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Address to the Terrorism & Justice Conference at the University of
Central Missouri**

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LESS SAFE, LESS FREE: A PROGRESS REPORT ON THE WAR ON TERROR

David Cole*
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**Address to the Terrorism & Justice Conference
University of Central Missouri, February 18, 2008**

Steven Spielberg film, *Minority Report*, based on a science fiction short story by Philip K. Dick, is set in the not-so-distant future in Washington D.C. at a time when we have miraculously solved the problem of crime or at least apparently so. The government has captured three witches who can predict the future with almost perfect accuracy. They predict who will commit crime so accurately that Congress enacts a “pre-crime law” that makes it a crime to think about committing a crime. With the help of these witches’ predictions, the government can convict people before the crimes ever occur. All is rosy – until, of course, someone figures out how to trick the witches into predicting that the protagonist will commit a murder that he does not in fact intend or plan to commit.

As far as I can tell, we do not have witches in the Justice Department, predicting who will commit crimes in the future. Nonetheless, the Bush Administration since 9-11 has adopted a strategy, which in some sense depends upon the ability to predict with incredible accuracy at what will happen in the future. It is that strategy that I want to discuss this afternoon. It was given its name by the U.S. Attorney General during the first Bush Administration, Missouri’s John Ashcroft, who argued that what we need in the wake of 9-11 is a “preventive paradigm.” The argument is understandable: when facing foes who are willing to commit suicide in order to inflict mass casualties on innocent civilians, it is not enough to bring them to justice after the fact. The perpetrators are dead -- and so are many innocent civilians. Thus, the goal must be to prevent the next terrorist attack from occurring.

Of course we all want to prevent the next terrorist attack from occurring. No one wants to see another 9-11 or anything like it. But the preventive paradigm as it has been employed in this particular conflict has a particular character. It deploys the state’s most coercive authorities, based not on objective evidence of past or even ongoing wrongdoing, but based on predictions about future harms we want to prevent. It is the use of coercive preventive measures that most characterizes the preventive paradigm as outlined by John Ashcroft and overseen by the Bush Administration in the war on terror.

Consider, for example, This notion of using coercive measures based not on objective measures of past or ongoing wrongdoing, but on predictions about future

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Please send your correspondence to author at Georgetown University Law Center, Washington, DC. Prof. Cole is the co-author with Jules Lobel of *Less Safe, Less Free—Why America Is Losing the War on Terror*, 2007, New Press: New York, upon which this address is based. Readers interested in citations for the assertions contained herein should refer to the book. *The Journal of the Institute of Justice & International Studies* Vol. 8

harm, includes preventive detention. In the first two years after 9-11, the government locked up by its own count over 5,000 foreign nationals in preventive detention anti-terrorism measures. These are people locked up, not to hold them responsible for things they have done in the past, not based on objective evidence of past wrongdoing, but out of a concern that they might commit a terrorist act in the future. So they are locked up to prevent that possibility from occurring.

The preventive paradigm also includes what President Bush calls “alternative interrogation tactics,” but what the rest of the world knows as torture. The argument that has been made to justify coercive interrogation or torture is inevitably based on the fear of an imminent terrorist attack. This fear is used to justify strapping men down and pouring water over their faces so they cannot breathe and fear they will drown in order to encourage them to talk. No one argues that it is necessary to use such torture to punish someone for a crime after the fact. Even if it can be established beyond a reasonable doubt that a person has committed a heinous crime for which he can be executed, we would not torture him. The pro-torture argument is that to prevent the ticking time bomb from going off, surely it is justified then to use a little bit of torture. So here the preventive paradigm makes what was unthinkable, thinkable.

As a third example, consider preventive war, the notion that led the U.S. into Iraq. During the run-up to the war with Iraq, the Pentagon criticized the traditional international law view that a country may unilaterally attack another country only in self-defense -- that is, only when the country has been attacked or is facing an imminent threat of attack. This standard requires justifications that are objectively verifiable. The Administration argued that this standard does not make sense in the era of weapons of mass destruction, rogue states, and international terrorist organizations. The country needs to be able to act unilaterally and preventively where it has not been attacked and does not face an imminent threat but there is a gathering storm that needs to be dealt with. The invasion of Iraq was justified on those grounds.

Let me make it a little more concrete by talking about one of my clients who was a victim of the preventive paradigm. His name is Maher Arar, a Canadian citizen born in Syria and therefore a dual national. Arar moved with his family from Syria when he was a teenager and he has been living in Canada for the last two decades. He was returning home to Canada from Europe in September 2002 when, while changing planes at JFK Airport in New York, he was pulled out of line by immigration officials, locked up for two weeks, denied access to an attorney, interrogated at length, and ordered deported on the basis of secret evidence that claimed he was a threat to national security. He denied he was such a threat, stating that he had been coming to the U.S. for years (in fact he had worked for years in Boston at a computer company). Furthermore, on this trip he was not trying to enter the U.S. but was just trying to change planes to go home to Canada. The United States not only ordered him deported, but placed on a federally chartered jet that took him not to Canada, but to Syria.

Why would the U.S. take a Canadian, who is simply returning home to Canada, and forcibly redirect him and send him to Syria? The answer lies in the fact that Canada does not have a record of torturing its suspects. Syria does. And Syria did. While interrogating him with questions virtually identical to those which the U.S. authorities had asked him at JFK Airport, Syrian officials beat him with an electric cable. They, ultimately locked him up for a year without charges, most of the time in a cell the size of a grave—3 feet by 6 feet by 7 feet.

At the end of a year, Syria released him because they found no evidence that he had engaged in any wrongdoing whatsoever, much less terrorism. He went back to Canada. This time he did not change planes at JFK Airport. Canada launched a massive inquiry into his case, which resulted in an 1100-page report fully exonerating Arar. Canada paid him ten million dollars in damages for that country's part in the wrongdoing, having provided the U.S. with some negligent misinformation. Canada did not, as far as we know, cooperate with the U.S. in deciding to send Arar to Syria to be tortured. That was the call of the U.S.

Maher Arar was a victim of the preventive paradigm. The U.S. did not have any evidence that he engaged in any wrongdoing. If the U.S. had, the government would have tried him, or might have sent him to Guantanamo. But U.S. officials had suspicions about Arar, and when he could not dispel those suspicions through the interrogations without a lawyer for two weeks at JFK, U.S. officials delivered him to Syria so that the Syrians could use more extreme tactics. These tactics were justified of course in the name of prevention. The U.S. wanted to prevent Arar from doing something dangerous in the future.

I will make three points about this preventive paradigm. The first is that it puts tremendous pressure on the values that we associate with the rule of law, the Constitution, and the American society at its best. Second, I will argue that while this preventive paradigm has been adopted in the name of making us more secure, it has in fact made us less secure and more vulnerable to terrorist attacks. Third, I will suggest that this was tragically unnecessary. Prevention is possible without compromising our most fundamental principles and without inspiring the kind of backlash that the preventive paradigm has occasioned.

I.

Let me first talk about the sacrifices brought on by the prevention paradigm. The rule of law is a critical element in the legitimacy of the state's monopoly on coercive authority. We give the state the authority to lock us up, to fine us, and in this country, to execute us, on the condition that it abide by certain basic principles of the rule of law. But the rule of law may appear to be an obstacle when the state does not have evidence that anyone has done anything wrong, but seeks to take action nonetheless. When the Administration wanted to use coercive force against Maher Arar, as to whom there was no evidence that he had done anything wrong, the rule of law seemed an obstacle, so there was tremendous pressure to push it to one side.

We have seen compromises in all of the most fundamental commitments of the rule of law: equality, the notion that everybody is equal before the law; transparency, the notion that procedures must be public so we can make sure the government is following the rules; fair process, which requires before the government takes away a person's liberty, life, or property, it has to provide a fair hearing where one can defend oneself; checks and balances, because in order to have a functioning rule of law, there needs to be separation of powers so that each of the branches can check each other; and, a commitment to fundamental human rights because the rule of law is ultimately about a collective commitment to respect for human dignity.

Since 9/11, we have seen major compromises in each of these values. I can only touch on a few examples here; I address the compromises more exhaustively in my book, *Lee Safe, Less Free*. With regard to equality, consider the government's response to Maher Arar's lawsuit. The government argued that since Arar is not an

American, he does not deserve the constitutional rights that a U.S. citizen would have if a U.S. citizen had been sent to Syria to be tortured. The double standard that “they” (mostly foreign nationals, mostly Arabs and Muslims) do not deserve the same rights that “we” (White Americans) deserve or enjoy, has been a constant theme in the post 9-11 war on terror. The same argument is made at Guantanamo. “They” do not have any rights because they are foreign nationals held outside of “our” border. So much for equality.

What about transparency? There have been secret arrests, involving thousands of people picked up right after 9-11, and essentially “disappeared” off the streets of the U.S. into this country’s prisons. U.S. authorities have disappeared other suspects around the world into CIA secret prisons; still secret to this day. The U.S. government has asserted the “state’s secret” privilege as a bar to any accountability for constitutional violations. Thus, another argument that the government made in Arar’s case was that even if he has some constitutional rights, and even if these limited constitutional rights might have been violated by sending him to Syria to be tortured, the case cannot go forward because it involves “secret secrets.” The Administration made the same argument with respect to challenges to his warrantless wiretapping program. Even though it is been reported on the front page of the New York Times, the Administration claims that the program is a secret, and therefore the courts cannot adjudicate whether he acted illegally when he ordered the NSA to engage in warrantless wiretapping in violation of a criminal statute. So much for transparency.

Fair process has also been thrown aside. The detainees at Guantanamo, have never had a fair proceeding. The government’s initial position was that it could pick up anybody anywhere in the world, foreign national or U.S. citizen, on the battlefield or at O’Hare Airport, and if the President determined that they were an enemy combatant or as President Bush put it a little more colloquially, “a bad guy,” then they could be locked up forever, without hearings or any process whatsoever.

With respect to checks and balances, President Bush has essentially revived what I call the Nixon doctrine. In an interview with David Frost after his forced resignation, President Nixon famously defended his order authorizing warrantless wiretappings of Americans during the Vietnam War on the ground that “if the President does it, that means it is not illegal.” President Nixon learned the hard way that that view of Presidential authority is not the American way. But President Bush has essentially revived this view with one little tweak, that if the President does it and invokes the magic words, Commander in Chief, then it is not illegal. The President has made this argument with respect to NSA wiretapping, which under federal statutes is a crime. He has taken the view that as Commander in Chief, he cannot be constrained by Congress in deciding how to engage the enemy. Similarly, a Justice Department memo argued that the federal law making torture a crime cannot apply to the President as Commander in Chief because he has to have the freedom to decide how to “engage the enemy,” and he cannot be restricted by the other branches in making that decision. So much for checks and balances.

Concerning the commitment to basic human rights, I do not need to make an extended argument. One need only contemplate two images--Guantanamo on the one hand and Abu Ghraib on the other. Images for which, unfortunately, the U.S. is probably better known around the world today than for the Statue of Liberty.

II.

When I make these points in debate with my friends in Washington who defend the administration, they always respond with some version of what my colleague, Viet Dinh, has said. Professor Dinh who teaches with me at Georgetown, previously served in the Bush Administration and is credited as the author of the Patriot Act. In one of our early debates, Viet replied, “David, you’re so September 10,” effectively asking, “Did you see what happened to us on September 11? We were attacked in a vicious and unprecedented way. We face new threats to security that require us to make some new compromises. Of course there have been some new compromises. But these compromises have been taken in the name of your security.”

I assume that for the most part, these measures were adopted in good faith by people who believe that they were needed to keep America safe. However, they are terribly misguided, on principle and on pragmatic grounds. There is very little evidence to believe that they have made America safer and a good deal of evidence to believe that we are in fact, less safe.

Are we safer? A couple of years ago, the State Department issued a report that counted the number of terrorist incidents worldwide for that year had decreased. Richard Armitage, the Deputy Secretary of State declared that the global war on terror is working. But about two months later Secretary of State Colin Powell had to admit that they had miscounted and in fact, the number of terrorist incidents had increased not decreased. In fact, every year since 9-11 terrorist incidents worldwide have increased both in frequency and lethality. Meanwhile our own national intelligence agencies tell us that Al Qaeda has fully reconstituted itself on the border of Pakistan.

Further, it is not just Al Qaeda anymore. New groups have sprung out that did not even exist on 9-11. They have sprung up out of animosity toward the U.S. and sympathy with Al Qaeda, in places like Iraq, Spain, and the United Kingdom. Al Qaeda in Iraq was created in response to the U.S. attack on that country; it did not even exist before we invaded that country. Additionally there are the homegrown groups in England, Spain, and the like, who attack Western targets and who may be even more challenging to defend against than Al Qaeda itself.

Still, there have been no terrorist attacks at home since 9-11. That of course is one of the Bush Administration’s most frequent and strongest arguments. Whenever they make that argument, it brings to mind Tom Ridge’s speech upon stepping down as first head of Homeland Security. He noted that under his watch there had been no terrorist attacks since 9-11, and then knocked on the podium. That night, Jon Stewart played that clip on the *Daily Show*, and he asked his audience, “Did I just see the Director of Homeland Security for the most powerful nation in the world, knocking on wood?”

Indeed he did. We argue in our book that Tom Ridge may as well have been knocking on wood for all the good that many of these coercive strategies have done in terms of identifying actual terrorists, disrupting actual plots, and bringing actual terrorists to justice. For example, take those 5,000 foreign nationals subjected to preventive detention in the United States in the first two years after 9-11. How many of those 5,000 today stand convicted of a terrorist offense? Zero. Or consider the 8,000 young men that the FBI sought to interview after 9-11, simply because they were recent immigrants from predominantly Arab or Muslim countries. How many of those 8,000 stand convicted of a terrorist offense today? Zero. Then the Administration decided to spread the net wider and called in all the Arab and Muslim

immigrant men, regardless of age, and required them to participate in “Special Registration,” which included fingerprinting, photographing, and interviewing by the INS. 82,000 came in. How many stand convicted of a terrorist offense today? Zero. When these initiatives are put together, they make up what was surely the most extensive campaign of ethnic profiling in the U.S. since World War II. And the government’s record? 0 for 95,000. That does not make us safer. What it does is alienate and create distrust in the very communities with which the government needs to be building trust if there is any hope of identifying actual terrorists should any ever actually come.

You won’t find those statistics on the government’s website for how it is winning the war on terror, www.lifeandliberty.gov. Instead, one sees other statistics. Such as the assertion that the government has indicted over 400 people in “terrorism-related” cases, and has had over 200 convictions in those cases. That sounds impressive. The preventive paradigm appears to be working. Until one examines these cases, and it turns out that the vast majority of them are not terrorism cases at all. They are *terrorist-related* only because the Justice Department has labeled them as related under some theory that is not evident on the face of cases. Most of the cases do not have any charges of any kind of terrorism whatsoever. The vast majority are for charges such as credit card fraud, check writing fraud, immigration fraud, lying to an FBI agent, or falsely filling out a federal form. The *Washington Post* examined these convictions and found that only 39 had any terrorism charges in them whatsoever. For our book, we looked at those 39 in more detail and find that virtually all of those cases involve the very broad statute targeting material support for terrorist organizations. This law basically allows the government to get a so-called “terrorism conviction” without proving that the defendant, engaged in any terrorist act, conspired to engage in any terrorist act, aided or abetted any terrorist act, or ever intended to further any kind of terrorism. All the government needs to show is that the defendant did something to benefit some group that has been put on a blacklist by the State Department or by the Treasury Department under an essentially unreviewable listing authority. No showing of a connection to terrorism is required for a conviction. Convictions under such a broad statute do not identify actual terrorists either, absent proof – lacking in most of the government’s cases – that the individual actually posed a threat of engaging in terrorism.

There has been exactly one Islamic terrorist who has been convicted of attempted terrorist activity since 9-11. That is Richard Reid, the “shoe bomber,” who was captured not by virtue of any brilliant preventive paradigm strategy but simply because an alert airline attendant saw this strange looking guy trying to light his shoe. The government has found no Al Qaeda cells. Despite massive infiltration, surveillance, ethnic and religious profiling, and harassment of the Arab and Muslim communities, the government has not yet found a single Al Qaeda cell in the United States. Meanwhile at Guantanamo, there have been 775 people locked up whom the government initially identified as the worst of the worst. We now know that more than 500 have been released suggesting perhaps they were not the worst of the worst. The military’s own tribunals have identified only eight percent of these people as fighters for either Al Qaeda or the Taliban.

I do not want to suggest that we are not safer in any respect. I think that airline security has improved, and substantially increased resources have been put into national security and counterterrorism. That has had to make us somewhat safer. Attacking Al Qaeda’s headquarters and training camps in Afghanistan made us safer,

at least for the short term. Although of course, by diverting our attention to Iraq, Al Qaeda has been allowed to reconstitute itself. For a time, however, those attacks were very significant in terms of responding to and preventing further terrorist acts. If the U.S. closes their training camps and headquarters that will make it more difficult for them to attack. But note, that was not a preventive measure. That was not a preventive war. The war in Afghanistan was a legitimate response in self-defense to an attack. NATO treated it as such, the UN treated it as such, and 120 nations signed on.

By contrast when you look at the war in Iraq, the preventive war, has that made us safer? It has let Al Qaeda reconstitute itself, but worse than that, though we closed the training camps in Afghanistan we created the best possible training ground the terrorists could ever hope for in Iraq. We have had over 3,000 Americans and ten to twenty to thirty times as many Iraqi civilians killed in Iraq in the name of our security, fighting against a country that did not attack us and did not threaten to attack us. It has become a magnet for terrorist recruitment and a magnet for terrorist training. Porter Goss, as head of the CIA, testified in Congress that the real danger is that these people will come out of there and be better trained and better armed to attack us in the future. The war in Iraq played right into Al Qaeda's playbook, not only by distracting us, but because the U.S. did exactly what Al Qaeda said the U.S. would do: attack a predominantly Muslim country that never attacked the U.S.

It is not just the war in Iraq. Each of these preventive measure has compromised our principles by taking the low road rather than the high road. And those compromises redound to our detriment as a security matter because they undermine our legitimacy in fundamental and long-lasting ways. The enterprise of trying to protect ourselves from attack by Al Qaeda is unquestionably legitimate. But if we pursue Al Qaeda through illegitimate means, our entire enterprise loses its legitimacy. By losing that legitimacy, the U.S. loses the ability to get needed cooperation. So India is now less willing to go along with nuclear nonproliferation with the U.S. because its people are so critical of anything the government may do that is seen to be cooperative with the U.S.. That makes us less safe as we go forward. In addition, Al Qaeda and its allies have many more recruits because of the actions that the U.S. has taken. If Al Qaeda had taken all of the best minds on Madison Avenue, locked them up in a room, and said "You cannot come out until you come up with an advertising campaign for us that will get the world to take on the victim here, America, and be sympathetic to us, the perpetrator," those folks could never have come up with anything half as good as Abu Ghraib. We gave that to them.

III.

Finally, let me just suggest that this was tragically unnecessary. I am not against prevention. I believe in prevention as a general rule. I brush my teeth on a regular basis but I do not believe in random root canals. I do not believe in the use of heavy-duty coercive force based, not on objective evidence of wrongdoing, but on speculative fear, often grounded on prejudice, about what might happen in the future. There are many things that we can do that are preventive *within* the rule of law that are likely to succeed in terms of making us safer and much less likely to have the kind of negative blowback consequences that we have seen from our own strategies.

One need go no further than the 9-11 Commission itself, which heard from all the nation's experts on national security and wrote a report detailing how to prevent

the next attack. There were 42 recommendations made and none of these include sending people to Syria to be tortured, conducting secret trials, denying people a fair hearing, creating secret black sites and disappearing suspects into them, and torturing people. Instead, among these 42 recommendations are sensible proposals, such as safeguarding nuclear stockpiles in the former Soviet Union so that terrorists cannot get hold of them, and improving the screening of cargo on passenger planes and of containers coming into shipping ports. Yes, this costs money but it costs a fraction of what is spent in a month in the war in Iraq. This money could result in better information sharing, improved public diplomacy, the use of State Department efforts rather than military intervention, which tends to inspire terrorists to take action against us. There could be support for moderate Muslims around the world instead of presuming they are guilty until proven innocent.

About a year ago, the 9-11 Commission issued a report card on how the Bush administration was doing in fulfilling these 42 sensible recommendations. It was like no report card that a child would want to bring home to parents. The Bush administration received five F's, twelve D's, eight C's, several incompletes, and only one A-. From this we learn two things. First, the 9-11 Commission is not guilty of grade inflation. But more seriously, we see that the Bush administration, while talking tough and acting tough and water boarding suspects, has failed to do the very sensible measures that might actually prevent terror without causing the kind of blowback effects that we have seen.

Let me close with a quote that reflects on the proper understanding of the relationship between national security and the rule of law. The quote comes from a person who has a great deal more experience with this issue than do Americans. This person is Justice Aharon Barak, who until recently was the President of Israel's Supreme Court, which has presided over more issues involving the conflict between human rights and national security than any other court in the history of mankind. Justice Barak wrote in a decision on the use of coercive interrogation tactics, far less violent than water boarding, declaring them impermissible in interrogating Palestinian terror suspects. He wrote "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."

That observation I think is the appropriate understanding of the rule of law. It sees the rule of law as an asset, not an obstacle in fighting and preventing terror. It recognizes that the rule of law gives a state all sorts of legitimate responses to the threats that terrorists pose. If we take that high road then we strengthen our spirit and can prevail in the long run. But, thus far, I fear that we have taken the low road, and by doing so, undermined our spirit, undermined our character, and undermined our security.

Thank you very much.