Beyond Guantánamo: Confronting the New Paradigm of Prevention in Domestic Terrorism Cases

It was a gruesome scene two months ago in Minneapolis and St. Paul when SWAT teams in riot gear, brandishing semi-automatic weapons, raided the homes of individuals suspected of planning to protest the Republican National Convention. Officers handcuffed the would-be protesters and forced them to lie on the floor while officials searched their homes, seizing personal computers, journals and political pamphlets.[1] Eight were charged with "conspiracy to commit riot in furtherance of terrorism."[2] Yes, *terrorism*.

Wielding anti-terrorism statutes to prosecute activists for planning to disrupt traffic is a reckless and outright ridiculous attempt to brand political dissent as domestic terrorism. Unfortunately, it is increasingly common for defense attorneys to encounter "terrorism cases" where the indictments do not even begin to allege a terrorist plot. The Justice Department must prosecute those who violate federal law, even when the alleged motive is political, but the criminal defense bar should be critical of cases deemed "terrorism-related" and be ready to confront the abuses of power that frequently flow from them.

A detainee is escorted to an interrogation room at the Camp Delta detention facility at the U.S. Marine Base in Guantánamo Bay, Cuba, on July 7, 2004.

By the Numbers

According to a new study by the Center on Law and Security at New York University School of Law, the Department of Justice has indicted 693 individuals on terrorism or terrorism-related charges since September 11, 2001.[3] There were 110 federal prosecutions last year alone — more than for federal crimes of arson, conspiracy, or manslaughter.[4] Yet just one-third of the indictments invoke one of the primary terrorism statutes identified by the DOJ, such as 18 U.S.C. § 2332 (terrorist acts abroad) or 18 U.S.C. § 2339 (material support). In short, the vast majority of defendants associated with "terrorism cases" are never charged with terrorism.

Over the past seven years, there have only been a handful of prosecutions alleging a "jihadist" plot to attack targets on American soil. There was the "shoe bomber," Richard Reid; the so-called 20th hijacker, Zacarias Moussaoui; and Martin Siraj, the author of a half-baked plan to bomb Herald Square in 2004. But the vast majority of "terrorism-related cases" allege nonviolent offenses, primarily fraud and immigration violations, with no link at all to terrorist activity. Even the inspector general has expressed concern, stating, "EOUSA's [Executive Office for United States Attorneys] view of the anti-terrorism category permits criminal cases arising from virtually any federal law enforcement effort, including immigration violations or border enforcement activities, to be categorized as anti-terrorism regardless of the actual circumstances."[5]

BY MICHAEL PRICE

The obvious question then, is why are there so many non-terrorism "terrorism cases"?

The New Paradigm of Prevention

The Justice Department insists that the large number of "terrorism-related" prosecutions — and its failure to secure convictions in almost 30 percent of them — is a product of its post-9/11 mission to prevent terrorist attacks before they occur: "While it might be easier to secure convictions after an attack has occurred and innocent lives are lost, in such circumstances, the Department would be failing in its fundamental mission to protect America and its citizens, despite a court victory. For these reasons, the Department continues to act against terror threats as soon as the law, evidence, and unique circumstances of each case permit, using any charge available."[6]

While there is nothing inherently troubling about prevention (a central purpose of law enforcement is of course to prevent crime), the current administration's frenzied crusade to "rid the world of the evil-doers" has produced policies that reflect a total disregard for the rule of law and an ever-increasing number of pre-emptive prosecutions with no demonstrable connection to terrorism. These "terrorism cases" run the statutory gambit: from racketeering and commercial fraud to drug-related offenses, false statements, and immigration violations. As a result, many members of the criminal defense bar whose areas of expertise do not include national security law may be called upon to confront and challenge some of the Bush administration's most controversial and constitutionally errant policies in the war on terror.

Beyond Guantánamo

NACDL recently joined with the ACLU to create the John Adams Project, a partnership designed to provide civilian defense teams to assist in the representation of detainees facing trial before the military commissions at Guantánamo Bay, Cuba.[7] NACDL and the ACLU vehemently oppose the grave flaws of the Military Commissions Act, including its authorization to admit secret evidence, hearsay, and coerced statements possibly derived from torture. While NACDL will make every effort to safeguard fundamental American legal protections and principles in these extraordinary cases, the struggle to preserve due process and the rule of law extends well beyond Guantánamo to halls of justice throughout the nation.

Under the new paradigm of prevention, the government has enacted a host of pre-emptive policies that are alien to the traditions of a free society and ride roughshod over the same liberties that this nation endeavors to spread across the globe. At the risk of repeating what has already become common knowledge, these policies include warrantless wiretapping and data mining, extraordinary rendition, secret detention, "enhanced" interrogation techniques, ethnic profiling, and the use of secret evidence to try terrorism suspects. To varying degrees, each of these issues may be present in a domestic terrorism case. Consider, for example, these three recent developments and observations:

- *Suspicion-less Surveillance.* While Congress enacted the FISA Amendments Act of 2008 (FAA) this summer, the FBI was busy promulgating new guidelines that would give the government even more power to spy on Americans. The new guidelines would grant field agents the power to open national security investigations without any articulable suspicion of criminal activity, including the authority to recruit sources, conduct "pretext" interviews, and engage in physical surveillance.[8]

- *Preventative Detention.* It is antithetical to basic notions of due process and the rule of law to indefinitely imprison an individual without charge or trial. Yet the Fourth Circuit just ruled that President Bush may continue to deprive Ali Saleh Kahlah al-Marri of his liberty and his right to trial by designating this U.S. resident as an "enemy combatant,"[9] despite the absence of any charges against him. Mr. al-Marri has been held in solitary confinement at a naval brig in Charleston since June 2003, where he has been subjected to "inhumane, degrading, and physically and psychologically abusive treatment."[10]

- *Material Support Statutes.* The current material support statutes and

terror financing laws revive the McCarthy era equation of guilt by association. As Professor David Cole of Georgetown University Law School observed: "In the name of cutting off support for terrorist organizations, U.S. law now makes it a crime to provide anything of support — from dues to volunteer services — to any organization or individual that the government has labeled 'terrorist.' The prohibition is not limited to those who intend to support the illegal or terrorist acts of so-called terrorist organizations. It criminalizes all support — including support that is otherwise entirely lawful, peaceful and non-violent."[11]

These are just the latest installments in the expansive assault on the principles of justice and due process that have been the hallmark of the American legal system for more than 200 years. This kind of crime prevention has no place in a free and democratic society. Unlike those who might seek to harm this country, our government must operate within the rule of law. As Justice Brandeis wrote in *Olmstead v. United States*, "Our government is the potent omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for the law."[12]

NACDL Support

NACDL is committed to marshalling its resources to aid the criminal defense bar in defending the Constitution in the national security context. In addition to regular updates on the military commissions at Guantánamo, NACDL will provide support to members engaged in national security-related litigation, including a specialized listserv, analysis of developments in the field, educational programs, and access to relevant background materials and briefs. Given the sheer quantity and statutory breadth of domestic "terrorism-related" cases, as well as the grave threat that the current administration's policies pose to fundamental American values, NACDL believes that this effort is necessary to ensure that the principles of justice and due process do not become casualties in the domestic war on terror.

Notes

1. Glenn Greenwald, *Massive Police Raids on Suspected Protesters in Minneapolis*, SALON, Aug. 30, 2008, http://www.salon.com/opinion/greenwald/2008/08/30/police_raids/.

2. Colin Moynihan, *Questions Emerge Over Police Conduct in St. Paul*, N.Y. TIMES, Sept. 16, 2008, *available at* http://www.nytimes.com/2008/09/16/us/politics/16cnd-protest.html?em.

3. CENTER ON LAW AND SECURITY, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 — SEPTEMBER 11, 2008 (forthcoming Oct. 2008).

4. *Id.*; Bureau of Justice Statistics, Federal Justice Statistics Resource Center, http://fjsrc.urban.org/index.cfm (follow "Online Analysis" hyperlink; then follow "Defendants Charged in Criminal Cases" hyperlink).

5. U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT 07-20, THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER TERRORISM REPORTING 39 (2007).

6. Press Release, U.S. Dept. of Justice, Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11 (Sept. 11, 2008), *available at* http://www.usdoj.gov/opa/pr/2008/September/08-nsd-807.html.

7. For more information about the John Adams Project, see http://www.aclu.org/safefree/detention/johnadams.html.

8. Eric Lichtblau, *Terror Plan Would Give F.B.I. More Power*, N.Y. TIMES, Sept. 13, 2008, at A11.

9. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008).

10. Complaint at 1, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (No. 06-7427).

11. David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE 233, 234 (Bianchi & Keller eds., 2008).

12. *Olmstead v. United States*, 277 U.S. 438, 435 (1928) (Brandeis, J., dissenting).

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