

Too Much of a Good Thing

The contested balance of civil liberties vs. police power was never more apparent than on September 11.

It appears the FBI discovered at least one U.S.-based thread of the Al Qaeda organization just four weeks before the attacks on the World Trade Center and the Pentagon. But its refusal to look at what was discovered not because of incompetence, or lack of funding, or bureaucratic snafus, but because of the overzealous enforcement of civil liberties laws.

The thread was Zacarias Moussaoui, an Algerian with known ties to bin Laden's Al Qaeda terrorist group. He came to their notice because employees at a flight school in Eagan, MN, were alarmed by his words and actions, so they called the local FBI, who arrested him. They subsequently asked for government permission to check his phone records and search his computer.

They were denied permission principally because they lacked "probable cause," which is jargon for evidence that the suspect has already committed a crime, or is about to commit a crime. Such evidence is required under the wiretap laws, including the criminal wiretap law of 1968, and the Foreign Intelligence and Surveil-

lance Act (FISA) of 1978.

But in Moussaoui's case, there was no such probable cause evidence. Moreover, there was not enough evidence to meet another requirement of the FISA law—that the suspect be an "agent of a



foreign power." Sure, various terrorists had talked about using airlines as flying bombs before, but nothing had ever happened. Sure, French intelligence reported that

Moussaoui was connected to terrorism, but flying lessons are legal, right? Nor were these issues offset by the possibility he was planning a very destructive terrorist attack because the laws do not consider the scale of the suspected crime.

For a few weeks, investigators thought Moussaoui was the missing fifth hijacker on Flight 93, but later concluded he was intended to play a part in a second wave of attacks. His arrest may have helped prevent some of those attacks, but investigators do not really know because Moussaoui has not cooperated while in jail. But if the FBI and Justice Department had been aggressive enough before Sept. 11, and if the agents had been allowed to check the phone records or tap the phone calls, maybe, just maybe, they would have beefed up air security before the attacks, and maybe thousands of lives would not have been lost, maybe U.S. forces would not be waging war in Afghanistan, and maybe Congress would not have passed a law expanding police powers.

But this was not the first time the FBI had been hobbled by

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enforcement of civil liberties laws. Before his arrest in 1999, FBI officials were denied permission to search the computer of suspected spy Wen Ho Lee, even though the civil liberties enforcers knew the computer was owned by the government, kept in a government building, used for government work, and animated by government software. Thus a critical chance to monitor Lee at work was lost—and thus was created a pseudo-scandal about overzealous prosecutors. In fact, Wen Ho Lee was suspected of giving China the instructions for building small, destructive nuclear weapons. Although such weapons can destroy cities and a million lives in an instant, Wen Ho Lee's privacy remained a higher priority.

It's pretty clear to me and many others the laws intended to restrict police powers were made too tight during the 1970s. It was a time when the U.S. left was in outrage mode over presidents—both Democratic and Republican—who monitored political opponents for political reasons. JFK bugged many, Nixon bugged many others, and so the young Democratic legislators in the 1960s and 1970s publicly skewered the CIA and FBI, slashed their budgets, dragged some to court, and generally restrained

them with restrictive new laws.

The CIA and FBI officials went into cringe mode. The CIA slashed its corps of undercover agents and both agencies changed their internal culture to avoid any risks of public criticism.

This political, cultural, and legal morass was worsened by additional factors. For example, the FBI loves to prosecute perps. Success in court is what gets FBI agents promoted and praised. Justice Department prosecutors also love guilty verdicts. Neither wants to mess up tidy trials with tales of shadowy terrorists in far-distant lands that would help defense lawyers make the claim their clients are being railroaded while the responsible masterminds go free. Moreover, former President Clinton ignored the terrorist threat. He was focused on avoiding a war with Iraq, nationalizing the nation's health care, and eluding prosecution for his violation of a perjury law that he in fact signed following the failed rape prosecution of William Kennedy Smith in 1991.

Throughout the 1990s, the FBI and Justice Department repeatedly pushed aside evidence that suggested a growing terrorist threat, most remarkably in the 1993 bombing attack on the Twin Towers. In that trial, the

prosecutor focused his fire on the fall guys—one of whom returned several times to the truck-rental company to get his deposit back because he needed the deposit to flee the country. That focus allowed the international aspects—and especially the two main bomb-plotters—to escape attention. One of the plotters still lives in Iraq where secret police likely provided the other plotter—known as Ramzi Yousef—with several alternative identities. Yousef was eventually caught in Pakistan and sent to a U.S. prison, but we still don't know his real name or background.

Other laws make the situation even worse. The FBI's Grand Jury information can only be shared with intelligence officials if they are invited by the prosecutor to be part of the investigative team. For the reasons described here, prosecutors don't invite CIA troublemakers into grand jury rooms. Another set of laws hinders consideration of intelligence gathered overseas whenever a domestic wiretap request is being weighed for approval. This restriction was designed to stop use in U.S. courts of evidence gathered abroad by devious and underhanded intelligence agencies.

The intelligence agencies are also reluctant to share information with the FBI, because they rightly fear prosecutors will use that information in public trials, exposing the sources and methods to immediate elimination by the foreign terrorists. Moreover, if an FBI or a CIA agent were to informally swap vital information or to creatively interpret wiretap laws, they face condemnation from their bosses and perhaps a personal-injury lawsuit from the aggrieved parties.

Thus these various laws did not merely create legal barriers to information sharing, they created bureaucratic incentives to prevent information sharing, and eventually they created a cultural hostility toward information sharing or aggressive investigations—an outcome that was strongly desired by civil libertarians.

From a historical viewpoint, one can easily explain the civil libertarians' errors. They were determined to prevent a repetition of what they saw when they were young and part of the dramatic anti-Vietnam War protests or of the Clinton corruptions of the 1990s. Like grumpy old generals, the civil libertarians were still fighting the last war against Hoover, Nixon, and Clinton while the terrorists gradually acquired the power to massacre countless people. These civil libertarians were so focused on their day-to-day fight against expanded police powers that their perspective was utterly narrowed.

Indeed, many foresaw a day when terrorists would strike a great blow against the U.S., but instead of worrying about the human costs of the attack and subsequent war, they worried about ensuring restrictions on encryption, easier wiretaps, or broader police powers. (The vast majority of politicians and pundits and reporters, including myself, also failed to comprehend the approaching disaster).

Congress has now passed a new anti-terror law that expands police powers. Civil libertarians say it goes too far. Others say it does not go far enough. For example, they say it fails to change the probable cause requirement, or the civil-liberties-first culture they see firmly rooted in the FBI and Justice Department. We won't know who is right until the newly energized FBI and CIA either destroy or miss terrorist groups, and either minimize abuses or exploit their new powers for illegitimate goals. But we do know that overzealous enforcement of civil liberties laws will eventually exact a price—including crimes and expanded police powers. ■

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