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Prophetic Justice

The United States is now prosecuting suspected terrorists on the basis of their intentions, not just their actions. But in the case of Islamic extremists, how can American jurors fairly weigh words and beliefs when Muslims themselves can't agree on what they mean?

AMY WALDMAN | OCT 1 2006, 12:00 PM ET



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At the age of twenty-two, Hamid Hayat appeared to be adrift on two continents. He slacked, by turns, in his hometown of Lodi, California, and in his family's home country, Pakistan. Having lived for roughly equal amounts of time in each, he seemed without direction in either. But on June 5, 2005, the young American offered up alarming evidence of personal initiative: after hours of questioning at the FBI's Sacramento office, he confessed that he had attended a terrorist training camp in Pakistan and returned to the United States to wage jihad. In quick succession came his arrest, a packed press conference, and his indictment—and suddenly it was all over but the trial.

U.S. v. Hayat No. 07-10457 archived on March 22, 2013

From *Atlantic Unbound*:

"Islam on Trial?" (September 12, 2006)

The author of "Prophetic Justice" discusses the murky business of prosecuting would-be terrorists on the basis of their beliefs.

Hayat's case presented a peculiar challenge for the prosecution, which needed to show not just that he had trained in Pakistan and concealed doing so, but that he had intended to commit terrorism. Yet the only direct proof of any

of this was Hayat's videotaped confession, which was as irresolute as his life. The slender, deferential young man repeatedly contradicted himself. He parroted the answers that agents suggested. And the details of any terrorist plan were scant and fuzzy.

The government said that its direct evidence was limited because it had intercepted Hayat so early in the process. "This is not a case where a building has been blown up, and, you know, the forensic investigators go in, they go looking through the rubble looking for clues," one prosecutor, David Deitch, told jurors. "This isn't that kind of case. This is a charge that allows the FBI to prevent acts of violence like that." Would Americans, he asked, want any less?

To prove intent, then, the government had to turn to the rubble of Hayat's life—an accretion of circumstantial but ugly evidence that prosecutors said proved "a jihadi heart and a jihadi mind." There were Hayat's words, taped by an informant, in which he praised the murder

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and mutilation of the journalist Daniel Pearl: “They killed him—I’m so pleased about that. They cut him into pieces and sent him back ... That was a good job they did—now they can’t send one Jewish person to Pakistan.” There was what the prosecution called Hayat’s “frequently expressed hatred toward the United States”; his comment that his heart “belongs to Pakistan”; his description of President Bush as “the worm.” There was, at his house, literature by a virulent Pakistani militant and a scrapbook of clippings celebrating both the Taliban and sectarian violence.

And folded in his wallet was a scrap of paper on which was written a squib of Arabic. Prosecutors first translated the words as “Lord, let us be at their throats, and we ask you to give us refuge from their evil,” and then amended it, after the defense protested, to “Oh Allah, we place you at their throats, and we seek refuge in you from their evil.” But regardless of the translation, the interpretation of what the government called the “jihadist note” never changed. The prosecution cited it as “probative evidence” that Hayat had “the requisite jihadist intent” when he attended the training camp and then returned to America.

The note became a kind of leitmotif in the case. Weighing a request for bail by Hayat’s father, who had been charged with lying about his son’s training, U.S. Magistrate Judge Gregory G. Hollows wrote:

The allegations depict Hamid as one who would be ruthless in his disregard for human life if and when ordered to do so on the behalf of a “religious” philosophy. Although religion can form the basis of mankind’s most noble deeds, it can also have the effect attributed to it by Pascal: “Men never do evil so completely and cheerfully as when they do it from religious conviction.” The scrap of paper found in Hamid’s wallet certainly speaks to the latter category.

An expert witness for the prosecution testified that the prayer would be carried around, as a prosecutor recapped, “by a holy warrior, a violent jihadi, who felt himself to be traveling in an enemy land, and who was ready to commit violent jihad.” That exposition resonated with at least some jurors, who speculated that the paper might be Hayat’s graduation certificate from the terrorist training camp. The prayer encapsulated everything they feared about the power and danger of religious conviction, and it helped ensure, after a ten-week trial, Hayat’s criminal conviction.

The September 11, 2001, attacks on the World Trade Center and the Pentagon prompted a fundamental shift in the American government’s approach to Islamic terrorism. Before 9/11, the government largely responded to attacks that had already occurred—by launching cruise missiles at terrorist bases in Afghanistan and Sudan after the 1998 embassy bombings in Africa, for example, or by prosecuting the planners and perpetrators of those bombings in federal court. (The notable exception was the trial and conviction in 1995 of Sheikh Omar Abdul-Rahman—the “blind sheikh—for “seditious conspiracy” to blow

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up New York landmarks.) But after 9/11, the focus turned to prevention.

Abroad, the government has pursued a doctrine of preemptive war. At home, it has pursued a strategy of what might be called preemptive prosecution. The criminal-justice system, the Justice Department said in a recent white paper on counterterrorism, now “operates effectively as an element of national power.” The goal has become to stop another terrorist attack before it happens. In 2002, the FBI told its fifty-six field offices they could no longer set their own law-enforcement priorities: the top priority for every office was preventing another attack. McGregor W. Scott, the U.S. attorney who prosecuted Hamid Hayat, says that then Attorney General John Ashcroft told him during their first meeting after Scott’s appointment, “Your job is to prevent further acts of terrorism.”

That job—a real-life, never-ending version of the television show *24*—has weighed heavily on agents and prosecutors, in part because they have been ill-equipped to perform it. Trained in the classic art of whodunit—collecting fingerprints, interviewing bank tellers after a robbery, trying the purported robber—agents and prosecutors now have to figure out who *will* do it.

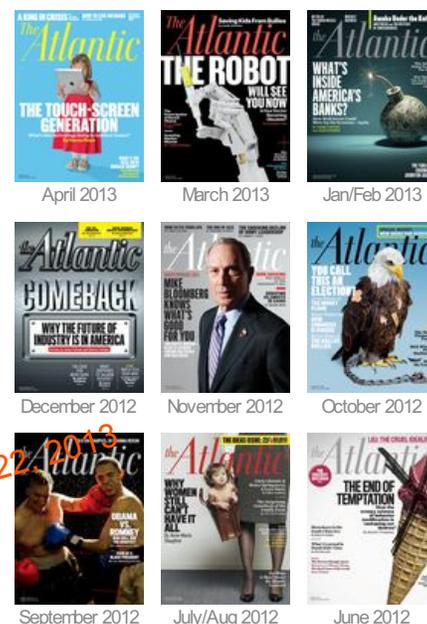
This preemptive strategy represents a major moral and legal change in the American approach to justice. Its premise is that terrorism—implicitly, *Islamic* terrorism—represents a singular, unprecedented threat to American safety and society. Testifying before Congress in 2004, Paul Rosenzweig of the Heritage Foundation paraphrased a well-known maxim, saying, “It is better that ten guilty go free than that one innocent be mistakenly punished.” September 11 changed the paradigm, he argued, and now, “we simply cannot afford a rule that ‘Better ten terrorists go undetected than that the conduct of one innocent be mistakenly examined.’”

The notion of preemptive prosecution is, of course, not without precedent. McGregor Scott notes that we prosecute felons for possession of firearms to stop them before they can use guns to commit a violent crime. David Cole, a professor at Georgetown University Law Center, cites the indictment of Al Capone for tax fraud as a “pretextual prosecution—the government couldn’t get him for more serious crimes—whose effect was also to prevent future crimes. Paul Robinson, a law professor at the University of Pennsylvania, argued even before 9/11 that the lengthy incarceration of habitual offenders was more about preventing future crimes than about punishing past ones, and warned against the ambiguity of punishing “dangerousness.”

The 9/11 attacks made this shift explicit for one category of crime and, in practice, largely for one category of American. In search of potential terrorists, the government has cast a broad net across the country’s Muslim communities, often relying on undercover informants. This has led to hundreds of legal cases against Pakistani, Saudi, Moroccan, Algerian, Palestinian, Yemeni, and American Muslims. In many

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instances, the prosecutions have been pretextual: charges of lying to law-enforcement agents, fraud, money laundering, and, often, immigration violations. But a number of prosecutions, like Hayat's, have been explicitly preemptive: cases against individuals the government said were planning to commit terrorist acts or were encouraging or supporting others to do so.

The Bush administration did not seek legislation to authorize its new preemptive approach, instead relying on existing, if previously little used, laws. Key among these were two statutes—passed in 1994 and 1996 respectively—barring “material support” of terrorism, which can mean anything from personnel to funds. The laws, which were expanded under post-9/11 legislation, allow the government to bring terrorism-related charges even when no terrorism has occurred.

Deputy Attorney General Paul McNulty said in a recent press briefing that he encouraged prosecutors to bring charges against would-be terrorists as early as possible. But that approach can be at odds with prosecutorial success: the earlier you intervene to stop a suspected crime, the less proof you have that a crime was going to be committed. “As a prosecutor, you probably don’t have as much evidence of guilt [as] you would if the thing were much further along,” McGregor Scott, the U.S. attorney in Sacramento, says. “We don’t have [the defendant] in the rental van with a whole bunch of C4 [explosives] in the back driving to the federal building.” Whether that points to a lack of evidence or a lack of guilt, it presents prosecutors with a practical problem: how to prove that a suspect who has not committed a violent crime is dangerous enough to convict. In the armed felon’s case, the measure of dangerousness—proven past bad acts—is at least clear. But most terrorism defendants have not had previous convictions. Determining their intent, therefore, is what David Cole calls an “inevitably speculative endeavor.”

The government has sought to demonstrate danger in two ways. The first is through acts, such as training, that are seen as preparatory to terrorism (but not concrete or defined enough to result in conspiracy or other overt charges). The second is through speech, belief, or association—documented through the defendants’ words or material found in their possession—that suggests sympathy or support for terrorism. In case after case, the government has sought to prove allegiance to a radical Islamist philosophy that supports violence in Allah’s name. Much of the evidence, as a result, is religious in nature.

The government’s professed target is extremist dogma. But, as Mary Habeck notes in *Knowing the Enemy: Jihadist Ideology and the War on Terror*, extremists have gained traction precisely because their dogma finds its roots in Islam’s sacred texts—the Koran and hadith, the traditions of the Prophet Muhammad as documented by his companions—and in subsequent interpretations of Islam. That continuum of religious dogma presents a challenge for Islam, but also for the American court system, where the effort to try terrorist extremism has arguably resulted in the trial of Islam itself.



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