The Rise of the Counterterrorist States

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The closing decades of the Twentieth century witnessed the proliferation of America's federal counterterrorist measures. Receiving less attention was the equally expansive use of state counterterrorist law. The 1993 World Trade Center bombing and thwarted attacks on New York City, and the 1995 Oklahoma City bombing brought the issue of vulnerability of the U.S. homeland into sharp relief. The 1995 Aum Shinrikyo nerve gas attack in the Tokyo subway increased awareness of the possible proliferation of weapons from the former Soviet bloc countries, and a flurry of anthrax hoaxes in the U.S. at the close of 1998 and into 1999, further heightened concern at both the federal and state level of the threat posed by terrorist use of chemical, biological, radiologic, or nuclear weapons. Terrorism became a pressing domestic concern.

Where to draw the line between federal initiatives and state measures, indeed, to what extent these should overlap, has been less than clear. This is due in part to the multi-faceted nature of terrorism: not only do the origins, strategies, and aims of the perpetrators vary, but so too do the tactics. Terrorist acts are criminal acts. Regardless of the motivation, murder, kidnapping, extortion, torture, bombing, sniping, shooting, and use of incendiaries are illegal. Historically, states have (properly) executed jurisdiction over these areas; however, terrorist acts often entail more than mere criminality. They may encompass issues of national security, foreign affairs, and domestic defense - - areas not typically falling within state legal jurisdiction.

The increase in state counter-terrorist legislation also derives from the expansive use of the term "terrorism" to describe a range of illegal activities, including "school terrorism," "gang terrorism," "eco-terrorism," "narco-terrorism," and "terroristic activity." Three types of measures that fall within a more traditional understanding of terrorism, and that have already been addressed at a federal level, have begun to work their way into state statutes, creating, in effect, a dual enforcement regime within the United States. These are measures that (1) prohibit support for international terrorist organizations, (2) focus on the actual or threatened terrorist use of weapons of mass destruction, and (3) seek to criminalize terrorist-motivated conduct.

This paper addresses these three types of state counterterrorist legislation, and the legal and practical questions regarding the proper role of the states in America's counterterrorist efforts. It begins with a description of several current state counterterrorist statutes. The next section considers both the legal and policy ramifications of these measures, many of which may threaten both the supremacy of federal counterterrorist laws and First Amendment protections of speech and assembly. The concluding section argues that, as states appear to become less concerned with traditional criminal enforcement, and

expressly embrace a realm of law enforcement more properly reserved for federal national security policy, these state laws could confuse both federal anti-terrorist policy and the role for the states in the fight against terrorism.

THE STATES AND COUNTER-TERRORISM

This section describes three types of state counterterrorist measures enacted by individual states in the last decade. These include initiatives that prohibit funding to foreign terrorist organizations, penalize terrorist incidents involving weapons of mass destruction, and that create a motivational crime of terrorism. All have been enacted in the last decade. A discussion of these laws and bills is intended to highlight key state initiatives and the themes that animated their enactment in order to understand both the scope, and the impact, of their passage.

Solicitation or Provision of Resources in Support of International Terrorism

The first area in which the states have mimicked federal counterterrorism efforts is by attempting to criminalize various forms of financial support for terrorist groups. In 1996, the federal government passed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), empowering the Secretary of State to designate a list of foreign terrorist organizations (FTOs). The act uses three criteria to identify an FTO: the organization must be foreign, engage in terrorist behavior,[1] and conduct activities that threaten the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States. The legislation criminalizes contributions to any organization associated with an FTO, reflecting congressional awareness that terrorist organizations may try to conceal their activities behind lawful activities, such as humanitarian or social work. Congress addressed the matter squarely: "Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA also allows the federal government to deny entry to the United States to any member of a terrorist organization.[2] In addition, it allows the government to freeze the assets of any FTO group or person affiliated with that group. In 1997, following an exhaustive interagency effort including input from the Departments of Justice, Treasury and Commerce, the Secretary of State designated thirty foreign terrorist organizations. In 1999 the Secretary of State issued an updated list, as required by law, dropping three groups and adding the al-Qaida, Usama bin Laden's terrorist network.

[1] U.S.C. Section 212(a)(3)(B).

Coincident with the federal government's decision to outlaw fundraising for terrorist groups, on July 16, 1996, Illinois introduced a state counterterrorist law prohibiting the solicitation or provision of financial resources that support international terrorism. This legislation followed a series of events that brought attention to Palestinian fundraising in the Chicago area. In October 1994, a bombing in Tel Aviv left twenty-three people dead.[3] Claiming that U.S. money was behind Hamas's actions, the State Department announced that it would seek to stem the flow of cash to the organization. In the meantime, Israel's consul general in New York, Collette Avital, declared that Hamas had created a U.S. military wing, based in the Chicago area, to recruit and train new members.[4] The city, with some 300,000 Arab Muslims, is home to one of the largest and most organized Arab communities in the United States.[5]

Repeated Hamas attacks in Israel kept the issue at the forefront of public attention. Between the September 1993 signing of the Oslo agreement that sought to move the Middle East peace process forward, and December 1994, Hamas bombings claimed the lives of ninety-four people.[6] News of suicide bombs throughout 1996 resulted in gatherings in Chicago to commemorate those killed in the Middle East.[7] The threat was not always so far from home: during 1995 fears emerged over Hamas targeting O'Hare Airport. City officials revealed that agents of the organization, who had obtained detailed maps of cargo facilities, had been sighted at the airport.[8] Immediate federal efforts to uncover the financial underpinnings of Hamas in the United States, however, met with little success. Responding to growing concern over the inability of the federal government to respond to Hamas's suspected operations, as well as those of other Palestinian terrorist groups, the Illinois state legislature introduced anti-terrorist funding bills.

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[2] The term "member" is understood to include anyone who has had any dealings with a terrorist organization, even if that means aiding the humanitarian and social programs of an organization.

[3] Stephen Franklin, "U.S. Probing Chicago Connection to HAMAS: Israel and the State Department Contend Chicago Is a Center of Cash and Training for Militant Palestinians, but Hard Evidence is Difficult to Come by," *Chicago Tribune*, Wednesday, November 16, 1994.

[4] Ibid. See also "Hamas Support," *Chicago Tribune*, November 28, 1994; and "Muslims Wronged," *Chicago Tribune*, December 4, 1994.

[5] Victoria Meyerov, "Comment: The Buck Stops Here: Illinois Criminalizes Support for International Terrorism," John Marshall Law Review, Vol. 30, Spring 1997, pp. 871-886, citing Stephen Franklin, U.S. Probing Chicago Connection to Hamas, *Chicago Tribune*, November 16, 1994, 1 at 20.

[6] Nicolas B. Tatro, "Hamas Sells Death-Wish Videotapes," *Chicago Tribune*, December 12, 1994, p. 23.

[7] See, for example, "Terror in Tel Aviv," *Chicago Tribune*, March 4, 1996; "Agony in Tel Aviv," *Chicago Tribune*, March 5, 1996; and "Service Mourns Bombings' Victims", *Chicago Tribune*, March 8, 1996.

[8] "City Considers Tightening Its Security New at O'Hare," *Chicago Tribune*, August 15, 1995; and "Daley Tells Travelers Security Is Adequate at Airports," *Chicago Tribune*, August 16, 1995.

In 1995 Illinois initiated efforts to criminalize the solicitation of funds for international terrorist groups through introduction of the Solicitation for Charity Act.[9] Under the act, the state Attorney General could obtain an injunction to seize the assets of a charitable organization suspected of soliciting funds for or contributing to an international terrorist organization. Questions about the Act's constitutionality, however, resulted in modifications to the original bill. Retitled, "International Terrorism", the final statute, passed in 1996 after AEDPA became law, gives the state Attorney General the same injunctive relief as was provided in the original act.[10] However, an individual or charity can be found guilty under the act only if that person or organization knew, or had reason to believe, that the monies would be used to support international terrorism. In effect, the statute also allows Illinois to rescind the tax-exempt status of the organization in question. The statute defines international terrorism as behavior that:

1. Involve[s] a violent act or acts, perpetrated by a private person or non-governmental entity, dangerous to human life that would be a felony under the laws of the State of Illinois if committed within the jurisdiction of the State of Illinois;
2. Occurs outside the United States; and
3. [is] intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of government by assassination or kidnapping.[11]

The act permits investigations when the facts indicate that an individual or an organization has knowingly or intentionally engaged in a violation of this "*or any other criminal law of this State*."[12] It prohibits the initiation or continuation of any investigation based on activities otherwise protected by the First Amendment, including "expressions of support or the provision of financial support for the nonviolent political, religious, philosophical, or ideological goals or beliefs of any person or group."

Other states, including Maryland, Wisconsin, and New Jersey, have attempted to introduce similar measures, all of which derive from concern that charitable organizations in the United States were being used to funnel resources to terrorist organizations in the Middle East. In Maryland and Wisconsin, however, the measures failed the test of constitutionality. In 1999, New Jersey introduced legislation

[9] H.B. 667, 89th Gen. Ass. (Ill. 1995).
[10] H.B. 3233, 89th Gen. Ass. (Ill. 1996).
[11] H.B. 3233, 29C-5, 89th Gen. Ass. (Ill. 1996).
[12] Id., italics added.

seeking to create a new offense of solicitation of material support or resources in support of international terrorism or providing material support or resources for international terrorism. New Jersey's Committee on the Judiciary has yet to decide the bill's ultimate resolution.

Legislating Against Weapons of Mass Destruction

Sine the late 1980s, the federal government has focused on halting the spread of WMD. More recently, however, states have shown more concern with the threatened or actual use of such weapons on U.S. soil and with preparing for such an event. Adding to this concern has been the exponential increase of anthrax hoaxes throughout the United States in the past two years. According to the Federal Bureau of Investigation (FBI), 145 biological and chemical threats or incidents occurred in the United States in 1998. In responding, a number of states have taken steps to criminalize the acquisition, use, or threat of terrorist use of such weapons.

Some of the most significant measures relating to WMD have been taken in California, which has had more reason than most states to be concerned about possible biological weapon attack. Between November 1998 and September 1999, the state experienced 58 biological terrorism threats. In response, a group of law enforcement officials successfully sought legislation that clarifies California's jurisdiction in this area, strengthens the current legal code, and consolidates existing measures that apply to the possible use of WMD. The alterations ensure that, particularly where the FBI has failed to pursue certain cases, the state can prosecute those suspected of involvement in WMD hoaxes. Importantly, the state does not seek to go beyond federal law, but rather has created identical and/or parallel measures to facilitate a state response. The Assembly analysis of the bill states: "All terrorism statutes are currently filed at the federal level. This legislation seeks to bring similar counterterrorism statutes to the state level." It continues, "[This bill] will give California peace officers concurrent jurisdiction in situations involving WMD which means that they will be able to work to prevent or interdict these acts before disaster strikes." From the California state officials' perspective, the magnitude of consequence of a terrorist attack - - whether with or without weapons of mass destruction - - would be the critical factor in determining whether an incident should be treated as criminal law or national security. The real use of WMD or the actual possession of weapons of mass destruction that had the potential to wreak havoc on a national scale would make any particular case one of national security. Until that point, lawmakers assume that responsibility lies with the states to respond to and prosecute WMD incidents. The ease with which the bill passed through the California State Assembly illustrated lawmakers' concerns about the proliferation of WMD threats. Other states that have considered initiatives dealing with the actual or threatened use of WMD include Georgia, Illinois, Kentucky, Maine, Nevada, and others. These proposed

measures reflect the states' growing awareness of the federal government's heightened concern with domestic preparedness for "catastrophic" terrorism. In 1999 Maryland, for example, introduced a bill that would require the Secretary of Health and Mental Hygiene to develop a contingency plan for biological and chemical terrorism.[13] The same year Utah issued an Executive Order that designated the Division of Comprehensive Emergency Management within the Department of Public Safety as the single point of contact for, and the state counterpart to, the Federal National Domestic Preparedness Office.[14] Virginia recently considered a bill that would require the Department of Health, with the assistance of the Department of Emergency Services, to examine the preparedness of state hospitals to deal with terrorist attacks.[15] In Hawaii proposals would require the Adjutant General to report on terrorist incident preparedness capabilities.[16] In Indiana a bill seeks to establish the State of Indiana Antiterrorism Fund.[17] Other states are working with their neighbors to improve their domestic preparedness capabilities. For instance, New Hampshire's Interstate Emergency Management Compact provides "mutual aid among the states in meeting any emergency or disaster that is duly declared by the governor of the affected state or states, whether arising from natural disaster…acts of terrorism, insurgency, or enemy attack." Although not all of these measures have passed, and some have been carried over to the next legislative sessions, their dramatic increase indicates a growing concern for the state of domestic readiness for possible terrorist attack and a heightened desire to prepare for such events at the state level.

Terrorist Thought

A third type of legislation makes violent activity performed in order to overthrow the U.S. government or that of the states illegal. For the most part, it criminalizes conduct that is already prohibited (e.g., the use of explosives, murder, maiming, and threatening), yet these go further by adding a motivational element, called "terrorism," to the crime of seeking to incite political change through violence. This legislation often augments penalties for criminal defendants, up to and including the death penalty.[18] It also

[13] 1999 MD H.B. 841.
[14] 1999 UT E.O. 9.
[15] 1998 VA SJR 425.
[16] 1999 HI HCR 224/SCR 182.
[17] 1999 IN HB 1429.
[18] See, for example, 1999 CA AB 1284; 1999 AL HB 109/SB 344; 1999 AR HB 2134, MA 1999; HB 3423, SB 199, SB 903, SD 192, and SD 1011; 1998 NJ SB 1436; 1999 NY AB 618; 1999 NY SB 4994; 1999 NY AB 6225/SB; 1999 NY SB 171; 1999 TN HB 724; and 1999 TN HB 726.

proscribes expressive activity in furtherance of the terrorist organizations' aims.[19] To introduce the motivational element of "terrorism", such provisions ascribe labels - - such as "seditious," "anarchic," and "communist" - - to organizations that engage in terrorism.

It is not surprising that many of these measures update the anticommunist laws of early twentieth century. The Red Scare altered Americans' sense of security within the United States, much the way terrorism does today. Between 1917 and 1919, some twenty-three states introduced criminal syndicalism measures aimed at stemming the red scare. By 1937, another twenty-three - - Alaska, Arizona, California, Colorado, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, and Wyoming - - had also passed such legislation.[20] The definition of criminal syndicalism as a "doctrine which advocate[s] crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political reform"[21] is similar to definitions used today in describing terrorism. And convictions are starting to result. Most recently, Montana, whose legislation prohibits certain advocacy and contains sanctions against landlords found to have rented to groups advocating violence, prosecuted individuals for domestic terrorism under a criminal syndicalism statute. [22]

IMPLICATIONS OF STATE COUNTERTERRORIST MEASURES

Both legal and practical problems arise from state initiatives to counterterrorism. This section considers two potential legal issues - - federal preemption and the First Amendment right to freedom of speech and assembly- - that may emanate from these state laws. It should be noted, however, that only a case-by-case analysis of these measures can determine whether they do, indeed, violate any federal or constitutional norms. The more significant concern, however, may lie in the direction of practical politics

[19] See, for example, Nev. Rev. Stat. Ann. § 203.117 (1998); 1999 NY AB 4260; Mont. Code Anno., § 45-8-105 (1998); Miss. Code Ann. § 97-7-23 (1998); ARS § 13-2308.01 (1999), and 1999 FL HB 141/SB 166.

[20] The measures were AK c. 6 (1919); AZ c. 13 (ext. sess 1918) (repealed in 1928); CA c. 188 (1919); CO c. 1 (ext. sess 1919); HI Act 186 (1919); ID c. 145 (1917), c. 136 (1919), c. 51 (1925); IN c. 125 (1919); IA c. 382 (1919); KS c. 37 (ext. sess 1920); KY c. 100 (1920), c. 20 (1922); MI Act 255 (1919); OK c. 70 (1919); OR c. 12 (1919); WA c. 3 (1919) (replaced by c. 174 1919) (repealed in 1937); W VA c. 24 § 1(1919); WY c. 76 (1919). Cited in Eldridge Foster Dowell, *A History of Criminal Syndicalism Legislation in the United States*. (Baltimore: The Johns Hopkins Press), 1939, 147, fn 12.

[21] ID c. 145 (1917).

[22] Some states, such as Arizona, California, Michigan, New York and South Carolina use similar language to that of states like Nevada, Montana, and Minnesota, without specific reference to "criminal syndicalism" per se.

and policy. The need for the federal government to be able to enforce a unified counterterrorist policy, for it to be able to speak with one voice, provides an important analytical basis by which to scrutinize the state laws.

Legal Considerations: Preemption Doctrine and the First Amendment

All fifty states possess broad authority to pass statutes protecting the welfare of their citizens. The foundation of the Constitutional Supremacy Clause, which makes federal law the supreme law over conflicting state enactments, "was colored by concerns of the Framers that the Constitution would strike an unworkable balance between federal and state interests."[23] The doctrine of preemption law exists to determine whether the state law actually does, indeed, conflict with a federal law or policy. Thus, state interest's, under preemption law, must be balanced against federal concerns as expressed through federal law. A state statute can be preempted because the Constitution forbids, or implies a prohibition, on a state's ability to legislate in a given area, or because a federal statute exists that explicitly, or implicitly, trumps any state role.

The U.S. Constitution provides for substantive areas of governance exclusive to the federal government. For example, states cannot declare war on foreign entities. That authority lies with the federal government, which is vested with power over foreign affairs. State lines cease to exist in regard to international negotiations, compacts, and foreign relations.[24] This general prohibition does not imply that the states cannot have some interaction with foreign entities. Although article 1, section 8, clause 3 of the Constitution empowers Congress to "regulate Commerce with Foreign Nations, and among the several States," the states may, as market participants, engage with other countries so long as their actions do not affect foreign commerce.

A state statute can also be challenged if it contradicts a federal statute, either expressly or implicitly, or where the state law stands as an obstacle to federal statutory objectives. State law need not directly contradict federal law to result in preemption. This legal doctrine, broadly known as "federal occupation

[23] David A. Hermann, Comment, *To Delegate or Note To Delegate - - That is Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, Pacific Law Journal, Vol. 28, 1997, pp. 1157, 1161.

[24] United States v. Belmont, 301 U.S. 324 (1937) ("in the case of all international compact and agreements. . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." Id. at 331.

of the field," posits that the "Court has come to understand a level of congressional veto power over state and local regulations within that field no matter how well they comport with substantive federal policies."[25]

The pervasiveness of federal statutes and regulations that govern a given field suggests that Congress intended to exercise exclusive control over the subject. Preemption of an entire field is one in which the federal interest is so "dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[26] It is also relevant if the field is traditionally deemed "national" in nature. The Supreme Court, in those instances, is more deferential to the federal statutes and to areas that Congress has reserved to itself. In the seminal case of Hines v. Davidowitz, the Court found that the state's involvement in foreign affairs was preempted because "the supremacy of the national power in the general field of foreign affairs. . .. is made clear by the Constitution," and the regulation of that field is "intimately blended and intertwined with responsibilities of the national government."[27] In effect, where foreign policy is concerned, the Court has indicated that preemption of local law will be presumed absent a clear statement to the contrary by federal authorities. Even local laws whose sole purpose may be to advance the goals of federal legislation will be preempted when they intrude on areas exclusively in the control of national authorities. The Court explained that in areas of dominant federal interest, states are prevented "not only from setting forth standards of conduct inconsistent with the substantive requirements [of the federal law], but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited [by the act]."[28] Thus in fields deemed to be in the national interest, what Congress and the President do is as relevant as what they do not do.[29]

In a recent ruling, the Supreme Court sought to clarify the complex preemption doctrine. In March 1996, Massachusetts introduced legislation to ban contracts between the Commonwealth and those doing business with, or in, the Union of Myanmar (formerly Burma). Following precedent set by antiapartheid measures, the state claimed the right to condemn Burma's terrible human rights record through restricting commerce. Three months later, Congress passed the Foreign Operations, Export Financing and Related Programs Appropriations Act to address how the federal government would do business with Burma. The act had several substantive and procedural provisions. Significantly, not only does it impose

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[25] Lawrence H. Tribe, American Constitutional Law, Third Edition (New York, N.Y.: Foundation Press, 2000) at 432.
[26] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[27] Hines v. Davidowitz, 312 U.S. 52 (1941).
[28] Wisconsin Department of Industry, Labor, and Human Relations v. Gould, Inc., 475 U.S. 282 (1986).
[29] Campbell v. Hussey, 368 U.S. 297 (1961).

economic and visa sanctions directly on Burma, it also provides for the President to introduce further penalties - - such as prohibiting U.S. persons from new investments in Burma - - if the Burmese government physically harmed or exiled Daw Aung San Suu Kyi (the Nobel Peace Prize opposition leader who is under house arrest in Burma for leading a democracy movement against the military government). The federal statute requires the President to work with other countries and international bodies, such as the Association of Southeast Asian Nations (ASEAN), to develop a "comprehensive multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma." The Act also provides for the President to waive any of the restrictions in the event that such sanctions might threaten U.S. national security.

As a result of the federal initiative, a group of businesses brought suit against the Massachusetts law, arguing that the federal law preempted it. The district court, the First Circuit, and the United States Supreme Court all agreed that the Commonwealth's measure undermined at least three provisions of the federal legislation: the discretionary powers delegated to the President to regulate economic sanctions against Burma, the limitation of federal sanctions only to U.S. persons and new investment, and the direction provided the President to proceed diplomatically to develop a multilateral, comprehensive policy toward Burma. The Court took issue with several provisions in the state statute, noting that the authority granted by the federal measure enabled the President not only to make a political statement, but to achieve real results. The Court continued, "It is simply implausible that Congress would have gone to such lengths to empower the President if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action." Finally, the Court noted that the Massachusetts law undermined the President's authority to speak with one voice to the world's nations, including Burma. The Massachusetts' law, which was criticized by other foreign governments and resulted in the lodging of a formal complaint against the United States in the World Trade Organization, thus complicated the unified objectives laid out in the federal statute.

While the specific Burma cases did not look to the issue of counterterrorism or domestic preparedness, it is nonetheless useful as a means to unearth the difficulties inherent in state counterterrorist measures. What the Court did and did not do in the Burma case is illustrative. Given that the Massachusetts law clearly contradicted the federal statute, this was, for legal preemption purposes, a generally easy case. By focusing exclusively on the statutory question, however, the Court did not provide guidance on what laws a state can pass in its role of protecting the "general welfare" role for its citizens, and what laws too likely might violate some norm of foreign policy that would be better left to the federal government. The need

for such clarity, however, is exceptionally timely. As states, in growing numbers, take up the issue of counterterrorism, the question of whether terrorism is solely a national security matter has become increasingly relevant. To the extent that terrorism is a national security priority, and to the extent that the American public views terrorism as the primary threat in United States, it is not surprising that the states would want to legislate in this area. The federal government has passed an extensive array of laws and procedures to combat international terrorism. Whether or not such action directly conflicts with a state law, it has legislated against foreign terrorist organizations and terrorist use of WMD, and has refrained from creating a crime of terrorism. Again, what the federal government chooses to do is as relevant as what it does not do. No doubt, preemption generally, and field preemption specifically, suggest that the states are venturing into foreign policy - - historically the federal government's sole domain.[30]

A second potential legal issue revolves around First Amendment concerns regarding an individual's rights to free thought and speech. Scholars, political activists, and civil libertarians have often criticized U.S. counterterrorism strategy as sacrificing democratic norms in the name of national security. The Red Scare, the internment of Japanese Americans during World War II, and FBI abuses during the civil rights movement demonstrate that the United States has the potential to overreact and overlegislate in response to generalized fears about the American public. Critics view the designation of foreign terrorist organizations under AEDPA as undermining protected speech and assembly guarantees, if not equal protection of the laws.[31]

These criticisms have some merit. The point however, is that the maximization of state counterterrorism laws, in the name of "fighting terrorism", is exceptionally risky when personal liberties are at stake. If subjected to legal challenge, some federal counterterrorism measures may be found to violate certain constitutional protections. An analysis of the state laws described above suggests that some state efforts may also go too far. This multiplying effect may have serious consequences for personal liberties.

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[30] For a history of the litigation regarding Massachusett's anti-Burma statute, see Crosby v. National Foreign Trade Council, 181 F. 3d 38 (1999) and the Supreme Court's decision, Crosby v. National Foreign Trade Council, 120 S.Ct. 2288 (2000).

[31] After the Oklahoma City bombing, Arab groups reported a dramatic increase in the number of hate crimes against members and vandalism of mosques. See Arab-American Anti-Defamation Committee Annual Report (1997). See also James X. Dempsey & David Cole, Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security (1999)(Los Angeles, Ca.: First Amendment Foundation Press, 1999).

Significantly, during the 1980s federal prosecutors dealing with terrorist cases generally chose to ignore the politically motivated aspects of the crime, focusing instead on the violent crime itself. The mistrials and acquittals resulting from the May 19th and United Freedom Front "seditious conspiracy" trials in the 1980s and Provisional IRA trials in the 1990s proved instructive in this regard.[32] While the general nature of the activities arises during the proceedings, a specific focus on political ideology or religious beliefs can often subvert the trial and distract from the violent crime at hand. State efforts to signify terrorist thought raise equally difficult issues for prosecutors looking to punish the crime, not the motivation, of those engaged in terrorist activity. Furthermore, the potential for selective enforcement in this area always exists, especially as the United States focuses its attention on Middle Eastern charities that may be fronts for terrorist groups.

This is not to say that state governments have no authority to act in this area. Everything they seek to criminalize in the name of counterterrorism is already a crime under state law. Indeed, states can punish unlawful activities such as the use of WMD under existing law which criminalizes, for example, theft, robbery, arson, intimidation, conspiracy, and attempt statutes.[33]

Policy Considerations: Speaking With One (multi-faceted and sometimes whimsical) Voice

On issues that encompass a variety of governmental needs and functions, like terrorism, the federal government must speak with one voice. Many state counterterrorist laws allow too much leeway in a realm that, to be effective, needs coherence and unity. Indeed, the very executive branch flexibility that the Court spoke of in the Burma decision is the same flexibility necessary in any counterterrorism strategy. Groups change. Issues realign. Ideologies alter. To accommodate shifts in the foreign affairs arena, the federal government needs to be given the latitude to make effective policy decisions.

Federal counterterrorism efforts are not limited to legislative initiatives. The federal government has many ways to address terrorism, and the law (including criminal prosecutions) is just one tool.[34] States, on the other hand, approach terrorism from one vantage point: the legal perspective. They have no authority - - let alone ability - - to bomb foreign countries, write executive orders, change national policy,

[32] Brent L. Smith and Kelly R. Damphousse, "The Prosecution and Punishment of American Terrorists: 1980-1996," paper presented at the Terrorism and Beyond…the 21st Century Conference, hosted by the RAND Corporation and the Oklahoma City National Memorial Institute for the Prevention of Terrorism, Oklahoma City, Oklahoma, April 17, 2000.

[33] Lawrence F. Reger, *Montana's Criminal Syndicalism Statute: An Affront to the First Amendment*, Montana Law Review, Volume 58, Winter 1997, pp. 287, 303.

or negotiate international agreements with foreign leaders. These options are all available to the federal government, and the ability to choose among them should not be undermined by a state's insistence that it be a player in the legal realm. This is not to imply that the federal government does not have its own internal debates about how to approach the issue, but inherent in the federal government's ability to function is the knowledge of its own preeminence. State laws that confuse this role threaten to undermine the overall counterterrorist effort.

At least three policy prescriptions flow from this analysis. First, as part of the United States' counterterrorism strategy, the federal government must send a clear message to its citizens, other countries, terrorists, and terrorist organizations about the boundaries of acceptable and unacceptable conduct. In regard to citizens, beyond the constitutionality of the measures, the cleavage created within America by the introduction and operation of such politically sensitive measures imports the affairs of foreign countries into the domestic realm. The state measures that sought to designate foreign terrorist organizations clearly derived from Middle Eastern politics. Minority concerns at the manner in which such provisions would operate within the United States immediately increased, threatening divisions in the domestic arena. State measures targeted at terrorist thought and behavior which focus on limiting freedom of speech and association may well generate increased friction with groups in the United States dedicated to preserving their independence from governmental involvement in their daily lives. Such measures threaten the domestic tranquility of a diverse country and may run the risk that counterterrorist law creates further divisions.

Second, while it was private trade groups that brought the Burma case, it is important to remember that several international organizations and foreign countries were concerned about the state legislation and reluctant to cooperate with the federal government's efforts to bring effective change to the region. Without a coherent strategy, the government appears disorganized, unable to resolve turf battles, and most importantly, unable to protect its citizens. This last aspect is, precisely, the aim of terrorism: to subvert the ability of the government to fulfill its most fundamental role. An uncoordinated, multipronged response conveys confusion and lack of control – a dangerous combination when faced by terrorist challenge to the political legitimacy of the United States both at home and abroad. It also is essential that the government uphold its international alliances and bilateral agreements regarding terrorism issues.

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[34] Philip B. Heymann, Terrorism and America: A Commonsense Strategy for a Democratic Society (Cambridge, Ma.: MIT Press, 1998).

State forays into this realm threaten that singularity.[35] The Supreme Court noted in the Burma case the number of international organizations that had lodged formal and informal complaints against Massachusetts' law. The country cannot risk such dissension when the lives of its citizens are at stake.

Third, one purpose of federal counter-terrorism measures is to create some incentive for terrorist organizations and sponsoring states to mend their ways. To some extent, this has been successful.[36] Economic and legal sanctions against state entities, coupled with penalties against terrorists and the groups that sponsor them, have been a central aspect of the United States' most recent federal counterterrorism efforts. The "carrot" of getting off of the State Department list of state sponsors of terrorism or FTO designations is coupled with the "stick" of future economic or legal deprivations. Individual states cannot offer such incentives. Their recent attempts to curtail foreign funding or group affiliation undermine the singularity of purpose in the federal plan. For example, constituent organizations in Illinois publicly claimed that Hamas was running funds and arms through Chicago. It is the federal government, though, that should have the role in determining whether such concerns should make Hamas an outlaw organization. Comity currently exists between the Illinois designations and the federal designations. That may not always be the case. The Clinton administration has changed its mind about the "intent" of Hamas over the course of the last 8 years.[37] By 1997, though, Hamas was on the foreign terrorist organization designation list. As the Middle East peace process unfolds, the federal government should have the flexibility to change the group's, or any group's, status. While Illinois may continue to have concerns about Hamas, the deterrent effect of the federal effort would be undermined if Illinois maintained state sanctions against the group. It would be a confusing message, and certainly one that would undermine the validity of federal government assurances to any organization in question and to key players in the Middle East.

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[35] It is therefore significant that a number of countries filed briefs in the Crosby case complaining of America's diluted and inconsistent message after international agreements were made.

[36] *See* Countering the Changing Threat of International Terrorism, Report from the National Commission on Terrorism (2000) at pp. 26-28.

[37] Written testimony of Mary A. Ryan, Assistant Secretary for Consular Affairs, Department of State, before the Subcommittee on International Law, Immigration and Refugees of the House Judiciary Committee, Feb. 23, 1994, at p. 7.

State lawmaking in the general area of foreign terrorism or terrorist threats in the United States may seem wholly unobjectionable. Given that in many instances the states do not specifically contradict federal legislation, they should be provided some leeway in protecting their citizens. This is, in some instances, true. But, as the Burma case showed:

> [w]e need not get into any general consideration of limits of state action affecting foreign affairs to realize that the President's maximum power to persuade rests on his capacity to bargain . . . . without exception for enclaves fenced off willy-nilly by inconsistent political tactics. When such exceptions do qualify his capacity to present a coherent position. . . . , he is weakened, of course, not only in dealing with [the subject of the legislation], but in working together with other nations in hopes of reaching common policy and 'comprehensive' strategy."[38]

It is that flexibility, that wholeness, that is threatened by the states' new eagerness.

A description of these laws is not meant to overstate the case law, nor to suggest that all these laws are necessarily problematic. State statutes in Illinois or Montana are not likely, alone, to cause our federal counterterrorism strategy to collapse. These state laws, however, do mark a trend that, for the legal and policy reasons highlighted above, should be seriously questioned by policymakers and legislatures. This trend does not appear to be slowing down; if anything, recent federal and state initiatives suggest that the concern driving their introduction is accelerating.[39] Importantly, these state efforts also may distract from a critical role that the states do play in our counterterrorism efforts.

RECOGNIZING THE STATE VOICE

States have a useful role in efforts to counter the terrorist threat in the United States. Given that such violence is criminal conduct, state criminal law enforcement is relevant. Domestic terrorism is a threat, and the states have a primary responsibility to protect citizens. More than mere criminal implications are at stake, however. Federal statutes and the U.S. legal framework give some indication of other considerations that need to be taken into account in determining the states' role.

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[38] Crosby, at 2292.

[39] Laura K. Donohue, "America's Counter-terrorist Complex," discussion paper (Cambridge, MA.: Belfer Center for Science and International Affairs, John F. Kennedy School of Government, 2000).

Some WMD laws provide a good example of where that state voice is best articulated. The group of laws that discuss domestic preparedness should be understood to do exactly what Congress intended in its WMD legislation - - enable the states to address consequence management in the event of a terrorist attack. For example, the training of emergency response and first responder personnel is essential because in the event of an attack they will likely be the initial providers of health and emergency care. Similarly, in areas where the states are responsible for domestic preparedness - - such as in training, certification for the issuance of vaccines, and environmental consequences - - legislation that helps facilitate these should not just be allowed but actively encouraged.

In addition, the states, seeking some recourse to the growing number of WMD hoaxes and the failure of the federal government to investigate and prosecute them, have sought expansive and easily referenced criminal enforcement of hoax attempts. These laws generally would not conflict with any federal statute or federal necessity for a unified anti-WMD approach. Hoaxes do not implicate WMD enforcement in the same way that a real WMD attack would. Understanding that terrorist acts may include elements of both criminal law and national security, our legal structure recognizes that hoaxes are, in actuality, closer to the traditional role of state general police power in ensuring that state authorities can respond.

Both legal and policy considerations suggest that states ought to exercise caution when venturing into the counterterrorist realm. The recent bombing of the U.S.S. Cole shows that the threat is still very real. State laws raise important legal issues that deserve particular attention, but the law should not be the only consideration. On the policy side, the state's efforts may prove useless, at best, or confusing, at worst. The primary goal of the states and the federal government is to maintain an effective and sound counterterrorist policy. Thus, U.S. counterterrorist efforts need to be coherent (no contradictions by state lawmaking our policy difficult to defend to other nations), flexible (so that the federal government can be free to change its mind and use other avenues, not just the law, in combating terrorism) and legitimate (so that these efforts are defendable and democratic).

EXECUTIVE SESSION ON DOMESTIC PREPAREDNESS
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The John F. Kennedy School of Government and the U.S. Department of Justice have created the Executive Session on Domestic Preparedness to focus on understanding and improving U.S. preparedness for domestic terrorism. The Executive Session is a joint project of the Kennedy School's Belfer Center for Science and International Affairs and Taubman Center for State and Local Government.

The Executive Session convenes a multi-disciplinary task force of leading practitioners from state and local agencies, senior officials from federal agencies, and academic specialists from Harvard University. The members bring to the Executive Session extensive policy expertise and operational experience in a wide range of fields - emergency management, law enforcement, national security, law, fire protection, the National Guard, public health, emergency medicine, and elected office - that play important roles in an effective domestic preparedness program. The project combines faculty research, analysis of current policy issues, field investigations, and case studies of past terrorist incidents and analogous emergency situations. The Executive Session is expected to meet six times over its three-year term.

Through its research, publications, and the professional activities of its members, the Executive Session intends to become a major resource for federal, state, and local government officials, congressional committees, and others interested in preparation for a coordinated response to acts of domestic terrorism.

***For more information on the Executive Session on Domestic Preparedness, please contact*:**

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