

COURTS AND TERRORISM

**Nine Nations Balance Rights
and Security**

**Edited by Mary L. Volcansek and
John F. Stack Jr.**



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COURTS AND TERRORISM

Since ancient times, terror tactics have been used to achieve political ends, and this is likely to continue into the foreseeable future. Preserving national security and the safety of civilian populations while maintaining democratic principles and respecting human rights requires a delicate balancing act. In democracies, monitoring that balance typically falls to the courts. *Courts and Terrorism* examines how judiciaries in nine separate nations have responded not just to the current wave of Al Qaeda threats but also to narco-trafficking, domestic terrorism, and organized crime syndicates. Terrorism is not a new phenomenon, and, even though the reactions have varied significantly, common themes emerge. This volume discusses eleven case studies and analyzes the experiences of these various nations in their battles with terrorism to reveal the judicial quandary for democratic governance and the rule of law in the twenty-first century.

Mary L. Volcansek is Professor of Political Science at Texas Christian University. She has written or coauthored five books and is editor or coeditor of five others. She edited, with John F. Stack Jr., *Courts Crossing Borders: Blurring the Lines of Sovereignty* (2005) and, with Donald W. Jackson and Michael C. Tolley, *Globalizing Justice: Critical Perspectives on Transnational Law and the Cross-Border Migration of Legal Norms* (2010). She has also published multiple articles and book chapters and is currently working on a new book, *Judicial Politics: A Comparative Lens*.

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*For Harry Thomas Antrim (1936–2009),
Leota Lightfoot Matthews (1918–2009),
Margaret Mahoney Stack (1915–2006),
Pamela M. Stack, and Nancy Stack Savoie*

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Introduction

Mary L. Volcansek

As the twenty-first century dawned, the public in the western world awakened to a new and heightened concern about terrorism as a consequence of the Al Qaeda attacks on the United States on September 11, 2001. Efforts to control and eliminate terrorism inevitably present a conundrum for democratic governance and the rule of law. Indeed, plans for a new U.S. embassy in London unveiled in 2010 can serve as a metaphor of the tensions terrorism introduces into a democracy. The structure, described as architecture serving “as a form of camouflage,” appears more like a fort than a welcoming democratic symbol (Ouroussof, 2010). Must democracies become fort-like entities rather than ones fostering freedom and self-actualization? Although the democratic promise is that liberty and security can be reconciled, how that reconciliation is achieved varies over time and by country.

Courts stand as the fulcrum to achieve a balance between protecting national security successfully and preserving democratic governance. Unfortunately, too often repression is the governmental response to violence, but repression and violence can develop a symbiotic relationship, with “each feeding off the other, in a mutually sustaining fashion” (Campbell and Connolly, 2006: 955). Democratic governance requires adherence to the rule of law, and the rule of law intrinsically entails respect for human rights (Tsoukala, 2006: 615). This book brings together analyses of how courts in the United States and eight other jurisdictions have treated governmental responses to terrorist threats and have balanced violence and repression, rights and security. It emphasizes the British and American experiences to provide reference points for how newer democracies have coped with similar dilemmas.

Terrorism is not a new phenomenon. Assassinations, bombings, kidnapping, and hostage-taking as means of political action can be dated

to the ancients, as seen in the tyrannicides of Greece and Rome, the Zealots of Palestine, and the medieval Hashashin of Islam. "The one characteristic common to terrorist acts against states was a belief, usually mistaken, that individual acts of violence could in some way accelerate change and achieve goals that other, more conventional forms of political action could not" (Halliday, 2001: 830). "Political violence" was the commonly used terminology before the events of 2001 and could be applied to domestic terrorism in the United States in the 1960s and 1970s that was sponsored by Students for a Democratic Society, the more violent Weathermen, and other fringe groups (O'Neill, 1971), as well as the bombing of the Oklahoma City federal building in the 1990s.

Other nations have also battled terrorism. Spain was the target of anarchist bombings as early as the 1890s, and "repression threw the movement into the hands of wild men bred by clandestinity" (Carr, 1980: 58). Italians confronted leftist terrorism from the Red Brigades and a less discriminating form from the extreme right throughout the 1960s and 1970s. The Red Brigades' most spectacular feat was the kidnapping and ultimate murder of former Prime Minister Aldo Moro in 1978 (LaPalombara, 1987). ETA in Spain, Direct Action in France, the Irish Republican Army and the Ulster Volunteers in Northern Ireland, and the Baader Meinhof gang in Germany wreaked havoc during those same decades. Israel confronted a variety of Arab and Palestinian terrorist groups for more than forty years. Though not necessarily acting on a political agenda, narco-trafficking cartels and other organized crime groups also have used terror to intimidate both politicians and the populace across several continents. Interestingly, between 1980 and 2003 the largest number of suicide terrorism acts were committed by the Tamil Tigers in Sri Lanka, a secular Marxist and Hindu group (Macgregor et al., 2008).

Ironically, the consequence of most acts of terrorism or political violence was not to achieve their desired ends, but rather to "harden them in the opposite direction" (Halliday, 2001: 830). That hardening usually involved strong actions by the state to identify, locate, and prosecute the perpetrators of terrorist acts. To accomplish those goals, the liberties of all citizens were in some ways restricted to facilitate apprehension of the few discontents. Often the net that the state cast brought in more than a few innocents along with the guilty.

A parallel development during the late twentieth century has been a rise in the power of courts (Tate and Vallinder, 1995). This phenomenon has been labeled the "judicialization" of politics and has been defined

variously, from the pejorative phrase “judicial activism” to the “reliance on courts and judicial means for addressing core moral predicaments, public policy questions and political controversies” (Hirschl, 2008: 121). The term “judicialization” suggests that judicial power is displacing political power (Ferejohn and Pasquino, 2003: 248). Whether judges around the world have usurped political power or politicians have willingly subjected political behavior to judicial control (Grimm, 2004: 26), judicial power is perceived to have increased through the last decades. If, indeed, the “world has witnessed a profound transfer of power from representative institutions to judiciaries” (Hirschl, 2008: 138), then courts should be expected to flex their judicial muscles to preserve rights and block repressive measures adopted in the “War on Terror” that violate the rule of law. Indeed, the International Commission of Jurists declared in 2003 that “states must ensure that any measures taken to combat terrorism must comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law” (ICJ, 2009). Yet, all courts function in a larger political milieu and engage in a peculiar type of dialogue with other political bodies. Those interactions color judges’ views of the potency of the threats and the necessity for governmental actions that may infringe rights.

Part of the judicial and political dilemma of the so-called “War on Terror” derives from the nature of the war. This war does not conform to our ordinary understanding of war; what would constitute a victory is not even clear. Philip Gordon argued that the Cold War represents the closest thing in our experience to the “War on Terror,” because it also was a conflict between ideologies. Instructively, the Cold War was a “long-term, multidimensional struggle against insidious and violent ideologies” (Gordon, 2007: 54), lasting from 1948 until perhaps the collapse of the Berlin Wall in 1989.

Indeed, we may not know when the “War on Terror” ends, any more than we can agree on a precise event or date when the Cold War concluded. In fact, when did this round of virulent terrorism begin? Suicide terrorism can be traced to as early as 1990, with three attacks in Lebanon and Sri Lanka, and the frequency has been accelerating since (“Globalization of Martyrdom,” 2008). The 2001 attacks in the United States may have been the ones that crystallized world attention, but Al Qaeda operatives bombed U.S. embassies in Kenya and Tanzania in 1998 (Van de Walle, 2008). This war has no beginning date and may continue for decades. Therefore, actions of governments and decisions of courts will serve as the precedents governing how security and liberty are balanced

for years to come, and understanding how judges in various places have responded is crucial to setting the parameters for how the war will be waged.

Governments fashion responses to or in anticipation of terrorist attacks, but knowledge about the current enemies is woefully limited. Even though the published work on terrorism is voluminous, the evidence presented is often contradictory. Khan and Azam (2008) concluded that terrorists were most likely to be people with a religious ideology who were young and poor, with little education and living in a large household. Yet others have found only a weak correlation between poverty and terrorism, possibly because poverty serves only as a necessary condition for one to become a terrorist but requires a catalytic agent to motivate one to act (Gupta, 2008). However, the nineteen men who carried out the 9/11 attacks were neither from poor families nor poorly educated, and many of them were citizens of the wealthy nation of Saudi Arabia. Robert Pape's review of 315 so-called martyr videos found that the religious element was minimal and instead that the messages focused on a specific secular and strategic goal, with religion serving merely as a symbol (Macgregor et al., 2008). With so little understanding of who the potential terrorists may be, governments are more inclined to use sledge-hammer approaches to secure their nations because more precise, laser-like tools are not available.

Terrorists reject law and choose means beyond the law. How then can governments through law respond to terrorism and remain true to democratic values and the rule of law? Respect for human dignity lies at the core of all of the international and transnational declarations of rights that have been promulgated since the end of World War II (Chaskalson, 2008: 71). Respect for human dignity also rests at the heart of the rule of law in a democratic society, but there must be incentives for political officials "to honor the rights of citizens, respect the outcome of elections and refrain from using force to settle conflicts" (Weingast, 2003: 110). Only two checks on official actions exist in democracies – elections and judiciaries – and the two may favor different outcomes. In an age of terrorism, political officials are caught in a bind between providing the physical security demanded by the electorate and respecting civil liberties as might be expected by the courts. Even in normal times, however, rights and security must be balanced. Are rights always the trump cards, and are constitutions and the rights they assert a suicide pact (Waldron, 2003)? Cannot democratic government exercise democratic self-defense? The answers that the United States and other nations have made to these

questions are the subject of this book. How have courts, as the supposed arbiters, balanced the rights and liberties of citizens against governmental assertions that some reduction in liberties lies at the base of strategies to combat terrorism successfully and prevent future attacks?

What seemingly distinguishes the 9/11 attacks and those that followed are the international character of the terrorists and their ability to inflict significant human and material damage in the United States, in Bali, in Madrid, in London, in Egypt, and elsewhere, combined with the rhetoric that has accompanied governmental efforts to thwart future attacks. The rhetoric does not intend to play only to domestic audiences around election times. Indeed, the choice of the term “war” to describe these governmental efforts against terrorism carries implications beyond mere domestic partisan political gains. War, whether declared against terrorism or drugs, implies the “need for implacable action against a serious, potentially lethal enemy” (Provine, 2007: 117). It evokes the necessity of an all-encompassing effort and of personal sacrifice – sometimes of rights and liberties – to protect national values and ways of life.

The enemy in the “War on Terror” is also an unlikely one, an idea. “Terrorists have crafted and disseminated a compelling narrative that resonates with audiences around the world, expanding and energizing their ranks,” and “[m]ilitary force alone will never beat this narrative” (Macgregor et al., 2008: 6). Yet, attempts at conciliation with terrorism have typically been followed by increased terrorist activity (Bueno de Mesquita, 2005). Crafting security measures to contain a virulent form of international, loosely linked networks of terrorists and simultaneously to conform to democratic values and the rule of law presents governments around the world with unprecedented challenges. Judges serve as the guardians, often the only ones, charged with preserving democracy and upholding the rule of law.

The contributions to this volume raise a number of recurring themes. When does the exception become the norm? How can the domestic be distinguished from the international? When does governmental repression aimed at stopping terrorism develop a symbiotic relationship with the terrorism that it aims to defeat? Is politics always primary to the rule of law? Do courts regularly defer to executive strategies to protect national security? How can state secrets impede the protection of rights and foster executive impunity? To what extent do international and transnational treaties define judicial options and responses? Must security always prevail over liberty or the reverse? How and when do international treaties designed to protect rights and regulate treatment in war become absorbed