israel, and the largest Western force in both Gulf Wars, the United States is a favored target of Islamic terrorism compared to Europe. This magnitude of animosity probably presents different obstacles for U.S. anti-terrorist efforts. Nevertheless, Europe continues to be a target of Islamic terrorism in its own right.¹⁴² At the time anti-terrorist legislation was passed in France, for example, it was a primary target of Middle-Eastern terrorism.¹⁴³ Therefore, despite the differences in terrorist problems, the United States can learn from Europe’s legal experience with terrorism.

IV. The U.S. and European Legal Responses Compared

Both continents have responded to terrorism by removing procedural protections from their legal systems. In response to tragic conditions, "the U.S. government passed legislation that reduces or eliminates the process of judicial review and erodes our civil liberties."¹⁴⁴ On the whole, this is the same response Europeans made. While there are, of course, technical and procedural variations between the two, at the heart of the matter is a removal of process that lies at the heart of both continents’ democracies.

In both cases, the executive took initiative over what is usually the judiciary’s domain. For example, in Great Britain, the executive’s commissioners determined whether a detainee was to be detained any further.¹⁴⁵ In the United States, the President ordered military tribunals be used to try suspected terrorists without any judicial review.¹⁴⁶ In this particular situation, the U.S. response might be even

¹⁴¹. Worldwide Adherents of All Religions by Six Continental Areas, Mid-2001 (ENCYCLOPÆDIA BRITANNICA 2003 DELUXE EDITION CD-ROM) (showing 31,724,000 Muslims in Europe compared to 4,518,000 Muslims in North America).
¹⁴³. See Pluchinsky, supra note 138, at 6, fig.1.1 (showing France as a primary target in the 1980s).
¹⁴⁵. See supra note 40 and accompanying text.
more severe because the British response allowed judges to review cases, albeit reluctantly.

To the extent they are comparable, the U.S. federal courts have been less inclined than the European legal institutions to overturn executive acts implementing harsh legal procedures. We saw above that European institutions have placed limits on harsh European member-state legal procedures. So far, U.S. federal courts have declined jurisdiction regarding detention of prisoners in Cuba on the grounds that the prisoners are not on U.S. territory. At present, it appears that the U.S. legal response to terrorism may have less judicial review than the European legal responses have had.

On the whole, the United States is using many of the same tools that Europe has used to battle terrorism. Prolonged detentions, increased surveillance and search powers, and procedurally-stripped trials were all used in Europe. We can now ask to what extent these tools worked for the Europeans and to what extent it is prudent for the United States to continue adopting these measures.

V. Effectiveness and Costs of the European Response

It is difficult to measure the effectiveness of any legal response to terrorism. Nobody knows how many terrorists are plotting attacks at a given moment or how many plans have been thwarted by the threat of harsher legal procedures or other legal changes. "[E]ach new attack tends to raise a presumption of ineffectiveness in relation to existing and earlier measures of legal control (how else to explain its occurrence?)." As at least one scholar has noted, "the whole subject is beset by an obscure and uncertain state of knowledge and

147. See VERCHER, supra note 7, at 32.
148. Id. at 46.
149. See supra Part I.D.
152. Id.
understanding." Another scholar notes that some questions of effectiveness are "untestable." What follows is an attempt to make some measurement of the effectiveness of the European responses to terrorism in this context of uncertainty.

In Spain, strong doubts have been voiced that the system of prolonged detention has helped authorities obtain evidence and facilitate investigation. Spain completely abandoned the use of military courts in cases of terrorism. Despite successive legal attempts to thwart Basque terrorists, there have been no decreases in deaths that can be directly ascribed to these attempts. As mentioned above, this raises doubts that the specific legal measures have had any effect. In sum, the costs in terms of civil liberties were not paid back in terms of stopping terrorism.

There is disagreement over whether Britain's exclusion orders were useful in fighting terrorism. Some believed terrorists were "substantially impaired" because of their inability to travel between the United Kingdom and Ireland. On the other hand, critics argued that there was no hard evidence that exclusion orders have prevented terrorism and that, in any case, they infringed on civil rights. It is difficult to measure the effectiveness of the United Kingdom's internment efforts. The abandonment of internment was perhaps a sign of its ineffectiveness or its high cost in civil liberties. Likewise, it is difficult to measure the effectiveness of Britain's arrests and information-gathering systems in their fight against terrorism. Nevertheless, the increased surveillance and powers of arrest at ports has increased the governments' ability to gather information, again at a cost of civil liberties. The use of accomplices and informers in Northern Ireland has been abused and the judiciary has allowed it

153. Id.
154. See VERCHER, supra note 7, at 85.
155. Id. at 256.
156. Id. at 337.
159. Id. at 16-17.
160. Id. at 17-18.
161. VERCHER, supra note 7, at 30.
162. Id. at 22.
163. Id. at 85.
164. Id. at 84-85.
and disallowed it at various times.\textsuperscript{165} This perhaps demonstrates that, again, any benefits came at a high price in civil liberties. This same trade-off applies to the Diplock courts in Northern Ireland.

In Spain and the United Kingdom, one lesson is clear. Harsher legal procedures will not stop terrorism. The legal mechanisms discussed above did not prevent terrorist acts altogether. On the other hand, it is likely some of the procedures reduced some terrorist activity or at least made it more costly to terrorist organizations. Nevertheless, it is difficult—if not impossible—to test how many more terrorist acts would have been undertaken but for the use of these terrorist procedures.

It is also clear that the procedures have imposed high costs in terms of democratic values. All of the procedures represent a shift from standard Western judicial practice. It is argued that such practices are necessitated by terrorism.\textsuperscript{166} When the benefits from these procedures are so few, however, it is more likely that these harsher procedures are either an emotional response or an attempt by governments to show they are in control.\textsuperscript{167} Thus, while gauging the success of anti-terrorism legal changes is difficult, measuring the costs of these same changes is far easier. For example, in Spain, evidence showed there was a connection between prolonged detention and torture.\textsuperscript{168} In other words, we do not know if harsher legal measures help, but we do know they impose significant constraints on civil liberties.

In Spain and the United Kingdom, negotiation and other political means have provided some success in stopping bouts of terrorist violence. The granting of limited autonomy to the Basque country after Franco’s death in Spain and the Good Friday Agreement\textsuperscript{169} in Northern Ireland produced periods of peace. While the peace has not been constant or complete, the effects of negotiation have saved more lives than any procedural measures.

Likewise, the decline of Iranian terrorist attacks in France was likely more attributable to political causes rather than legal

\begin{footnotes}
\item[165] \textit{Id.} at 118.
\item[166] \textit{Id.} at 156.
\item[167] See Harding, \textit{supra} note 151.
\item[168] VERCHER, \textit{supra} note 7, at 256-57.
\item[169] See Irish Republican Army, \textit{supra} note 38 (explaining that the IRA agreed to the Good Friday agreement which recognized that the majority of the population of Northern Ireland would determine whether the province would remain part of Britain, but pointing out that the peace process is not complete).
\end{footnotes}
adaptations. A spurt of alleged Iranian attacks came in 1985 through 1986, when France was selling arms to Iraq. The Iran-Iraq war ended in 1988. The end of the war meant French sales to Iraq were less threatening to Iran and thus the incentive was gone for Iran to support terrorist acts in France. Nevertheless, France has experienced terrorist incidents since 1986 and continues to be a target today. France’s 1986 anti-terrorist act did not solve France’s terrorist problem altogether.

In sum, these three European countries gained no dramatic advantages from their harsh legal response to terrorism. Gains came from political action and dialogue. Harsher legal procedures, however, generated criticism, reduced civil liberties and undermined the integrity of the judiciary.

VI. Prudence of the U.S. Response in Light of Europe’s History with Terrorism

The U.S. legal response to terrorism is not prudent to the extent it is costing more in terms of civil liberties and democratic prestige than it is gaining in terms of stopping terrorism. Having a nation ruled by laws generates respect from other countries. Proper procedure makes the outcomes of trials relatively trustworthy and respectable, even if they are not always correct. Overall, the rule of law has benefits, all of which cannot be discussed here.

170. See Pluchinsky, supra note 138, at 12.
171. See generally, Gross, supra note 1 (presenting some benefits).
173. Id.
demonstrate the lack of legitimacy that stems from overly-harsh procedures. By cutting off due process, the United States is losing clout and undermining the rule of law.

The U.S. legal response is prudent to the extent the small gains in intelligence and prevention of future terrorist acts are worth the sacrifices in terms of human rights and national prestige. As we saw above, the United States has sustained more terrorist casualties than Europe has in a short amount of time. There is good reason to believe the desire of terrorists to cause massive damage is greater with respect to the United States than it has ever been with respect to Europe. As a result, it could be argued that draconian legal changes are a necessity in the United States. When faced with the possibility of chemical, biological or nuclear attacks, some argue that the potential benefits of such laws outweigh the costs in civil liberties. On the other hand, would adding more judicial process and protection for defendants undermine the government's effort? Probably not. Great Britain abandoned internment, for example, without abandoning its fight against terrorism.

Congress and the administration cannot win the war on terrorism with harsh legal changes. As we saw above, legal changes simply did not stop terrorist attacks. Congress and the administration will probably realize some minor gains. In Europe, increased intergovernmental cooperation and increased surveillance capabilities have proven at least somewhat useful. The United States has made finding information within the various U.S. agencies easier and has also increased its ability to collect information. It is likely that these changes will generate or have generated at least some additional intelligence in the United States as well.

The United States should also not completely defer to Europe's legal history with terrorism. As we saw above, there are important

177. *We Need to Know the Wartime Rules*, CHI. SUN-TIMES, June 13, 2002, at 41 (arguing that "we have to be prepared in times of national emergency to bend the rules in the interest of defending ourselves").
179. *See supra* notes 123-124 and accompanying text.
180. *See supra* Part III.
differences between terrorism in the United States and Europe. Terrorism in Europe has tended to be domestic and international terrorism there has been less deadly than in the United States. Given these differences, harsh legal reforms in the United States could yield a different experience, despite the lack of success with Europe's own harsh legal reforms. For example, exclusion may be of limited use in Spain and the United Kingdom, because terrorists there are home-grown. On the other hand, terrorists targeting the United States appear to be primarily from the Islamic world. Since it is easier to exclude those who are already outside a country, U.S. attempts at exclusion could theoretically be more effective than the European attempts. Of course, the United States would still suffer costs in terms of civil liberties. 181

There is no certain response to the question set out in this note, especially since it is difficult to gauge the effectiveness of legal adaptations to terrorism. 182 There are some benefits to harsher legal procedures. Likewise, there are significant costs that go with them. If the United States is being prudent or imprudent, it is by a margin.

On balance however, the U.S. response is an overreaction in light of European history. Bush's military tribunals are reminiscent of authoritarian regimes, such as Franco's military tribunals in Spain. 183 When Spain transitioned to a democracy, it abandoned these vestiges of dictatorship. Great Britain, whose democratic traditions are closely related to U.S. democratic traditions, abandoned its use of internment and has not created any courts void of judicial review like the military tribunals in Cuba. While the September 11 attacks on the United States were unprecedented in magnitude, it does not follow that traditional legal values should be put aside. Implementing more procedural safeguards would create a system more in line with Western legal values that would still be capable of fighting terrorism.

If the U.S. legal reaction to terrorism is somewhat imprudent, it should be noted that Europe itself has also failed to learn from its past mistakes. The United States was not alone in implementing legal reforms post-September 11. The United Kingdom, for example, enacted the Anti-terrorism, Crime and Security Act in December of 2001. 184 The act, which provides for the detention of suspected

181. See, e.g., supra notes 126-135 and accompanying text.
182. See supra notes 151-153 and accompanying text.
183. See supra note 29 and accompanying text.
184. Henning, supra note 116, at 1265 (citing Anti-terrorism, Crime and Security
terrorists even when contrary to international law,\textsuperscript{185} was criticized and challenged by civil rights advocates.\textsuperscript{186}

\textbf{Conclusion}

The United States and Europe have had problems with terrorism that have led both continents to implement harsh legal reforms. The United States, Spain, France and Great Britain have all used prolonged detentions, procedurally-stripped courts and increased investigative abilities to fight terrorism and thereby lessen civil liberties. The U.S. response has perhaps been the harshest. While the attacks on the United States were also the most dramatic, the legal responses of Congress and the President are, on the whole, imprudent in light of European history. They will definitely not stop terrorism. Any gains will be outweighed by losses in civil liberty and legal clout. More procedural safeguards would bring the legal response back in line with Western legal values while still providing a limited remedy for terrorism. As others have argued, perhaps the best defenses against terrorism would be fundamental changes in foreign policy and global political and economic structures.\textsuperscript{187}

\begin{itemize}
  \item Act 2001, c. 24, §§ 21-23 (Eng.).
  \item Id. at 1270.
  \item See Harding, \textit{supra} note 151 (citing President Clinton).
\end{itemize}