

**While the European Union was Sleeping, the Data Retention Directive Was Passed:  
The Political Consequences of Mandatory Data Retention**

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**Abstract**

This article examines the political consequences of mass data retention. The objectives of this article are two-fold. It first assesses the situation that might have been expected to occur in the European Union as a result of the implementation of a mass surveillance measure, Directive 2006/24/EC. Usually, measures that affect all citizens invite political resistance. As such, one might have expected that as a result of EU-wide data retention, mass resistance of this measure would ensue. Yet, this situation did not arise. Accordingly, the second task of this article is to explore the current situation in the European Union and explain why public resistance to a mass surveillance measure was largely absent.

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## 1. Introduction

The Madrid and London bombings (on March 11, 2004 and July 7, 2005, respectively) brought about a significant change both in European conceptions of the threat posed by al-Qaeda and concerning the appropriateness of measures with which to respond to these attacks. In response to this threat, one of the measures introduced by the EU and its Member States in order to facilitate the tracking and prosecution of terrorists was the Data Retention Directive (Directive 2006/24/EC), which calls for an unprecedented mass collection and storage of information on all European citizens for a significant period of time. This data can reveal “who everyone talks to (by email and phone), where everyone goes (mobile phone location co-ordinates), and what everyone reads online (websites browsed)” (Bowden 2002: 21). This measure represents a new direction for surveillance: a shift from a more targeted mode of surveillance to one of mass surveillance.

This article examines the political consequences of mass data retention. First, it explores the extent to which democratic accountability exists within EU legislative decision-making. By presenting the Data Retention Directive as a first pillar (Title IV EC Treaty) measure it is assumed that more accountability is brought into the EU decision-making process. The argument brought forward by European Community institutions is that by using co-decision-procedure, democratic accountability of the legal acts being proposed and adopted would be guaranteed through the direct involvement of the European Parliament; thus providing a more legitimate policy response to terrorism (Balzacq & Carrera 2006). The first section of this article investigates this claim.

Second, it considers the consequences of the possible loss of legitimacy in the EU. More specifically, it explores the loss of legitimacy and the implications of this occurrence in terms of the loss of political trust and public confidence. This section also investigates Sunstein’s (2005) claim that measures that affect all citizens tend to invite political resistance; whereas, measures that affect only certain parts of the population do not.

Lastly, this article explores the current situation in the EU and provides explanations as to why mass data retention has failed to provoke mass political resistance. Within this section three factors are examined that may have played a role in the lack of resistance to mandatory data retention: the speed with which the Data Retention Directive was passed, the communication of the threat of terrorism to the public, and public perception of this threat.

## 2. In the Name of Output Legitimacy, Input Legitimacy is Sacrificed

The legislative procedure used determines the rules governing the interaction between European Community institutions during decision-making on adopting a measure. The legislative process used to adopt the Data Retention Directive was the co-decision procedure. Co-decision was introduced under Article 251 (ex 189b) of the Treaty Establishing the European Community (EC Treaty) 1992. This procedure was created in order to reduce the democratic deficit which existed from the European Parliament's diminished role in the legislative process. Specifically, co-decision "is based on the principle of parity between the directly-elected European Parliament, representing the peoples of the Union, and the Council, representing the governments of the Member States" (European Parliament 2007: 4). Under the co-decision procedure, the European Parliament and Council of the European Union (previously known as the Council of Ministers) can only adopt legislation jointly – neither can adopt legislation without the agreement of the other (European Parliament 2007: 4). Furthermore, this procedure gives the Parliament the ability to block any decision by the Council. As Wessels and Diedrichs (1999: 141) put it, the European Parliament's right to say "no" gives it a bargaining position which it previously lacked. The EC Treaty gave the European Parliament such powers under co-decision in order to increase the legitimacy of EU decision-making.

There are two fundamental approaches for identifying the legitimacy of decision-making in the EU, direct (or input) and indirect (or output) legitimacy (Lipset 1960). Direct legitimacy is considered as "legitimacy by the people"; whereas, indirect legitimacy is considered as "legitimacy for the people" (Muntean 2000: 1). Indirect legitimacy constitutes what is known as "legitimacy through performance," where one criterion by which efficiency is tested is the speed with which legislation is passed. The direct legitimacy approach proposes the parliamentary model, which specifically outlines the growing importance of the European Parliament as the only directly-elected political body in the EU (Muntean 2000: 1). Häge and Kaeding (2007: 342) argued that the input legitimacy of the EU was enhanced by giving the European Parliament, the only directly accountable institution in the EU, the power to shape policies in the European Union. To the extent that the European Parliament shapes the evolution of the EU as a whole, it constitutes a means for EU citizens to influence European governance (Wessels & Diedrichs 1999: 141). Through co-decision, democratic legitimacy is enhanced by increasing the European Parliament's powers. Since the European Parliament has been afforded more power in

legislative decision-making, what needs to be determined is whether or not it is making effective use of these powers.

The success of co-decision in increasing the European Parliament's power is questionable at best. If there are few or no similarities between the European Parliament's preferences and the actual outcome of the legislative decision-making process, then there is no reason to assume that the European Parliament's input on this issue had an impact on the end result. During negotiations on data retention, the majority of the European Parliament's recommendations on essential aspects of data retention, such as who has access to retained data, the length of retention, and cost reimbursement of data retention, were ignored. Specifically, the Parliament wanted to define competent national authorities as the "judicial authorities and national authorities responsible for the investigation, detection, and prosecution of serious criminal offences" (Alvaro 2005: 36). The Council of the European Union (2005b) opted against such a definition, instead allowing Member States to define "competent national authorities". The final version of the Directive did not define "competent national authorities" and was thus in line with the Council's recommendation. For the length of retention and cost-reimbursement, both the European Commission and Parliament recommended a retention period of no greater than one year and for service providers to be reimbursed by Member States for retaining data. By contrast, the Council recommended a maximum period of two years and no mandatory reimbursement of service providers. Once again, the final version of the Directive was in line with the Council recommendation requiring a maximum retention period of two years and no mandatory cost-reimbursement. Accordingly, in the case of the Data Retention Directive, it would appear that input legitimacy was not improved because the European Parliament and Council did not actually have equal say in the process. From the final draft of the Directive, it appears that the Parliament gave way to the recommendations of the Council. If the European Parliament had a say in this process, it did not make use of it. While the co-decision procedure was introduced to increase the European Parliament's democratic legitimacy, in practice, as will be shown below, not only does it fall short of this but it also resulted in some negative, unanticipated consequences.

These negative consequences were in part the result of the Treaty of Amsterdam's introduction of the possibility of an early agreement between the European Parliament and Council on legislation under co-decision. Originally, legislative decision making in the EU was a lengthy process. Specifically, the co-decision procedure introduced by the EC Treaty was an arduous decision-making process, which consisted of three readings (first

reading, second reading, and third reading with conciliation). In contrast to the EC Treaty, the Treaty of Amsterdam made the adoption of legislation at first reading possible. This is also foreseen in the *Joint Declaration on Practical Arrangements for the Codecision Procedure*, which states that “institutions shall cooperate throughout the procedure with a view to reconciling their positions as far as possible and thereby clearing the way, where appropriate, for the adoption of the act concerned at an early stage of the procedure” (European Parliament 2007: 9). In order to speed up the process, the three European Community institutions (Commission, Parliament, and Council) started to engage in trilogues – informal and semi-formal negotiations before and between their formal readings. These trilogues, initially intended to deal with non-controversial or highly technical measures, are considered as a vital part of the legislative process. Nowadays, however, these informal or semi-formal meetings are used even when making decisions on highly controversial measures with the justification that these meetings will result in more efficient law-making. Here, efficient legislative decision-making is measured by the length of time needed to adopt the final text (Boyron 1996: 303). Thus, these trilogues increased the efficiency of decision-making by speeding up the legislative process.

Normally, the decision-making process in a democracy consists of “an elaborate process of deliberation and contest rather than simply a majority vote” (Huysmans 2004: 332). As such, decision-making develops relatively slowly. However, calls for increased output legitimacy (efficiency) required the conclusion of negotiations within six months of the respective Presidency, thus placing too much emphasis “on fast-track negotiations, at the expense of an open political debate within and between the institutions, with the involvement of the public” (European Parliament 2007: 9). This was the case with the Data Retention Directive, which was fast-tracked through the European Parliament on its first reading. Usually, the adoption of a measure – from the European Commission draft proposal to the final vote – takes approximately one year (Digital Rights Ireland 2005). The adoption of the Directive was passed with indecent haste. The Commission submitted a legislative proposal to the European Parliament and Council on the 21st of September 2005. The vote on the Directive was scheduled for 15 December 2005. This afforded Community institutions less than three months in order to meet the December deadline. In fact, the European Parliament’s rapporteur, Alexandor Nuno Alvaro, had less than two months to prepare a final report (which was completed on 28 November 2005). By contrast, the rapporteur for the Electronic Communications Directive (Directive 2002/58/EC, which preceded the Data Retention Directive), Marco Cappato, had 14 months to prepare

his Committee's report. While the report on Directive 2002/58/EC was given significant time to be prepared, the report on the Data Retention Directive was not.

According to the impact assessment, a decision on data retention was to be submitted immediately and not put off until later, even if the current information on the specifics of data retention and its implications was of poor quality (European Commission 2005: 3). This "undue haste" has been criticised by Rauhofer (2006: 336) as an attempt on the part of the Council of the European Union and, in particular, the UK Presidency, to prevent an in-depth investigation of the need for mandatory retention of data of all EU citizens. More importantly, Rauhofer argued that the UK Presidency sought agreement on data retention before Austria's Presidency (a declared opponent of data retention who also postponed the implementation of the Directive) in the Council in January of 2006. While fast-track agreements are a legitimate element of the legislative procedure, they circumvent democratic processes of deliberation, in which measures are scrutinized and heavily debated (Raunio & Shackleton 2003: 176). By speeding up the decision-making process on the proposal for data retention, scrutiny of the measure was unduly limited.

The co-decision procedure, therefore, has some negative, unanticipated consequences for the transparency and accountability of EU legislative decision-making. Consider the roles of core institutions, such as the European Parliament and the Council of the European Union, in EU legislative decision-making. Due to EU Member States' (most notably, the United Kingdom) reluctance to allow any further erosion of national sovereignty, the Council of the EU and not the European Parliament remains the dominant decision-making forum (Norris 1997: 275-276). As such, the Council of the EU, essentially an intergovernmental negotiating forum representing Member States and acting behind closed doors, is the most important law-making body (Norris 1997: 274-275). Accordingly, there is a significant lack of transparency about "who said what" in negotiations behind the closed doors of the Council of the European Union, thus making it extremely difficult for the public to evaluate the actions of their governments within the EU (Norris 1997: 275). While the Parliament has the power to shape legislation this power comes at a price because this institution "is increasingly finding itself embroiled in secretive and unaccountable forms of decision making" (Farrell & Héritier 2003: 11).

These informal meetings and early agreements are not as transparent and accountable as they ought to be (Farrell & Héritier 2003: 30). Specifically, when texts go through the European Parliament, debates are as open as possible and "information on the position of each institution is accessible" (Boyron 1996: 314). By contrast, during meetings and early

agreements “negotiations are conducted in secret, behind closed doors, where the public is not admitted” (Boyron 1996: 314). Behind closed doors, representatives of the Council, Commission and Parliament have agreed to introduce unprecedented laws such as the Data Retention Directive. Outside observers are not given the possibility to scrutinise the proposals in detail before they are passed. The only way to hold institutions accountable is to keep these meetings open and subject to public input. By cutting itself off from public opinion, the European Parliament endangers its democratic legitimacy. The European Parliament is the chief advocate of democracy, efficiency, openness, and accountability in the European Community (Lodge 1994: 69). Clearly, during decision-making on mandatory data retention, this institution failed to advocate for transparency and accountability in the legislative decision-making process. Consequently, while trilogue negotiations increase EU output legitimacy in terms of decision-making efficiency (the speed with which these measures are passed), the opaqueness of these processes endanger the original goal of fostering input legitimacy (that is, transparency and accountability of EU decision-making). The question that follows is: what are the political consequences of the possible loss of legitimacy in EU legislative decision-making?

### **3. What Should Be: Exploring the Loss of Legitimacy**

Legitimacy is fundamental to the exercise of all forms of authority (Tyler 2004: 87). It constitutes a generalized judgment that the actions of institutions are valid, desirable, proper, or just “within some socially constructed system of norms, values, beliefs and definitions” (Suchman 1995: 574 in Tyler 2006: 377). When faced with uncertain terrorist threats, governments are faced with the dilemma of taking action – which constitutes neither an under-reaction (falling short of protecting citizens, which affects public confidence in leadership) nor an over-reaction (action unnecessarily hard handed, which also affects public confidence in leadership) to the threat (Flyghed 2002: 26-28). Either one of these reactions can lead to a loss of legitimacy for those in power.

Political trust relies on the basic evaluative orientation towards the government. Public views about the legitimacy of the police might, for example, be the result of public assessments of government performance, in terms of its ability to provide security for its people or its effectiveness in fighting terrorism (Tyler 2004: 90). Terrorist attacks undermine the legitimacy of the governments by demonstrating how they are unable to protect their citizens and maintain law and order. Indeed, events such as 9/11, and the Madrid

and London bombings reveal the inability of government to protect national security. The media may also serve to undermine the public's perception of government competence. Coverage of repeated terrorist incidents creates the impression of government apathy or impotence (Falkenrath 2001: 171).

Since institutions are legitimated by the manner in which they make decisions and exercise authority, they must have the ability "to create and maintain a credible presence by combating crime and punishing wrongdoers" (Tyler 2006: 394; Tyler 2004: 96). In response to the threat of terrorism post 9/11, according to Schneier (2006: 38) what is occurring is "security theater," the implementation of measures that are designed to make you feel safer when in fact such security is not provided. These measures are not aimed at countering a specific threat; they are merely symbolic. Consider the airport security measures implemented in the aftermath of 9/11: when small blades, box cutters and knitting needles were banned in the aftermath of 9/11, terrorists decided to hide explosives in their shoes (Richard Reid); when shoes were screened after Richard Reid's failed attempt to blow up the airplane he was on, terrorists decided to use liquid explosives (foiled 2006 plot in London to blow up the planes of three major US airlines over the UK and the US by using containers with liquid explosives); and by restricting liquid, terrorists devised another way of bringing explosives on board – in their underwear (as Umar Farouk Abdulmutallab did in 2009). However, even symbolic measures designed to reassure citizens may have a negative impact on the public's perception of government competence. One way to determine whether a measure is symbolic or actually tailored to the threat it purports to deal with is by examining the proportionality of the measure.

### **3.1. Proportionality**

Terrorist attacks are extremely rare events. However, even though the probability of a terrorist attack is minute, the risk of terrorism is considered as great because the consequences of an attack are extremely severe. It has to be recognized that counterterrorism "legislation can be justified because of the way terrorists operate, which makes them hard to catch and convict, because of the risks that they pose to society, and because it is important to be able to pre-empt, as well as to deter, terrorism" (Cohen 2004: 443-444). An important underlying principle justifying the implementation of these measures, with respect to the law and in the eyes of the public, is proportionality. It is expected that certain restrictions on human rights are inevitable when an individual (or individuals) are sus-

pected of a crime (or crimes). The same cannot be said about those who have not committed crimes. This is especially true when governments are implementing more expansive measures aimed at the entire population, such as the Data Retention Directive.

The question of proportionality is interesting because the Directive may be proportionate to the size of the risk but perhaps not the likelihood of its arising (particularly, since non-targeted measures fall on those who pose little or no risk). Consider a controversial form of targeted surveillance – racial profiling. For racial profiling, investigations of groups or members of the population are disproportionate if fairness (that is, the distribution of burdens) is violated (Risse & Zeckhauser 2004: 140). For data retention, the violation of fairness implies something different. Here, a measure may be considered as disproportionate if it applies to all, instead of only those who pose a threat. What is the probable response of those targeted by the Directive? Measures that extend beyond suspected terrorists undermine trust and impair the perceived legitimacy of measures. Thus, even when governments act in the best of faith, they risk arousing suspicion and even resentment and hostility “on the part of law-abiding individuals who feel they may fall under the sweep of such powers” (Schulhofer 2005: 27).

Loss of trust has additional implications for the government because “it affects both the level of citizens’ tolerance of the regime and their degree of compliance with governmental demands and regulations” (Levi 1998: 87). The destruction of trust may lead to widespread antagonism to government measures and even resistance (Levi 1998: 88). When the Directive was being negotiated in the EU, there were many debates on data retention in Member States’ newspapers, on the internet, and among institutions of Member States (such as parliaments, human rights organisations, telecommunications and internet service providers, academic conferences etc.). Shortly after the Directive was adopted by European Community institutions, debates on this issue largely subsided. One known case of resistance on data retention involved a protest in Germany. In particular, one of the largest street protests occurred on the 22nd of September 2007 in Germany, where more than 15,000 marched in Berlin under the slogan “Liberty instead of Fear – stop the Surveillance Mania!,” calling for the rejection of pervasive surveillance measures such as the Data Retention Bill (EDRI 2007). These numbers, however, pale in comparison to the total number of EU citizens, approximately 460 million; the vast majority of whom remained silent on the issue.

Cole (2002: 5) argues that if widespread human rights violations experienced by foreigners were experienced by us (citizens) they would not be tolerated. Likewise, Sunstein

(2006) argued that political resistance does not arise when the measures implemented affect only certain parts of the population; whereas, measures that affect all of us tend to invite political resistance. The Data Retention Directive, however, affects all citizens and as such, it is precisely the kind of measure that ought to provoke public resistance (because every citizen is affected in a way that they were not by other types of measures). If this is true, then why has this measure not provoked the natural political resistance that Sunstein claims arises from measures that affect all of us?

#### **4. What is: The Silence of the Population**

The Data Retention Directive was introduced in the EU with little or no debate by Member States, their representatives and citizens. The Directive applies to those who pose little or no risk. This disproportionate measure would not have been passed before terrorist attacks such as the Madrid and London bombings. Yet, after these bombings the situation changed. Specifically, after the Madrid bombings, in the Declaration on Combating Terrorism, Member States were urged to “take any measures that remain necessary to implement fully and without delay” mandatory data retention (European Council 2004: 3). After the London bombings, in the Council Declaration on the EU Response to the London Bombing, this need was reiterated when the Council of the European Union (2005a: 6) stated that it declared its immediate priority “to build on the existing strong EU framework for pursuing and investigating terrorists across borders, in order to impede terrorists’ planning, disrupt supporting networks, cut off any funding and bring terrorists to justice” by implementing measures such as those requiring data retention. One would expect an expansive measure like the Data Retention Directive to be widely resisted. The situation in the EU proves otherwise. Why is this the case? The lack of resistance may be attributed to public support, tolerance, or muted opposition. Certain factors may also have played a role in the lack of resistance to mass surveillance. These factors are the speed with which legislation is introduced, the rhetoric and the reference to the responses of the terrorist threat as a war on terrorism, the presentation of terrorist threat as an emergency, and the EU publics’ perception of the risk of terrorism.

##### **4.1. The Need for Speed**

A common characteristic of many counterterrorism measures is the speed with which they are passed following terrorist attacks. In the United Kingdom, legislation has been rushed through Parliament following terrorist attacks. For example, the Prevention of Terrorism (Temporary Provisions) Act of 1974 was debated for only seventeen hours and the Criminal Justice Act (Terrorism and Conspiracy) Act of 1998 was rushed through Parliament 27 hours after the Omagh bombing in Northern Ireland. In the United States, on October 26, 2001 (just six weeks after 9/11) Congress passed the broadest anti-crime act in American history, the USA Patriot Act. In Europe, the Data Retention Directive was also rushed through.

Other than efficiency (output legitimacy), the increasing in the speed of EU legislative decision-making is also attributed to the presentation of the current threat of terrorism as an emergency. Specifically, in the aftermath of both the Madrid and London bombings, European Community institutions have stressed the urgency of the situation and the need to immediately implement measures such as those on mandatory data retention (European Council 2004; Council of the European Union 2005a). Security responses, especially after dramatic events such as the Madrid bombings, often articulate a need for swift and decisive counter measures (Huysmans 2004: 332); the Declaration on Combating Terrorism attests to this. Presenting these events as emergencies or crises put pressure on institutions to speed up the decision-making process. Can the situation in the EU be described as an emergency necessitating such a response?

According to Gross (2003: 1070-1071), an emergency, which compromises a sudden, urgent, and usually unforeseen event that poses a fundamental threat and requires immediate action, is “inherently linked to concepts of “normalcy” in the sense that the former is considered to be outside the ordinary course of events or anticipated actions.” 9/11 was considered as an emergency. This emergency or unanticipated event was characterized by Taleb (2007) as a “black swan”. The term “black swan” has been used by Taleb to define any event that occurred outside of the realm of expectations.

What is the relevance of the term “black swan”? According to Taleb, prior to the discovery of black swans in Australia, all swans were assumed to be white. This notion held true as long as white swans were the only ones found in the discovered world. Once a black swan was discovered the perceptions of what swans were had to change and did change. This one black swan was all that was needed to invalidate “a general statement derived from millennia of confirmatory sightings of millions of white swans” (Taleb

2007: xvii). This is similar to 9/11. This one event was all that was needed to change the perceptions of what terrorism was and what terrorists can do.

In order to determine whether the Madrid and London bombings are “black swans”, they must meet three criteria posed by Taleb. First, the event must be an outlier, since “it lies outside the realm of regular expectations, because nothing in the past can convincingly point to its possibility” (Taleb 2007: xvii). Both the Madrid and London bombings were outliers. In particular, the Madrid bombings represented the first coordinated terrorist attack on European soil; whereas the London bombings represented the first suicide bombings from al-Qaeda inspired terrorists on European soil. Second, the event must carry with it a severe impact. This was evident in both bombings, which resulted in more than 250 deaths combined and thousands injured, not to mention the disruption of commerce, damage to the transportation industry, and heightened fear among the public. For the third criteria Taleb (2007: xvii - xviii) argues that “in spite of its outlier status, human nature makes us connect explanations for its occurrence after the fact, making it explainable and predictable”. Such explanations and predictions were plentiful following both the Madrid and London bombings. Specifically, after the attacks, it was argued that the involvement of Spain and the United Kingdom in the Afghanistan (2001) and Iraq (2003) wars made them terrorist targets. As such, an attack should have been expected. What few had anticipated, however, was that the attacks would have been implemented by their own countrymen (Gove 2006). As Taleb (2007) argues, if a terrorist attack (the event in its entirety) had been anticipated (which was not the case for the terrorist attacks on Madrid and London), then measures would have been implemented in order to ensure this attack would not take place. That is, had it been predictable, it would not have occurred.

Accordingly, the Madrid and London bombings meet Taleb’s three criteria and as such, can be characterized as “black swans.” However, while these attacks were “black swans” and “exceptional” in their nature, the threat of terrorism is not. Specifically, the low predictability and devastating impact of these “black swans” deflects attention from an important truth about them – that they are low probability events. The current threat of terrorism encompasses these events, thus making it seem as if the threat itself is “exceptional” when in fact it is not. This threat is not exceptional because it has become an integral facet in citizens’ daily lives. As Gross (2003: 1071) observes, “for normalcy to be ‘normal,’ it has to be the general rule, the ordinary state of affairs, whereas emergency must constitute no more than an exception to the rule.” Currently, the threat of terrorism

has indeed become part of the normal state of affairs. Accordingly, it cannot be described as exceptional or an emergency. The same could be said about the war on terrorism.

The nature of the war on terrorism would make any claims of a state of emergency, if they existed, extremely difficult because of the irreconcilable nature of this war with the term “emergency.” As Gross (2006: 74) argues the concept of an emergency “must be informed by notions of temporal duration and exceptional danger.” While there is no doubting that 9/11 and the attacks on Madrid and London were extraordinary crises, there is “no reason to believe that the threat of terrorism will recede any time soon” (Schulhofer 2002: 68). Therefore, the ongoing war on terrorism blurs the distinction between normalcy (the normal state of affairs) and emergency in the face of a war that is sustained indefinitely against a succession of terrorist cells or rogue states lacking territories and borders. Since no one knows when the war on terrorism will be over, it cannot reasonably be described as an emergency.

Due to the presentation of this threat as an emergency, the legislative decision-making process was sped up thus not allowing sufficient time for deliberation and contest on the issue of mandatory EU-wide data retention. This resulted, however, in the introduction of a mass surveillance measure with seemingly no dissent. What possible explanations are there for the public’s support, tolerance, or largely muted opposition? Sunstein (2005: 217) argues that as the magnitude of the terrorist threat increases, governments’ arguments for intruding on human rights also increases. Especially if the risk is great, governments might, for example, allow law enforcement and intelligence agencies to engage in practices that would not be permitted under normal circumstances. For Sunstein (2005: 207), if the burdens of the restrictions posed are widely shared, it is unlikely to be acceptable unless most people are convinced that there is a “good reason.” He further states that for genuinely burdensome restrictions, individuals will not be easily convinced unless a “good reason” is apparent, provided, or believed to exist (even if this is really not the case).

In what follows, the manner in which the threat of terrorism was communicated to the public is explored. This is subsequently followed by an examination of the psychological mechanisms which might make individuals think there is a good reason for government action (even if this is not really the case).

#### 4.2. Counterterrorist Rhetoric: Communicating the Threat to the Public

While rhetoric became known as the voice of democracy, the earliest rhetorical texts consisted of speeches in homicide trials, whose proceedings were largely dictated by laws (Draco's homicide laws in ancient Greece) pre-dating democratic rule. Socrates defined rhetoric as an "art of persuasion;" that is, the art of going to any and every length (*πάντα λέγειν*), such as deceptions, lies, force, and so on, to achieve persuasion (Plato, *The Republic*). Rhetoric is both used to persuade an audience that the issue raised is paramount and then to convince them to take their side (Carawan 1998: 5). Reflective strategy is a type of rhetoric where government officials use discourse first to assert their legitimacy and then press for action (Leeway 1991: 75). One way legitimacy is established is by using the distinction between "us" (friend) and "them" (enemy) in political discourse. The calls for unity, the existence of a collective "we" or "us," not only mobilize the masses in support of political power to combat 'them', but also serves to justify or legitimate this power in spite of the means (the measures) used by authorities to achieve the end (combating the threat). This bipolar view of the world divides individuals (and even nations) into those who are with and those who are against terrorists. The government (the counterterrorist in this case) uses this bipolar discourse to vehemently oppose the terrorist, who is presented as inhumane and barbaric (Leeway 1991: 72). The calls for unity and action against the "others" may therefore serve as a means to suppress dissent and reduce the scope for democratic debate.

Rhetoric is further used to present terrorist attacks as those threatening national survival, requiring a war to be waged against the nation's enemies. The terminology of warfare, such as the war on terrorism, gives the impression that we are "on our way towards a state of emergency, where our normal moral perceptions of right and wrong, good and evil, are set aside in favour of a kind of emergency morality, a war ethic" (Halvorsen 1998: 344; Flyghed 2002: 24). For Schmitt, enemies are politically significant because they create an emergency, which requires exceptional political action to assure the survival of the nation (Huysmans 2006: 133). By presenting the terrorist threat this way, as endangering the life of a nation, more restrictions of individuals' human rights are tolerated.

Security powers resulting from counter terrorism measures such as the Data Retention Directive are best understood as extraordinary powers. Whether or not such powers can be circumscribed in law has been an issue that has been debated. Schmitt (1922) believed

that provisions in Constitutions for emergency powers were futile because they fail to anticipate novel crises. That is, he believed that an emergency cannot be circumscribed in law nor made to conform to the normal legal order, because no legal order can reasonably foresee all potential crises and as such, no existing law can constrain which measures may be required in an emergency. While Schmitt was correct to argue that existing norms cannot foresee all potential crises that may necessitate an exception, he was incorrect in his assertion that this exception could not be anticipated procedurally (Scheuerman 2006: 62). Specifically, even if the actual content of the emergencies could not be predicted, it is still possible to predict that these emergencies may occur and to establish procedures for them (Zuckerman 2006: 526). The provisions in Constitutions and the derogation clauses in human rights instruments obviously attest to this. The notion of a state of emergency or state of exception exist in many European Constitutions and affords these States with emergency powers necessary to deal with potential crises (Ignatieff 2005: 31). The European Convention on Human Rights also affords Member States emergency powers during a “time of war or other public emergency threatening the life of the nation,” under Article 15 of the Convention (the explicit provision for derogation), by allowing them to derogate from certain rights (except Article 2 – excluding death that result from lawful acts of war, Article 3, 4.1, and 7) for the period of the emergency. The existence of these clauses generally represents the consensus that it is inevitable for governments to resort to exceptional measures in times of emergency. Despite the existence of these provisions, no State in Europe, except the United Kingdom, relied on Article 15 derogations to justify the implementation of their counterterrorism measures in the aftermath of 9/11. Nonetheless, Member States (and even the European Union) have resorted to using emergency powers (e.g. indefinite detention) even though they have not officially declared that they are in a state of emergency.

These powers, however, should be constrained by the rule of law. They should also be exercised in accordance with human rights instruments. By contrast, Schmitt believed that legal restraints on emergency powers are inappropriate for exceptional circumstances because the situation may necessitate the need to resort to the use of absolute power, thus surrendering the legal restraints on its exercise. In light of this, what occurs, according to Agamben (2005: 31), is a suspension of the legal “order that is in force in order to guarantee its existence” (i.e. the “state of exception” suspends the law in order to defend it). Therefore, as Schmitt argued, an effective response to the emergency must be “outside the rule of law,” and thus, “cannot be limited by the rule of law” (Dyzenhaus 2001: 22),

because the emergency precludes the possibility that emergency powers can be “regulated, controlled, and ultimately subjected to democratic standards of legitimacy” (Zuckerman 2006: 526). Accordingly, in order for a democratic society to effectively deal with an emergency, he believed that they must give up their fundamental commitments to human rights and the rule of law (Dyzenhaus 2001: 22).

Yet, Schmitt was wrong in assuming that democracies cannot respond to emergencies unless they abandon the rule of law and their commitments to fundamental human rights. In both the Declaration on Combating Terrorism and the Council Declaration on the EU Response to the London Bombing, it was argued that acts of terrorism are attacks against the founding principles of the European Union. Among such principles is respect for the rule of law and human rights. However, the institutions that made these declarations also advocated the creation and implementation of a measure that neither accords with the rule of law nor respects human rights. If the EU abandons the rule of law and human rights, it “sacrifices the very aim of its existence to the means which it adopts to preserve this” (Fontana 1988; Zuckerman 2006: 524). Such an occurrence can never be justified.

One way this could be prevented is by allowing governments, when faced with an emergency, to resort to emergency powers which are limited in “time, space, and object” (Bigo 2006: 65). That is, States’ powers should be based on facts that justify the claim that there is an emergency and constrained by both the time limits of the emergency (since the time limit of the war on terrorism is unknown, sunset clauses and periodic reviews should be included in the measures) and limits on the specific means that may be used to respond to the emergency (Dyzenhaus 2001: 27). Flyghed (2002: 33) provided a good illustrative example of why this is needed. In Sweden, a law was passed in 1952 in order to deal with an exceptional circumstance (espionage). As an exceptional measure it would only apply for one year at a time, where Parliament would determine each year whether or not to extend the life of the measure. Despite the one year time limit safeguard, this measure has been in force for approximately 50 years. Consider also the use of exceptional clause 2.2 of the Schengen Convention by EU Member States to reinstate border checks post 9/11. Such border checks can only be reinstated in exceptional circumstances. As Apap and Carrera (2003: 3) argued even though this provision must be used exclusively under the exceptional circumstances of an emergency and for a limited period of time, looking at the states’ practices, however, their use of the provision has not been so exceptional, but rather a common practice.

Emergency powers should be used to deal with the consequences of major terrorist attacks, only after a state of emergency is declared, in order to react to some exigent circumstance; however, such powers should expire or cease to be operational after the emergency has passed (Heymann 2002: 451; Cohen 2004: 448). Most importantly, what should not occur is what happened in Sweden: that is, an emergency measure introduced to deal with a very specific situation should not later be expanded and made a permanent part of the ordinary criminal justice system.

By presenting the current threat of terrorism as an emergency, legal restraints on counter terrorism measures are being relaxed. The use of the war rhetoric, and the consideration of new terrorism as “exceptional” (when in fact, it is not), has put governments under pressure by speeding up decisions. The speeding up of decisions, coupled with the calls for unity, may therefore serve as a means to suppress dissent and reduce the scope for democratic debate when expansive counterterrorism measures are introduced to combat this so-called ‘exceptional’ threat.

Sunstein (2005: 205) argued that the “legitimacy of government action depends on the strength of the arguments it can must in its favour”. Yet, legitimacy depends on how its arguments are perceived by the public. According to economic theory of regulation, the demand for government action corresponds to the perceived risk to be regulated (HLRA 2002: 1229). As such, the following sections focus on the underlying mechanisms individuals use to assess the threat of terrorism.

#### **4.3. Terrorists Here, Terrorists There, Terrorists Everywhere: The Role of Heuristics**

Risk concerns the calculation of the magnitude of harm (its adverse impact) and the likelihood of harm (its probability of occurring). Risk perception involves a subjective judgment, anticipating the likelihood and consequences of a future event. Typically, the public’s perception of risk is considered politically more important than mathematical reality because the public seeks law in areas such as environmental protection and national security on the basis of their judgments about the probabilities associated with certain threats (perception of risk), like pollution or terrorism (Jolls, Sunstein & Thaler 1998: 1518). It bears on the demand for (and hence also the supply) of regulation. It is, therefore, important to look at the underlying mechanism involved in risk perception because they can

explain how public attention and support may be directed in favour of certain issues but not others.

Research has shown that psychological reactions to terrorism play a fundamental role in understanding public support in counter terrorism measures (Huddy et al. 2005: 593). As terrorism threatens greater harm and poses greater perceived risk, the public demands increased government action (HLRA 2002: 1229-1230). Thus, by looking at how individuals perceive threats to personal safety, one can find explanations for public support of expansive government policies which erode individual human rights such as privacy. Cognitive psychologists and policy researchers have investigated the underlying mechanisms that govern risk perception (Slovic 1987: 280-285; Kasperson et al. 2000: 233). According to their studies, when thinking about risks, individuals rely on certain heuristics (or rules of thumb). Among the most prominent are the availability heuristic, probability neglect, and prospect theory.

#### **4.3.1. Availability Heuristic**

Individuals' calculations of probabilities are beset with cognitive fallacies (HLRA 2002: 1230). One of the most common fallacy or source of bias is known as the availability heuristic. The availability heuristic makes "some risks seem especially likely to come to fruition whether or not they actually are" (Sunstein 2005: 35). Individuals employ the availability heuristic whenever they estimate the frequency of probability of an event by the ease with which those instances could be brought to mind (Tversky & Kahneman 1982a: 163-164; Slovic, Fischhoff & Lichtenstein 2000b: 105).

The introduction of laws to counterterrorism can in themselves promote availability. That is, if a measure responds to the problems associated with terrorism, individuals may come to see those problems as readily available. Consider, for example, anti-social behaviour. When it was introduced into the law and order discourse of the UK government, it "acquired a burgeoning life of its own in the public arena assisted by an increased volume of legislation" (Burney 2005: 3). Specifically, the UK government made a small problem larger, by making anti-social behaviour into a major policy and as a result, making more people aware of it in their surroundings (Tonry 2004: 57).

Even discussions of low-probability threats may increase the judged (or perceived) probability of that threat regardless of what the evidence indicates (Slovic, Fischhoff & Lichtenstein 2000b: 107). For the public, the media constitutes a primary source of in-

formation concerning social problems and political discourse on how to deal with terrorist threats (Crelinsten 2002: 100). Thus, it plays an important role in shaping the public's perception of risk. With news media, individuals are much more likely to believe the depiction of crime presented to them (Callanan 2005: 61). Studies have shown that the media's emphasis on certain crimes leads the public to believe that such crimes are most likely to be committed. For example, Singer and Endreny (1993) noted how the reporting of a single terrorist incident involving US citizens in Greece led to a major decline in the numbers of US citizens prepared to travel to Europe.

Availability is also affected by the frequency of the occurrence of events. In the weeks following the attacks on 9/11, and the Madrid and London bombings, the mass media focused its attention almost exclusively on the threat of terrorism and the governments' responses to it, reinforcing the availability of the attacks themselves (Kuran & Sunstein 1999: 685). Politicians and the media refer to these bombings on countless occasions as a way of emphasizing "the reality of seemingly distant threats and the need to incur significant costs to counteract them" (Sunstein 2006: 206). However, repeated stories direct public attention toward particular risk problems, thus making them familiar with them (Kasperson et al. 2000: 241). Familiarity affects how individuals think because it can affect the availability of instances (Sunstein 2005: 37). Accordingly, individuals' consider an event likely to happen because it is easy to recall. A risk that is familiar (available) will be seen as more serious than one that is less familiar.

Salience can further affect how individuals think about risks. For example, the impact of seeing a house burning down either in person or on television is probably greater on individuals perception of risk than reading about a fire in a local newspaper (Tversky & Kahneman 1982b: 11; Sunstein 2006: 198). Availability, which is produced by "a particularly vivid case or new finding that receives considerable media attention," plays a major role in the public's perception of that risk (Loewenstein & Mather 1990: 155; Sunstein 2005: 38). Rare but high-consequence events, such as the 9/11, Madrid, and London bombings, tend to be more vividly remembered, thus making individuals more likely to overestimate these risks. Accordingly, the more visible or salient the event is, the easier it is to recall and overestimate its likelihood.

The availability heuristic can, therefore, produce an inaccurate assessment of probability (Sunstein 2005: 39). By focusing on one or two incidents, the public's perception of the risk of these incidents is likely to be substantially exaggerated as a result of increased publicity. The mass media covers risks selectively according to how rare or dramatic they

are (because such risks are newsworthy). This disproportionate coverage can explain why individuals downplay common and often more serious risks such as smoking, suicide, heart disease etc, while perceiving uncommon risks such as terrorism as great. Research has shown that levels of individuals' perceived risks were "linked to willingness to support aggressive anti-terrorist policies" (Huddy et al. 2005: 593; Jenkin 2006: 3). As such, the availability heuristic may lead to the public's increased perceived risks, thus readily giving public support for mass surveillance measures, such as the Data Retention Directive.

#### **4.3.2. Probability Neglect**

If one or more incidents are both salient and emotionally gripping, individuals tend not to think about probability at all (Sunstein 2005: 206). Particularly, when strong emotions are involved, individuals tend to focus on the badness of the outcome (e.g. a terrorist attack), "rather than on the probability that the outcome will occur" (Sunstein 2003: 121). This is known as probability neglect.

According to Sunstein (2005: 40), even the word "terrorism" evokes images of disaster thus making individuals focus on the outcome and not the likelihood of it occurring. Due to probability neglect, it is not difficult for governments to trigger public fear (Sunstein 2005: 124-125). Governments' promotion and use of the public's beliefs and assumptions about risk and fear in order to achieve certain goals are features of the politics of fear (Altheide 2006a: 982). The foundation of the politics of fear is the belief that citizens are all actual or potential victims in need of protection by the state from the source of the fear (Garland 2001; 11; Altheide 2006a: 993). In the European Union's case, one major source of fear is terrorism. The use of fear to control behaviour has been recognized as a political tool, where fear turns the public into the vulnerable, the easily led. Accordingly, the language used – the rhetoric strategy – to communicate to the masses can not only mobilize emergency measures with no declared state of emergency, but can also be used "to invest fear or unease in a policy issue" (Huysmans 2006: 8). By focusing on the dynamics of fear, the public and governments' overreaction to risks to national security, such as new terrorism, can be explained. The more powerful the enemy, the greater the fear, and thus, the more imperative it appears for governments to act.

The impact of terrorism can be determined by the media's portrayal of the threat (Falkenrath 2001: 171). Through media such as television the "effects of terrorism extend

well beyond its immediate victims and physical destruction” including a broader target population (Crenshaw 1986; Long 1990; Wardlaw 1982 in Huddy et al. 2005: 593). Through the process of risk amplification, which increases public fear of risks, the adverse consequences of a dramatic, horrific event (like the Madrid and London bombings) can extend beyond the direct damages to victims (loss of life or limb) and property. Indeed, fear, crime, terrorism, and victimization are (or can be) experienced vicariously through the mass media by the public (Altheide 2006b: 419). The psychological effect that terrorist attacks have on individuals far removed from the incident itself is known as the multiplier effect (Falkenrath 2001: 171).

The medium through which the psychological effects (evoking a sense of horror, fear, indignity, and vulnerability in individuals removed from the incident) of terrorism are transmitted is typically a news source, such as television (Falkenrath 2001: 171). Once this information is retrieved, individuals communicate their fear and concern to one another; the widespread fact of fear and concern then increases media attention; and the cycle continues until individuals move on to other risks which the media presents to them (Sunstein 2006: 203). Consider the Columbine shootings in the US. The media saturation of rare school shootings further reinforces beliefs in a “widespread ‘pattern of violence’ until the epidemic is taken as truth and fear sets in” (Monahan 2006: 116). Another example was given by Furedi (1997: 24) who argued that highly publicized child murders, such as the killing of the toddler James Bulger by two other children in the United Kingdom, helped shape the impression that these tragedies “could happen to every child”. The disappearance of Madeleine McCain on May 3rd 2007 from Prais Da Luz, Portugal while on vacation with her parents is another example. High volumes of information can thus mobilize latent fears about a particular risk and enlarge the extent to which particular failures or consequences of events can be imagined (Kasperson et al. 2000: 241-242). The nature of these events engenders public outrage and a call for action (in terms of legislating) from the part of the government.

What can also occur from widespread and repeated coverage of terrorism and the response of governments to terrorism (in terms of, for example, legislation) is what Wilkins (1967) termed “deviancy amplification.” Deviancy amplification describes how the media and law enforcement agencies (even the government) can create, with their actions, an increase in deviance (or in this case, terrorism). As reactions by governments become more severe towards terrorists, terrorist attacks become more prominent and ruthless in

response. As such, any overreaction by governments to terrorist attacks may also increase the likelihood of terrorist attacks in the near future.

To maximize the impact of their attacks, terrorists carry them out in a bold, unexpected, and even bizarre manner in order to create the impression that anything is possible (Homer-Dixon 2002: 58). Consider the threat of home-grown terrorism. As Furedi (2007: 95) stressed, a threat that can be found anywhere in a community acquires a “ubiquitous and menacing character. Its very proximity to people’s everyday lives serves as a reminder that the enemy is at home”. By stressing the existence of an omnipresent enemy within the community with nothing to fear and nothing to lose, governments and the media are making matters worse by creating the impression that there is no defence against this kind of threat, thus causing widespread panic and fear.

By labelling terrorists as “evil,” “irrational,” “extremists,” or “fanatics,” attention is diverted away from the fact that these individuals employ violence and even engage in suicide tactics to achieve specific political goals (Sprinzak 2000: 73). Terrorist attacks are aimed at convincing governments and their citizens that they can strike anywhere at any-time. In reality, this is not the case. Terrorists have specific political objectives and are, despite popular beliefs, restrained by them. Were such terrorists less bound by these goals, one would expect to see more of these attacks. For some attacks that have deviated from al-Qaeda’s long-term objectives, leaders of the movement such as Abu Bakr Naji (a well-known al-Qaeda propagandist and jihadi leader) have expressed their concerns. They believe that overzealous new recruits may jeopardize the movement, if these recruits’ actions and their implications are not fully considered before a decision is made to attack a particular target (McCants 2006: 17-19).

Probability neglect has several implications for law and policy, particularly in the context of counterterrorism. If probabilities are neglected, especially when emotions are engaged, then excessive public concern will be given to specific low-probability risks (Sunstein 2005: 39-40). Probability neglect also leads individuals “to focus on the worst case, even if it is highly improbable” (Sunstein 2005: 35). This helps explain excessive reactions to low-probability risks of harm. When probability neglect is at work, the public’s attention is focused on the bad outcome itself, and they are inattentive to the fact that it is unlikely to occur. If probability neglect characterizes individual judgment under particular circumstances, governments and law enforcement agencies are likely to be neglecting probability under those same circumstances. If the public shows unusually strong reactions to low-probability harms, a democratic government is likely to act accordingly.

For counterterrorism measures, like the Data Retention Directive, the law itself can be seen as a response to the fear of bad outcomes without close attention paid to the question of the probability of these outcomes.

The perception that matters the most is that of the public. If they perceive the threat as it is presented to them by the government then these individuals will accept the government's measures. As Bannister (2005: 72) argued "irrational fear, especially on a mass scale, can lead to all sorts of undesirable outcomes, not least a public willingness to cede important freedoms and civil rights in response to what may be an imagined, or even a manufactured, myth of danger." The public's perception of the risk of terrorism can produce effects such as increased anxiety and government and law enforcement's response to these perceived threats, such as increased surveillance, can act to amplify these public reactions. Heightened anxiety about the threat of terrorism may partly explain the tolerance (lack of dissent) or public support for the expansion of surveillance powers. The psychological effects of anxiety are politically important because they lead to an over-estimation of risk and risk-averse behaviour (Lerner & Keltner 2001; Huddy et al. 2005: 593).

#### **4.3.3. Prospect Theory**

Prospect theory is used to accentuate a number of anomalies in individuals' reactions to risks (Kahneman & Tversky 1979 cited in Sunstein 2002: 107). This theory emphasizes the public's aversion to significant harms that have a low probability of occurring (if government follows the judgment of its citizens, then it will be risk averse as well). Prospect theory predicts an over-reaction to small probabilities of catastrophic outcomes. For example, individuals typically overestimate the dangerousness of air travel and underestimate the dangerousness of automobile racing and bungee jumping. Although this theory can be taken as a form of probability neglect, it "does not set out any special role for emotions...and it does not predict that people will react in any special way to emotionally gripping risks" (unlike probability neglect) (Sunstein 2003: 123). While availability or vividness biases may be one explanation for why individuals overestimate low probability events and underestimate high probability events, in prospect theory "it is proposed that over weighting of low probability events occurs regardless" (Jackson, Allum & Gaskell 2004: 5).

One way over-estimation is explained is through individuals' loss aversion (an aspect of prospect theory) – their dislike of losses from the status quo (Sunstein 2005: 35). Spe-

cifically, individuals are “far more willing to tolerate familiar risks than unfamiliar ones, even if they are statistically equivalent” (Slovic, Fischhoff & Lichtenstein 2000a; Sunstein 2005: 43). Research has shown that the number of individuals who have died from worldwide terrorism is not much greater than the number of individuals who have drowned in their bathtubs in the United States (Mueller 2005: 220). Moreover, since 2001, “fewer people have been killed in America by international terrorism than have drowned in toilets or have died from bee stings” (Mueller 2006 cited in Furedi 2007: 158). When loss-aversion is at work, individuals’ fear the former risk more than the latter even though they are (approximately) statistically equivalent. Consider another example, a comparison between air and automobile travel. Traffic accidents (familiar risk) represent a much greater risk than terrorism (unfamiliar risk). In order to put things into perspective, the following examples were used by Adams (2005: 1): the total death toll in the Madrid bombings (191 people) represents approximately the number of individuals killed in Spain about every 12 or 13 days in traffic accidents; whereas the total death toll in the London bombings is approximately equivalent to six days of traffic fatalities in the UK, where on average nine individuals die and over 800 are injured daily. While the risk of death is greater when travelling by automobile, far more individuals are afraid of terrorist attacks than driving or being driven in automobiles. Individuals, therefore, show a disproportionate fear to risks that are unfamiliar.

Individuals also show disproportionate fear of risks that are involuntary or hard to control. Adams (2005: 4) argued that individuals react strongly to terrorist attacks because harm is intentional and not accidental. For example, individuals are less likely to tolerate malignly imposed risks, which include crimes such as mugging, rape, and murder (Adams 1995: Adams 2005: 4). By contrast, individuals are more tolerant of voluntary risks such as smoking or playing extreme sports such as mountain-climbing. Individuals are also more tolerant of risks they can control, such as driving their own vehicles. Accordingly, individuals are less tolerant of risks they cannot control such as using public transport systems. That is, while individuals may voluntarily board airplanes, “buses and trains, the popular reaction to crashes in which passengers are passive victims, suggests that the public demand a higher standard of safety in circumstances in which people voluntarily hand over control of their safety to pilots, or to bus or train driver” (Adams 2005: 3). Public transport, however, is safer than automobile travel. A study conducted by Sivak and Flannagan (2003: 6-9) showed that if one was to calculate the probability of an American being killed in one non-stop airline flight it “is about one in 13 million (even

taking the September 11 crashes into account), while to reach that same level of risk when driving on America's safest roads, rural interstate highways, one would have to travel a mere 11.2 miles" (cited in Mueller 2005: 222-223). While the risk of death is greater when travelling by automobile, far more individuals are afraid of flying than driving or being driven in an automobile (Bannister 2005: 73). Despite the Madrid and London bombings, public transport is still an extremely safe form of travel (Litman 2005: 2). Specifically, studies have shown that the "traffic fatality rate per passenger-kilometer is less than one-tenth that of automobile travel" (Litman 2005: 2).

### **5. Concluding Remarks on the Directive**

Despite widely held assumptions, presenting the Data Retention Directive as a first pillar measure did not bring more accountability into EU decision-making. Even though through co-decision the European Parliament had direct involvement in the legislative decision-making process, its input was largely ignored. The legitimacy of the Directive was thus called into question because of the lack of transparency in EU decision-making on mandatory data retention. This loss of legitimacy, both in terms of the legislative process and the reach of this measure (as it applies to all and not just those suspected of wrongdoing), however, should have resulted in mass political resistance; as Sunstein claimed would occur if the entire population was adversely affected by measures. Yet, resistance and dissent on this matter was largely absent. Individuals' use of the three underlying sources of error (availability heuristic, probability neglect, and prospect theory) in their assessment of the risk of terrorism and the presentation of the current threat of terrorism by politicians, governments, and the media and the assessment of it by the public have muted dissent and may have even fostered an environment of tolerance and even public support for the introduction of draconian laws aimed at combating terrorism, such as the Data Retention Directive.

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