REACTIONS TO TERRORISM AFTER SEPTEMBER 11 - NEW RULES ON IMMIGRATION IN US AND EUROPE: THE ILLUSION OF CHANGE AND CONVERGENCE

Martin Schain
Department of Politics, New York University
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In reaction to security concerns following the events of September 11, 2001, it is generally assumed that new legislative initiatives to combat international terror have had a deleterious effect on immigrants and immigration on both sides of the Atlantic. In this paper, I will examine these assumptions, first by examining actual rules in place at the end of 2001, and then changes in these rules during the period since then in Britain, France and the United States.

As in many countries in Europe, there had been a long history of terrorist incidents and attacks in both France and Britain for decades before the attacks of September 11, 2001. These attacks had begun to accelerate in the late 1960s as a revolutionary challenge in domestic conflict, often supported by international European networks. By the 1980s, terrorist incidents with roots in conflicts in other parts of the world began to increase in France, as well as in other parts of Europe. It was not until a decade later, however, that more recent incidents of *jihadist* terrorism brought together new patterns of domestic conflict involving immigrant communities with conflicts and revolutionary challenges in other parts of the world.[1]

I have found that the reactions to patterns of terrorism since 2001 in the United States and Europe have been generally shaped by the ways that each country dealt with very different patterns of terrorism before 2001. In Britain, there has been a focus on legislation that was originally devised to deal with the IRA after 1974, and then refashioned to deal with broader terrorist threats even before 2001. The attack on the London transport system in July 2005 provoked new legislation, but did not alter the basic approach that had evolved until then.

In France, policy, and the organizational structure to pursue that policy, changed dramatically during the 1980s, and has not been altered much since then. Although rooted in legislation, the French approach has been quite different from that of the British. It has been organized around a group of investigating judges who have been granted broad discretionary

powers of investigation, as well as power to impose penalties under law.

The reaction in the United States, constructed in the 1990s, was embedded in a long tradition of the way government has dealt with war powers– powers that do not derive from legislation, but that have been exercised directly by the president, with a claim that they are based on the president's constitutional prerogatives as commander-in-chief. As in the past, most such actions have been ultimately tested in the courts, and have sometimes been reversed by court decisions after the fact. Compared with Britain and France, the legislative initiatives to deal with terrorism have been relatively modest, with the strange exception of the passage of the Detainee Treatment Bill in September 2006. This legislation, which is generally portrayed as a Democratic victory that constrains presidential war powers, in fact affirms prior presidential initiatives, and places them beyond the reach of court review.[2]

In general, the "war on terrorism" in Europe has been fought with draconian legislation that has legally compromised what Americans call civil liberties in ways that American legislation only began to pursue after the attacks of 2001. These compromises in civil liberties were made long before 2001, but the application of pre-2001 legislation has been reoriented and extended since then. In the United States, on the other hand, executive actions, only some of which have been successfully challenged in the courts, have had a similar effect. Unlike the United States, for France and Britain 2001 does not constitute a sea-change, but rather a continuation of a process through which the balance between liberty and security has been changing in fits and starts for some time.

Some of what I am saying will be covered in other chapters in this volume. My focus in this chapter, however, will be on the importance of these trends for immigration policy. On one hand, despite concerns about security, immigration policy has become more expansive

throughout Europe and the United States in the years since 2001. France, Britain and other European countries have moved their focus away from the exclusionary "0" immigration policies of the 1990s, and have begun to devise ways of developing more normalized policies of immigration. On the other hand, the important anti-terrorism actions of governments on both sides of the Atlantic have increasingly focused on immigrant populations, particularly those of Muslim origin. This pattern has accelerated as attention has shifted from external threats of terrorism, to internal threats based among immigrant populations– citizens, legal residents and illegal aliens. Thus, increasingly, anti-terrorism actions are also actions that inevitably implicate immigrant populations.

Nevertheless, in general, there has not been a public reaction against immigrants. Indeed, I will present data from recent studies that find that immigrant population have generally become more, and not less accepted in Europe and the United States. In addition, although there have certainly been political reactions to immigration in some European countries-- the Netherlands, Denmark and Switzerland—among mass publics in most of Europe and the United States, the political priority of immigration is relatively low, although there has been a growing concern about illegal immigration on both sides of the Atlantic. First, let us examine policy and policy change in Britain, France and the United States, and then we will look at public opinion.

Britain

In many ways the British reaction is at once the most severe, and the least changed from the pre-2001 pattern. The wave of sectarian violence that swept through Britain in 1974 provoked legislative initiatives that serve as a baseline for understanding the British reaction to terrorism.

Baseline

The primary heritage of the "troubles" in Northern Ireland is an accumulation of broad powers of arrest and detention, powers that apply to all residents of the UK. In reaction to a wave of IRA violence throughout 1974, the Labour government rushed through Parliament the *Prevention of Terrorism Act* soon after the October elections.[3] The new Act:

1. gave the Home Secretary the power to issue a list of proscribed organizations, and applied penalties of prison and fines to anyone belonging to these organizations, or supporting them with financial and other means. It also outlawed the wearing of dress and symbols that could be linked to these organizations.
2. gave the police powers to detain people for up to seven days– if they judged them to be a threat– without an arrest warrant and without any charge being brought against them.
3. allowed the authorities to 'exclude' people from entering Britain, including citizens of the UK who have ordinarily resided outside of the territory of the UK and its colonies, and residents who had not ordinarily resided in the UK for the previous 20 years.

The legislation applied to citizens as well as residents, but was far more constraining for non-citizens for purposes of exclusion and expulsion. Although the only proscribed organization initially named under the act was the IRA, the list was expanded to other militant organizations engaged in violent struggle, including those on the loyalist side.

Initially viewed as a temporary measure, the *Prevention of Terrorism Act* was renewed each year and modified in 1978, 1984 and 1989. Most of its major provisions were finally incorporated into the *Terrorism Act of 2000, (*although some of the exclusion and internment without trial provisions were dropped, at least until 2001). Critics of the legislation found that its provision were used mainly as a means of monitoring the movements of Irish Catholics,

without having to go through the formalities of applying for warrants and bringing charges. Indeed, Home Office reports tell a story of several hundred people stopped and examined each year; generally, never more than 2 were ultimately charged. Although the number of those actually detained each year fell during the decade of the 1990s, the number of those examined for suspected involvement with international terrorism grew each year, indicating a shift away from the Irish problem.[4]

The Terrorism Act of 2000 made this more explicit. It extended police stop and frisk powers, and elaborated a list of 14 organizations involved in the struggle for Ireland. However, at the end of February 2001, Home Secretary Jack Straw requested that 21 "international groups" be added to the list, and by September, there were 25 of these on the proscribed organizations list, 18 of which were Islamic.[5]

Therefore, a year before the attack on the World Trade Center, British policy– and the tools that had been developed during the long IRA emergency– had been reoriented towards trans-national terrorism in ways that generalized extensive police powers that restricted several aspects of civil liberties: freedom of movement and freedom of association. Perhaps more important, with the legislation in 2000, the temporary/emergency approach to terrorism was dropped entirely. The altered approach is evident from the report on the operation of the act in 2001, which indicated that only 12 of the30 arrests under the act, between January and the end of August 2001 were related to Irish terrorism.[6] Those more frequently targeted were immigrant residents and ethnic British citizens of immigrant families. The measures in place by 2000 were so extensive by European standards, that in a variety of reports issued by European and international organizations, Britain ranked as one of the most repressive countries in Europe.[7]

Changes

After the attacks in the United States, the focus was turned more fully on the question of trans-national movements, and more precisely on immigration and asylum. In fact the *Anti-Terrorism, Crime and Security Emergency Act 2001* was not a sharp break with the previous legislation. The changes, however, are important because of their impact on immigrants and immigration.

A key consequence of the legislation was to further separate citizens from foreign residents, with the focus was on foreign residents. As a continuation of the pattern begun in the 1974 legislation, foreign residents who were dubbed "suspected terrorists" could be detained without trial (or appeal), or– where the option existed– could be deported. That option depended on whether the Home Office decided that they may be subject to actions by their "home" government that would be contrary to Article 3 of the European Convention on Human Rights. If deportation was not possible, foreign residents could now be jailed indefinitely. This required that Britain opt out of Article 5 of the ECHR, which prohibits imprisonment without trial, which in turn required Britain to declare a "state of emergency," permitted by the treaty in case of public emergency or war. In fact, Britain was the only signatory of the treaty to opt out.

In the long run, the opt-out of Article 5 proved to be a crucial obstacle to the enforcement of the 2001 legislation. In December 2004, the British High Court– the Law Lords– found that the law was a breach of fundamental human rights, essentially rejecting the opt-out that had been written into the law.[8] This supported a previous decision that found that the treatment of foreign terror suspects was discriminatory because the law applied only to people who were not British citizens (i.e. subject to immigration control). At the time of the ruling 12 terror suspects were being held in Britain without being charged (and had been held for three years).

To remedy the situation, the government proposed new legislation that finally replaced indefinite detention with limited (but renewable) judicially controlled detention– under "control orders," a form of house arrest– to citizens and foreigners alike. *The Prevention of Terrorism Act 2005* was meant to correct the Act of 2001, therefore, by making what was unacceptable against foreigners applicable to all suspects.[9]

The most recent legislation, The Prevention of Terrorism Act 2006, was passed in the aftermath of the July 2005 attacks in London. The Act creates a number of new offences, and increased police powers and the power of the Home Secretary to proscribe new groups.. Once brought into force, it expanded the number of criminal offense to include what are deemed as acts preparatory to terrorism: incitement or encouragement of terrorism, the dissemination of terrorist publications, and presence where terrorist training is taking place. It also extended the powers of the police to search property, to detain suspects for up to 28 days (though periods of more than two days must be approved by a judicial authority). Finally, the legislation extended the proscription regime to include the power to proscribe groups that glorify terrorism.

After more than 30 years of anti-terrorist legislation, the legal basis for arrest, detention, deportation and proscription has been expanded cumulatively. To this, we must add the discretionary powers attributed both to the Home Office and to the police themselves. All in all, one comparative study of anti-terror laws and civil liberties found that, on an 8-point scale,

> Britain leads the 'scoreboard' with legislation introduced in 7 out of the 8 categories surveyed and a law that does not expire, followed by Germany with 5 out of 8 categories affected and a law that expires very late and for the provisions introduced relating to the power of the secret services. Finally, there is France with a score of only 3 out of 8 categories affected and a law that expires very late, two years after it has been invoked.[10]

This evaluation is based on the assumption that the legislation passed since 2001 was a new

departure. In fact, the judgment could be harsher if we consider the long accumulation of legislation since 1974.

France

Baseline

France developed an approach to international terrorism far earlier than Britain, but only after a series of attacks in the early 1980s indicated that the earlier policy– what has been called the "sanctuary doctrine"– was producing more violence than security. French authorities had concentrated their considerable efforts on combating home-grown terrorism of the anarchist left, Action Directe, as well as regional separatist groups in Brittany, the Basque area and– above all– in Corsica. The French counter-espionage service (the SDECE) and the agency for internal surveillance (the DST) had long experience in dealing with internal terrorism eminating from the Algerian war of independence to Action Directe to Corsica– but had no organizational means for dealing with international terrorism. Instead,

> [the] sanctuary doctrine attempted to isolate the country from international terrorism by creating within France a sanctuary both for and from international terrorists. This policy required making French policy and soil as neutral as possible with respect to the issues that motivated international terrorism... [which] could operate with impunity, as long as they did not perpetrate acts of terrorism within France or against French interests.[11]

Jeremy Shapiro and Bénédicte Suzan argue that the policy was relatively successful, at least until the early 1980s, in part because it presumed that international terrorism was a foreign-policy problem, rather than a problem for law enforcement. The presumption was that the prevention of terrorism, at its core, depended on diplomacy. Increasingly, however, this approach seemed to convey a sense of weakness, and invited conflicting countries and groups in

the Middle East to play out their violent conflicts in the streets of Paris. Finally, 14 attacks in 1986, 12 of them by one previously unknown group, provoked a change in policy, and a major reorganization of the approach to terrorism.[12]

The Law Relative to the Struggle Against Terrorism of 1986 refocused the state efforts away from the Ministry of Foreign Affairs, and increased the administrative capabilities of the Ministries of the Interior and Justice– the police and judicial authorities– that effectively coordinated the various intelligence and police agencies. The State Security Court, a secret military court that had been established during the Gaullist period to fight against the Secret Army Organization had been abandoned after the Left came to power in 1981, and never replaced. Now, under the new legislation, the fight against terrorism was centralized in a core group in Paris of *juges d'instruction* (investigating magistrates), who then took both the judicial and investigative lead in the French struggle with terrorism for the next 20 years.

Under legislation that was passed in 1986, 1995 and 1996, the investigating magistrates have gained tools that are similar to, if less draconian than, those developed at the same time in Britain. Thus, ordinary law permits stop and frisk, as well as detention without charge for as long as 4 days in terror investigations. In addition, *juges d'instruction* can order preventive detention for long periods of time, once suspects are under judicial investigation. In the 1994 roundup (see below), some defendants spent up to 4 years in prison before their trial in 1998.[13]

These police/judicial powers work in much the same way that they do in Britain, except that they are generally under the authority of a judge. During the worst of the Algerian civil war (1992-2000), played out once again in the streets of Paris, there were major roundups of Algerians in France in 1993, 1994, 1995 and 1998. In each case, the roundups far exceeded the number finally held over for trial (with the exception of November 8, 1994, when 78 of the 93

arrested were brought to trial, of which 51 were cleared).[14] The 1996 legislation created the notion of "conspiracy to commit terrorism" as a crime, which gave the investigating magistrates considerable power to prevent acts from ever occurring.

The often cited virtues of this system are its specialization, centralization, flexibility, coordination and political independence. Its virtues, however, are also its problems, since there is no political oversight, and little oversight within the judicial system. Key magistrates, such as Jean-Louis Bruguière [15] make decisions on investigation and police action that are difficult to question. On the other hand, since the attacks on the London underground, British Home Secretary Charles Clarke has stated a number of times that a French-style system in Britain could be more effective in detaining suspects while a case is being constructed against them.[16]

Changes

By 2001, the French system for dealing with terrorism was firmly set into place, and new legislation, the *Law on Daily Security*, which was passed in November 2001, changed relatively little. The ability of the police to stop and search was strengthened, at least in terms of the places where this could take place, and the kinds of police able to carry out such security checks (private police, for example). September 11, however, did provide an opportunity– or an opening– to augment a campaign already underway against crime in France, and the police were given new powers to deal with petty crime. Police prerogatives were then reinforced with more specific legislation passed each year between 2001 and 2004.

While there have been few legislative changes since September 11, as in Britain, the focus of the system set in place after 1986 has shifted some focus towards internal aspects of terrorism. The dogged efforts of the Ministry of the Interior to develop relations with the Islamic community with the establishment of the CFCM, and the sometimes contradictory efforts of

Interior Minister, Nicholas Sarkozy, are all indications of the importance of the European context of Islam. Olivier Roy has emphasized: "So what is at stake is no longer immigrants, because there are no more immigrants. The guys we are speaking about are citizens."[17] But there are immigrant or ethnic communities.

Although the judicialization of the struggle against terrorism has no direct implications for immigration, the effectiveness of the system, combined with more generally enhanced policy powers, inevitably intrudes on immigrant communities and on the daily life of immigrants who walk the streets and ride the metro. French police have poor training in "community relations," and little effort has been made to make this larger police presence more tolerable, as recent studies have pointed out.[18] In one reaction to the attacks in London, the French press pointed out that some 15 groups under policy surveillance "are somewhere between petty criminality and the radical Islamic movement".[19] Clearly all of these groups relate to French immigrant communities.

The United States

How, then, can we compare what has happened in Britain and France with what has happened in the United States? The US case, is at once the most radical in terms of the evolution of executive power, relatively unchecked by either legislative or judicial constraint. It is relatively less radical in terms of the evolution of legislated powers, either with regard to the struggle against terrorism, or with regard to immigration.

Baseline

Prior to the passage of the Patriot Act in 2001, the US approach to domestic terrorism was defined by the reaction to the bombing of the World Trade Center in New York in 1993,

which in turn extended changes that had taken place a decade before. Both the FBI and CIA were reorganized, but domestic terrorism never became a priority. Although the counter-terrorism budget of the FBI tripled in the mid-1990s, spending remained constant between 1998 and 2001. "In 2000, there were still twice as many agents devoted to drug enforcement as to counter-terrorism." For the CIA, counter-terrorism appears to have become a priority by 1997, but the director testified that even by 2004 the agency was still five years away from being able to play a significant role in this effort.[20] Finally, the concern about terrorism had only minimal effect on immigrant entry into the United States. Legislation in 1996 authorized the use of classified information in removal hearings conducted by the Immigration and Naturalization Service, which had, however, an impact on only a few cases.[21]

Before 2001, US law did not permit the kind of preventive detention permitted under British and French law (if we do not consider the problem of bail), or most of the intrusive police powers permitted under French law; and– as we know from the 9/11 Commission Report– terrorist activity within the United States was treated as criminal activity.[22] US law did permit the effective outlawing of certain organizations (under the McCarran-Walter Act of 1952) and the FBI had a history of infiltrating domestic organizations that were labeled as "subversive". Nevertheless, the 9/11 Commission Report makes clear that, by the 1990s, these powers had been curtailed by legislation, as well as by court decisions.

Changes

The primary changes in the United States after the attacks of 9/11 have been legislative and organizational. However, the application of executive powers to the war on terrorism, to construct a system that is largely outside of the legislative purview, has been more far-reaching. One result has been the activation of judicial oversight in areas only rarely touched before (the

military tribunals at Guantanamo Bay), and judicial fine-tuning of the rights of United States citizens accused of terrorist activities.

Certainly, the Patriot Act, first passed on October 26, 2001, and renewed in 2006, is the most visible change since 9/11.[23] Although the act enhances powers of the government and law enforcement authorities, it also constrains some of their worst impulses under law. For example, the law required that the hundreds of detainees (mostly immigrants), who were being held secretly without charges or hearings in October 2001, be released or charged. The act also granted special protection against deportation to non-citizen relatives of those killed or who had lost jobs in the attacks.

Nevertheless, the Patriot Act incorporates into American law many of the anti-civil-libertarian principles that have existed in European law for some time. The provisions granting enhanced surveillance powers to the FBI and other government agents are unchecked by either transparency or accountability. Wiretapping and searches, for example, can now be pursued without any requirement (previously imposed under Foreign Intelligence Surveillance Act– FISA– standards) that these actions are primarily for intelligence against foreign conspiracies, rather than criminal investigatory purposes. In effect, this vastly broadens the basis for surveillance. In addition, the act either enhances or provides new tools for search warrants, the seizure of records, and the surveillance of bank, telephone and internet records (through so-called National Security Letters) in preliminary investigations.[24]

The act is not directed specifically against aliens or immigrants but, nevertheless, specifically provides for non-citizens to be detained for up to seven days. If the government states its intention to deport, detention can be extended up to six months renewable. Indeed, most prominent in the claims by Attorney-General John Ashcroft in May of 2003, was that 478

people had been deported and 211 criminal charges had been legally brought since October 2001.

On the other hand, a report by the NYU Center on Law and Security indicates that these claims may indicate less effective police work than they imply. Sweeping surveillance under the Patriot Act has produced very few arrests and fewer convictions. Thus, the report notes that:

> FISA warrants have mushroomed at an alarming rate; and the public sees only the tip of the iceberg, since FISA warrants and their fruits never see the light of day unless they are used in a criminal prosecution– which represents only an infinitesimal fraction of the total number of FISA wiretaps and searches.[25]

Among the 211 criminal charges claimed by Ashcroft, the NYU/CLS study documents 120 cases. Of the 84 people arrested on charges of terrorism between September 2001 and October 2004, 54 have been indicted for terrorism and/or support of terrorism, of which 27 have been convicted or accepted a plea (eleven have been convicted). Only one person has been convicted of a direct act of terrorism (Richard Reid), and only 5% (18) of the charges brought before the courts have been for direct acts of terrorism.[26]

However, the alternative– perhaps the more serious– effort of the government to combat terrorism has been an extra-legal, ad hoc campaign, under cover of presidential war power, with results which have been dubious. The Patriot Act specifically does not give the government the authority to incarcerate "enemy combatants" incommunicado, to detain illegal immigrants without filing charges, or to impose secrecy on the detention and hearings in immigration cases.[27] Although citizens, in principle, have greater claims on the legal system than non-citizens, there has been no consistency in the treatment of either. Thus, an American citizen, John Walker Lindh, who was captured in Afghanistan as an enemy combatant, was charged in federal court and given a plea-bargain, while the government has simply detained two other

citizens, Yasser Esam Hamdi and Jose Padilla as enemy combatants, without filing charges.[28] On the other hand, Richard Reid, a British citizen, was convicted, and Zacarias Moussaoui, a French citizen, was sentenced after pleading guilty in Federal court on terrorism charges.

As for the impact on immigration and immigrant communities, it is clear from the arrest pattern detailed in the NYU/CLS study that the focus of attention is on Muslim immigrant communities, and, in general, increased detention and deportation has created hardships for undocumented aliens. Although the new legislation does not appear to be harsher than legislation already in place in France and Britain, it makes life more difficult for immigrants and aliens, not only because of new rules, but because of the new means of administering both the new rules and the old. Thus the follow-up Intelligence Reform Act of 2004:

> ...is principally concerned with the reorganization of the intelligence community and the creation of a new "czar," the director of national intelligence, to oversee the intelligence operations of the Central Intelligence Agency, the Pentagon, and other agencies. In addition, however, it modifies many of the laws and regulations identified with the Patriot Act. It expands the scope of foreign intelligence surveillance, and strengthens the power to detain suspected terrorists prior to trial. It sets minimum federal standards for personal identity documents and attempts to bolster their security.[29]

The most high profile detentions have included those of two 16-year old girls, neither of whom was ever charged with a crime; one of whom was released to her home, the other of whom was deported to Bangladesh. From the perspective of new rules, however, all of these actions were undertaken on the basis of existing rules, enforced with greater vigor.[30] Thus, legal immigrants in the US after Sept 11, from Arab and other Islamic countries, were required to register with the INS. Failure to register carried with it the danger of deportation.

As in Britain and France, all of these additional powers and administrative personnel create additional hardships for immigrant communities. Although one target of legislation,

reorganization and ad hoc action has been undocumented aliens, the impact inevitably includes immigrants and even citizens, many of whom may be in the same family.

The American approach to combating terrorism in the post-9/11 period has therefore focused on means that have often been called extra-legal, but which the government has seen as a theory of expanded executive powers. In effect the executive has been not just been using executive powers that have developed and been legally sanctioned over the years, but has been testing new power, not yet sanctioned. As Valerie Caprioni, the General Counsel of the FBI noted at a seminar at New York University, in November 2005:

> I think that anyone who reads the papers recognizes that this president in particular has a very broad view of executive power, and what is within his power as the executive, and as the authority to act unilaterally. And you may quarrel with that, there may be some people here who think that the federalist society view of the power of the executive is wrong and they are misleading the law, but there is nevertheless a legal structure for that, where there are lawyers at the Department of Justice and the Office of Legal Counsel whose job it is to opine whether particular things that the executive wishes to do are lawful or not, whether they are within his constitutional power as the commander in chief and as the executive.
>
> So we operate every bit as much within the parameters of the law when we are operating pursuant to an executive order that has been blessed by the Department of Justice's Office of Legal Counsel as when we are acting pursuant to a statute that has been passed by the United States Congress and signed by the President. So we stay within the legal parameters though those legal parameters can shift between being legal parameters that have been passed by Congress, and ones where we are operating pursuant to executive order. But it is no less legal from our perspective. [31]

In general, the anti-terrorism actions of the United States pursuant to law have touched relatively few people (as is indeed the case in Europe). However, the actions that have been undertaken under cover of executive power have touched many thousands of people, if we consider the scope of the phone warrant-less phone taps first reported by the New York Times on

December 16, 2005. Subsequent reports referred to thousands "perhaps millions" of phone lines that were involved.[32]

President Bush's expansive use of executive power has been checked by two notable decisions by the United States Supreme Court, notably: Hamdi v Rumsfeld, in July 2004 and Hamdan v Rumsfeld in June 2006. Each of these decisions limited the prerogative of the president to authorize the unlimited detention of American citizens, and the Guantanamo case, decided together with the Hamdan case, also applied similar standards to non-citizens being held at Guantanamo Bay.[33] Nevertheless, although these court decisions were important landmarks, their impact has been to shape, rather than seriously constrain presidential power in this area.

The president was forced to return to congress to request authorization to do what he was already doing. The result was the Detainee Treatment Act in 2006, which gave congressional authorization to detention. Most newspaper reports in the United States focused on the challenge posed by a coalition of some Republicans and a majority of Democrats to the treatment of prisoners held at the American base in Guantanamo Bay. The Supreme Court, in Hamdan vs. Rumsfeld in June 2006, had ruled that the military commissions organized under presidential authority to try these prisoners were invalid without congressional authorization. The European press, and a few American commentators, noted the affirmation of expanded presidential power.

The president could now authorize under law the identification of who is an enemy combatant (under a broadened definition), and their indefinite imprisonment outside of the United States. The legislation does force the president to limit interrogation techniques, but prevents Guantanamo prisoners from appealing to the courts. Of course the new law also reinstates the military commissions.[34] Of course the new legislation will be challenged in the courts. However, it now appears that, at least for the moment, congressional action that was

mandated by the Supreme Court has strengthened the ability of the president to act without being constrained by the courts in the future.

We find a similar pattern emerging in the case of the NSA warrant-less searches that were authorized by the president in 2001. In August 2006, a federal district court declared that this surveillance, ordered by the president and undertaken by the National Security Agency, was unconstitutional, but the case has been appealed, and is now being considered by federal appeals courts.[35] A month later the House of Representatives passed the Electronic Surveillance Modernization Act, and that bill has now has been passed to the U.S. Senate where three other competing, mutually-exclusive, bills are also being considered. For purposes of this analysis, what they all have in common is that, in the name of constraining presidential prerogatives, each would broaden the statutory authorization for electronic surveillance, while still subjecting it to some restrictions.

Much of this debate was transformed, however, when Attorney General Alberto Gonzales informed U.S. Senate leaders, by letter on January 17, 2007, that the program would not be reauthorized by the president, and "Any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."[36] The letter implies a compromise, but one that conforms with the standards approved by the Patriot Act in 2006. Nevertheless, the president appears to have emerged with reinforced prerogatives in the area of surveillance, powers that may yet be sanctioned by legislation.

New Immigration Departures

Nevertheless, this is only part of the story of immigration since 9/11. In Britain, France

and the United States, the tendency since 2001 has been towards immigration expansion, rather than exclusion.

In Britain, there have been new initiatives to increase at least some kinds of immigration. In 2002, the government launched a broader program to recruit skilled workers through the Highly Skilled Migrant Program based on a Canadian-style point system. Individuals who accumulate sufficient points, by scoring well on such criteria as educational qualifications, work experience and professional accomplishment are then free to look for a job, and are thus free to enter the UK without a guarantee of employment.[37] This approach has quietly shifted the initiative for labor migration from the state to employers. The Economist, looking back on immigration policy after 2000, concluded that:

> Over the past five years, the government has quietly liberalized the work-permit system: businesses, which used to have a tough time getting permits for foreigners, now find that applications go though pretty much on the nod. By and large, it is the employers who determine what kind of immigrants get jobs. They ask for permits, and the government responds, usually positively.[38]

In France, there was new cooperation among the G5 interior ministers (France, Germany, Britain, Spain and Italy) at the European level, to transport undocumented aliens out of France and Europe on cooperatively sponsored charter planes.[39] At the same time, there are proposals emanating from the Ministry of the Interior for developing a program "to determine the need for immigrant workers by professions categories, and a new organization of different services related to immigration."[40] These proposals have resulted in the first wide-ranging debate on immigration policy since 1997.

Finally, in the United States, the Department of Homeland Security has strengthened its control of the borders, and has supported a national standard for drivers' licenses that would

approximate an identity card for immigrants. On the other hand, there are contentious discussions within the Bush administration and Congress about a program that would include both amnesty (that would benefit mostly undocumented Hispanic aliens) and an expanded guest-worker program.[41] Perhaps what is most notable about these proposals is that, like those in Britain and France, they imply increased, rather than reduced immigration.

Attitudes towards Immigrants

The other part of the story is that attitudes towards immigration have evolved in unexpected ways. Two patterns seem to have emerged since 2001: on one hand, attitudes towards *immigrants* seem to have either improved, or not deteriorated in ways that might have been expected. In general, public opinion in many ways favorable to immigrants—and to legal immigration—has increased. For example, even as political concern about immigration has increased markedly in the United States during the past six months, a series of surveys also indicate strong support (55-60 percent) to permit illegal immigrants who are working in the United States to stay.[42] Furthermore, at least for the United States, public opinion has grown more, rather than less, favorable in some areas presumed to be affected by the current concern about illegal immigration.

Table 1
Immigration from third world* seen as a "good" or "bad" thing, 2002 compared with 2005

	Good thing		**Bad thing**	
	2002	**2005**	**2002**	**2005**
US	67.4%	60%	22.6%	29%

Britain	53	61	–	30
France	43	53	51.3	45

* US/Mexico and LA; Brit/ME and N. Africa; France/ N. Africa
The Pew Global Attitudes Project, 2002 (Question #35) and 2005 Report

Table 2
Overall, would you say immigrants are having a good or bad influence on the way things are going in your country? (May, 2006)

	US	**Britain**	**France**
Very good	13	7	2
Somewhat good	39	36	43
Somewhat bad	29	26	40
Very bad	17	22	9

Source: IPOS Public Affairs

On the other hand, attitudes towards the political importance of immigration, while somewhat more volatile, have not generally supported more restrictionist policies. There has been some variation in the political importance of immigration among mass publics since 2001. For the EU 15, it has remained relatively low, and relatively stable at about 14%, less than unemployment (the highest), the economy, crime, prices, terrorism and health care.[43] In the Netherlands, for example, only 7 percent of those surveyed in 2004 ranked immigration among their most important political concerns.

The Eurobarometer surveys cited above are supported by country-based polls that generally show a decline in immigration as a political concern in France and low-level stability in the United States. In addition, immigration issues do not seem to be masked by attitudes

towards law and order. Crime does not register among the top political concerns for Americans; it has declined as a political concern for the French.

Table 3
France
The Motivations of French Voters: 1984-04 *
(Percentage of Party Voters Voting for These Reasons)

%: ->	Law and Order						Immigration						Unemployment						Social Inequality					
	84	**88**	**93**	**97**	**02**	**04**	**84**	**88**	**93**	**97**	**02**	**04**	**84**	**88**	**93**	**97**	**02**	**04**	**84**	**88**	**93**	**97**	**02**	**04**
PC	9	19	29	28	29	23	2	12	16	15	7	6	37	59	77	85	41	66	33	50	52	46	56	43
PS	8	21	24	29	36	24	3	13	19	15	10	3	27	43	71	83	44	60	24	43	40	47	55	41
Rt	17	38	37	43	56	63	3	19	33	22	17	11	20	41	67	72	32	40	7	18	23	21	18	7
FN	30	55	57	66	68	66	26	59	72	72	57	54	17	41	64	75	27	40	10	18	26	25	18	16
TT	15	31	34	35	48	43	6	22	31	22	21	15	24	45	68	75	36	52	16	31	32	35	33	25

*Since several responses were possible, the total across may be more than 100%. For 1988, the results are for supporters of presidential candidates nominated by the parties indicated.

Sources: Exit Poll, SOFRES/TF1, June 17, 1984, Le Nouvel Observateur, June 22, 1984;and SOFRES, État de l'opinion, Clés pour 1987 (Paris: Seuil, 1987), p. 111; Pascal Perrineau, "Les Etapes d'une implantation électorale (1972-1988), in Nonna Mayer and Pascal Perrineau, eds., Le Front National à découvert (Paris: Presses de la FNSP, 1988), p. 62; Pascal Perrineau, "Le Front National la force solitaire," in Philippe Habert, Pascal Perrineau and Colette Ysmal, eds., Le Vote sanction (Paris: Presses de la FNSP/Dept. d'Etudes Politiques du Figaro, 1993), p. 155, CSA, "Les Elections legislatives du 25 mai, 1997," Sondage Sortie des Urnes pour France 3, France Inter, France Info et Le Parisien, p. 5; CSA, "L'Election Presidentielle: Explication du Vote et Perspectives Politiques" (April, 2002); CSA, "Les élections régionales: explication du vote et perspectives politiques," 22 mars 2004, pp. 5-6.

Table 4
Britain
MORI Political Monitor: Current three most Important Issues Facing Britain (2001-2005)

Date	Crime, Law and Order, Violence	The Economy	Education	Race Relations, Immigration, Immigrants
Oct, 2001	14%	12%	31%	17%
Sept, 2002	28	10	31	21
Sept, 2003	24	14	28	29
Sept, 2004	27	10	29	26
June, 2005	30	11	24	33

The MORI Political Monitor, 2001-2005

Table 5

The United States
What do you think is the most important problem facing the United States today?

Issue:	Iraq	Terrorism	The Economy	Unemploy-ment	Immigration/ Illegal aliens
Oct 2001	–	46%	13%	4%	2%
Jan 2002	–	23	21	8	2
Nov 2003	18	7	20	12	2
Oct 2004	17	13	12	10	2
July 2005	25	17	10	8	4

The Gallup Organization, Gallup Surveys 2001-2005

Nevertheless, in this context Britain stands out. As the parliamentary elections of 2005 approached, both the concern and the priority of immigration increased. In part, the issue has been driven by the political campaigns in 2000 and 2005, when the Tories merged the issues of race and immigration and in part by the rising concerns with security and terror after 2001. However, neither the campaigns, nor rising popular political priority given to immigration appeared to have any impact on British immigration policy.[44]

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The MORI Political Monitor, 2001-2005

Conclusion

Therefore, although there has been a certain amount of convergence of concerns between

Europe and the United States with regard to international terrorism, there has been less change in Europe than is generally thought. On the other hand, there has been considerable change in the United States, in part because there was little focus on terrorism before September 11. Nevertheless, the changes in American law have not gone as far as Britain and France had gone even before September 11, 2001. What is of more concern is not the changes in law, but the use of executive war power to deal with the struggle against terrorism. Moreover, as the episode of the Detainee Act of 2006 indicates, it is difficult for either the courts or congress to seriously constrain the more creative aspects of executive power.

Convergence is most evident in the more widespread surveillance and actions against immigrant populations. It is also evident in the awareness that, as terrorism emerges as a domestic-based problem, such an approach may be increasingly self-defeating, since the cooperation and trust of immigrant communities are essential tools in the fights against terrorist activities. However, the reaction in Britain, France and the United States is complicated.

Britain and France have begun to move away from immigration policies that emphasized the goal of “0" immigration. In the United States, more open immigration policies have been maintained since 1965, and a conservative Republican president seeks to gain potential electoral points for his party by proposing policies that would regularize millions of illegal immigrants who reside in the country. In addition, in all three countries, mass publics are more accepting of immigrant populations than even a few years ago.

Of course, this does not mean that the politics of immigration are necessarily fading. The French experience with the National Front indicates that, among those who deeply oppose immigration and immigrants, there may still be a durable sub-culture that can be mobilized for electoral purposes. Moreover, the opposition of conservative Republican (and some Democrats)

to the Bush proposals indicates the complexity of regularization.

However, the easy link that is often made between security policy and immigration policy needs to be reconsidered. Although the lives of immigrants in France, Britain and the United States have certainly been changed in some ways by the denser security networks that have been put in place, the general orientation of immigration policies have moved in a direction that could not have been anticipated if we presume that these policies are driven by security concerns. At a time when security administration on both sides of the Atlantic has been hardened, and even become more arbitrary, immigration policy, driven by other concerns, has become more expansive.

Notes

[1] See Olivier Roy, Globalized Islam:The Search for a New Ummah (New York: Columbia University Press, 2006

[2] See the article by Scott Shane and Adam Liptak, "Shifting Power to a President," in the New York Times of September 30 2006, and the article in the (French) Figaro, "Le Congrès 'légalise' le programme secret de la CIA," September 23-34, 2006.

[3] Prior to 1974, states of emergency, with power given to the Cabinet to issues orders, were declared under the Defense of the Realm Act of 1914, and its successor, the Emergency Powers Act, passed after the war. See: Tony Bunyan, The Political Police in Britain (London: Quartet, 1977), pages 51-56.

[4]Home Office Report, Review of the Operation of the Prevention of Terrorism Acts, Ch.12 (March 7, 2000).

[5]Lord Carlile of Berriew QC, Report on the Operation in 2001 of the Terrorism Act 2000, Report for the Home Office (2002), Annex I. This report is available for each year since 2002.

[6]ibid. Annex F

[7] See the House of Lords , Joint Committee on Human Rights, "Anti-terrorism, Crime and Security Bill: Further Report," (2002), p.37. For a summary of some of these criticism, see Ronald Dworkin, "Political Freedom in Britain," Democratic Findings No. 1, Democratic Audit of the United Kingdom, Human Rights Centre, University of Essex, 1996(?)

[8]Of course, this was only possible because of the 1998 legislation that integrated the ECHR into British law.

[9]The fix, was tentative, since a backbench revolt and resistance by the House of Lords forced the government to accept a sunset clause by which the law could have expired within a few months. However, according to the Home Office, " to date the Government has not sought to make a control order requiring derogation from Article 5 of the European Convention on Human Rights."

[10]Dirk Haubrich, "September 11, Anti-Terror Laws and Civil Liberties: Britain, France and Germany Compared," Government and Opposition, Vol 38, no. 1, January 2003, p. 19. Other comparisons (cited in le Nouvel Observateur, 21 January 2002) yield roughly the same result, while placing the US first on the list. We should note that these comparisons are based on new legislation after September 11, and therefore do not seriously consider the question of change.

[11]Jeremy Shapiro and Bénédicte Suzan, "The French Experience of Counter-Terrorism," Survival, Vol.45, no. 1, Spring 2003, p. 69

[12] The attacks in 1986 were organized by groups close to Iran, probably on the instigation of the Iranian government which was demanding that France fulfill its commitment to the deposed Shah, and provide it with the technology for the development of atomic energy. At the same time, France was also giving material support to Iraq. See the article by Laurent Greilsamer in *Le Monde*, January 30, 1990.

[13]Henri Astier, "Profile: France's Top Anti-terror Judge," BBC News on Line, January 7, 2003.

[14]Shapiro and Suzan, pp. 80-82.

[15] Bruguière , around whom the press has constructed a legendary reputation, indicated that he was considering resigning to run for the National Assembly in the 2007 elections. See Le

Monde, December 6, 2006.

[16]The Sunday Express, July 17, 2005.

[17]Oliver Roy, "Euro-Muslims in Context," The NYU Review of Law and Security, Summer 2005, p. 20.

[18]See Sophie Body-Gendrot and Catherine Wenden, [find title] (2003); Didier Bigo, "Reassuring and Protecting: Internal Security Implications of French Participation in the Coalition against Terrorism," in Eric Hershberg and Kevin Moore, Critical Views of September 11 (New York: The New Press, 2002).

[19]Le Monde, July 9, 2005, p. 6

[20]Final Report of the National Commission on Terrorist Attacks Upon the United States (New York: WW Norton, 2004), pp. 77 and 81.

[21]Ibid., p. 80

[22]See Chapter 3.

[23]The best critical account of the Patriot Act is Stephen J. Schulhofer, Rethinking the Patriot Act: Keeping America Safe and Free (New York: Century Foundation Press, 2005)

[24]See presentation by Sophie Body-Gendrot, "The USA Patriot Act and the Threat to Civil Liberties,"

[25]Karen Greenberg, "The Courts and the War on Terror," published by the NYU Center on Law and Security, April, 2005

[26]The Center on Law and Security, NYU, "Terrorist Trials: A Report Card," February, 2005

[27]Schulhofer, p. 3

[28] Hamdi gave up his American citizenship and was deported to Saudi Arabia in September 2004, after the US Supreme Court remanded his case in June.(124 S Ct. 2633 2004) The Padilla case is more complicated. In November 2005, the US Attorney-General decided to charge him, apparently to avoid another reversal by the Supreme Court. The indictment, that he"conspired to murder, kidnap and maim people overseas,." had little to do with the original charges made by the administration-- an alleged plot to use a dirty bomb in the United States, and that he engaged in terrorist activity. Padilla's lawyers resisted his transfer to civilian prison, as well as the new charges, and instead pursued a case before the Supeme Court that questioned his initial and continuing imprisonment in a military brig without being charged. In April 2006, a divided Supreme Court refused to hear the case. Padilla is now in civilian prison awaiting trial on the new charges.

[29]Schulhofer, Rethinking the Patriot Act: Keeping America Safe and Free, p. 5.

[30]New York Times, June 17, 2005

[31] This was in answer to a question that I posed in a public discussion about the legal bases of American actions during the post 9-11 period

[32] See *USA Today*, May 1 and May 10 2006

[33] *Washington Post*, June 30, 2006

[34] See the *New York Times*, September 30 and October 18, 2006.

[35] ACLU v. NSA (06 CV 10204)

[36] New York Times, January 18, 2007

[37]See Geddes, The Politics of Migration and Immigration in Europe, p. 43

[38]"Why the British Government's Plan for Controlling Immigration is a Bad Idea," The Economist, February 10, 2005.

[39]Le Monde, July 7 and 27, 2005

[40]Le Monde, January 14 and 20, February 24, 2005

[41]The most comprehensive proposal has been made in the Senate by Senators McCain and Kennedy: The Secure America and Orderly Immigration Act of 2005. See New York Times, February 11, 2005.

[42] See USA Today, April 3, 2006; Washington Post, May 15, 2006

[43]Eurobarometer 62, 2004, p. 6 and Q33 in Annex.

[44] "A New, Improved Race Card," The Economist, April 7, 2005.