The Legal Challenge to the War on Terror

Andrew C. McCarthy

The American sense of justice is cathartic. Justice is the public purging of proven wrongs, a balancing of the scales. When profound evil has resulted in grievous harms, the scales can never really be evened—not for the individual lives that are damaged forever. But society does heal, and the criminal justice system is its traditional medium for doing so.

It is a tradition with a well-established cycle. First and foremost, there must be a wrong that has been done. From that premise, all else flows. An investigation's aggressiveness is judged to be lax, appropriate or overwrought based on the nature and extent of the wrong to which it is responding. The same is true of a prosecution's length, zealousness and accuracy. Most obviously, judgment and sentence must be commensurate with the actual harm done.

From that tradition, moreover, flows an abiding conviction that judicial proceedings—replete with rights, procedures and presumptions intentionally skewed in favor of the accused—are our best protection against economic instability, social anarchy, and domestic insurrection. This is how we have always done it in a nation committed to the rule of law and blessed with unparalleled prosperity and security on the home front.

But is this tradition an apt fit for the present-day menace of international terrorism? And, perhaps just as important, if it is not, are we as a society prepared to adjust to a new reality?

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There are grave reasons for doubt on both scores. International terrorism dramatically alters the law enforcement paradigm, down to its most rudimentary assumptions. Yet, on many fronts, Americans are still clinging to those assumptions, regardless of how misplaced they are and how deeply they endanger national security.

While terrorist attacks have been criminalized in our penal code, they are not crimes in the strict sense of the word. Rather, they are true acts of war, and mere prosecution is a pitifully meager response. Since the first duty of government is the security of those it governs, the cardinal goal must be the prevention of such acts, rather than their prosecution after the fact.

A prevention-first paradigm, however, rubs against our grain. It crashes headlong into another American tradition: the love of liberty. Simply stated, a prevention paradigm cannot work unless citizens (and the growing population of non-citizens able to claim Bill of Rights protections) are willing to make sensible accommodations to the government's need to constrain their liberties. And already, just four years after the horrors of 9/11, Americans are chafing.

An unnoticed war

Contrary to conventional wisdom, what today is called the War on Terror did not begin with the savage suicide attacks of September 11th, in which nearly 3,000 Americans were killed. The invaluable Norman Podhoretz, writing in the pages of *Commentary*, makes the case that the current conflict with the militant Islamic ideology that has replaced fascism and communism as a global threat (what Podhoretz aptly dubs "World War IV") can be traced back to at least the 1970s.[1]

Personally, I would set the date when the war began as somewhat later: February 26, 1993. Shortly after noon on that day, a powerful bomb ripped through the bowels of the World Trade Center in lower Manhattan. The explosive was timed to detonate at lunchtime, when nearly 100,000 people routinely inhabited the twin towers and the surrounding plazas, stores and restaurants. The van housing the bomb was strategically parked by terrorists in an area of the underground garage proximate to key support beams. Had it been positioned only slightly differently, the aim of bringing down one tower (crashing it into the other) might have been realized. As it was, the damage was immense, blowing a huge crater several stories high. While the goal of killing tens of thousands would not be realized, the attack should easily have claimed many hundreds, and perhaps thousands, of lives. Stunningly, however, only six people (including a pregnant woman) were killed.

This minimal death toll, together with an attribute of international terrorism then unfamiliar to Americans—a sub-national, shadowy and largely anonymous enemy—invariably meant that this act of war would be treated as a crime, notwithstanding the fact that the literal and figurative pinnacle of the U.S. financial system had been targeted, and that the enemy publicly claimed that its "battalions" were preparing more of the same, absent a radical change in American foreign policy.

Immediately, the FBI was placed in charge of the criminal investigation, and the WTC became the most famous crime scene since the Texas School Book Depository. Several of the culprits directly involved in the bombing were rounded up quickly, appointed counsel, and indicted. Within about six months, four of them were standing trial, and seven months later all were convicted. The following year, a dozen more terrorists, led by Sheik

Omar Abdel Rahman, the blind firebrand who was *emir* of Egypt's deadly Gama'at al Islamia, were convicted of a variety of terrorism charges arising out of the WTC attack and an even more ambitious "Day of Terror" plot to bomb several New York City landmarks. In an important but overlooked lesson, the latter conspiracy was foiled only because the FBI successfully infiltrated the *jihad* organization with a spy: an informant at the heart of an elaborate sting, who won the trust of terrorists by attending political rallies and praying in mosques with them, ultimately enabling government agents to record them gleefully planning and preparing their barbarity.

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In all, from February 1993 through September 2001, the United States was challenged by eight major terrorist plots. In addition to the WTC bombing and the "Day of Terror" plot, there were:

- "Operation Bojinka," the unsuccessful 1994-95 conspiracy to blow up U.S. airliners in flight over the Pacific
- The 1996 Khobar Towers bombing in Jeddah, Saudi Arabia, in which nineteen U.S. airmen were killed[2]
- The 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania that killed nearly 250 people
- The unsuccessful 1999 "Millennium" conspiracy to bomb Los Angeles International Airport (LAX)
- The 2000 bombing of the U.S.S. *Cole* in Aden, Yemen, which claimed the lives of seventeen U.S. sailors (an attack that had actually been attempted unsuccessfully ten months earlier against the U.S.S. *The Sullivans*), and
- The terrorist attacks of September 11th

That same eight-year period featured six major terrorism trials (and three related but less substantial cases), prosecution in the criminal justice system then being government's almost-exclusive strategy for combating international terrorism.

Legal proceedings provide rich opportunities for projecting energetic government activity that nicely complements rhetoric portraying a nation at "war." Such, of course, has been the history of the "war on drugs," in which nearly half a century of seemingly ceaseless prosecutorial successes masks the reality of a stubborn blight that operates in some quarters with utter impunity, and for which there is no end in sight. So too the "war on terror," 1990s style. Successful attacks spawned wall-to-wall media coverage. High profile arrests preceded months (or more) of pretrial hearings, which peppered coverage with new revelations, suggesting investigations making dramatic progress. The resulting trials spread out over several months, generating daily news about the government methodically calling terrorists to account.

While the projection was accurately indicative of robust activity on the law enforcement side, it was an illusion insofar as the rest of govern-

ment (particularly, its true war-fighting mechanisms) was concerned, and a dangerous one at that. Even by conservative accounts, membership in al-Qaeda and its affiliates grew well into the thousands during the years prior to 9/11, and tens of thousands more received training in terrorist paramilitary camps. Yet, although the terrorism prosecutions stoked the public impression of massive governmental pressure, in reality they neutralized less than three dozen terrorists. And, with few exceptions, those apprehended were extremely low-level operatives.

The WTC attack alone was responsible in whole or part for half the trials and about two-thirds of the defendants.[3] There was one "Bojinka" conspiracy trial, accounting for three terrorists (one being Ramzi Yousef, who would in any event have received a life sentence as a result of the WTC cases). Although the embassy bombings resulted in the filing of charges against high-ranking al-Qaeda members, including Osama Bin Laden himself, only six have actually been prosecuted, and the highest ranking of these was not tried for the bombings themselves.[4] The Millennium plot generated two trials—one of the major plotter, another of a bit player—and a total of three convicted terrorists.

Of all the terrorist incidents, only the embassy bombings provoked a military response—a single, ineffectual burst of cruise missile strikes on August 20, 1998 against al-Qaeda targets in Afghanistan and Sudan. Five years after the fact, the government would file an indictment against fourteen defendants in response to the Khobar Towers bombing. But none were ever actually brought to trial, and no other meaningful action was taken. The *Cole* bombing, for its part, did not even prompt criminal charges, let alone any military reaction, until two Yemenis were indicted nearly two years after the 9/11 attacks. (They, too, were never actually prosecuted on terrorism charges.)

Flawed assumptions

This track record is telling proof of the chasm between effective law enforcement and effective national security. As prosecutions, the cases could not have been more successful. Every indicted terrorist brought to trial was convicted. All received severe sentences, and most (including two capital defendants in the embassy bombing case whom the jury spared from execution) were imprisoned for life terms.

Significantly, the public broadly supported this approach to counterterrorism. In the aftermath of the WTC bombing (and the subsequent "Day of Terror" and "Bojinka" conspiracies), the danger did not seem at all hypothetical. Aggressive investigative and prosecutorial efforts won widespread approval. They did so because they resonated with the American public. If terrorism was a crime, there was none more serious. It cried out for a muscular and public government response, which law enforcement supplied, and crushing penalties on offenders, which the federal courts imposed. There was catharsis.

There was only one problem—the United States was not facing a crime wave. It was facing a war. If that was not clear in the WTC rubble of 1993, it should have been by 1996, when—in an echo of the "Day of Terror" and "Bojinka" Air plots—Osama Bin Laden issued his "Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Mosques [i.e., Saudi Arabia]," which called upon militant groups to pool their resources to better kill Americans. The reality was even more blatant by February 1998—six

months *before* the African embassy bombings—with the issuance of Bin Laden's notorious *fatwa* urging Muslims to kill Americans, including civilians, anywhere in the world.

Under the circumstances, the legal response—fewer than three dozen terrorists neutralized over eight years at prohibitive costs—was simply unacceptable. From a national security perspective, eliminating such a piddling fraction of a committed enemy was a sure prescription to be hit repeatedly. And so we were. Nothing galvanizes the opposition like the combination of at least some successful offensives and the belief that its adversary is unwilling to fight back vigorously.

The paltry number of terrorism prosecutions may have been an eye-opener, but it was also symptomatic of a more structural dissonance. Legal prosecution, when used as the point of government's defensive spear rather than one element in a multi-faceted arsenal, is not an effective means of addressing true threats to national security. It is simply not designed for that purpose.

Though the distinction has been blurred of late, domestic policing and national defense are separate aspects of the executive branch's constitutional power. In the former, as former U.S. Attorney General William P. Barr explained in October 2003 testimony before the House Intelligence Committee, government seeks to discipline an errant member of the body politic who has allegedly violated its rules. That member, who may be a citizen, an immigrant with lawful status, or even, in certain situations, an illegal alien, is vested with rights and protections under the U.S. Constitution. Courts are used as a bulwark against suspect executive action; presumptions exist in favor of privacy and innocence; and defendants and other subjects of investigation enjoy the assistance of counsel, whose basic job is to put the government to maximum effort if it is to gather intelligence and obtain convictions. The line our society has painstakingly drawn here is that it is preferable for government to fail than for a single innocent person to be wrongly convicted or otherwise deprived of his rights.[5]

Not so in the realm of national security. There, government confronts a host of sovereign states and sub-national entities (particularly international terrorist organizations), all claiming the right to use force. There, essentially, the Executive Branch's purpose is not to enforce American law against suspected criminals. Rather, it is to exercise national defense powers to protect against predominantly external threats. Foreign hostile operatives acting from without and within are generally not vested with rights under the American Constitution. The Fourth Amendment, for example, bars only *unreasonable* searches, and there is nothing *per se* unreasonable about searching, arresting or wiretapping a foreign spy or terrorist planning mayhem against the United States from within our borders.[6] When true threats to national security are at issue, the galvanizing concern is to defeat the enemy and, as Barr put it, "preserve the very foundation of all our civil liberties." The line drawn here is that government cannot be permitted to fail if we are to have freedom worthy of the name.[7]

The absurd ramifications of branding the same terrorist operative alternately an enemy and a criminal illustrate the point that there is a disconnect between the battlefield and the courtroom. In the former, the terrorist confronts U.S. military personnel, who presume him hostile and attack him with deadly force, entirely absent judicial oversight or standards of proof. In the latter, the same terrorist would be presumed innocent,

afforded counsel at the expense of the American taxpayer, and given every advantage of due process available to an accused embezzler.

Structural impediments

Less apparent, but just as perilous to national security, are the nuts-and-bolts of trial practice itself. Under discovery rules, the government is required to provide to accused persons any information in its possession that can be deemed "material to the preparation of the defense," and, under the current construction of the so-called *Brady* doctrine, any information that is even arguably exculpatory. The more broadly indictments are drawn, the more due process demands disclosure of precious intelligence—and terrorism indictments tend to be among the broadest. The government must also disclose all prior statements made by witnesses it calls, and often even the statements of witnesses it does not call. In capital cases, moreover, *Brady* is expanded, requiring surrender not only of evidence that is colorably exculpatory, but also of that which, even if incriminating, might induce a jury to vote against the death penalty.

This is a staggering quantum of information, certain to illuminate not only what the government knows about terrorist organizations, but the methods and sources used by intelligence agencies in obtaining that information as well. When, moreover, there is any dispute about whether a sensitive piece of information needs to be disclosed, the decision ends up being made by a judge on the basis of what a fair trial for the terrorist dictates, rather than by the Executive Branch on the basis of what public safety demands.

Finally, the dynamic nature of the criminal trial process must be accounted for. The discovery typically ordered will far exceed what is technically required by the rules. To begin with, common sense dictates that officials do not operate on the margins of their authority when the stakes are high. Further, as already noted, terrorism trials are lengthy and expensive. The longer they go on, the greater the public interest in their being concluded with finality. The Justice Department does not want to risk reversal and retrial, so it tends to bring questions of disclosure to the presiding judge for resolution. The judge, in turn, does not wish to risk reversal and—because the government cannot appeal acquittals—can never be reversed for ruling against the government on a discovery matter (at least where classified information is not involved).

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Thus, the system goads participants to disclose far more information to defendants than what is mandated by the (already broad) rules. These incentives, furthermore, become more powerful as the trials proceed, the government's proof is admitted, it becomes increasingly clear that the defendants are probably guilty, and prosecutors become even less inclined to risk a conviction over withheld discovery—even if making legally unnecessary disclosures is certain be edifying to our enemies.

Finally, applying criminal justice rules to a national security problem not only provides terror organizations with precious intelligence they could never obtain on their own. It also threatens public safety by retarding inputs to our intelligence community. As demonstrated by several post-9/11 investigations of intelligence failure, the United States relies heavily on cooperation from foreign intelligence services, particularly in areas of the world from which threats to American interests are known to stem and where our own human sources have been grossly inadequate. It is vital that we keep that pipeline flowing. Clearly, however, foreign intelligence services will be reluctant to share information with our country if they have good reason to believe that information will be revealed to terrorists in court proceedings under generous U.S. discovery rules.

Paradigm shift?

It was widely believed that the unadorned savagery of 9/11 would rouse the country out of its lethargic approach to national security threats. But while government is slowly changing, the public, by and large, has not.

The 9/11 attacks were taken by the Bush administration to be the start of a true war. International terrorism as practiced by Islamic militants bent on harming America would henceforth be treated as principally a military challenge. U.S. armed forces would take the battle overseas, to the sanctuaries from which terrorists had previously operated with impunity. The diplomatic corps would step up pressure on hostile or apathetic regimes to desist supporting or at least abiding these terrorists. And Treasury enforcers would be mobilized to choke off funding channels.

Law enforcement thus receded from the forefront. Its mission, however, became at once dramatically different and incalculably more difficult. Investigation and prosecution, its bread and butter, were out; intelligence collection and incident prevention were in.

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The vast majority of training for agents and prosecutors is premised on the need to prove completed crimes. The metrics by which we evaluate them are quantified in complaints, arrests and convictions—not in fears that are never realized or sympathizers discouraged from crossing over into active wrongdoing. The ability to knit together the answers to disparate clues that solve a complex crime is an invaluable skill, but it is a skill critically different from the collection and analysis of intelligence to predict and prevent events. The zeal to maintain chain-of-custody and evidentiary integrity in anticipation of courtroom use, the ingrained deference to defendants' rights and privileges—these things produce a mindset markedly different from that suited to sifting through raw and disconnected data for the kernels of future trends.

The FBI is making this transformation in fits and starts. From a philosophical standpoint, it has done a good job: Director Robert Mueller's vision has been clear and agents have responded to the cultural transformation. There is, in addition, the most salient and overlooked development of all—the U.S. has gone four years without a domestic

terror attack, bottom line success for which the Bureau's vigilance is owed some credit.

To sustain prevention-first success, however, requires capable information systems. Those of the FBI are impossibly cumbersome and woefully antiquated. In early 2005, it was finally forced to abandon (after spending over $100 million) the deficiency riddled "Virtual Case File" technology upgrade. The Bureau is now preparing to commence a new overhaul, called "Sentinel," which in the best of circumstances will not be fully implemented until 2009. This means that its information processing and sharing capabilities will be substandard for years to come. Moreover, this does not even touch upon the problem of translating collected intelligence. A lack of competent linguists in key languages and dialects has caused an alarming backlog in untranslated data. After all, dots cannot be connected if they cannot be read in the first place.

Far more of a challenge, however, is growing public ambivalence. Those who believed that "9/11 changed everything" failed to factor in two crucial realities that may ultimately prove fatal to a prevention-first paradigm. One is the extent to which the U.S., over the last half-century, has become a litigation culture which regards judicial procedures as the *sine qua non* of fact-finding and dispute resolution. The second is how resistant such a culture really is to deterring and punishing *potential* as opposed to *completed* wrongdoing—even when the stakes are life-and-death.

A disruption strategy is guided by several principles. Because a modern terrorist attack is capable of killing thousands of people and causing untold billions in damage, it cannot be allowed to happen. To prevent something from happening, you must neutralize not only those whom you know would carry it out, but also those whom you have reason to believe *might* carry it out. This necessarily means probing people whose ties to terrorism are apparent but elusive, and may prove on greater scrutiny to be highly attenuated or even non-existent, but who have committed other law violations that are readily provable. Reliable intelligence sources are sparse and invaluable, so if there are legal ways of neutralizing suspects without having to reveal why agents suspect they have terror ties, these must be utilized. Since the terrorism at issue is motivated by an interpretation of religion, those targeted will very likely be adherents of that religion. And since the terror suspicions that galvanize investigators will be often be difficult to prove, but the suspects' religious (and often ethnic) affiliation will be consistent, the situation will always be ripe for claims that it is an alien culture, not terrorism, that government is truly targeting.

In the abstract, people understand and are sympathetic to this explanation. In the immediate aftermath of 9/11, they were downright enthusiastic. But when we get to the brass tacks of real people and real cases, unease sets in. Government, moreover, becomes a victim of its own success. As the months turn into years without any reprisal attacks on the U.S. homeland, people's natural, hopeful reaction is that the threat has ebbed and prevention-first is excessive, rather than that prevention-first is a big part of the reason they have been safe.

This is best elucidated by the current controversy over immigration detentions. Following the attacks of 9/11, over 700 mostly Arab Muslim immigrants were arrested. There was nothing remotely unlawful about this; virtually all were guilty of violating immigration laws—which, after all,

are laws—and the number detained is such a tiny fraction of the overall Arab Muslim population as objectively to belie the claim that a culturally discriminatory "round-up" had occurred. But while this sensible measure was strongly approved of when undertaken, and while it was meek in comparison to historical excesses such as the Alien and Sedition Acts, the Palmer Raids, and the Japanese internment, it is now the subject of widespread condemnation.

The basis of the criticism speaks volumes about the state of domestic law enforcement in the War on Terror. These aliens may have been guilty of immigration violations, but they were being targeted and punished for suspected terror ties. In our presumption-of-innocence, proof-beyond-a-reasonable-doubt culture, there will always be a demand for evidence of terrorism before severe punishment is tolerated. The effect of this, counter-intuitively, is to immunize law violators who may have terror ties from prosecution for crimes that other, less dangerous felons could be convicted on uneventfully. The same line of thinking also threatens to frustrate the government's best tools in the post-9/11 world: the Patriot Act and the aforementioned statutes making it a crime to provide terrorists with material support.

Enacted six weeks after 9/11, the Patriot Act essentially did three things. First, it updated investigative techniques developed in the late Twentieth Century to meet Twenty-First Century technology (for example, placing access to email evidence on a par with equivalent evidence about telephone communications). Second, it made available to intelligence agents responsible for national security cases (involving terrorism and espionage) some of the same investigative techniques—such as broad subpoena power and roving wiretaps—that had long been available to investigators responsible for probing ordinary crimes. Third, it put an end to structural intelligence impediments by repealing misguided law and regulations that had rendered national security agents unable to communicate effectively with criminal investigators and prosecutors. The law was measured, badly needed, and most significantly, there have been no reported instances of the new powers actually being abused.

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Yet, the Patriot Act has been subjected to a tireless smear campaign by an odd marriage of right- and left-wingers who share a knee-jerk hostility to government power. So successful has the propaganda offensive been that many localities have enacted symbolic condemnations of the Patriot Act. One major city, Portland, Oregon, has gone so far as to withdraw its law enforcement contribution to the local Joint Terrorism Task Force. And, despite revelations that at least seven of the 9/11 hijackers made use of libraries in their preparation for the attacks, the House of Representatives voted in June 2005 to exclude libraries from the Patriot Act provision allowing national security agents to compel production of business records (as criminal investigators have been able to do for decades)—a vote which, if it ultimately became law, would create an instant domestic safe-haven for would-be terrorists. So corrosive is the political climate that renewal of several key Patriot Act provisions which will otherwise sunset at the end of this year is in doubt as of this writing.

Learning to adapt

If we are not to have repetitions of the WTC bombing, the embassy bombings, and the 9/11 atrocities, the American people will have to adjust. The prosecutions of the 1990s, suffuse in gore and destruction, proved to be very attractive as criminal cases. But, of course, people had to die to make them that way. Bad national security will always provide opportunities for soaring law enforcement. But if we are to avoid having to try such cases again, good national security is needed.

Still the fact remains that for a populace in which lawsuits have become as American as baseball and apple pie, prevention-first will be an increasingly hard sell. Post-crime investigations are fine, but investigative tools designed to stop wrongdoing—however heinous—from happening in the first place cannot help but impinge on some degree of innocent activity and invade some zones of privacy that would otherwise be left undisturbed.

Moreover, the criminal justice system that Americans rightly cherish assumes a wrong—crimes which the punishments must fit—for society to accept the results as legitimate. Here, though, the real "crime" at issue is a terrorist war. Yes, there can be no greater wrong. But, as a practical matter, the connections to that wrong will frequently be murky at best, and in many instances either invisible or undisclosable (if precious intelligence methods and sources are to be protected). Those suspects will of necessity have to be thwarted by reliance on far less serious infractions. Prevention-first, then, means the punishment will frequently not appear to fit the crime.

The public welfare demands this. As for the public itself, the jury is still out.

1. Norman Podhoretz, "World War IV: How It Started, What It Means, And Why We Have To Win," *Commentary*, September 2004.
2. While the Khobar Towers attack has long been considered a Hezbollah operation, intelligence brought to light by the 9/11 Commission has raised the intriguing possibility of an al-Qaeda role. Moreover, the two organizations are known to have collaborated in other contexts (such as Hezbollah training of al-Qaeda's top military committee members and operatives involved with its Kenya cells prior to the 1998 embassy bombings).
3. In addition to the aforementioned trials of the four originally arrested bombers and the Blind Sheik's *jihad* organization, a third major WTC prosecution occurred in 1997, when WTC master-planner Ramzi Yousef (a fugitive until 1995) and another conspirator were tried and convicted. In the less substantial category, the brother of one bomber, who had assisted the bomber's unsuccessful flight to avoid prosecution, was convicted after a short trial in 1997 of being an accessory-after-the-fact to the bombing.
4. Four were convicted at trial and one pled guilty. The sixth, Bin Laden's close associate, Mamdouh Mahmud Salim (aka Abu Hajer al Iraqi), was severed after a barbaric escape attempt in 2000, during which he plunged several inches of a shiv through the eye of a prison guard, nearly killing him. He was later convicted of this attempted murder, but whether he will ever be tried for the embassy bombings is unknown.
5. William P. Barr, Testimony before the Senate Select Committee on Intelligence, October 30, 2003, http://www.fas.org/irp/congress/2003_hr/103003barr.pdf.
6. Until 1978, when the Foreign Intelligence Surveillance Act (FISA) was enacted in response to Watergate and Vietnam-era domestic spying scandals, there was no formal judicial role in electronic eavesdropping or searches conducted for national security, as opposed to criminal investigative, purposes.
7. Barr, Testimony before the Senate Select Committee on Intelligence.