

Why We're Losing the War on Terror

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Taken from: http://www.thenation.com/docprint.mhtml?i=20070924&s=cole_lobel

President George W. Bush is fond of reminding us that no terrorist attacks have occurred on domestic soil since 9/11. But has the Administration's "war on terror" actually made us safer? According to the July 2007 National Intelligence Estimate, Al Qaeda has fully reconstituted itself in Pakistan's northern border region. Terrorist attacks worldwide have grown dramatically in frequency and lethality since 2001. New terrorist groups, from Al Qaeda in Mesopotamia to the small groups of young men who bombed subways and buses in London and Madrid, have multiplied since 9/11. Meanwhile, despite the Bush Administration's boasts, the total number of people it has convicted of engaging in a terrorist act since 9/11 is one (Richard Reid, the shoe bomber).

Nonetheless, leading Democratic presidential candidate Hillary Clinton claims that we are safer. Republican candidate Rudy Giuliani warns that "the next election is about whether we go back on defense against terrorism...or are we going to go on offense." And Democrats largely respond by insisting that they, too, would "go on offense." Few have asked whether "going on offense" actually works as a counterterrorism strategy. It doesn't. The Bush strategy has been a colossal failure, not only in terms of constitutional principle but in terms of national security. It turns out that in fighting terrorism, the best defense is not a good offense but a smarter defense.

"Going on offense," or the "paradigm of prevention," as then-Attorney General John Ashcroft dubbed it, has touched all of us. Some, like Canadian Maher Arar, have been rendered to third countries (in his case, Syria) to be interrogated by security services known for torture. Others have been subjected to months of virtually nonstop questioning, sexual abuse, waterboarding and injections with intravenous fluids until they urinate on themselves. Still others, like KindHearts, an American charity in Toledo, Ohio, have had their assets frozen under the USA Patriot Act and all their records seized without so much as a charge, much less a finding, of wrongdoing.

In the name of the "preventive paradigm," thousands of Arab and Muslim immigrants have been singled out, essentially on the basis of their ethnicity or religion, for special treatment, including mandatory registration, FBI interviews and preventive detention. Businesses have been served with more than 100,000 "national security letters," which permit the FBI to demand records on customers without a court order or individualized basis for suspicion. We have all been subjected to unprecedented secrecy about what elected officials are doing in our name while simultaneously suffering unprecedented official intrusion into our private lives by increased video surveillance, warrantless wiretapping and data-mining. Most tragically, more than 3,700 Americans and more than 70,000 Iraqi civilians have given their lives for the "preventive paradigm," which was used to justify going to war against a country that had not attacked us and posed no imminent threat of attack.

The preventive paradigm had its genesis on September 12, 2001. In *Bush at War*, Bob Woodward recounts a White House meeting in which FBI Director Robert Mueller advised that authorities must take care not to taint evidence in seeking 9/11 accomplices so that they could eventually be held accountable. Ashcroft immediately objected, saying, "The chief mission of US law enforcement...is to stop another attack and apprehend any accomplices.... If we can't bring them to trial, so be it." Ever since, the "war on terror" has been characterized by highly coercive, "forward-looking" pre-emptive measures-warrantless wiretapping, detention, coercive interrogation, even war-undertaken not on evidence of past or current wrongdoing but on speculation about future threats.

In isolation, neither the goal of preventing future attacks nor the tactic of using coercive measures is novel or troubling. All law enforcement seeks to prevent crime, and coercion is a necessary element of state power. However, when the end of prevention and the means of coercion are combined in the Administration's preventive paradigm, they produce a troubling form of anticipatory state violence-undertaken before wrongdoing has actually occurred and often without good evidence for believing that wrongdoing will ever occur.

The Bush strategy turns the law's traditional approach to state coercion on its head. With narrow exceptions, the rule of law reserves invasions of privacy, detention, punishment and use of military force for those who have been shown-on the basis of sound evidence and fair procedures-to have committed or to be plotting some wrong. The police can tap phones or search homes, but only when there is probable cause to believe that a crime has been committed and that the search is likely to find evidence of the crime. People can be preventively detained pending trial, but only when there is both probable cause of past wrongdoing and concrete evidence that they pose a danger to the community or are likely to abscond if left at large. And under international law, nations may use military force unilaterally only in response to an objectively verifiable attack or threat of imminent attack.

These bedrock legal requirements are a hindrance to "going on offense." Accordingly, the Administration has asserted sweeping executive discretion, eschewed questions of guilt or innocence and substituted secrecy and speculation for accountability and verifiable fact. Where the rule of law demands fair and open procedures, the preventive paradigm employs truncated processes often conducted in secret, denying the accused a meaningful opportunity to respond. The need for pre-emptive action is said to justify secrecy and shortcuts, whatever the cost to innocents. Where the rule of law demands that people be held liable only for their own actions, the Administration has frequently employed guilt by association and ethnic profiling to target suspected future wrongdoers. And where the rule of law absolutely prohibits torture and disappearances, the preventive paradigm views these tactics as lesser evils to defuse the proverbial ticking time bomb.

All other things being equal, preventing a terrorist act is, of course, preferable to responding after the fact-all the more so when the threats include weapons of mass destruction and our adversaries are difficult to detect, willing to kill themselves and seemingly unconstrained by any recognizable considerations of law, morality or human dignity. But there are plenty of preventive counterterrorism measures that conform to the rule of law, such as increased protections at borders and around vulnerable targets, institutional reforms designed to encourage better information sharing, even military force and military detention when employed in self-defense. The real problems arise when the state uses highly coercive measures-depriving people of their life, liberty or property, or going to war-based on speculation, without adhering to the laws long seen as critical to regulating and legitimizing such force.

Even if one were to accept as a moral or ethical matter the "ends justify the means" rationales advanced for the preventive paradigm, the paradigm fails its own test: There is little or no evidence that the Administration's coercive pre-emptive measures have made us safer, and substantial evidence that they have in fact exacerbated the dangers we face.

Consider the costliest example: the war in Iraq. Precisely because the preventive doctrine turns on speculation about non-imminent events, it permitted the Administration to turn its focus from Al Qaeda, the organization that attacked us on 9/11, to Iraq, a nation that did not. The Iraq War has by virtually all accounts made the United States, the Iraqi people, many of our allies and for that matter much of the world more vulnerable to terrorists. By targeting Iraq, the Bush Administration not only siphoned off much-needed resources from the struggle against Al Qaeda but also created a golden opportunity for Al Qaeda to inspire and recruit others to attack US and allied targets. And our invasion of Iraq has turned it into the world's premier terrorist training ground.

The preventive paradigm has been no more effective in other aspects of the "war on terror." According to US figures, international terrorist attacks increased by 300 percent between 2003 and 2004. In 2005 alone, there were 360 suicide bombings, resulting in 3,000 deaths, compared with an annual average of about ninety such attacks over the five preceding years. That hardly constitutes progress.

But what about the fact that, other than the anthrax mailings in 2001, there has not been another terrorist attack in the United States since 9/11? The real question, of course, is whether the Administration's coercive preventive measures can be credited for that. There were eight years between the first and second attacks on the World Trade Center. And when one looks at what the preventive paradigm has come up with in terms of concrete results, it's an astonishingly thin file. At Guantánamo, for example, once said to house "the worst of the worst," the Pentagon's Combatant Status Review Tribunals' own findings categorized only 8 percent of some

500 detainees held there in 2006 as fighters for Al Qaeda or the Taliban. More than half of the 775 Guantánamo detainees have now been released, suggesting that they may not have been "the worst of the worst" after all.

As for terror cells at home, the FBI admitted in February 2005 that it had yet to identify a single Al Qaeda sleeper cell in the entire United States. And it hasn't found any since-unless you count the Florida group arrested in 2006, whose principal step toward an alleged plot to blow up the Sears Tower was to order combat boots and whose only Al Qaeda "connection" was to a federal informant pretending to be Al Qaeda.

The Justice Department claims on its website www.lifeandliberty.gov to have charged more than 400 people in "terrorism-related" cases, but its own Inspector General has criticized those figures as inflated. The vast majority of the cases involved not terrorism but minor nonviolent offenses such as immigration fraud, credit-card fraud or lying to an FBI agent. The New York Times and the Washington Post found that only thirty-nine of the convictions were for a terrorism crime. And virtually all of those were for "material support" to groups labeled terrorist, a crime that requires no proof that the defendant ever intended to further a terrorist act. While prosecutors have obtained a handful of convictions for conspiracy to engage in terrorism, several of those convictions rest on extremely broad statutes that don't require proof of any specific plan or act, or on questionable entrapment tactics by government informants.

Many of the Administration's most highly touted "terrorism" cases have disintegrated after the Justice Department's initial self-congratulatory press conference announcing the indictment, most notably those against Capt. James Yee, a Muslim chaplain at Guantánamo initially accused of being a spy; Sami Al-Arian, a computer science professor acquitted on charges of conspiracy to kill Americans; Muhammad Salah and Abdelhaleem Ashqar, acquitted in Chicago of aiding Hamas; Sami al-Hussayen, a Saudi student acquitted by an Idaho jury of charges that he had aided terrorism by posting links on his website to other sites containing jihadist rhetoric; and Yaser Hamdi, the US citizen held for years as an enemy combatant but released from military custody when the government faced the prospect of having to prove that he was an enemy combatant. The Administration recently managed to convict José Padilla, the other US citizen held as an enemy combatant, not for any of the terrorist plots against the United States that it once accused him of hatching but for attending an Al Qaeda training camp and conspiring to support Muslim rebels in Chechnya and Bosnia before 9/11.

Overall, the government's success rate in cases alleging terrorist charges since 9/11 is only 29 percent, compared with a 92 percent conviction rate for felonies. This is an astounding statistic, because presumably federal juries are not predisposed to sympathize with Arab or Muslim defendants accused of terrorism. But when one prosecutes prematurely, failure is often the result.

The government's "preventive" immigration initiatives have come up even more empty-handed. After 9/11 the Bush Administration called in 80,000 foreign nationals for fingerprinting, photographing and "special registration" simply because they came from predominantly Arab or Muslim countries; sought out another 8,000 young men from the same countries for FBI interviews; and placed more than 5,000 foreign nationals here in preventive detention. Yet as of September 2007, not one of these people stands convicted of a terrorist crime. The government's record, in what is surely the largest campaign of ethnic profiling since the Japanese internment of World War II, is 0 for 93,000.

These statistics offer solid evidence to support the overwhelming consensus that Foreign Policy found when it polled more than 100 foreign policy experts-evenly dispersed along the political spectrum-and found that 91 percent felt that the world is becoming more dangerous for the United States, and that 84 percent said we are not winning the "war on terror."

It is certainly possible that some of these preventive measures deterred would-be terrorists from attacking us or helped to uncover and foil terrorist plots before they could come to fruition. But if real plots had been foiled and real terrorists identified, one would expect some criminal convictions to follow. When FBI agents successfully foiled a plot by Sheik Omar Abdel Rahman (popularly known as "the blind sheik") and others to bomb bridges and tunnels around Manhattan in the 1990s, it also convicted the plotters and sent them to prison for life.

In October 2005 Bush claimed that the United States and its allies had foiled ten terrorist plots. But he couldn't point to a single convicted terrorist. Consider just one of Bush's ten "success" stories, the one about which he

provided the most details: an alleged Al Qaeda plot to fly an airplane into the Library Tower, a skyscraper in Los Angeles. The perpetrators, described only as Southeast Asians, were said to have been captured in early 2002 in Asia. As far as we know, however, no one has ever been charged or tried for this alleged terror plot. Intelligence officials told the Washington Post that there was "deep disagreement within the intelligence community about...whether it was ever much more than talk." A senior FBI official said, "To take that and make it into a disrupted plot is just ludicrous." American officials claim to have learned about some of the plot's details by interrogating captured Al Qaeda leader Khalid Shaikh Mohammed, but he was captured in 2003, long after the perpetrators had been arrested. As the Los Angeles Times put it, "By the time anybody knew about it, the threat-if there had been one-had passed, federal counter-terrorism officials said." These facts-all omitted in Bush's retelling-suggest that such claims of success need to be viewed skeptically.

if the Bush strategy were merely ineffectual, that would be bad enough. But it's worse than that; the President's policy has actually made us significantly less secure. While the Administration has concentrated on swaggeringly aggressive coercive initiatives of dubious effect, it has neglected less dramatic but more effective preventive initiatives. In December 2005 the bipartisan 9/11 Commission gave the Administration failing or near-failing grades on many of the most basic domestic security measures, including assessing critical infrastructure vulnerabilities, securing weapons of mass destruction, screening airline passengers and cargo, sharing information between law enforcement and intelligence agencies, insuring that first responders have adequate communications and supporting secular education in Muslim countries. We spend more in a day in Iraq than we do annually on some of the most important defensive initiatives here at home.

The preventive paradigm has also made it more difficult to bring terrorists to justice, just as FBI Director Mueller warned on September 12. When the Administration chooses to disappear suspects into secret prisons and use waterboarding to encourage them to talk, it forfeits any possibility of bringing the suspects to justice for their alleged crimes, because evidence obtained coercively at a "black site" would never be admissible in a fair and legitimate trial. That's the real reason no one has yet been brought to trial at Guantánamo. There is debate about whether torture ever results in reliable intelligence-but there can be no debate that it radically curtails the government's ability to bring a terrorist to justice.

Assuming that the principal terrorist threat still comes from Al Qaeda or, more broadly, a violence-prone fundamentalist strain of Islam, and that the "enemies" in this struggle are a relatively small number of Arab and Muslim men, it is all the more critical that we develop close, positive ties with Arab and Muslim communities here and abroad. By alienating those whose help we need most, the preventive paradigm has had exactly the opposite effect.

At the same time, we have given Al Qaeda the best propaganda it could ever have hoped for. Then-Defense Secretary Donald Rumsfeld identified the critical question in an October 2003 internal Pentagon memo: "Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training and deploying against us?" While there is no precise metric for answering Rumsfeld's question, there can be little doubt that our preventive tactics have been a boon to terrorist recruitment throughout the world.

More broadly still, our actions have radically undermined our standing in the world. The damage to US prestige was perhaps most dramatically revealed when, after the report of CIA black sites surfaced in November 2005, Russia, among several other countries, promptly issued a press release claiming that it had nothing to do with the sites. When Russia feels the need to distance itself from the United States out of concern that its human rights image might be tarnished by association, we have fallen far.

In short, we have gone from being the object of the world's sympathy immediately after 9/11 to being the country most likely to be hated. Anti-Americanism is at an all-time high. In some countries, Osama bin Laden has a higher approval rating than the United States. And much of the anti-Americanism is tied to the perception that the United States has pursued its "war on terror" in an arrogant, unilateral fashion, defying the very values we once championed.

The Bush Administration just doesn't get it. Its National Defense Strategy, published by the Pentagon, warns that "our strength as a nation state will continue to be challenged by those who employ a strategy of the weak

using international fora, judicial processes, and terrorism." The proposition that judicial processes and international accountability-the very essence of the rule of law-are to be dismissed as a strategy of the weak, aligned with terrorism itself, makes clear that the Administration has come to view the rule of law as an obstacle, not an asset, in its effort to protect us from terrorist attack.

Our long-term security turns not on "going on offense" by locking up thousands of "suspected terrorists" who turn out to have no connection to terrorism; nor on forcing suspects to bark like dogs, urinate and defecate on themselves, and endure sexual humiliation; nor on attacking countries that have not threatened to attack us. Security rests not on exceptionalism and double standards but on a commitment to fairness, justice and the rule of law. The rule of law in no way precludes a state from defending itself from terrorists but requires that it do so within constraints. And properly understood, those constraints are assets, not obstacles. Aharon Barak, who recently retired as president of Israel's Supreme Court, said it best in a case forbidding the use of "moderate physical pressure" in interrogating Palestinian terror suspects: "A democracy must sometimes fight terror with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."

The preventive paradigm has compromised our spirit, strengthened our enemies and left us less free and less safe. If we are ready to learn from our mistakes, however, there is a better way to defend ourselves-through, rather than despite, a recommitment to the rule of law.