



# THE BROOKINGS INSTITUTION

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## U.S.-FRANCE ANALYSIS SERIES

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### **FRENCH LESSONS: THE IMPORTANCE OF THE JUDICIAL SYSTEM IN FIGHTING TERRORISM**

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On February 19, 2003 a court in Germany handed down the first guilty verdict related to the September 11 attacks. A panel of judges in Hamburg found Mounir Al-Motassadeq, a Moroccan studying in Germany, guilty of over 3000 counts of accessory to commit murder. The verdict was a signal victory in the war against terrorism. The very fact, however, that the first such conviction occurred abroad is also a reminder of how little success the U.S. government has had since September 11 in involving the U.S. courts in the struggle against terrorism.

The Bush administration's judicial inactivity reflects a widely held discomfort in the U.S. with using the courts for dealing with national security threats. The process is considered too slow, too dependent on inflexible rules, too prone to leaks of valuable intelligence, and too unresponsive to the needs of a rapidly evolving and essentially political threat. These concerns are certainly valid, but they must be weighed against the points raised by numerous human rights organizations and legal scholars that indefinite detentions and military tribunals are inconsistent with deeply held American principles of fairness and justice.

There is no simple formula for reconciling the war on terrorism's short-term requirement for speed and flexibility with the same war's long-term need for legitimacy. Nonetheless, understanding the importance of judicial procedures and legitimacy requires a long-term view of the problem of terrorism that the United States lacks. The long French experience with terrorism provides some perspective and demonstrates why judicial institutions that can handle terrorist cases are a critical piece of a nation's counterterrorism arsenal.

#### **The French Experience**

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

**TABLE 1- SELECTED TERRORIST INCIDENTS DIRECTED AT FRANCE, 1980-PRESENT**

October 1980	A bomb planted outside the synagogue on the Rue Copernic in Paris explodes killing four and wounding eleven.
April 1982	A car bomb explodes in front of a pro-Iraqi newspaper on the Rue Marbeuf in Paris, killing one and injuring 63.
March 1982	A bomb explodes aboard a Paris-Toulouse express train, killing five and injuring 27.
August 1982	Seven terrorist attacks against Jewish targets in Paris kill six and wound 29, including an attack at a kosher restaurant on the Rue de Rosiers that killed six and wounded 22.
October 1983	A truck bomb explodes at the headquarters of the French contingent of the Multinational Peacekeeping Force in Beirut, Lebanon, killing 58 French soldiers.
February-March 1986	Over the course of six weeks, five bombs explode in stores throughout Paris and on a Paris-Lyons TGV. Two others, including one atop the Eiffel Tower, are found and defused. Two people died and 67 were injured.
September 1986	Over the course of two weeks, 5 bombs explode in various restaurants and government buildings around Paris, killing 8 and wounding 165, including 5 killed and 52 wounded in a shop on Rue de Rennes.
September 1989	A bomb planted on a French DC-10 (UTA 772) explodes en route from Brazzaville to Paris killing all 170 aboard.
December 1994	An Air France flight from Algiers to Paris is hijacked. French commandos assaulted the plane on the tarmac in Marseille killing the hijackers.
July-September 1995	Over the course of six weeks, several bombs explode in transit stations and crowded public areas in Paris, killing 10 and wounding over 150.
December 1996	A bomb explodes during rush hour at the Port-Royal commuter rail station in Paris. Two people die and forty are injured.
May 2002	A suicide car bomb in Karachi, Pakistan kills 14, including 11 French Naval engineers.
October 2002	Suicide bombers in small boat ram the French oil tanker <i>Limburg</i> off the coast of Yemen, killing one and setting the tanker ablaze.

At first, the French government showed a similar distrust of their established judicial institutions. In 1963, they created a new quasi-military court, *Le Cour de sûreté de l'Etat* (the State Security Court), outside of the normal system of French justice and not unlike the military tribunals the Bush administration has established. While that court was reasonably effective at its immediate task, it was very controversial and seen as a creature of the Gaullist political party. It lacked the

legitimacy of a normal judicial procedure that could sustain it through the inevitable lulls in France's struggle against terrorism. Indeed, opposition politicians such as then Senator François Mitterrand specifically criticized it as an unconstitutional appropriation of judicial power by the executive, prefiguring claims by American civil libertarians that the Bush administration's military tribunals represent a "sudden seizure of power by the executive branch, bypassing all constitutional checks and balances."<sup>1</sup>

When Mitterrand and the Socialists came to power in 1981, a time when the terrorist threat was perceived as decreased, they eliminated the State Security Court. Yet, a renewed threat became abundantly clear in 1986, and the lesson for those reconstructing the system was that in order to maintain vigilance in times of decreased threat, they had to create a process that existed as much as possible within the normal procedures of French justice and that could therefore have legitimacy across the political spectrum. The result was a compromise that created a specialized legal procedure for prosecuting terrorists, but one that was firmly rooted in the normal procedures of French jurisprudence.

As a result, the most important anti-terrorism official in France today is not the head of the DST (*Direction de la Surveillance du Territoire*, roughly the French FBI) or the Minister of Defense, but rather the chief investigating magistrate Jean-Louis Bruguière, a combination prosecutor and judge in the main court of Paris. Bruguière sits at the heart of a centralized and specialized system within the judiciary for fighting terrorism. Terrorist cases in France are now investigated by specialized police forces and prosecuted by specialized prosecutors, but the trials take place in a regular court in front of regular judges. Police and prosecutors are also geographically centralized in Paris. Thus, a terrorist attack anywhere in France, or involving French interests abroad, is investigated and prosecuted out of the judicial offices in Paris. Over time that process has created within the Ministry of Justice, a virtual intelligence analysis center that has played a key role in breaking up terrorist networks in France. As a result, French officials have succeeded in recent years in breaking up numerous terrorist conspiracies to attack Western interests in France and throughout Europe. (See Table 2)

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<sup>1</sup> William Safire, "Voices of Negativism," *New York Times*, December 6, 2001, p. A35. For Mitterrand's criticisms, see Edgar S. Furniss, Jr, *DeGaulle and the French Army*, New York: Twentieth Century Fund, 1964, p. 160.

**TABLE 2- MAJOR TERRORIST PLOTS PREVENTED BY FRENCH AUTHORITIES,  
1998-PRESENT**

May 1998	In a synchronized operation, police in France, Belgium, Italy, Germany and Switzerland detained over 80 Islamic militants suspected of planning terrorist actions during the upcoming Football World Cup in France.
December 2000	Four men were arrested in Frankfurt, Germany based on a tip from French authorities. Evidence found in their apartment showed they intended to blow up the Christmas market surrounding the Cathedral in Strasbourg, France.
October 2001	In France, the Netherlands, Belgium and Dubai, intelligence and security services arrested 14 men suspected of planning an attack on the American Embassy in Paris.
December 2002	French antiterrorism police arrest nine people planning to blow up the Russian Embassy in Paris. The group's apparent motive was to avenge the deaths of several comrades killed in Chechnya.
January 2003	Based on intelligence provided by French authorities, raids on five homes in North London resulted in the arrests of seven people apparently planning terrorist attacks in Britain. Traces of the deadly poison ricin were discovered in one of the apartments.

The legitimacy of the system of investigating magistrates helps to ensure that it has an unusual degree of flexibility. The magistrates, for example, have the capacity to investigate a terrorist act once it has been committed or to open an investigation against a particular group based on intelligence that they might be involved in a conspiracy to commit terrorism. They also have the capacity to interrogate suspects, to initiate investigations and to indict. These powers complement each other by allowing the magistrates to understand every step in the process of investigating and prosecuting terrorists and to acquire a vast knowledge of the terrorist networks.

One lesson the magistrates were able to glean from their vast experience with terrorism in 1990's was the importance of attacking logistical and financing networks. Terrorist attacks do not happen in vacuum—they are usually prepared over a long period of time and require putting people in place to provide documents, shelter, directions, financing and the collection of intelligence on the target. This type of preparation is identifiable, but often only if one knows what to look for. Such acts might otherwise appear perfectly anodyne, but when taken as part of a larger context, they might also prefigure a terrorist act.

### **Legitimacy and Efficacy**

In all, the United States has detained, according to CIA Director George Tenet, over 3000 terrorist suspects throughout the world since September 11.<sup>2</sup> An unknown number have been released, but more than 600 of them remain held at the U.S Naval Base at Guantanamo Bay, Cuba. The government is not seeking to bring these detainees to trial before a civilian court.

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<sup>2</sup> George Tenet, "The Worldwide Threat in 2003: Evolving Dangers in a Complex World," Testimony of the CIA Director before the Senate Select Intelligence Committee, 11 February 2003.

Rather, they have established a system of extra-judicial military tribunals for the express purpose of trying the detainees.

There have been notable and successful prosecutions of Islamist terrorists in the United States. Cases such as those against Ramzi Youssef, the architect of the first World Trade Center attack in 1993 and Sheik Omer Abdul Ahmed Rahman, the head of conspiracy to bomb New York City landmarks, resulted in more than just convictions. They also, in the process of assembling evidence, created a vast understanding of terrorist methods and motives.<sup>3</sup> Since September 11, Richard Reid, the alleged shoe-bomber of an American Airlines flight and John Walker Lindh, an American citizen detained with Taliban in Afghanistan, have both pled guilty to terrorist-related charges. Despite these convictions, however, the government has recently turned even more firmly against using the judicial process, electing to label even American citizens suspected of terrorism as “enemy combatants” outside of the jurisdiction of the U.S. courts.<sup>4</sup>

The case against Zacarias Moussaoui demonstrates some of the shortcomings of the U.S. judicial system for prosecuting terrorists. Moussaoui, a French citizen, is the only person thus far charged in the U.S with crimes related to the September 11 attacks. The government indictment against him claims that Ramzi Bin al-Shibh, a confessed Al-Qa’eda operative and one of the masterminds of the September 11 attacks, wired Moussaoui approximately \$14,000 as part of the plot.<sup>5</sup> Bin al-Shibh was arrested by Pakistani authorities and is being interrogated in an undisclosed location. Moussaoui, representing himself, insists that since the government is using Bin al-Shibh’s testimony against him, he has the right to interview him. Government officials claim that such an interrogation would require the disclosure of sensitive intelligence that might hinder the war on terrorism. The Fourth Circuit Court of Appeals is due to decide by March 31 whether Moussaoui’s attorneys can meet with Bin al-Shibh.

If the Fourth Circuit accepts Moussaoui’s argument, the U.S. government would probably abandon the federal court case and turn him over to the U.S. military as an “unlawful enemy combatant.” Moussaoui would then join the other detainees at the U.S. Naval Base in Guantanamo in a sort of legal limbo with essentially no recognized standing in either international or U.S. law. This status would keep him off the street, but it would simultaneously

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<sup>3</sup> Affirming the French experience that judicial proceedings can help accumulate knowledge, Daniel Benjamin and Steven Simon, former Clinton Administration National Security Council staffers describe the court proceedings resulting from these and other major terrorist trials as “treasure troves.” They add that in reading these court cases, they “discovered information so crucial that we were amazed the relevant agencies did not inform us of it while we were at the NSC.” See Daniel Benjamin and Steven Simon, *The Age of Sacred Terror*, New York; Random House, 2002, p. xii.

<sup>4</sup> The administration has labeled as ‘enemy combatants’ both Yaser Esam Hamdi, another American citizen detained in Afghanistan, and Jose Padilla, an American citizen detained in Chicago on suspicion of plotting a radiological bomb attack in the U.S.

<sup>5</sup> See United States District Court for the Eastern District of Virginia, Alexandria Division, *United States of America v Zacarias Moussaoui*, December 2001.

validate the argument that the normal U.S. courts are incapable of contributing to the struggle against terrorism.

The unique nature of terrorism means that maintaining the appearance of justice and democratic legitimacy will be much more important than in past wars. The terrorist threat is in a perpetual state of mutation and adaptation in response to government efforts to oppose it. The war on terrorism more closely resembles the war on drugs than World War II; it is unlikely to have any discernable endpoint, only irregular periods of calm. The French experience shows that ad-hoc anti-terrorist measures that have little basis in societal values and shallow support in public opinion may wither away during the periods of calm. In the U.S., there is an enormous reservoir of legitimacy, established by over 200 years of history and tradition, in the judiciary. That reservoir represents an important asset that the U.S. government can profit from to maintain long-term vigilance in this type of war.

Despite the unusual opportunity for innovation afforded by the crisis of September 11, the U.S. government has not tried to reform American judicial institutions to enable them to meet the threat of terrorism. To prevent the next wave of attacks, however far off they might be, and to avoid re-inventing a slightly different wheel each time will require giving life to institutions that can persist and evolve, even in times of low terrorist activity. Given the numerous differences between the two countries, the U.S. cannot and should not simply import the French system, but it can learn from their mistakes. Their experience suggests a few possible reforms:

- A specialized U.S. Attorney tasked solely with terrorism cases and entirely responsible for prosecuting such cases in the U.S.
- Direct and formal links between that U.S. Attorney's office and the various intelligence agencies, allowing prosecutors to task the intelligences agencies during judicial investigations
- Special procedures for selecting and protecting juries in terrorism cases and special rules of evidence that allow for increased protection of classified information in terrorist cases

Creating a normal, civilian judicial process that can prosecute terrorists and yet retain legitimacy is not merely morally satisfying. It may also help to prevent terrorist attacks in the long run. Not incidentally, it would demonstrate to the world a continuing faith in the ability of democratic societies to manage the threat of terrorism without sacrificing the very values they so desperately desire to protect.