The New REPUBLIC

CAN A FOREIGN SYSTEM OF PREVENTIVE DETENTION WORK IN THE UNITED STATES?

Finders Keepers

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Last week, the new National Intelligence Estimate (NIE) asserted a growing Al Qaeda capacity "to recruit and indoctrinate operatives, including for Homeland attacks." True or not--and not all NIEs prove equally reliable--the document redoubles pressure on the government to anticipate homeland attacks like last month's incidents in Glasgow and London. Such scenarios, however, present a difficult problem for authorities: If you suspect a conspiracy is unfolding, how can you detain suspects before they act, absent sufficient evidence of guilt?

Many countries have attempted to solve this problem by erecting systems of preventive detention, which would allow suspects to be held in custody without criminal charges for specified periods of time, as investigators gather information. In 2006, in reaction to the July 2005 bombings in London, the British Parliament passed legislation doubling the number of days suspects may be held in detention from 14 to 28. Israel, France, and Spain have similar schemes. And, this month, Germany's senior counter-terrorism official, Wolfgang Schaüble, proposed new preventive detention measures as well.

Britain's 2006 law has also inspired particular interest here in the United States because of a shared common law heritage, a common language, and a deep level of counter-terrorism cooperation. On the fifth anniversary of 9/11, senior Bush administration officials, including Alberto Gonzales and Michael Chertoff, raised the possibility of a new preventive detention law modeled on Britain's legislation. And, more recently, the prospect of Guantánamo's closure has sparked a broader debate about what preventive detention powers might be implemented on U.S. soil.

There are, however, powerful reasons not to adopt the British model. The claim that Britain's system of preventive detention has worked there and thus will work here is too facile. Legal systems are not like Legos, to be broken into pieces and rebuilt elsewhere. The applicability in the United States of the U.K.'s preventive detention scheme must be considered in its legal, cultural, and political context.

First, while there is nothing in U.S. federal statutes that resembles Britain's detention scheme, the executive branch does in fact read the law to allow sweeping detention in the absence of criminal charges. Long before 9/11, Alan Dershowitz pointed out that American law has "stretch points," ambiguous provisions and principles that can be torqued to new and unexpected purposes. Preventive detention in American law has been a matter of squeezing two stretch points drafted for very different purposes--immigration law and the "material witness" statute.

Under a regulation issued six days after 9/11, the then-Immigration and Naturalization Service was given the authority to seize and detain indefinitely non-citizens without charges of any violation of immigration law. Against U.S. citizens, the government invoked the "material witness" law, which dates back to the Founding and is used to detain witnesses temporarily to secure testimony for some other case. Innovatively, the government argued that people could be detained to secure testimony for their *own* trial.

Neither of these approaches is ideal to say the least. According to the Justice Department's inspector general, post-9/11 detainees were held by the INS, on average, more than 80 days--an excessive amount, by international standards. None were found to be involved in ongoing terrorist conspiracies. The material witness law similarly led to prolonged detentions. One U.S. citizen, Abdullah Al Kidd, was held for 16 months before prosecutors decided not to charge him.

A new, formal detention system might seem to staunch the unpredictable application of these ad hoc tactics and reduce abuse. This sunny prospect, though, is at odds with historical practice and political theory. More likely, new powers provided through a formal detention system would simply supplement--rather than supplant--existing ad hoc powers.

The immediate post-9/11 experience provides a historical example. In section 412 of the 2001 Patriot Act, Congress authorized the detention of non-citizens for security reasons--for seven days. But the Bush administration ignored this limitation in favor of using the stretch points in the immigration and material witness laws to detain suspects for much longer. Establishing a new preventive detention system based on the British model would do nothing to limit the stretch points now in place.

And even if Congress recognizes this danger, there is reason to worry that limits on executive power would prove harder to impose than extensions. At present, the executive branch can take the initiative in exploiting other stretch points in the law by issuing regulations and executive orders either based on its (perhaps dubious) interpretation of statutes or its (certainly dubious) conception of "inherent" executive power. The presidential veto also makes it hard for Congress to reverse these power-grabs. Indeed, it is generally easy for Congress, by majority vote, to grant new powers to the executive--but systemically hard for it to reduce executive power, since the latter demands well-nigh impossible super-majorities.

Even if such legal and institutional problems can be overcome, however, the different political climates in Britain and the United States make adoption of the British detention system inadvisable. The UK's law is used fairly sparingly. Perhaps due to the U.K.'s long experience with Irish terrorism, the U.K. does not have so much of the politics of fear that warp discussion of terrorism issues in the U.S. Hence, measures in the U.K. are more likely to be tempered to existing needs. Whereas Congress rushed to pass the Patriot Act days after 9/11, with nary a thought to its sweeping provisions, parliamentarians in London resisted panic after the July 2005 bombings and voted down Tony Blair's request that the preventive detention period be expanded to 90 days.

Further, Britain's judiciary is starkly different from its U.S. counterpart. Unlike federal judges in the United States, British judges have not withered under decades of partisan-motivated attacks on "judicial activism." They thus have provided searching scrutiny of executive claims of the "need" to constraint civil liberties in the name of national security.

Finally, the minorities most likely to be targeted by counter-terrorism laws--Muslims and South Asians--are better represented in the British parliament and media than in the United States. Without being Pollyannaish about the state of U.K. race relations, it's important to note the wider and more vigorous public concern there about overreaching on civil liberties there. That may be why the U.K. police has used the preventive detention power selectively, even as they acknowledge that there may be hundreds of people willing to use violence in the U.K.

Counter-terrorism laws in the United States, though, are driven as much by partisan politics as by need. No system erected in the United States, then--British or otherwise--however legally sound, will work without the political will to enforce its provisions.

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