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MAKING TERRORISTS (PART II) -- CHANGE THE LAW!

Relaxing the standards for electronic interceptions can be a good idea

By Julius (Jay) Wachtel. The word on the Sears Tower "terrorist conspiracy" is in, and it's not good for the Government. One defendant was acquitted outright and the jury hung on the others (reportedly an even split). As many predicted, the FBI's active promotion of the crime left a few fact-finders cold. If an informer has to intercede *that* forcefully to get someone to step over the line, where was the threat in the first place?

That's what we questioned when the trial began. That the FBI persists in making questionable cases like the Sears Tower plot isn't surprising. As a law enforcement agency they are driven by arrests and convictions. If making quality cases is tough, what gets done is numbers. That's one reason why ferreting out terrorists should be left to intelligence agencies, who are held to completely different standards.

But we digress. Regardless of who does what, evidence must come from *somewhere*. Police are normally mobilized by victims, witnesses and physical evidence. In consensual crimes such as vice and narcotics victims and witnesses are unavailable, so we turn to informers, surveillance and undercover work. Police can participate in illegal transactions and collect evidence until they have a strong enough case to satisfy even the pickiest prosecutor.

Terrorism presents special challenges. Obviously, we must intercede before the crime is completed. But "real" terrorists are far less vulnerable to undercover infiltration than ordinary criminals. How else can we mobilize? One approach is to intercept wire and wireless communications. However, unlike informers, who require no judicial blessing, tapping requires that police convince a judge there is probable cause a serious crime is being planned or committed. "Probable cause" means more likely than not, a standard that's tough to meet when bad guys are so secretive that conventional methods don't work.

What's the fix? Lower the standard. Yes, there *is* precedent. Consider the Supreme Court's *Terry* doctrine, which allows police to temporarily detain persons for investigation when there is "reasonable suspicion" that a crime is being planned or has occurred. Police use this authority frequently; for example, to detain someone in the vicinity of a crime who resembles the suspect's description. It could be possible to

adopt a like standard, allowing police to intercept and “detain” communications given reasonable suspicion that at least one of the parties is promoting terrorism, under court supervision and within set time limits. If probable cause is reached then cases could proceed along a conventional track. (Incidentally, the “investigating magistrate” model is how some European countries inject the judicial system at the early stage of the evidence-gathering process.)

If we’re happy to live under the illusion that our criminal justice system is doing just fine, and we’re comfortable with staging show trials and using informers as agents provocateurs, then no change is necessary. Any approach, no matter how flawed, is certain of success until we’re hit again.