A PUBLICATION OF THE CENTER ON LAW AND SECURITY AT THE NYU SCHOOL OF LAW / OCTOBER 2007

THE CENTER ON
LAW AND SECURITY

Terrorist Trials, 2001-2007: Lessons Learned

Six years after 9/11, the picture of the U.S. Department of Justice's "War on Terror" in the courts is clear. Seen in its best light, it is a picture of flexibility which takes as its strategic goal an increasing emphasis on prevention and disruption. The purpose of this updated commentary (Fall 2007) on the *Terrorist Trial Report Card* is to help describe that strategy statistically as a basis for going forward.

From the beginning of the War on Terror declared by Executive Order 13224 on September 23, 2001, the courts have had to grapple with an ill-defined and unspecified role in combating terrorism. Time and again, President Bush has dismissed the courts in rhetoric, preferring military might and know-how. In the 2004 State of the Union address, the President ridiculed those who view terrorism more as crime than as war, more as "a problem to be solved mainly with law enforcement and indictments" rather than with the tools of war. As the President explained it, "After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got." The 2005 National Defense Strategy of the United States concluded likewise, under a heading called "our vulnerabilities" that included "judicial processes" as a "strategy of the weak."

Contrary to the assertions of the Bush administration, the legal system has in fact served as the venue for important battles. *The Terrorist Trial Report Card: U.S. Edition: 2001-2006*, compiled by the Center on Law and Security, and updated online, tells that story, documenting the hundreds of indictments of suspected terrorists in the first years since the attacks and providing a summary and analysis of the cases. Who was indicted? On which charges? And with what outcome? Collectively, these cases tell an important part of the story of America's response to terrorism, a story which is all the more interesting against the backdrop of the Bush administration's continued insistence that the struggle against terrorism occurs within the realm of war, not crime.

The Center took the most logical approach to answer these questions; our law students examined each case in which the government announced – at some point during the case – an arrest as part of a terrorism-related investigation. They then followed up to see what happened when the case actually went to trial. Surveyed collectively, the trajectory of these cases helps us understand the administration's approach to combating terror through the courts. The universe of cases can be separated into three distinct types: cases in which the government indicted defendants for the federal crime of terrorism, including material support; cases in which the government proclaimed a terrorism connection at arrest but charged the defendants with non-terrorism criminal offenses; and cases in which the government did not announce a terrorism connection with the initial arrest but later superseded the original indictment with a federal terrorism charge. It should be noted that there are myriad strategic reasons for the government not to push for the fullest conviction – in these instances, the federal crime of terrorism. Perhaps there is a secret plea agreement, or defendants could be cooperating witnesses, or the government may not want to divulge an intelligence method at trial, or the government may argue for a terrorism sentencing enhancement post-conviction after proving key facts at trial.

Six years after 9/11, the record on apprehending, indicting and convicting suspected terrorists has left a trail from which we can begin to draw conclusions about the efficacy of prosecutions as weapons in the fight against terrorism, and the potential impact of such indictments and trials upon the legal system in general.

The Terrorist Trial Report Card shows that:

Despite the Bush administration's insistence that terrorism is not a matter of crime, the Department of Justice has not been idle. On the contrary, it engaged in "lawfare," its own War on Terror, in an aggressive coast-to-coast program aimed at ferreting out suspected terrorists.

In two-thirds of the cases, the government never brought federal terrorism charges. Rather, it brought charges ranging from fraud to drugs, criminal conspiracy, racketeering, immigration violations, national security violations, obstruction of investigation, violent crimes, or weapons violations.

Many of the highest profile cases do not involve terrorist cells operating in the United States. The conventional notion of the domestic terrorist threat is a clandestine cell living and planning an operation on U.S. soil.

Since 9/11, there seems to have been only one such arrest, indictment, and conviction – the case of Martin Siraj, known as "the Herald Square bomber," who was convicted in 2006 of planning to bomb a New York City subway station. Other widely publicized cases in which the federal crime of terrorism was charged do not fit this bill. Richard Reid, "the shoe bomber," was captured on a plane outside of the United States, the fortuitous result of alert passengers and flight attendants. Chao Tung Wu, another defendant convicted on this ground, is a Chinese national captured as part of a sting operation against illegal weapons sales from China. The arrest of Zacarias Moussaoui occurred prior to the 9/11 attack, when he was picked up on immigration violations.

If success is measured by disruption of terrorist plots, The DOJ has largely been able to rely on the tools available before the USA PATRIOT Act. The DOJ has used more than 100 different federal laws in the hundreds of cases it has brought. Although we are just beginning to discern the true extent and manner in which the administration has used the sweeping investigative powers granted by the Patriot Act, the record indicates that the criminal law provides an adequate tool set for trying suspected terrorists.

Criminal conspiracy charges constitute a principal tactic for securing convictions. Criminal conspiracy – referred to as "the prosecutor's darling" for its amenability to cases in which evidence supporting the underlying crime is sparse – has been a common tool in terrorism-related prosecutions. In the Jose Padilla case, criminal conspiracy charges permitted the government to reach a conviction for conspiring to murder, maim and kidnap people in a foreign country and for providing material support to terrorists based on largely circumstantial evidence. This case, among others, has highlighted one of the more adaptive, if not questionable, tactics that the DOJ has used in its War on Terror.

The FBI has been increasingly effective. Other offices initiated the investigations in three of the four major cases – Siraj, Moussaoui and John Walker Lindh. Siraj was identified and implicated by the NYPD, Moussaoui was arrested before 9/11 on immigration violations, and Lindh was picked up on the battlefield in Afghanistan. But the effectiveness of the FBI has grown over time, evidenced by its role in the May 2007 disruption of the Fort Dix Plot and the June 2007 disruption of the plot to attack JFK Airport.

There is a fine line between preventive arrest and entrapment. As part of the increased role of the FBI in counterterrorism arrests, the trend seems to be towards preventive arrests. Rather than let the evidence mount through surveillance, as is customary in European counterterrorism investigations, FBI agents prefer to disrupt plots through arrest before building the strongest case possible, particularly in cases where suspects are quite a ways from achieving operational capacity. Only at trial do the details emerge, demonstrating the use of confidential informants to engage, and sometimes bait, individuals suspected of having ties to terrorism. Occasionally, the FBI skirts a close line between preventive arrests and entrapment. The Siraj case, the al-Hayat case, and the Yassin Aref and Mohammed Hossain case have all come under scrutiny in this regard.

2007 UPDATE

109 Defendants charged *(9/11/06 - 9/11/07)*
33 Terrorism-related indictments brought *(9/11/06 - 9/11/07)*
18 Defendants charged and convicted *(9/11/06 - 9/11/07)*
6 Defendants both charged and convicted of federal crimes of terrorism in the past year *(9/11/06 - 9/11/07)*
9 Defendants convicted of federal crimes of terrorism who were charged before 9/11/06 *(9/11/06 - 9/11/07)*
62 Defendants convicted of federal crimes of terrorism *(9/11/01 - 9/11/07)*

None of the convictions from 9/11/06 - 9/11/07 involved jihadist terrorist plots targeting the U.S. homeland.

All told, there has been a scattershot approach to alleged terrorism indictments, with 104 different criminal charges used to indict alleged terrorists.Thus the underlying method used by the United States Attorneys' Offices to prioritize cases is impossible to discern at this point in time. This approach has the potential weaknesses of substituting quantity over quality, breadth over focus, and a general lack of precision in terms of the collection of evidence.

The incoming attorney general would be wise to reconsider not only the tools at hand but the way in which the DOJ uses those tools. At the core of prosecutorial strategy in the War on Terror is the inherent debate between prevention and punishment. While conviction at an early stage may ease minds, the cost to national security may ultimately weaken the system itself. This also highlights the tension between long-term surveillance and premature arrest. Counterterrorism is about the use of focused, informed intelligence. By arresting individuals too early in the process of investigation, the government runs the risk of dulling its own tools by diminishing the sharpness of its investigatory techniques and eroding the need to collect substantial evidence.

Any shift towards prioritizing strong cases over immediate arrests of persons potentially linked to terrorism must ensure the public is not subjected to unacceptable levels of risk. However, forsaking accuracy for the immediate benefit of quantitative gains in suspects imprisoned or deported can lead to lazy investigations and half-hearted convictions. That result neither sets at ease the American public nor hones the skills of law enforcement in the national security age. *– By Karen J. Greenberg with Daniel Freifeld, and with special thanks to Michael Price and the research of NYU law students.*