Counterterrorism Instruments: Law Enforcement

The next instrument we'll discuss is law enforcement. The very major role that the Federal Bureau of Investigation, the FBI, plays in counterterrorism is testimony to just how important this instrument is. We've talked about, in a previous lesson, the FBI's role as an intelligence collector. But we need to remember, they are still, first and foremost, a law enforcement agency.

Particularly after a terrorist incident, applying law enforcement means, in the first instance, applying a very formidable set of forensic and other investigative skills. The same skills that the FBI can apply to a bank robbery investigation, they also apply to counterterrorism. And typically, in these investigations, if foreign terrorists are involved, you have the FBI and the CIA, the principal foreign intelligence organization in the United States, trading information back and forth. But all the time, the FBI is also involved in building, or helping prosecutors to build, a criminal case.

And that gets into the next aspect of what applying law enforcement means-- criminal prosecution of terrorists in courts for their crimes. In fact, if you look at the principles of counterterrorist policy that have been applied through the years through several presidential administrations, both Republicans and Democrats, you will see applying the rule of law and bringing terrorists to justice for their crimes as one of the major principles that's been involved.

Sometimes you hear a debate, which I think is kind of a phony debate, about whether terrorism should be considered crime or war. And that really isn't very helpful, because all you have to do is look at the military tribunals that have been established by the United States as one way of applying the rule of law. They are military, to be sure. The trials involve judges that wear uniforms. But it's also a form of administering justice and applying the rule of law to terrorists.

This use of the instrument has several advantages and attractions. The most obvious one is if you incarcerate or execute a terrorist, he is no longer on the street to commit more terrorist crimes in the future. You may also have a deterrent effect on other terrorists or would-be terrorists who do not want to be incarcerated for life themselves. And it may impede the operations of other terrorists and terrorist groups, knowing that they are perhaps subject to the same sort of prosecution and treatment if they were to be seized and arrested, as well.

Also, a criminal prosecution perhaps does something for us, the public. It realizes a sense of closure when justice is applied for terrorist crimes that have been committed. It is a demonstration of, particularly in the United States, a commitment to the rule of law. And it can be a very high-profile demonstration of our determination to strike back against terrorism.

As always, there are limitations and disadvantages. One of them is it doesn't apply to state
sponsorship. You can't take a whole country or government and haul it into a federal court and prosecute it for a terrorist crime. Also, the individuals who tend to get caught often are the underlings, the ones who are most likely to be captured, and less so the leaders and the masterminds, who tend to be more unreachable. They're the ones we'd most like to prosecute, but perhaps we're less likely to see them in court.

Deterrence may not be as effective as we hope it would be. It's obviously not a deterrent for a suicide bomber. And in some cases, a prosecution of a captured terrorist may invite retaliation, rather than causing terrorists to stand down. There have been numerous instances in the past of hostages being taken with the demand being made by the terrorist hostage-takers being the release of a previously captured compatriot in prison.

There are also a couple of other limitations. One, especially when capital punishment or the death penalty is involved, as it has been, to some extent, still in the United States. This may be an impediment to international cooperation. We've had some instances in which foreign governments have been reluctant to surrender terrorist suspects for prosecution in the United States, because the foreign governments-- as is true, for example, of basically all the European states-- have done away with capital punishment and do not consider it proper to surrender someone to a state where that may be the penalty.

And finally, and not least important, building a criminal case is harder than you may think. It's one thing to have an intelligence case that leads us to conclude that someone is a terrorist or has been responsible for a terrorist act. It is something else, and generally more difficult, for prosecutors to be able to put together a case that, subject to all the rules of evidence and procedure that our courts are subject to, both military and civilian, will stand up. And of course, the last thing that you would want to have happen, as far as counterterrorism is concerned, is to take a prominent terrorist, try him in court, and have him acquitted, and he walks out of the courthouse a free man.