

Why Can't the U.S. Have Its Own MI5?

James A. Lewis, CSIS

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Britain's success in stopping a plot to bomb a dozen airliners has prompted a renewal of the calls for an American version of the MI5 (the former name of Britain's Security Service). The desire for an American MI5 has surfaced regularly since the 911 attack. The most prominent call was a recommendation in the WMD Commission's Report to establish a National Security Service. This recommendation led President Bush to direct the FBI to merge its counter-terror and counterintelligence division into a new National Security Branch.

The FBI's National Security Branch is not an MI5, but unfortunately for the admirers of the British system, this may be as far as we can go without significant pain and fundamental change. One major obstacle is a decision made some 230 years ago to separate from the British Empire. While both countries share a heritage of common law, there have been significant divergences. Some of this divergence was intentional. The framers of the Constitution were careful to forbid, in the Bill of Rights, many of the Crown's activities that had annoyed them as colonials. The Fourth Amendment is a particular obstacle to replicating the UK approach to domestic security. It reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitutional differences are significant in explaining why the UK approach to counterterrorism would be difficult to duplicate in the U.S. The unwritten British 'constitution' provides a high degree of protection for civil liberties, but there is, for example, no first amendment that poses an insurmountable obstacle to banning hate-speech. The requirements for U.S. counterterror efforts that grow out of the Fourth Amendment help explain why U.S. practice has developed in a different fashion from that found in the UK. In contrast, British laws give the Home Secretary great discretion in approving electronic and physical surveillance in a terrorism investigation. The Home Secretary (whose formal title is the Secretary of State for the Home Department) heads the Home Office (a Ministry that combines many of the functions of the U.S. Departments of Justice and Homeland Security) and has authorities that in the U.S. are usually reserved for the courts. The U.S. doctrine of the separation of powers into executive, legislative and judicial is very different (and much less of an issue) for a parliamentary system where the Prime Minister and his cabinet are at the same time sitting members of the legislature.

Organizational differences also complicate any effort to duplicate the MI5. The British approach to counterterrorism and domestic security has very different traditions and precedents. The Security Service was founded (as MI5) in 1909, to watch for Imperial German spies infiltrating Britain's ports and harbors. Its twin, MI6 (now known as SIS – the Secret Intelligence Service), was responsible for foreign intelligence. Although it has been almost a century since the Security Service was founded, this common military and security background (MI stands for military intelligence) and twin birth with the SIS make for a culture and history that is very different from the origins of the FBI and the CIA. Until recently, the two U.S. agencies were better seen as competitors. While cooperation between

the Security Service, SIS and GCHQ (Government Communications Headquarters, the British equivalent of the National Security Agency) is not seamless, it is easier than the cooperation between FBI, CIA and NSA.

Whereas counterterror responsibilities in the U.S. still remain somewhat diffuse, even after a series of legislative reforms, the Home Secretary's dual responsibilities for police and domestic intelligence (something not matched in the Department of Homeland Security) provide a greater degree of focus in the UK. The Security Service operates the UK's Joint Terrorism Analysis Center (JTAC), an interagency body whose responsibilities are similar to the U.S. National Counter Terrorism Center (NCTC). The location of the JTAC in the Security Service may provide some small advantage over the U.S. approach (where NCTC is a quasi-independent agency, standing outside of any agency). The Home Office also oversees the UK's Counterterrorism Strategy (known as CONTEST). Difficult as it may be for some Britons to believe, the UK counterterror effort may be better organized than the U.S. effort, but our federal system of government and constitution prevent us from matching this organization.

The relationship of the Security Service to the police is also very different from that in the U.S. Britain has a national police service. The national service is divided into more than 40 regional services (although the British are planning to consolidate). Oversight of the police services are divided among chief officers for each force, regional police authorities (committees whose members include magistrates, elected officials, and community representatives), and the Home Office. The Security Service also reports to the Home Secretary. Thus, the same Cabinet Minister has a considerable degree of control over both police and domestic intelligence. This combination is unthinkable in the U.S., given our Federal system. There are several thousand police forces in the U.S., reporting to mayors, councils, State Governors and others. The organic link between police and security services is impossible to duplicate here, and long-standing competition between the FBI and some local police forces further complicates the matter.

The Security Service, working with the police special branches and GCHQ, has a long experience in dealing with terrorism from the conflict in Northern Ireland. The IRA and the more militant Provisional IRA sporadically engaged in bombings and assassinations in the UK for decades before the peace agreement. This kind of experience produces good cooperation among police and intelligence agencies and it is hard to duplicate. The Security Service may also have an advantage over its American counterparts, given its status as an intelligence agency that reports to an elected official rather than a law enforcement agency that reports to prosecutors and judges. Prosecutors want to build a case and go to trial. This may bias them against long-term intelligence activities that are essential for understanding an opponents' nature and intentions, but which may not lead directly to a trail.

The smaller size and parliamentary nature of the British government also give it an unduplicatable advantage. The distinction between legislative and executive is much less pronounced. In retrospect, the decision of the founding fathers to separate powers (to avoid an overweening executive) may prove less efficient than a Parliament and its ministers and their ability to change administrations with a vote of no confidence. The smaller size also reduces coordination problems. Intelligence activities are coordinated by the Joint Intelligence Committee (JIC), which has representatives from both the Security Service and the SIS. There is no comparable body in the U.S., although the position of the new Director of National Intelligence (with its oversight of both domestic and foreign intelligence activities) is somewhat similar.

Perhaps more importantly, the long threat of Irish terrorism led the UK to refine and adjust its anti-terror and domestic intelligence laws both before September 11 and more recently. The most important laws are the Security Services Act of 1989 and the Intelligence Services Act of 1994 (which reorganized and reformed the services – something the U.S. did not do until the 2004 Intelligence Reform and Terrorism Prevention Act); the Regulation of Investigatory Powers Act of 2000; the Terrorism Act of 2000; the Anti-Terrorism, Crime and Security Act of 2001 (passed in response to 9/11); and the Prevention of Terrorism Act of 2005, which was revised in the Terrorism Act of 2006 to meet civil liberties objections.

The most important of these laws is the Regulation of Investigatory Powers Act of 2000 (known as ‘RIPA’). RIPA spells out the conditions under which both electronic and physical surveillance may take place. It gives considerable authority to the Home Secretary to initiate such actions – no FISA court required for the UK.¹ It establishes independent oversight bodies (one for communications surveillance and one for physical surveillance – including what the British call ‘intrusive surveillance’) to ensure that the conditions and safeguards imposed by the Act on surveillance are being met – U.S. oversight bodies are usually housed in the agency they are overseeing. RIPA even led to the creation of an independent commission to which British citizens can complain if they felt they were the victims of unwarranted surveillance or if an error had been made. RIPA differs from comparable U.S. laws in that it gives far greater authority to the Home Secretary to issue warrants that allow the Security Service to engage in surveillance activities, including infiltrating agents into suspect groups.

The Prevention of Terrorism Act of 2005 also provides important authorities that are likely unmatched in the U.S. The Act creates the ability to impose ‘control orders.’ These orders restrict the movement and activities of suspected terrorists. The Home Secretary can use intelligence information to apply to a court to impose a control order, and in an emergency, he can impose an order on his or her own authority for up to a week. There is an annual review of control orders, again by an independent reviewer, and the Home Office must report to Parliament every year on the implementation of the Act’s authorities.

The Terrorism Act of 2006 is itself controversial in the UK and some of its provisions are likely to be revised, but not eliminated. The Act creates new authorities designed to prevent terrorist acts before they occur. Acts preparatory to terrorism are illegal, as are the encouragement of terrorism, and the dissemination of terrorist publications or terrorist training documents or activities. Groups that glorify terrorism can be proscribed. The Act allows police to detain suspected terrorists for two days on their own authority and up to 28 days with the approval of a court.

One thing that the UK’s laws do not do is put in place the barriers between foreign and domestic intelligence created by the U.S. in the 1970s. This may be an historical anomaly – the 1970s saw a President who abused intelligence followed by a President (and a Congress) who were at best, ambivalent about intelligence activities. U.S. intelligence reforms in the 1970s, by splitting domestic and foreign intelligence, introduce an awkwardness not found in the UK. At the same time, since our safeguards for domestic intelligence depend on these 1970s reforms, an effort to reduce the foreign/domestic divide to meet the challenge of borderless terrorism could put civil liberties at risk unless some alternate form of protection is

¹ The Foreign Intelligence Surveillance Act of 1976 created a special court to approve or deny applications for domestic surveillance.

devised. This makes the task of refining and adjusting anti-terror and domestic intelligence laws to make them more effective much more complex for the U.S.

It seems safe to say that RIPA and the Terrorism Acts of 2005 and 2005 would be likely to produce objection (if not consternation) in the U.S. The Judicial branch might be reluctant to surrender this degree of authority. Civil libertarians would, rightly, point out that control orders, suppression of publications, and broad surveillance power raise serious and perhaps insurmountable constitutional objections. Even if the climate in Washington was not shaped by mistrust and suspicion engendered by the domestic intelligence initiatives of the last few years, the security arrangement found in the UK would be hard to duplicate in this country.

Not that the British system is foolproof. The UK's difficulty in assimilating Muslim immigrants has created a major vulnerability. A third of British Muslims, according to polls, believe jihad against their fellow citizens is acceptable and that the UK would be better off operating under sharia law. UK immigration policies were badly managed for many years, with an unspoken agreement that let Muslim radicals into the country in exchange for their confining their attacks (usually verbal) to targets outside the UK. Now there are several hundred potential terrorists living the UK, mostly radicalized UK citizens, and it is difficult for the police and Security Service to monitor them. The recent counterterror success must be weighed against these larger problems in immigration and assimilation, and in this, the U.S. may have an advantage.

Our federal system, the rigid separation of powers, and a different history of domestic intelligence, mean that the U.S. cannot duplicate Britain's Security Service. That said, it is worth looking at the UK's combination of a different threshold for approving terrorist surveillance; a seamless integration of intelligence, police and communications surveillance; and expanded authorities for detention and other restrictions on terrorist-related activities. We cannot recreate the British system, but we can learn from their more extensive experience to identify useful authorities (and civil liberties safeguards) that would benefit our own counter-terror efforts. The U.S. needs precedents for further reform. Despite three major pieces of legislation (the Patriot Act, the Homeland Security Act and the Intelligence Reform and Terrorist Prevention Act), the U.S. has not come up with a formula for domestic intelligence. Some would say this is for the best, but this only prolongs the conflict with terrorists and increases the risk of a successful domestic attack.