

A Book Review from *Commentary*, July-August 2006

Early Action

Preemption:
A Knife that Cuts Both Ways
by Alan M. Dershowitz
Norton. 348 pp. \$24.95

Reviewed by

Andrew C. McCarthy

In the aftermath of the 9/11 attacks, American officials were like a reeling prizefighter, fending off a barrage of blows with little thought of the rounds ahead. At issue was not just recovering from the devastation at the World Trade Center and the Pentagon; like the public at large, many in the military and in law-enforcement agencies feared a second wave of strikes. Sparse intelligence made an expeditious sorting of terrorists from innocents a practical impossibility. Could we afford to investigate the events of 9/11 under the ordinary procedures of the criminal-justice system? With thousands of lives hanging in the balance, could we leave potential al-Qaeda operatives at liberty until probable cause for issuing arrest warrants could be established?

These dire questions were answered on the wing, resulting in the mixed bag of outcomes one would expect in the face of so unprecedented a crisis. Alan Dershowitz believes that, even now, we have yet to think through the measures demanded by this dangerous new world, much less how they fit into our legal and political traditions. In *Preemption: A Knife that Cuts Both Ways*, the prolific Harvard law professor has applied himself to filling the need, calling for a jurisprudence that would permit and, at the same time, control government actions to forestall today's most dire threats.

Though he titles the book *Preemption*, Dershowitz actually focuses on two separate, albeit intimately related, species of anticipatory protective actions: preemption and prevention. Many languages, he points out, do not have separate words for the two concepts, and in English they are often conflated. Nonetheless, they are distinguishable. Prevention refers to coercive steps undertaken to disable or dispense with a potential threat at a very early stage, while it is still gathering. Preemption, by contrast, is action intended to eliminate a more concrete and immediate threat. Both stand in contrast to deterrence, the doctrine that prevailed during the nuclear stand-off of the cold war.

Dershowitz considers both notions along a spectrum, from the regulation of individuals to policies against other sovereign states, with our current campaign against international terrorist networks falling somewhere in between. Americans have long been uncomfortable with the idea of preventive action against individuals. Chief Justice Robert Jackson opined in 1950 that "the jailing of persons . . . because of anticipated but as yet

uncommitted crimes” was against American tradition and “unprecedented.” But, as Dershowitz points out, such conventional wisdom is hard to square with our actual history. Indeed, Jackson himself had been FDR’s attorney general during World War II when the President ordered the internment of thousands of Japanese Americans, based on fear of their collusion with the enemy.

Though the cliché insists that Americans would prefer ten guilty men to go free lest a single innocent be wrongly convicted, this has not always corresponded to the practical realities of incarceration in the U.S. As Dershowitz shows, there is a rich tradition of preventive detention, especially as practiced by justices of the peace, who were long authorized to use “peace bonds” temporarily to detain troublemakers. Individuals thought to pose a threat to the community have also been sidelined by various other mechanisms, including forms of civil commitment for the mentally ill; denial of bail to defendants deemed dangerous; and refinements of the law to cover offenses, like vagrancy and conspiracy, for which jail terms are imposed even in the absence of completed crimes.

In the international arena, too, Dershowitz points out, ample precedent exists for anticipatory action. Though not the norm, and increasingly controversial, preventive wars are easy to find in the historical record, including the War of the Spanish Succession, initiated by Great Britain in 1700 to protect itself from the perceived threat of Spain and France joining together under a Bourbon king. In our own day, with the emergence of sophisticated terrorist groups and widely available technology for weapons of mass destruction, the U.S. has lost its margin for error, and prevention has taken on a new urgency.

For Dershowitz, the experience of Israel is particularly instructive in studying the uses and limits of anticipatory state action of this kind; those uses and limits constitute, indeed, the two edges of the “knife” referred to in his subtitle. Since the late 1950’s, he explains, Israel has depended on a national-defense strategy of preemption, aware that the state’s very existence might depend on exploiting its superior air power and carrying any necessary fight to the enemy outside its tiny territory. The policy’s first test was the Six-Day war of 1967—a rout accomplished by attacking first, once Israel’s gathered Arab enemies had made their intentions clear. The policy was a ringing success, but that success made it politically impossible to preempt again in 1973 when the threat was not so overt and when being painted as the aggressor would have led, catastrophically, to Israel’s abandonment by the U.S.

The lesson, according to Dershowitz, is that preemptive action may be a nation’s best strategy, but once it is used, any reprise is likely to be difficult, both politically and practically. Thus, Israel’s 1981 bombing of the Osirak nuclear reactor in Iraq—Saddam Hussein had promised to use any resulting nuclear weapon against the “Zionist enemy”—provided an instructive warning to Iraq’s neighbor, Iran, which has built diffuse, underground facilities far more challenging to destroy.

Preemptive measures also make it more probable that enemies will attack first the next time around, thus giving rogue nations a precedent to justify sheer aggression. Moreover, if preemptive initiatives unexpectedly lead to messy entanglements, they can undermine the national will to respond to future challenges. Cases in point here include the deleterious fallout from Israel's 1982 venture into Lebanon and, potentially, the ongoing American operation in Iraq.

All such qualifications notwithstanding, the key point, according to Dershowitz, remains this: the U.S. now confronts a radically new threat environment, one that may call for harsh measures like the preventive detention of terrorists and preemptive strikes against rogue nations. The consequences of shrinking from this reality could be cataclysmic—on the one hand, leading the government to default on its primary duty of protecting the governed; on the other hand, bringing about an unconsidered abridgement of our civil liberties.

So our first duty is to acknowledge that drastic times do sometimes call for drastic measures. Our second, Dershowitz believes, is to map out the likely scenarios, identify the relevant factors—quality of intelligence, dimension of the threat, extent and duration of the contemplated action—and arrive at sensible legal protocols for taking the initiative against emerging threats. Such exercises should be done with necessary humility, he insists, showing respect for the law of unintended consequences. Even the most thorough planning cannot account for every contingency, and this will sometimes counsel forbearance.

Dershowitz's ambitious endeavor could not be timelier. Thanks to the challenge posed by Islamist terrorism, ours is a transformational era. Prosecuting completed crimes must now take a back seat to the imperative of preventing future attacks. In trying to guide us through this terrain, Dershowitz brings to bear the best of his estimable arsenal: a penchant for analyzing current problems through the lens not merely of legal scholarship but of philosophy, ethics, and comparative history; a determination that political correctness not become a substitute for thought or an excuse for ducking hard realities; and an engaging style that makes for a rapid, accessible read.

Does Dershowitz succeed in framing a new jurisprudence for our unsettling times? Not really. By his own account, reaching this goal will take years, and will require seismic shifts in some of our bedrock assumptions. He observes, however, that such shifts can happen, and points to Israel's preemptive attack at Osirak as an action that was subjected to universal condemnation at the time it occurred, but is now widely lauded.

Where Dershowitz fails to convince is in arguing that jurisprudence is in fact the best arena for dealing with the questions surrounding preemption. Plainly he himself is most comfortable discussing the issue in relation to judicial processes, even when it comes to the international scene. Yet, under the Constitution, no topic falls more clearly in the domain of presidential rather than judicial power. The framers saw the international realm as a place not for the law's antecedents and procedures but for the exercise of

broad executive discretion. The latter can be abused, granted; but in confronting international crises, it is indispensable.

This aside, however, in Preemption Alan Dershowitz has asked the right questions, pointed to the right data, and demonstrated the urgent necessity of confronting the most serious threats right now—while they are still at bay, though rising ominously on the horizon.

ANDREW C. MCCARTHY *is a senior fellow at the Foundation for the Defense of Democracies. A former chief assistant U.S. attorney, he led the prosecution in the first World Trade Center bombing case.*