

Investigating and Prosecuting Terrorism in the Cyber-Age

Moderator: Honorable Loretta E. Lynch, United States Attorney,
Eastern District of New York

Panelists: Honorable Joseph I. Lieberman, Kasowitz, Benson, Torres & Friedman LLP
Honorable Michael Chertoff, The Chertoff Group
Honorable Michael B. Mukasey, Debevoise & Plimpton LLP



The Honorable Loretta E. Lynch, United States Attorney for the Eastern District of New York, introduced a panel formed to discuss the challenges associated with investigating and prosecuting cyber-terrorism in the cyber-age.

Ms. Lynch asked former United States Senator Joseph I. Lieberman to discuss how the threat of cyber-terrorism compared with more traditional types of terrorism. Senator Lieberman observed that the focus previously has been on Islamist extremist terrorism and threats to infrastructure from terrorist physical attacks. With the creation of the Department of Homeland Security ("DHS"), the new agency worked together with the Director of National Intelligence and the National Counterterrorism Center to coordinate a response to the threat of cyber-terrorism.

Ms. Lynch then asked former DHS Secretary Michael Chertoff whether he viewed cyber-tools primarily as a means of preventing terrorism or just as a means of protecting our cyber-infrastructure. Secretary Chertoff focused on two ways in which cyber-issues came to the fore within DHS. First, cyber-tools were and are significant to the recruitment and training of people, and in communications related to, and the execution of, terrorist plots. Second, cyber-infrastructure became an attractive target for terrorism, in response to which the government established a comprehensive national cyber-security initiative. Secretary Chertoff also stated that the domestic faces of cyber-security are the domestic civilian agencies, like the DHS and FBI.

Former Attorney General and former United States District Court Chief Judge Michael B. Mukasey then discussed the creation of the National Security Division of the Department of Justice. Judge Mukasey said it “was enormously helpful” because of the cooperation among participants. He said rules were implemented to turn the FBI into an intelligence gathering agency, in addition to being a law enforcement agency. While noting that terrorists traditionally were known for killings on as large a scale as possible, Judge Mukasey predicted an increase in the use of “cyber” both in recruiting and as an adjunct to future attacks.

Ms. Lynch next questioned whether cyber was a weapon or simply a means. Secretary Chertoff suggested that, over time, cyber would likely move from becoming an enabler of physical terrorism to an end attack of terrorism, noting that “smart devices” could easily become “attack vectors,” with real world consequences. Senator Lieberman observed an inevitability to terrorist groups becoming more sophisticated and using cyber as a form of attack on our country's infrastructure, which he pointed out is managed by cyber — our electrical grid, water systems, financial systems and communications systems. Secretary Chertoff added that, increasingly, cyber was being used as a weapon by groups for ideological, political and other reasons.

The panelists then discussed whether cyber-security strategy would allow for the internet, or certain websites, to be shut down. Judge Mukasey said that we have the capacity to do it and that he believed that the government had the right to do it if it wished to do so. Senator Lieberman said that legislation to provide the President with the authority to close down the internet nationally or in a specific region was opposed. He further explained that cooperation from the private sector is vital because most of the country's critical infrastructure is privately owned and controlled and that the private sector strongly opposed comprehensive cyber-defense legislation due to government regulation. The private sector simply has to be better at creating defenses.

Ms. Lynch asked how we can push the private sector to do more. Secretary Chertoff offered several recommendations, including establishing liability protection for companies that raise the standard for their protection to a reasonable level of performance standards, and translating technical jargon related to cyber-security into simpler language that senior executives can understand so that it can be acted upon more effectively.

Ms. Lynch next inquired as to what can be done to expand or manage “.com” companies. Judge Mukasey said that companies should get together and consult with those sharing technical capability in order to protect their secrets and maintain a level of security that the companies cannot handle by themselves. Senator Lieberman remarked that cyber-defense is an area that really calls for a public/private cooperation and partnership.

The panelists then considered whether the fallout from Edward Snowden's disclosure of confidential government files would likely dampen information sharing that could be a vital tool to security protection. Senator Lieberman answered affirmatively, but cautioned that such a response is “totally irrational and unconnected.” Secretary Chertoff explained that Snowden has had a “tremendously damaging impact” on our ability to protect ourselves with respect to cyber. Companies in the private sector are scared to cooperate with the government, and

allies are placed in a position where they are concerned and afraid that “they’re going to be outed.” Judge Mukasey concluded by alluding to panic among allies, private business and Congress.

Ms. Lynch next inquired about other governmental responses (other than legislative) that might help in protecting us from terrorists using cyber and pure cyber-infrastructure issues. Senator Lieberman explained that President Obama acted wisely by issuing an Executive Order to develop a process allowing the government and private sector to work toward developing certain standards to defend. He also added that “reality has begun to awaken companies” and that companies are now spending more money to defend against cyber-attacks and cyber-crime. Secretary Chertoff noted that we can educate people about what they ought to do even if we cannot provide a direct incentive and that basic education would allow companies to understand the threat and how to conduct themselves on the internet.

The discussion then turned to whether the Department of Justice has what it needs to keep up with the cyber-threat in terms of being able to share information and work cooperatively. Judge Mukasey noted that the Department of Justice cooperates with local authorities on a regular basis. He added that it would be prudent to focus on education and educating people about the nature of what the government collects, what it does not collect and why it collects it.

Ms. Lynch next asked if there was a disconnect with the citizenry in terms of how people view their own cyber-security and what we do about that issue. In response, Messrs. Chertoff, Lieberman and Mukasey focused on the wealth of commercial data that is collected by and held in private hands and then used and marketed with minimal constraints.

Ms. Lynch concluded by inquiring what each panelist might want from a wish list in order to provide better cyber-security or combat cyber-terrorism. Senator Lieberman suggested passing cyber-security legislation, including offering immunity from liability to privately-owned infrastructure if the companies prove that they have met or attempted to meet certain standards. He also suggested authorizing — by statute — cooperation or the sharing of information between the government and private entities and among private entities. Secretary Chertoff explained that the focus should be on better allocation of responsibility between domestic and military agencies as to threats which are “away and home.” Judge Mukasey sought a revised authorization for the use of military force.

Following the panel discussion, two comments were raised by the audience. First, a concern was raised about the need to focus on the individual, not just the technology. Secretary Chertoff agreed that it was critical to focus on people who present risks while balancing that with civil liberties. Senator Lieberman focused on the increasing problem with so-called lone wolves who operate on their own. Second, a concern was raised about not letting the government “off the hook” and requiring government to raise its standards to protect itself better. Judge Mukasey agreed that government should be able to do a better job. Secretary Chertoff concluded the panel discussion by observing that the government needed more effective ways of monitoring its own networks for problematic behaviors and suggested assembling a group to take a thorough look at the way counter-intelligence is being managed.