

An Analysis of the Legal Issues Relating to the Prevention of Nuclear and Radiological Terrorism

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The potential for nuclear and radiological terrorism is a concern for policy makers as the motives and methods of many modern terrorists have changed to embrace weapons of mass destruction. Because these threats likely involve malefactors who rely on a combination of preparation, cooperation, and technical data, it is important to examine how the law addresses preliminary criminal activity as well as access to potentially dangerous information. Although criminal and First Amendment legal sanctions are primarily oriented to address past activities, they do allow authorities to act prospectively in limited circumstances. These circumstances can include instances where nuclear or radiological terrorism is a possibility.

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The threat of nuclear and radiological terrorism has shifted from merely being the topic of fringe theoretical scholarly debate to an operational issue for policy makers. Government agencies now issue high-level threat warnings about the possibility of nuclear-related terrorist attacks (National Infrastructure Protection Center, 2002). After the September 11 attacks and a spate of fatal anthrax mailings, Americans no longer readily dismiss the possibility of unusual or catastrophic homeland terrorist incidents (Kushner, 2002). Moreover, the concept of addressing the amorphous terrorist threat has become an issue of immense national importance.

As counterterrorism efforts have taken on a new urgency, American authorities have profoundly shifted their organizational structure and tactics to concentrate on prevention (Mueller, 2002). This proactive focus on prevention has a profound effect on the area of nuclear and radiological research. Except in those cases where terrorists obtain a fully intact operational nuclear or radiological weapon, a higher level of technical information is necessary to construct and

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deploy such devices. In an era where both science and communication has undergone significant advances, the process of quarantining technical data to prevent its potential misuse is a daunting, if not impossible, task. Moreover, even if it is possible to severely limit the dissemination of sensitive scientific information, a strong argument can be made that the associated costs are too detrimental to the free exchange of information that is the hallmark of both scientific advancement and a civilized democracy. After a brief analysis of recent developments in the area of terrorism, this article will address the legal issues relating to the government's ability to prevent terrorism and to restrict access to the kind of sensitive scientific information that could be used to produce a nuclear or radiological terror weapon.

THE EMERGING TERRORIST THREAT

The nature of terrorism has changed as associated motivations and instrumentalities have become more ominous. Political terrorists with well-defined nationalistic, economic, or social reform as their goals were outpaced by transnational religious fanatics, such as Al Qaeda and Aum Shimrkyo, who sought to execute mass terrorism. Although religious fanaticism is nothing new in the sphere of terrorism, several recent developments are of import. First, religiously motivated terrorists are mobile with loyal secretive networks that stretch around the world. Second, they have demonstrated an intent toward procuring weapons of mass destruction. Third, they are often well financed. Fourth, their moral compass often embraces mass casualties and suicide. Last, some religious terrorists are supported or hosted by countries such as Iraq, Iran, and Syria (Hoffman, 1998; U.S. Department of State, 2002).

Even before September 11, religiously motivated terrorist events had a higher civilian mortality rate per occurrence than secular related attacks. Although religious terrorists had tangible goals in some contexts, death and destruction was viewed less as a means to an end than an end in itself. For many militants, the purpose of terrorism had progressed from merely being a wedge to leverage reform to a new form of unconstrained warfare, where the goal was to inflict mass destruction on one's enemies. Because of the intense and unique nature of their motivation, religious terrorists are less influenced by mainstream public opinion, political pressure, criminal sanctions, personal physical danger, and possible infiltration than are secular extremists. Because many religious terrorists embrace the notion of martyrdom or apocalyptic violence, mass terrorism is often coextensive with their belief system (Hoffman, 1998).

The Muslim extremists who bombed the World Trade Center in 1993 laced their device with cyanide as part of an unsuccessful attempt to induce mass casualties (Kushner, 1998). Both Al Qaeda and Aum Shimrkyo unsuccessfully attempted to secure nuclear devices before settling on other weapons (Elliot, 2001; Stern, 1999).

In addition, Iran and Iraq, both active state sponsors of terrorism, are reputedly interested in procuring nuclear devices. Furthermore, the collapse of the former Soviet Union has resulted in speculation by some that nuclear or radiological material or scientific information could eventually end up in the possession of terrorists (Stern, 1999). Pakistan, a nuclear armed nation, has an active minority of violent religious extremists and al Qaeda supporters (U.S. Department of State, 2002).

Terrorism expert Dr. Bruce Hoffman noted the characteristics of the emerging terrorist threat in 1998:

The growth of religious terrorism and its emergence in recent years as a driving force behind the increasing lethality of international terrorism shatters some of the most basic assumptions about terrorists and the violence they commit. It also raises serious questions about the continued relevance of much of the conventional wisdom on terrorism—particularly as it pertains to potential future use of WMD [weapons of mass destruction].

PREVENTION AS POLICY IN THE NUCLEAR AND RADIOLICAL CONTEXT

Since 1970, when the FBI received its first nuclear threat, the agency has responded to more than 100 incidents relating to the threatened use of nuclear or radiological weapons. The only credible threat occurred in 1979, when a person who had previously been employed at a nuclear fuel processing plant stated that he would place radioactive uranium in various parts of an American city. The individual, who actually possessed a slightly radioactive form of uranium, was captured before the threat was executed (Weapons of Mass Destruction Operations Unit, 1998).

In 1974, federal officials in the Department of Energy created the Nuclear Emergency Support Team (NEST) following an attempt to extort \$200,000 from authorities in a hoax involving a threatened nuclear bomb attack on Boston. NEST utilizes mobile patrols with helicopters and ground-based personnel who scour metropolitan areas with devices that detect unusual emissions of alpha, beta, gamma, and neutron radiation. These emissions, it is hoped, would enable the detection of a nuclear or radiological weapon by authorities before it is deployed. NEST conducted 20 field exercises from 1986 to 2001 and responded to various threats and high-profile events both before and after September 11, 2001. Its resources have recently been significantly enlarged and enhanced (Kaplan, 2002).

A terrorist nuclear bomb would involve an interaction called fission where atomic nuclei, from isotopes of uranium or plutonium, are divided into lighter nuclei. In instances where one fission reaction results in a series of others, a chain reaction takes place. Under certain circumstances, a chain reaction can be



induced to create enough energy to result in a massive explosion capable of destroying large areas and killing great masses of people. Because of the sophistication, cost, and rarity of the weapons-grade nuclear material, a terrorist nuclear device is considered the least likely mass weapon to be employed (Stern, 1999).

A radiological weapon, by contrast, is one that disperses an unstable radioactive isotope. Isotopes are atoms that have different atomic weights than nonisotopes of the same element because they do not have the same number of neutrons. Over time, isotopes degrade into other elements to eventually form a stable or nondecaying element. Certain uranium isotopes, for instance, decay into a form of lead. During this process of radioactive decay, energy is emitted in the form of radiation. The ill effects from radiation exposure to human tissue and organs depend on the potency of the energy absorbed and the duration and type of exposure. The primary effects from the detonation of radiological device are not the mass casualties from that of a nuclear device but rather widespread fear and the contamination of large areas. Radiological materials from hospitals and businesses are more accessible than nuclear material. The most likely way a terrorist might disperse radiological material is by means of an attack on a nuclear power plant or through the detonation of a "dirty bomb." A dirty bomb is a conventional device spiked with radiological material that would be dispersed upon detonation (Stern, 1999; William & Munn, 2002).

Due to the belief that terrorism now poses a more immediate threat, the U.S. government restructured many of its agencies to focus on the prevention of terrorist attacks, as opposed to the previous practice of postincident investigation and prosecution (Mueller, 2002). The prevention of a nuclear or radiological terrorist attack requires the interdiction of dangerous people, hazardous material, and relevant technical information before the three factors combine into an opportunity.

From both a practical and legal standpoint, the containment of potentially dangerous technical information is perhaps the most vexing and least understood of the three variables. The criminal law generally, although not exclusively, punishes injurious conduct after it takes place. By contrast, the First Amendment places a heavy burden on government attempts to prevent the dissemination of information.

TRADITIONAL CRIMINAL LAW

Because of the potential for casualties from a nuclear attack, and the disruption from a radiological attack, it is necessary to examine how the law addresses anticipatory criminal conduct. Anticipatory offenses are those offenses that punish the precursors to more detrimental conduct. These offenses are particularly relevant for complex and dangerous crimes, such as mass terrorism, that require preparation and concerted action for successful execution. Generally, however, the enforcement of criminal laws has focused on punishing completed

offenses. The recent shift by the Federal Bureau of Investigation (FBI) to an expanded prevention-based model may be part of a new investigative strategy, but it is nothing new in the area of counterterrorism and national security laws (Mueller, 2002). For instance, 18 U.S.C. § 2332a (Crimes and Criminal Procedure Act, 1998) punishes not only those who intentionally use a weapon of mass destruction but also those who threaten, attempt, or conspire to use such a weapon. Another law, 18 U.S.C. § 794 (Crimes and Criminal Procedure Act, 1998), punishes those who knowingly or purposely transmit sensitive information, including information relating to nuclear weapons, to foreigners under various circumstances. 18 U.S.C. § 831 (Prohibited Transactions Involving Nuclear Materials Act, 1982) punishes unauthorized individuals who not only disperse nuclear material and its by-products but also those who engage in the intentional unauthorized possession, conveyance, or transfer of such material. 18 U.S.C. § 2332b (Crimes and Criminal Procedure Act, 1998), relating to acts of terrorism transcending national boundaries, explicitly covers attempts, threats, and conspiracies to commit the prohibited conduct. Another statute, 18 U.S.C. § 231 (Civil Rights Act, 1968), punishes paramilitary training relating to the use, application, transport, or construction of firearms, incendiary devices, and explosives when done with the purpose of fomenting civil disorder. Interestingly, it only punishes trainers and not students.

Many national security and counterterrorism laws, such as the ones mentioned above, rely on the criminal law tradition of anticipatory criminal statutes. Examples of these types of offenses are conspiracy, solicitation, attempt, and threat. All of these offenses have a mens rea requirement of knowledge and purpose, so unwitting conduct is generally not actionable. A conspiracy is an agreement between two or more parties to engage in a subsequent criminal act. Under federal law and that of many states the government must also establish the performance of an overt act by a defendant in the furtherance of the conspiracy's goals. The goal of the conspiracy need not be executed, nor is imminency required for conspiracy to be charged. Federal conspiracy law is codified at 18 USC §371 as well as in the text of various specific statutes. Conspiracy law dates back to the late 1200s and was used extensively in questionable proceedings in England in the 17th century. The logic behind conspiracy law is that people acting in concert toward an evil end pose more of a risk and have greater capability than do lone actors (Gardner & Anderson, 1999).

The criminal law also punishes the related offenses of criminal solicitation and aiding and abetting. Criminal solicitation is the act of requesting another person to engage in a criminal act. Aiding and abetting occurs when a person advises or actively supports a criminal event. Again, a person who unwittingly assists a terrorist, such as those who innocently provided flight training to the September 11th hijackers, are not criminally culpable (American Law Institute, 1962-2003; *Black's Law Dictionary*, 1983).

Attempt is the most commonly charged anticipatory crime. It is defined as "an [intentional] endeavor to do an act, carried beyond mere preparation, but



short of execution.” The Model Penal Code, which is frequently relied on by federal courts, uses the more clear phrases of “dangerous proximity” and “substantial step” in their text (*Black's Law Dictionary*, 1983, p. 65; Gardner & Anderson, 1999). Legal impossibility is generally not a defense in a criminal attempt case. In the counterterrorism area, that means that someone who attempts to procure nonexistent nuclear material from an undercover agent is still criminally liable. It also means that criminal liability attaches to someone who is unsuccessful in the attempted detonation of an inoperable mass weapon despite a malicious intent (Gardner & Anderson, 1999).

Because one of the key aims of terrorism is to instill widespread fear and panic, even the articulated threat of a hoax nuclear or radiological attack can be especially disruptive. A criminal threat is a “communicated intent to inflict physical or other harm on any person or property” that serves to unsettle the mind of the person on whom it operates . . . with a view towards restraining such person’s freedom and actions.” The Supreme Court has held, however, that in order for a threat to be criminally punishable it must be genuine and not the expression of a crude political statement (*Black's Law Dictionary*, 1983, p. 769; *Watts v. United States*, 1969). After a spate of real and threatened anthrax mailings, the House of Representatives passed a bill making it a crime to terrorize people via terroristic hoaxes (Anti-Hoax Terrorism Act of 2001).

RECENT PREVENTIVE LEGAL METHODS

After the September 11th terrorist attacks, numerous individuals were put into secret custody as part of an antiterrorism government sweep. The legal justifications for these detentions were based on three legal rationales. Some detainees were held on the basis of suspected violations of state or federal criminal law, others were held on immigration charges, whereas still others were detained as material witnesses. A material witness is a person whose testimony is crucial to a criminal proceeding. If that person is deemed a flight risk, as are many foreign nationals, he or she may be detained. Civil libertarians have criticized these detentions as pretextual and open ended in length.

The Foreign Intelligence Surveillance Act (FISA), enacted in 1978, gives government authorities greater latitude to conduct “foreign intelligence” surveillance than is available under standard law enforcement guidelines. Although hearings under FISA are before federal judges, they are held in secret. Foreign nationals, in the United States and elsewhere, who are members of international terrorist groups would likely be proper targets for investigation by authorities under FISA (Foreign Intelligence Surveillance Act of 1978 (50 USC § 1801 et. seq.)).

On November 13, 2001, President George Bush issued an Executive Order pursuant to his authority as commander in chief to establish military tribunals to detain and try suspected noncitizen terrorists (Bush, 2001). Eventually the

administration unveiled rules that gave defendants similar but less expansive rights than those granted to civilian criminal suspects. The administration invoked *United States ex rel. Quirin v. Cox*, a 1942 Supreme Court case that upheld the validity of military tribunals to try Nazi saboteurs as enemy belligerents (*U.S. ex. rel. Quirin v. Cox*, 1942). Among those who unsuccessfully petitioned the Court was a defendant claiming American citizenship. American citizen Jose Padilla, an alleged al Qaeda member, was initially connected by federal authorities to a possible radiological “dirty bomb” plot. In May 2002 he was arrested at Chicago’s O’Hare International Airport upon his arrival from Europe. The Justice Department, without charging him, transferred him to the Defense Department that maintained that it has the authority to interrogate him, deny him access to a lawyer, and hold him indefinitely in military custody (Lichtblau, Drogin, & Meyer, 2002).

THE FIRST AMENDMENT

Up to now, the focus of this article has dealt with how the criminal law addresses terrorists and their weapons. Of great import, however, particularly in the area of nuclear weapons, is access to technical data. Although there certainly are laws that address the dissemination of classified or proprietary government information, it appears that much of the information needed to make a nuclear device, or to sabotage nuclear installations, is readily available in the public domain. Clearly, traditional laws that target particular people, conduct, and material do not address the problem of the widespread availability of technical scientific information to those who would exploit it to terrorist ends. To complicate matters even more is the American legal tradition of protecting access to information.

In the United States, the First Amendment of the Constitution provides extensive, although not limitless, protection for the communication of ideas. The First Amendment was ratified on December 15, 1791, with nine other amendments that are collectively known as the Bill of Rights. It reads in relevant part: “Congress shall make no law . . . abridging freedom of speech or of the press; or of the people peaceably to assemble, and to petition the government for a redress of grievances.” Despite the straightforward wording of the amendment, the Supreme Court has established detailed precedent relating to its protections and limitations (*U.S. Constitution Amendment I*; Tribe, 1988).

The Supreme Court has held that the First Amendment not only protects speech from the undue infringement by federal authorities but from infringement at the hands of state and local officials as well. The Court has ruled, however, that there are several types of communication that the government can regulate without invoking full First Amendment protections. These categories include defamation, fighting words, commercial speech, obscenity, immediate incitement to criminality, and traditional crimes like conspiracy. Even when

communication is afforded First Amendment protection, the government may nonetheless, in rare circumstances, punish or regulate its expression. To do so, however, the government must convince the courts that it has met the burdens of the "strict scrutiny" test. The strict scrutiny test requires that the government demonstrate that the restriction of protected speech advance a compelling governmental interest. In addition, the government is burdened with establishing that the application of the restriction is done in the least intrusive possible way (Tribe, 1988).

PRIOR RESTRAINT ON COMMUNICATION

When expression can be regulated, the government has traditionally done so after the fact. America's founders were influenced by the detrimental effects of the English licensing system of the 1600s, which mandated prepublication approval of documents by church or state officials. The U.S. Supreme Court first dealt with the issue of prepublication censorship of expression, otherwise known as prior restraint, in the 1931 case of *Near v. Minnesota*. In *Near*, the Supreme Court invalidated a permanent injunction against the publisher of magazine called *The Saturday Press*.

Minnesota had a state law that permitted "nuisance" injunctions to be issued by courts against any "newspaper, magazine or other periodical" that publishes "malicious, scandalous and defamatory" material. *The Saturday Press* consistently published anti-Semitic tomes and incendiary commentary against municipal officeholders. The Court was highly critical of the low burden of proof assigned to the government, the fact that it suppressed political opinion, and the fact that it censored expression. The Court articulated a very strong, but not complete, presumption against prior restraint on speech. Interestingly, in a nonbinding section of their opinion the Court listed exceptional situations where prior restraint might be allowable. The Court gave an example of a possible national security exemption where "a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number or location of troops" (*Near v. Minnesota*, 1931, p. 631).

The U.S. Supreme Court addressed the issue of prior restraint and national security four decades later in the landmark case of *New York Times Co. v. United States*. In that case, the Supreme Court invalidated an injunction placed on the *New York Times* and *Washington Post* that prevented them from publishing the so-called Pentagon Papers. The Pentagon Papers were an expansive secret historical study of the Vietnam War leaked to prominent journalists during the course of American participation in that war. The government maintained that publication of the report would aid North Vietnam and diminish the reputation of the United States government in foreign affairs (*New York Times Co. v. United States*, 1971).

The Court invalidated the injunctions in a 6-3 decision, resulting in the publication of the Pentagon Papers in the nation's newspapers. Every justice filed an opinion in the case but all agreed that there was a significant burden against prior restraint. Two of the justices stated that prior restraint was always invalid. Three justices believed that although prior restraint was generally disfavored, it was appropriate with regard to the Pentagon Papers.

Four justices led by Justice William Brennan reserved the constitutionality of prior restraint for only the gravest circumstances. Justice Brennan's explanation has particular resonance today:

Even if the present world situation were assumed to be tantamount to a time of war, or if the power of presently available armaments would justify even in peacetime the suppression of information that would set in motion a nuclear holocaust, in neither of these actions has the government presented or even alleged that publication of [the Pentagon Papers] . . . would cause the happening of an event of that nature. (*New York Times Co. v. United States*, 1971, p. 725-726)

Some of the justices believed that prior restraint was not warranted in the case because the risk of damage to the nation's interest was not a substantial certainty. Others believed that prior restraint might be valid if Congress had enacted enabling legislation. All of the justices serving at the time that the decision was rendered are deceased, so it is difficult to determine how the current Court would rule.

In 1980, the Supreme Court ruled against an ex-CIA analyst who violated his previous employment contract by publishing a book without prior clearance from the agency. Although the book, *Decent Interval*, was critical of America's final Vietnam departure, it contained no classified information. Because Snepp violated both his contract and his special duty to his employer, the government was awarded the proceeds from the profits derived from the book's publication. This civil law rationale could certainly apply in cases where employees have access to sensitive unclassified technical information whose dissemination is not already prohibited by a statute (*Snepp v. United States*, 1980).

The only time an American court has dealt with prior restraint in the context of sensitive nuclear information was in 1979. Federal district court judge Robert Warren issued an injunction against a magazine seeking to publish an article relating to a hydrogen bomb in the case of *U.S. v. Progressive, Inc. The Progressive Magazine* was prevented from publishing an article titled "The H-Bomb Secret" by freelance journalist Howard Morland. The article contained sensitive technical information that was classified and other information that was unclassified. The government contended that publication of the article was dangerous and could assist some medium-size foreign government in the construction of a hydrogen bomb. In a subsequent law review article, the magazine's editor contended that only large governments could construct such a device. He further maintained that a major purpose of the article itself was to destroy the myth of an

H-Bomb secret. He maintained that the bulk of the information could be found in textbooks, encyclopedias, and declassified government documents (Knoll, 1994; *United States v. Progressive, Inc.*, 1979).

Judge Warren relied on two rationales that were presented by the various concurrences in the Pentagon Papers case. First, in this instance, there was statutory authority for an injunction relating to the release of some of the contested data through the Atomic Energy Act of 1954 (42 USC § 2284). Some of the justices in the Pentagon Papers case contended that an authorizing statute was an important factor in determining an injunction's validity. Next, the threat of greater nuclear proliferation was significant enough to convince Judge Warren to issue an injunction (*United States v. Progressive, Inc.*, 1979). The publisher's subsequent appeal was rendered moot when the government dropped its case after the information was published elsewhere. *The Progressive* finally published the article in November 1979 after a 6-month delay (Knoll, 1994).

Harvard University analyst Jessica Stern maintains that we need better federal legislation to close a loophole relating to the publication of unclassified bomb-making information. Although she admits that the government could not ban all bomb-making manuals, it could nonetheless punish those who publish with the intent that the information be used to commit a crime or to aid a particular malefactor (Stern, 1999).

There is one last restraint that can be placed on those who would publish sensitive technical information—self-regulation. Where morality or common sense is absent, an actor might nonetheless decline to publish sensitive information based on the threat of a potential lawsuit. Generally, courts have been extremely hesitant to allow civil liability to extend to a publisher of potentially dangerous information. For instance, *Hustler Magazine* was found not liable for damages in a case where a teenager committed suicide after allegedly reading an article describing the practice of autoerotic asphyxia, where one masturbates while hanging oneself (*Herceg v. Hustler Magazine*, 1987).

It appears, however, that publishers can be liable in instances where they publish for the express purpose of instructing others to commit a crime. Paladin Press was sued by the families of murder victims after a contract killer relied on instructions in the book *Hitman: A Technical Manual for Independent Contractors*. Paladin stipulated for the purposes of an appeal only that the book assisted the killer and that they intended that the book be sold to murderers. The United States Court of Appeals for the Fourth Circuit held that in such a narrow circumstance a jury could find a publisher liable in tort under a claim for aiding and abetting—even in the absence of a significant relationship between the publisher and the reader. Two things are worth noting here. First, Paladin's stipulations were not admissions but merely a way to present a fact pattern for an appeal. Second, the Court did not say a jury must find a publisher liable under those facts, only that it could. The case eventually settled and Paladin took the book off the market on its own (*Rice v. Paladin Press*, 1998).

CONCLUSION

The government has a variety of legal tools at its disposal to prevent terrorists from deploying nuclear or radiological weapons. Although a strong case can be made that the government can limit the dissemination of sensitive nuclear and radiological information during turbulent times, the legal argument may already be largely moot. Still, even if sensitive information is circulating, the nature of the risk requires that the government use every legal tool at its disposal to limit its accessibility to those who would seek to do our nation harm. This includes the invocation of a variety of measures based as much on common sense, patriotism, and vigilance as it is on statutes and cases.

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