The Global War on Terrorism Round II

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**The Global War on Terrorism
Round II**

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Foreword

The terrorist attacks of September 11, 2001 marked the beginning of what may be called the "age of global terrorism," and the beginning of a new way of thinking about security and war. With the threat difficult to identify, locate, and disable, the United States and a coalition of countries have begun to reformulate security strategies and engage in a global war on terrorism.

During the first term of the President George W. Bush's administration the United States conducted military operations in Afghanistan and Iraq, the U.S. National Security Strategy was reformulated, and national strategies for homeland security, combating weapons of mass destruction and terrorism, and protecting critical infrastructure were articulated. In addition, the Department of Homeland Security, a domestic combatant command - U.S. Northern Command, and the office of Director of National Intelligence were created and law enforcement capabilities to investigate and prosecute terrorists were enhanced. As the second term of the Bush administration begins with four years of experience in the struggle against terrorism, the United States must consider the impact and efficacy of these actions and determine how to prevail in the short and long-term over a threat that continues to change and evolve.

The 2005 Bantle-INSCT Symposium on The Global War on Terrorism – Round II brought together academics, government officials, and media representatives to consider U.S. progress, successes and failures, and the challenges that lie ahead. The articles collected in this book build on presentations made by panelists at the symposium. They examine executive branch challenges in forming counterterrorism policy; dilemmas faced by governments in liberal democracies in countering terrorism; the composition, formation, and operation of groups involved in the global salafi jihad; and legal considerations in the war on terrorism especially concerning the use of coercive interrogation to obtain critical intelligence.

The symposium was organized by Syracuse University's Bantle Chair in Business and Government Policy, currently held by Montgomery C. Meigs, the National Security Studies Program, and the Institute for National Security and Counterterrorism (INSCT). It was held at Syracuse University on March 31 and April 1, 2005. A video stream of the symposium is available on the INSCT web site at insct.syr.edu.

Abstracts

Former International Atomic Energy Agency and United Nations chief nuclear weapons inspector, David Kay, calls for the creation of a new national security policy (to be distinguished from our prior policies of isolation and deterrence) that would be responsive to the current era in which failed states span the globe, destructive science and technology are globally accessible, the U.S. role in the global economy has shifted, and there is a high probability of devastating shifts in the global climate. He identifies 6 major obstacles that impede such policymaking. Three relate to the federal policymaking process: the challenge of setting priorities, especially among conflicting objectives; the interagency process which is hampered by powerful fiefdoms advancing their own institutional interests; and ineffective congressional oversight. The remaining challenges include: the lack of credible intelligence; the inherent conflict between the development timelines of weapons and effective, acceptable policy options; and the design of the U.S. political system.

Former Director of the National Office for Combating Terrorism, General Wayne Downing, U.S. Army (Ret.), considers the U.S. National Strategy for Combating Terrorism and finds it to be a sound strategy, but recommends that it be recalibrated in response to lessons learned over the past four years. The United States should recognize that the enemy is a global insurgency that uses terrorism as a tactic; employ all elements of national power instead of relying too heavily on the military; nurture and strengthen old alliances and forge new ones; focus on key battleground states and regions; win the war of ideas; and inhibit insurgent access to nuclear weapons and material. By applying unrelenting pressure through ongoing worldwide political, social, economic, and security programs, General Downing maintains that the global reach and lethality of the insurgency can eventually be reduced to the point where it can be contained by local law enforcement.

Forensic psychiatrist and former CIA operative, Dr. Marc Sageman, analyzes the composition, formation, and operation of groups involved in the global salafi jihad that threaten the U.S. and the West. His research shows that the terrorists connected to the perpetrators of the 9/11 attacks were not poor, ignorant, unsophisticated, or mentally ill. Instead, most were young married men from middle class, secular backgrounds, with college and professional degrees. Feeling excluded and alienated from society, they joined or formed terrorist groups following the guidance of friends, family, and spiritual advisors. These groups then formed networks on the basis of pre-existing bonds or common operational goals. Given the organization and operation of these networks, Sageman recommends changing the social conditions that promote such networks and engaging and succeeding in an ideological war so that the United States regains its credibility in the Muslim world.

Israeli counter-terrorism expert and executive director of the International Policy Institute for Counter-Terrorism (ICT), Boaz Ganor, identifies characteristics unique to the international radical Islamic terrorist network and the need to engage in a joint international counter-terrorism campaign. Although terrorist networks have existed throughout history, the new radical Islamic terrorist networks possess a unique and dangerous combination of characteristics including belief in a divine command, experience on the battlefield, willingness to engage in suicide terrorism, and willingness to use non-conventional weapons. To be successful the counterterrorism campaign must reduce or eliminate both the ability of terrorists to perpetrate attacks and their motivation to carry out attacks. Ganor also maintains that the campaign must be a joint international effort and recommends establishing a "League of Nations Fighting Terrorism," an international court for terrorist crimes, an international intelligence body, an international academic research network, educational programs for sharing and disseminating knowledge, and a system of international charters requiring nations to act against terrorists.

Professor Philip B. Heymann, former deputy attorney general of the United States and current James Barr Ames Professor of Law at Harvard Law School, finds that the threat posed by terrorism requires some new laws and international understandings. In evaluating whether highly coercive interrogation should be legal in this new world, Heymann considers five relevant factors about which there is a great degree of uncertainty: the effectiveness of coercive interrogation in getting timely, useful, and truthful information; the cost of interrogation; the risk that highly coercive interrogation may be used more broadly than intended and cause the loss of trust in leaders; the national understanding of the relative value of U.S. lives; and the costs of lost respect for legality and the loss of trust in United States upholding its promises. These and other factors lead Heymann (and his colleague Juliette Kayyem) to make a specific legislative proposal that would permit the president to use highly coercive interrogation, short of torture, in life threatening emergencies as long as the form of interrogation would not be prohibited by the Constitution if applied to a U.S. citizen in a similar circumstance within the United States.

Professor Oren Gross, director of the Center for Legal Studies at the University of Minnesota Law and the Irving Younger Professor of Law, considers the debate about the morality and legality of preventive interrogational torture—that is torture aimed, not at confession, but at gaining information to foil exceptionally grave terrorist attacks. Gross concludes that an absolute ban on torture should be upheld, but that in truly catastrophic cases public officials may have to act extralegally and be ready to accept the legal ramifications of their actions. Among other reasons Gross's conclusion is supported by the following considerations: general policy should not be based on exceptional cases; symbolism of human dignity and the inviolability of the human body

prevent "emergencies" from trumping fundamental rights and liberties; an absolute ban helps officials resist employing torture in less-than-catastrophic cases; it is easier to justify torture if one engages in balancing competing values; an authorized exception dilutes moral restraints which could lead to the use of torture in less-than-catastrophic cases; and there is a great likelihood that internal minorities with foreign connections ("others" or "them" as opposed to "us") will be disproportionately targeted without resistance from the general public.

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EXECUTIVE BRANCH CHALLENGES IN FORMING COUNTERTERRORISM POLICY

Creating a New National Security Policy

David Kay, Ph.D.

Senior Fellow at the Potomac Institute for Policy Studies

The Evolution of U.S. National Security Policy

Today we are at a crossroads very much the equal of the period 1945 to 1949 in this country. During this period shortly after the conclusion of World War II, for the second time in our country's history, we changed our national security strategy. From the time of the founding of the republic until somewhere between 1939 and 1945, our security strategy (commonly known as the Monroe Doctrine) was keeping others out of our hemisphere. While the dominant security strategy from Washington to FDR was far more complicated than that, at its core our national security policy, diplomacy, finance, and

what little of military power we had were devoted to keeping other European powers away from our continent and more broadly the Western Hemisphere.

This "founding" national security strategy changed very slowly, first among some elites after the end of World War I, but they were not in any really great ascendancy until the onset of the Second World War. Our second national security strategy emerged out of the triple shocks provided by the rise of Nazi Germany, the surprise attack at Pearl Harbor, and the unexpected early acquisition of nuclear weapons by the Soviet Union. These shocks gave rise to the national security strategy that dominated American foreign policy from 1950 until the tragic terrorist attacks on the American homeland on September 11, 2001. This strategy had one essential element from which a multitude of policies, alliances, military capabilities, and national security institutions developed. In its simplest form, the core of this strategy was the fundamental belief that the United States must always have, and be recognized as having, overwhelming military power that over-matches any potential opponent or combination of opponents and be seen as being prepared to use that power to protect itself, its allies, and a security structure that was favorable to U.S. interests. Pearl Harbor, the argument behind the new national security strategy ran, occurred because we did not have such preponderant military power; the Japanese did not recognize that we could rapidly acquire such power because of our superior industrial strength, and thus that any temporary military advantage they might gain from a surprise attack would be rapidly reversed; and they failed to understand that we would not allow them and their German allies to create a security environment that was hostile to American interests.

From this reading of the events leading up to the Second World War, the vast edifice of deterrence arose. Not only do you have to have overwhelming military power, but others must recognize that you are willing to use these capabilities to protect your interests. If you fail to have overwhelming military power or you fail to convey your determination to use that power when your vital interests are threatened, then you are going to end up having to use that power in a horribly destructive military conflict. In the motto of the Strategic Air Command, "Peace is our profession." U.S. military capabilities and the visible material and policy willingness to use those capabilities would ensure peace in the nuclear age.

Given the ominous shadow of global nuclear war, if American capabilities or will were to be doubted, the Cold War was heavy with efforts to ensure that no possible opponent would ever again doubt us on either score. And so, from 1949 until the disappearance of the Soviet Union, the policy of deterrence really concentrated on a narrow focus, that is to ensure that we always clearly over-matched the Soviet Union in military power and that they would see this and know we were determined to maintain this dominance. The principal task of U.S. military and intelligence efforts was to ensure that we had,

and that the Soviets knew we had, an overwhelming preponderance of strategic nuclear power that would ensure that they would meet defeat under any scenario they might consider for initiating conflict.

We did not do a very good job, and, quite frankly, we did not attempt to do a very good job of understanding Soviet plans and intentions outside of the central strategic nuclear area. Our understanding of the dynamics of Soviet society and economy was not a principal focus of intelligence. The joke in the intelligence world at that time was that it was a terrible easy job: you counted missiles, you counted Army divisions, you tried to understand the order of battle of the strategic nuclear force and you knew if you were off by 50 or 100 it did not matter, because we were going to over match them so much that even if they were poor at collecting intelligence, which they were not, they would understand that it would be unfathomable disaster for the Soviets to embark on a military conflict with the U.S. And that really was the focus of the U.S. intelligence effort. Almost all of this intelligence was gathered by technical means; that is, a wide range of fantastic technical capabilities that allowed the U.S. to observe, count, and understand Soviet strategic forces without ever having to recruit a single Soviet agent or place an American agent inside the Soviet Union.

Over the last 50 years, there has been a steady decline of U.S. human intelligence collection. The dirty little secret of the history of U.S. spying on the Soviet Union is that there was not a single valuable agent in the upper levels of the Soviet Politburo ever recruited by U.S. intelligence. In every case, and there were not that many, the Soviet agents who aided us were volunteers–"walk-ins"–and they were not in the upper reaches of the Soviet political system. They walked-in for their own reasons, decided they wanted to serve U.S. interests and the interest of freedom or whatever they saw it as, and provided us with the keys to a part of the Soviet kingdom. And that worked out fine. Our picture of Soviet nuclear and military capabilities was more than adequate to allow the United States to maintain a considerable overmatching of Soviet military capabilities–and they knew it.

The Passing of the Orderly State System and the Need for a New National Security Policy

The world in which our deterrence policy would suffice has now ended and we are in the middle of, for only the third time in our history, defining a new national security policy. There is not yet any great name for the new national security strategy or even agreement as to when the need for it emerged. Historians will probably go back and cite September 11, 2001 as the beginning of this new era. That is partially right and partly wrong, as most attempts to establish clear dates for historical eras are. It could be called the age of the passing of the orderly state system. The long run of the dominance of the orderly state system that began in 1648 with the Peace of Westphlia has

finally ended. We are now surrounded by a large group of "states," between 50 and 70, that have failed to demonstrate the most basic characteristics that were expected of states in the old order. If we had a Chapter 11 bankruptcy for states, these states would now be under court-ordered supervision and reorganization. Now, this is very politically incorrect and it offends a lot of our friends, but these failed states span the globe. They range from Haiti in our own hemisphere, and include virtually all of sub-Sahara Africa. The Philippines, Afghanistan, and Pakistan are in that class. Yemen and Sudan certainly would be counted. And south of the Mexican border there are a number of states that, if they are not yet failed, are so close to it that it ought to keep you awake at night.

The dominant security challenge for the United States in this new era is going to be to find a national security policy that deals with a world in which the orderly state system has disappeared and large parts of the world no longer have a functioning system of domestic governance capable of providing for the health, education, economic well-being, or internal security of their populations. In a world that is more closely tied together than ever by ease of travel and trade-resource dependency, we have slipped into a period where much of that world is unable to meet the minimum expectations of local populations or the norms that the global system requires of states. This is the very messy period in which the United States now finds itself. Neither isolation–the dominant policy of the first era of U.S. security policy–nor deterrence–the dominant policy of the era that has just ended–provide adequate tools or guidance for this period we have now entered.

Concurrent Revolutions Impacting the Security Environment

The Technical Revolution

If the challenge of a disorderly world were not enough, we need to recognize that the breakdown of the orderly state system is occurring against a background of a series of interlocking revolutions in other spheres. There is first of all a technical revolution that is ongoing. Nuclear weapons represent the height of man's intellectual genius. From the efforts of 20th-century physicists to penetrate and understand the fundamental laws of nature came, among other things, nuclear weapons. But that is passé today. There are no remaining scientific secrets to creating first- or second-generation nuclear devices that you cannot find in the open literature, and the tools for doing so are commercially available. So the hope that you can control the spread of nuclear weapons by denying access to scientific knowledge is foolish.

If you were to move to the examination of scientific developments in the biological area, you clearly see the accelerating pace of science and technology. Gene splicing was the thing of noble science 20 years ago. Today gene splicing and even more advanced bio-technology are widely taught beginning in many

high schools in the United States. This technology has quickly moved from the world of education to that of commerce, and has now spread globally.

Now the disappearance of the orderly state system and the rapid spread of technology are interacting. This interaction is dramatically demonstrated in the life of A.Q. Khan. Khan made the cover of Time magazine, and his life story says much about the world we are now facing.[1] A.Q. Khan was born in 1936 in Bhopal, India, when India was still controlled by the British. After the 1947 partition of India into India and Pakistan, his family in 1952 joined millions of other Muslims and moved to newly created Pakistan. He finished his secondary education in Pakistan, a good student, and set off to Europe, first to Germany and then Holland and Belgium, to earn advanced degrees in engineering. After graduation in 1972, he took a job with Urenco, a European consortium that produces civilian nuclear fuel in Europe. He turned out to be a model employee. He worked late, he worked on weekends, he took work home; just the type of young engineer we would all like to have working for us. That is, if one does not mind that he began in 1974 passing details of the world's most advanced design for enriching uranium to the Pakistan government. In 1976, using the ruse of a family visit to Pakistan, A.Q. went back to Pakistan with all his secrets, and within several years Pakistan had its first nuclear device. Then what did he do? He started offering and selling his nuclear knowledge around the world in places like North Korea, Iran, and Libya.

Now, if what A.Q. Khan did in the nuclear area, one dominated by national security concerns, was so easy, imagine how easy it would be to do in the biological area, which is predominantly a commercial enterprise. Science and technology have become international, and even the most valued secrets can flow without effective control into the hands of states and groups that may want to use them to threaten the security of the nations where the original technology was developed. In the era we have now left, a state like the Soviet Union had to devote a huge part of its national wealth to gain the capacity to threaten the United States. Indeed this expenditure became so large that it ultimately played a major role in the collapse of the Soviet Union. For the United States, we could focus our intelligence and military efforts on the Soviet Union and feel confident we would consequently be secure. In this new era, as symbolized by A.Q. Khan, the ability to acquire devastating weapons is divorced from economic strength necessary to develop such weapons in the first place. The United States is left to figure out where it should focus its intelligence and military efforts when weapons of great destructive power may pop up almost anywhere.

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[1] See TIME cover, "The Merchant of Menace", Feb. 14, 2005. See also Bill Powell and Tim McGirk, "The Man Who Sold the Bomb: How Pakistan's A.Q. Khan outwitted Western intelligence to build a global nuclear–smuggling ring that made the world a more dangerous place," TIME, February 14, 2005; Missy Adams, "Khan's Dangerous Game: Abdul Qadeer Khan stole nuclear designs from the Netherlands, helped Pakistan build a bomb and then created a vast network that traded nuclear secrets and illicit technology across several continents," TIME, February 14, 2005.

The Revolution in Global Economics

The second revolution that is now confronting U.S. efforts to shape a new national security policy is the revolution in global economics. Last year, the United States provided six percent of the industrial goods that were exported in the world economy, down from a decade ago of 14 percent. From the end of the American Civil War until the 1960s, the United States was the place you went to for food exports, energy exports, and industrial goods, particularly those embodying the best existing technology, such as machine tools. This is no longer true, and we have not come to terms with that. The energy world may be the most obvious part of this revolution as oil climbs above $50 a barrel. The Chinese are importing 25 percent of their petroleum today, about 7 billion barrels a day. The public Chinese plans call for that figure to rise to 70 percent in 25 years. That is why, and there have been no congressional hearings on this unfortunately, Chinese investment in Latin America is huge in primary energy and mineral areas. We are in a period of tectonic shifts in the global economy, and not just in the energy area, and it would be naïve to not believe that these shifts will have a significant impact upon U.S. national security policy.

Global Climate Change

The shape of the landscape of international politics will be changed by the growth of failed states, the easy access to destructive technology, and the re-shaping of the global economy. One should also add to that list the elephant in the room that we most steadfastly refuse to acknowledge, the high probability of devastating shifts in the global climate. So what does this mean for those who are going to be the leaders of the next 25 years? They are going to have to do something as demanding as was done in the 1945 to 1949 period, and that is to design a national security policy that protects the country but does not change its fundamental political values.

Becoming an armory for the world, locking our fortress to the world, more TSA guards that make our trips through airports resemble prison visits—that is not going to do it. Leaders will be challenged to find a way that is true to our political values and culture and provides us security.

Major Obstacles to Creating a New National Security Policy

Prioritizing Objectives

The first obstacle to meeting this challenge is the extreme difficulty in the national security area of prioritizing objectives. This problem has plagued the United States for some time. For example, in 1985 in the face of growing evidence that Pakistan was on the verge of obtaining nuclear weapons, Congress passed the Pressler Amendment to the U.S. Foreign Assistance Act, which requires a total cut-off of U.S. aid to Islamabad unless the president can certify

that Pakistan does not possess a nuclear weapon, and that continued U.S. aid will significantly decrease the probability of its developing one in the future. What did that do?[2] Well, it did nothing to delay the Pakistan nuclear program and did a great deal to corrupt the U.S. intelligence community. Damning evidence continued to build up that the Pakistani nuclear program was going ahead, and even that the Chinese were exporting nuclear capable missiles to Pakistan. Yet neither Democrat nor Republican administrations ever invoked the full range of sanctions of the Pressler Amendment. We simply could not prioritize our security objective with regard to Pakistan. Were our interests proliferation or Pakistan's assistance against the Soviets and later against Afghanistan?

Another all too typical case was that of Russian nuclear sales to Iran. There has existed over the years overwhelming evidence of Russian assistance to the Iranian nuclear program that goes well beyond the sales of peaceful nuclear technology. But all we have been able to do is deliver marshmallows to the Soviets. That is what the state department is best at delivering; and quite frankly, that is about all we did to the Russians because we had other security objectives with regard to the Russians.

Security of the old Soviet nuclear stockpile is a similar case. In the end, the Russians essentially stiffed us. They took as much U.S. money as they could and did what they wanted to do anyway. With the huge run-up in oil prices, we now have a lot less leverage, but we do not have a lot more security in the arm stock piles of the former Soviet Union. And if you are really worried about proliferation of nuclear weapons, leakage out of the stockpile of the former Soviet Union represents the most serious threat of proliferation today. Soviet-era nuclear weapons and fissile material falling into the hands of terrorists is a far more serious threat than either the Iranian or the North Korean program.

In the case of Chinese proliferation activities, the United States has acted seriously, and, on a few occasions, actually taken action. But in general, the United States has failed to act against Chinese proliferation activities because of an inability to resolve the question of what is really important to us–good relations with the Chinese or stopping proliferation.

The hardest thing to do in the federal government remains priority-setting and setting priorities among objectives—all of which are important, but some of which are more important than others. Administrations of all stripes have not been very good at either.

The Interagency Process

The second major obstacle to meeting the challenge of crafting an effective national security policy for the new era is the existence of powerful fiefdoms

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2 U.S. Foreign Assistance Act, 22 U.S.C. §2375(e); Pub. L. No. 99–83, §902 (1985).

in the executive branch. The Department of Defense is a powerful fiefdom in Washington that protects and advances its own institutional interests, often at the expense of coherent national policies. But DOD is such a powerful fiefdom not for reasons that most people outside the government understand. DOD is a powerful bureaucratic opponent in any bureaucratic battle, because it has the logistics, command and control capability to actually do things, whereas most other executive branch entities have weak or non-existent capabilities in these areas. For example, planning is something DOD trains for and does.3 DOD may come up with the wrong plan, it may have parochial DOD objectives, but all too often DOD's plan is the only document that gets on the table. And discussion starts from the DOD document. Another reason the DOD fiefdom is so powerful is because it invests heavily in the education of its officer pool. In interagency meetings the DOD participants are articulate, well-trained in presentation skills, and numerous. The DOD team always thinks about and knows how to work the Hill. DOD officials are really good and bright, and they, quite frankly, outshine most of the rest of the U.S. bureaucracy. The energy department is another powerful fiefdom. It owns the nuclear establishment and a fair portion of the federal scientific establishment; and if you want to deal with nuclear issues, you have to deal with energy. There are many other fiefdoms in the executive branch that, while less powerful than defense or energy, represent real power in specific areas, and are quite capable of following their own interests. Certainly the Environmental Protection Agency, the Nuclear Regulatory Commission, the National Guard Bureau, and the commerce department also deserve mention.

The White House interagency management process is simply broken. While very good people can, and have, made it work, it is now beyond dispute that, in general, the process no longer serves the president's or the nation's interest in crafting coherent policy for the difficult era we have now entered. The complexity of the task has gotten beyond the interagency process itself. We are dealing with areas where decisions and tradeoffs have to be made that are very complex, impacting national security, the economy, and global environmental issues. It makes 3D chess look simple. The interagency meeting process has gotten so complex that it does not lead to effective coherent strategy and decision making, and it is largely responsible for the inability of the government to walk and chew gum at the same time.

The interagency process is just not nimble enough to develop an effective national security strategy for this new era. Indeed, it is time for a Hoover Commission or some similar organization to take up the task of reexamining the entire interagency process and come up with something more effective.

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3 I remember an interagency meeting: the conclusion was that state and DOD should come to the next meeting with a plan. State raised their hand and said, oh, they would do it, and this was followed by not too polite laughter. The next meeting came along and the only plan on the table was one delivered by DOD.

Congressional Oversight

The real third-rail of obstacles to effective national security policy is the failure of effective congressional oversight. After the twin failures of the 9-11 tragedy and the weapons of mass destruction (WMD) intelligence on Iraq, two national commissions have courageously documented what went wrong and produced far-reaching recommendations for reform.[4] But has anyone asked the question of why it is that it took over 10 years and a series of failures to identify the problems and come forward with reforms to remedy them? No congressional oversight hearings did what these commissions did. This, indeed, is what one would have expected congressional oversight to do. It is not that the Executive Branch does not appear before Congress. If you look at the schedule of the Secretary of Defense or the Secretary of State or the heads of any of the cabinet agencies, you will discover they spend an inordinate amount of time testifying before Congress. In spite of all the time the Executive Branch spends on the Hill, very little oversight occurs, and Congress must be held responsible for this. Congress now echoes the Executive Branch fiefdoms and fails to identify or force reforms prior to tragic national failures. This must be changed.

The Lack of Credible, Sharable Intelligence

There are three other major obstacles to designing and implementing a new national security strategy. First is the lack of credible and sharable intelligence on the threats from terrorists and weapons of mass destruction. The Presidential Commission established to examine the intelligence failures surrounding Iraq WMD and WMD threats in other states concluded in its report that the intelligence on Iraq was "dead wrong." The process is broken and it cannot be replaced by simply realigning the deck chairs on the Titanic. We are in for a decade-long process of intelligence reform if we are to fix this system. To do so will challenge the considerable power and interests of entrenched fiefdoms, both in the Executive Branch and in Congress. There are no short cuts to gaining good intelligence against the hard targets and changed world we now face. Better human intelligence and new technology may help, but they will be much harder to achieve than is generally believed.

The Dilemma of Timelines

The second obstacle is the dilemma of timelines. With regard to a weapons of mass destruction program, the easy time to operate against it is the early period when the state or group is trying to design and acquire the material to build its first weapons. Facilities need to be built, material acquired, and people trained. All of these are easy to disrupt without kinetic solutions. Diplomacy can work, as can financial incentives or disincentives. However, at

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4 National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report (2004), available at www.9–11commission.gov; Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (2005), available at www.wmd.gov/report/index.html.

this early stage, the evidence as to the real intentions of a state or group is always the weakest. The benign explanations are legion: "It is just a chemical fertilizer plant." "It is a civilian nuke program." "It is a pharmaceutical plant." As a weapons program crosses the point where the evidence is convincing beyond a reasonable doubt that it is an actual weapons program, you can prove it exists but the kinetic solutions are about the only ones that are left; and they are hard–both politically and militarily. The United States has a lot of very smart weapons but if you do not have the coordinates, the weapons are dumb. And one danger is that policy makers will talk as if they would never allow a state or group to acquire such awful weapons until they face the sobering reality of all the bad choices they are left with. At that point you are left, not with hanging chads, but with hanging threats, which weaken and undermine U.S. diplomacy even more.

Challenges Caused by the Design of Our Political System

The last obstacle to effective policy in this new era is the Pogo dilemma. Our political system is fundamentally one that is designed to react, not to take proactive action. This is not an accident; this is what our founding fathers intended in writing the Constitution. The federal system and the separation of powers were intended to limit the scope of unfettered action by the federal government. Our civil liberties and democracy would best be protected by such a system. In the national security area, the federal government was given the responsibility of dealing with threats abroad; internal threats, other than sedition, were law enforcement issues that would generally be left to the states. Now, that generally worked from 1776 until 9/11. Even though federal law enforcement powers grew tremendously during this period, they remained constrained by a Constitutional system of civil liberties that was appropriate when the challenge was crime and law enforcement. We now face an amalgam of terrorists, some based abroad, some based here, some state-sponsored, some with diverse and uncertain sponsorship. We have now entered into a zone in which the traditional methods of law enforcement, much of it state and local based, cannot guarantee protection. The traditional external national security response of hitting threats abroad will not work when the terrorist network has become resident within the United States. This is, I think, the greatest challenge in terms of our political values as we move ahead. In order to protect our security, we must be sure we do not destroy our values in the process. The old division, that the federal government would protect us from threats abroad and states would be responsible for law enforcement and response, simply is not going to work in a world of weapons of mass destruction. It is really up to political leaders and thinkers in the academy as we move forward to think about how we do this in a way that is at the same time true to our values and provides the level of security that the American people will demand.

We worked out a way to do the Cold War and avoid the global catastrophe that would have come from a nuclear exchange between the United States and the Soviet Union. We do not know how to do WMD in the hands of terrorists in a world of failed states. This is the challenge we face today.

Recasting the National Strategy for Combating Terrorism: Six Recommendations[1]

Gen. Wayne A. Downing, U.S. Army (Ret.)

Chairman of the Combating Terrorism Center at the U.S. Military Academy at West Point

Introduction

Status Report: Mixed Results since 9/11

Recasting the National Strategy: Six Recommendations

1. Recognize the essence of the struggle: The U.S. and the world face a global insurgency, not a global outbreak of terrorism
2. Harness and focus all elements of national power
3. Create a global community of shared interest
4. Focus on key battleground states and regions: Pakistan, Southeast Asia, Gulf States and Saudi Arabia, Africa
5. Turn the tide in the war of ideas, distance Islamic society from radical Salafist ideology
6. Inhibit insurgent access to nuclear weapons and nuclear materials

Current Problems Also Demand Attention

Prepare for a long term struggle in Iraq—and win!

Capitalize on Middle East peace process opportunities

Endgame

Challenge and Providence

Introduction

Four years have passed since 9/11 and it is clear that the United States is engaged in a long-term struggle with a defiant and committed opponent. The United States must currently contend with a violent insurgency–bordering on civil war–in Iraq. Renewed fighting has erupted in Afghanistan, where extremists aim to impede the upcoming national elections. Radical Islamist cells are surfacing around the world. The 7/7 London bombings on the heels of last year's attacks in Madrid illustrate how this conflict is spreading. The American homeland is far from secure; but most Americans, and many throughout the world, do not understand the nature of the conflict or the stakes involved.

The United States has not been idle. We have conducted worldwide operations, gaining extensive knowledge on the tactics, strategy, and intentions of a vicious and intelligent enemy. More importantly, we have fresh insights into America's strengths and weaknesses. Reflecting on this knowledge and these insights, this article will make six recommendations that would reinvigorate U.S. efforts to combat not just terrorism, but also a new and insidious threat that we did not fully understand at the outset. Since 9/11, we have seen that those who attacked the United States on 9/11 are more than terrorists. Our enemies, Sunni Salafist extremists, are revolutionaries who use terrorism, among other tactics, to conduct a worldwide insurgency.[2] The purpose of this insurgency is political: to transform the entire Islamic world into fundamentalist Islamic states in the mold of the 9th- and 10th-century AD caliphates, or, in 21st-century terminology, Taliban-like governments.[3]

The Salafist extremists justify this holy war (Jihad) and appeal to other Muslims through ancient interpretations of the Koran and the life and writings of the Prophet, Mohammed. Al-Qaeda and the other Sunni Salafist groups attack the United States and our allies because we are the stabilizing anchor of the world they intend to change, as well as the principal supporters of the regimes they aim to depose.[4]

Al-Qaeda and the other Sunni Salafist franchises pursue common goals, all of which are profoundly political in nature.5 These goals include the elimination of U.S./Western presence in the Arabian Gulf and access to its oil; the

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1 This article borrows some material written by Downing from a draft chapter titled "The Global War on Terrorism, Refocusing the National Strategy" for a new book to be published by the Combating Terrorism Center at the United States Military Academy.

2 Some scholars compare counterinsurgency techniques to counterterrorism policy, and find the former more useful when considering the specific threat posed by Salafist organizations such as al-Qaeda. Counterinsurgency is an even more useful way to frame the issue when the struggle occurs in areas where the rule of law has yet to be established, or exists in only a weak form – such as in Iraq. See Daniel Byman. "How to Fight Terror." The National Interest, Vol. 79 (Spring 2005), 160.

3 Christopher M. Blanchard. "Al-Qaeda: Statements and Evolving Ideology." CRS Report for Congress, (November 16, 2004), , CRS-3.

4 Ibid, CRS-4.

lessening and elimination of American and Western influence in the Islamic world; the promotion of conflict between Islam and the West; and the destabilization and then toppling of corrupt and apostate Islamic regimes.[6]

Thus far the United States has successfully defended the homeland from further attack. We have been less successful in defeating and containing the threat. The current National Strategy for Combating Terrorism (National Strategy) has only been partially executed.[7] The United States has not even begun to address the underlying conditions that spawn radical Salafist terrorism. In fact, U.S. and coalition operations in Iraq appear to have created new recruits and sympathy in moderate Islamic communities around the world. Although the U.S. continues to increase homeland security, intelligence, and military spending, "more spies and better defenses do little to defeat a hostile ideology."[8]

The Executive Branch must affirm the strategic intent and goals in the National Strategy while harmonizing and harnessing the elements of national power. Since we clearly need international support, the United States must forge a global community of shared interest, solidify relationships with key battleground states, and win the "war of ideas." The United States and its allies must conduct unrelenting diplomatic, social, economic, intelligence, information, and military campaigns to assist beleaguered nations around the world. We must encourage key battleground states like Iraq, Afghanistan, Pakistan, Saudi Arabia, Egypt, and countries in the Horn and Central Africa, to reach out to the disenfranchised citizens that Osama bin Laden and his cohorts recruit. Although we can never completely eradicate Salafist ideology, we can contain and limit the extremists.

An effective counterproliferation policy and stronger political initiatives in the Middle East are necessary to limit the options available to Salafist extremists hoping to attack the United States, its allies, and interests. The United States must inhibit enemy access to nuclear weapons and materials, because the

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5 Mariam Fam. "Al-Qaeda No. 2 Decries U.S. Idea of Reform: On New Video, Zawahiri Says Jihad Is Only Way to Achieve Change," Associated Press in the Washington Post, 18 June 2005.

6 A posting by Global Islamic Media on qal3ah.net read as follows: "Do not find it strange if after a while, a year or so, you will hear about secret negotiations by one country and representatives of Al-Qaeda. The organization has come to represent the Islamic ummah and speaks in its name. It appears that we are returning to the days of the caliphate." Cited in Lawrence Wright. "The Terror Web: Were the Madrid Bombings Part of a New, Far-Reaching Jihad Being Plotted on the Internet?" The New Yorker, 2 August 2004, 17. See also General Intelligence and Security Service, Dutch Ministry of the Interior and Kingdom Relations. "From Dawa to Jihad: The Various Threats from Radical Islam to the Democratic Legal Order", December 2004, 19, retrieved from www.fas.org/irp/world/netherlands/dawa.pdf, May 2005, and Marc Sageman, Understanding Terror Networks, University of Pennsylvania Press, 2004. pp 17-24.

7 The National Strategy for Combating Terrorism, published in February 2003, had actually begun to be implemented as it was formulated in late 2001 and early 2002. Formal approval of the strategy by the interagency process was time consuming and difficult. The U.S. Government bureaucracy remains formidable. While the foot soldiers understand the war and usually cooperate magnificently in the field, the agencies in Washington continue to squabble about their departmental prerogatives.

8 Byman, "How to Fight Terror," 124.

Salafists will definitely use them if they become available.[9] Other immediate issues that the United States must address in order to reduce the threat posed by Salafist extremists include creating a stable, democratic Iraq, and making progress toward creating a Palestinian state. These cumulative actions will limit the extremists' global reach and reduce their lethality. Overall, this conflict with radical Islamists will be a long-term struggle, which, like the Cold War, will be measured in decades, not in years. We must prepare now for the long journey ahead.

Unfortunately, the U.S. interagency process does not appear to be equal to the task. Since 9/11 we have witnessed significant weaknesses in the interagency system that coordinates the efforts of our vast federal bureaucracy. The process has almost been moribund at times, characterized by a profound lack of interagency consensus and direction. The Department of Defense has dominated the interagency at the expense of the other departments. The state department has been noticeably inactive, although this may be changing under the leadership of the new secretary. As a result, the vast potential of the U.S. government (USG) has not been realized.

Status Report: Mixed Results Since 9/11

Thus far, the USG has been fairly successful accomplishing the first goal of the "4 Ds" outlined in the National Strategy: defending U.S. citizens and interests at home and abroad (DEFEND) (see Figure 1).[10] However, the U.S. homeland is definitely not secure, as the recent chain of bombings in London on 7/7 and 7/21 aptly demonstrates.

The USG has also had fair success in accomplishing the second goal of thee National Strategy, defeating and destroying terrorist organizations (DEFEAT). By cooperating closely with select allies, the USG has rooted out terrorist organizations and cells overseas, and thus far countered the proliferation of dangerous weapons.[11] Led by Brazil, the Latin American countries invoked the Rio Treaty in solidarity with the United States following the 9/11 attacks, and Australia invoked Article IV of the ANZUS treaty.12 Over 37 nations provided military, law enforcement, intelligence, or humanitarian support in the Global War on Terror (GWOT).13 Many highly successful (and often unpublicized) operations have taken place overseas, conducted by friendly host-nation

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9 Tiina Tarvainen "Al-Qaeda and WMD: A Primer," Terrorism Monitor (Jamestown Foundation), Vol. 3, No. 11, 2 June 2005.

10 Downing, Defeating Terrorism, McGraw Hill, 2004. "The Global War on Terrorism: Focusing the National Strategy," pp 146-157.

11 Consider the following statistics: "Number of Taliban-style states created since 9/11: 0; Number of countries that have recognized al-Qaeda: 0; Number of nations that have adopted "state-sponsored" terrorism as an official policy: 0; Number of states that have voluntarily given-up weapons of mass destruction programs since 9/11: 1; Number of transnational nuclear smuggling networks broken-up since 9/11: 1; Number of Middle Eastern states that have moved closer to democracy: 5." James Carafano. "Terrorism by the Numbers." Heritage Foundation Commentary, 4 May 2005, retrieved from www.heritage.org/Press/Commentary/ed050405c.cfm, May 2005.

police, military, and intelligence organizations, supported by small teams of Americans. Few of these operations, except the most newsworthy, have been revealed.[14]

As a result, the United States has decimated the original al-Qaeda, eliminating 70 percent of the original leadership. The United States and its allies have killed, arrested, and/or incarcerated thousands of al-Qaeda members, including, most recently, its third-ranking leader, Abu Faraj al-Libbi.[15] Operation ENDURING FREEDOM successfully ousted the Taliban from Afghanistan, and the elected Afghani government has made great progress toward stable, democratic rule and the establishment of law and order.

The third goal, as stated in the National Strategy, is to deny terrorist groups sanctuary and support from other nations (DENY).[16] While the United States has partially achieved this goal, future efforts will demand a higher level of allied cooperation and renewed commitment. For example, eliminating sanctuary and support will require the establishment of an international standard

> **Figure 1: Fundamental Goals**
> The "Four Ds"
> ✓ Defend US citizens at home and abroad.
> ✓ Defeat/destroy terrorist organizations.
> ✓ Deny sanctuary and support to terrorist organizations.
> ✓ Dimish the underlying causes.
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> Source: National Strategy for Combating terrorism. February 2003.

of accountability, based on current international counterterrorism conventions and protocols, UN Security Council Resolution 1373, and international rights to collective and self defense. An effective denial of support also requires com-

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12 See, for example, Kenneth R. Maxwell. "Latin America: Back to the Past?" Council on Foreign Relations Op-Ed piece, 7 April 2002, retrieved from www.cfr.org/pub4488/kenneth_r_maxwell/latin_america_back_to_the_past.php, June 2005.

13 Jim Garamone. "International Coalition Against Terror Grows." American Forces Press Service, 23 May 2002.

14 Significant operations include the apprehension of Khalid Sheikh Mohammed in Rawalpindi, Pakistan, in cooperation with the Pakistani Police and Intelligence Services in March 2003 after a month-long pursuit throughout Pakistan. In another success, Thai security forces, with the invaluable assistance of American intelligence agents, in August 2003 captured Hambali, the main Jemaah Islamiyah (JI) strategist and al-Qaeda liaison, in Ayutthaya, Thailand (50 miles north of Bangkok).

15 al-Libbi, a Libyan, is also implicated in two assassination attempts on President Musharraf of Pakistan. See, for example, Kamran Khan and John Lancaster. "Top Al-Qaeda Figure Is Held in Pakistan." Washington Post, 5 May 2005, A1.

16 The United States has a long memory and is committed to holding terrorists and those who harbor them accountable for past crimes." National Strategy for Combating Terrorism, 17.

bined intelligence and coordinated law enforcement efforts, sanctions against nations that sponsor terrorism, and assistance to nations that lack national security resources or the will to oppose the terrorists. Afghanistan made it clear we can no longer ignore so-called "uncontrolled" areas in Muslim Africa, Southeast Asia, and Central Asia, since they have become insurgent base areas.

Obviously, support from host countries is critical to the DEFEAT and DENY goals of the National Strategy, but such support has not been consistent. For the first six to nine months after 9/11, the United States enjoyed a high level of international empathy and there was consensus among many nations, especially in Europe. Since then the consensus has deteriorated significantly for many reasons, including an international perception that the United States is currently waging a unilateral struggle without regard to the sensibilities and prerogatives of other states. The 2003 invasion of Iraq and subsequent occupation has exacerbated international discontent with U.S. policies, especially in the Islamic world. The United States must do much more to foster greater international support and understanding.

The United States has made little, if any, progress in achieving its fourth goal, diminishing the causes of terrorism (DIMINISH). In fact, perhaps the opposite has occurred. Since 9/11, groups sympathetic to al-Qaeda's ideology, opposed to what they view as unwarranted American action, have developed worldwide. A Spanish counterterrorism official explains the phenomenon as follows:

> Al-Qaeda has four different networks... first, there is the original network, the one that committed 9/11, which uses its own resources and people it has recruited and trained. Then, there is the ad-hoc terrorist network, consisting of franchise organizations that Al-Qaeda created– often to replace ones that weren't bloody enough–in countries such as the Philippines, Jordan, and Algeria.[17]

The third network is "more subtle, a strategic union of like-minded companies."[18] The final network, to which the United States should pay the closest attention, is the network of "imitators, emulators, who are ideologically aligned with al-Qaeda but are less tied to it financially."[19] The latter type of network operates not only in the Islamic world and places such as Iraq, where the establishment of law and order remains a challenge, but also in the West, where permissive human civil rights laws impede local law enforcement and intelligence agencies' actions against the global insurgents.

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17 Quoted in Lawrence Wright. "The Terror Web: Were the Madrid Bombings Part of a New, Far-Reaching Jihad Being Plotted on the Internet?" The New Yorker, 2 August 2004, 6-7.

18 Ibid.

19 Ibid.

The noble effort to establish a democratic state in Iraq has created great challenges and opportunities. The invasion of Iraq is part of a global strategy to establish a democratic state in the region that will dramatically affect relationships in the Islamic world. It is a daring initiative and is proving to be a very difficult endeavor with several consequences that feed into the current struggle at the tactical level. According to CIA director Porter Goss, Iraq is now a magnet for Jihadists.[20] The former head of the CIA bin Laden unit, Michael Scheuer, is even more forceful: "There's no bigger gift we could have given to Osama bin Laden," he says, "than the invasion of Iraq."[21] Daniel Byman correctly summarizes the current position of the United States, stating that the United States and its allies have "failed to capture al-Qaeda's recuperative capacity, its relationships with other groups, and its broader appeal in the Muslim world."[22] While posing a serious challenge to the United States and its coalition partners, Iraq also presents a life and death struggle to the Salafists. An Islamic democracy, especially a Shia Islamic democracy, constitutes an unacceptable apostasy for these radicals. Accordingly, they will fight to the death. If the U.S. and its coalition allies can assist the duly elected Iraqi government in providing the security necessary to allow the political, economic, and social processes of the new state to take place, we will score a strategic victory of the first magnitude, resoundingly defeating the insurgents and, more important, directly affecting the balance of power in the region.

Recasting the National Strategy: Six Recommendations

There are a number of actions the United States should take to calibrate the National Strategy with the lessons learned over the past four years. These changes are necessary if the United States and its allies are to be successful in this long term conflict.

Recommendation #1: Recognize the essence of the struggle: The United States and the world face a global insurgency, not a global outbreak of terrorism

The United States must recognize, articulate, and act on the true nature of the conflict. We are not engaged in a Global War on Terrorism. Terror itself is not the enemy; it represents a tactic used by the enemy. Rather, a worldwide insurgency challenges the U.S., as well as governments and populations everywhere. Concentrating on counterterrorism operations alone will give rise to a series of local engagements, which, even if they are successful, may well lose the war.[23] Therefore, the United States must redefine the struggle not as a

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20 Cited in Peter Katel. "Exporting Democracy: Will President Bush's Efforts Succeed?" CQ Researcher, Vol. 15, No. 12 (April 1, 2005), 269-292, 278.

21 Daniel L. Byman, Michael Scheuer, Anatol Lieven, and W. Patrick Lang. "Iraq, Afghanistan, and the War on 'Terror.'" Middle East Policy, Vol. 12, No. 1 (Spring 2005), 4.

22 Daniel L. Byman. "Al-Qaeda as an Adversary; Do We Understand Our Enemy?" World Politics, 56, 1, October 2003, 139, 158.

Global War on Terrorism, but as a global counterinsurgency campaign.24 This campaign must not only eliminate the insurgents, but also achieve other more subtle and difficult goals.[25] These aims include driving a wedge between the Salafists and their potential supporters, and connecting target populations to their legitimate governments. The United States must enlist allies around the world in collective counterinsurgency efforts that support the emergence of democratic, stable governments in the Islamic world, and peaceful, integrated Muslim expatriate communities living in the West.[26]

The United States must publicly present the counterinsurgency in such a way that does not appear anti-Islamic. Overtones of racial, religious, or political superiority will cause the United States to inadvertently facilitate one of al-Qaeda's aims, namely, conflict between Islam and the West. Public diplomacy will be critical in informing the world of the true nature and danger of the threat.

The National Strategy needs clarification in this area. It clearly states that the intent of the USG in this conflict

> is to stop terrorist attacks against the United States, its citizens, its interests, and our friends and allies around the world and ultimately to create an international environment inhospitable to terrorists and all those who support them.[27]

This statement and the National Strategy's goals, discussed earlier, must reflect our newly discovered knowledge of the Sunni Salafist insurgent enemy. Substituting "insurgent" for "terrorist" and "global counterinsurgency campaign" for "Global War on Terrorism" in the strategy will not be enough. We must execute all the elements of the 4D strategy simultaneously, with emphasis on DIMINISHING the root causes. Success requires special attention to the political, economic, and social dimensions of the conditions that give rise to the extremists that threaten us.

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23 Scholars recognize that the use of terrorism itself is a tactical-level activity, secondary in the minds of those who use such tools. For example, see Charles Knight and Melissa Murphy, "The Sources of Terrorism." International Security 28, 2 (2003) 192-198.

24 The U.S. Executive Branch is slowly beginning to examine such a reformulation. A new National Security Policy Directive is expected to broadly outline new roles of the major agencies, including putting the state department in charge of "counter-ideology" while leaving the defense department responsible for destroying terrorist networks themselves. See Jim Hoagland. "A Shifting Focus on Terrorism." Washington Post, 24 April 2005, B7.

25 Susan B. Glasser. "Review May Shift Terror Policies: U.S. Is Expected to Look beyond Al-Qaeda," Washington Post, 29 May 2005.

26 AIVD Report Rekrutering in Nederland voor de Jihad, van incident tot [sic] trend (recruitment for the Jihad in the Netherlands, from incident to trend, 2002. See also Dutch General Intelligence and Security Service, "From Dawa to Jihad The Various Threats from Radical Islam to the Democratic Legal Order," available at www.fas.org/irp/world/netherlands/dawa.pdf.

27 National Strategy for Combating Terrorism, 11

Recommendation #2: Harness and focus all elements of national power

The U.S. federal government wields immense power and the ability to accomplish a multitude of varied tasks. The challenge is to get the diverse elements of the federal government to work in concert to achieve national goals. Such harmonization is very difficult given the size and complexity of the USG and the tendency of departments within bureaucracies to focus on departmental objectives at the expense, and to the exclusion, of national objectives.

Unfortunately, internal government competition hamstrings the current struggle against the Salafist insurgents. Immediately following 9/11, the different USG agencies cooperated, and sacrificed their own departmental goals in a rare display of solidarity, especially at the working level in Washington and in the field. Within nine months, however, the familiar squabbles between competing factions began anew. In some cases, the personalities of key cabinet officials and their attempts to dominate or ignore the interagency process exacerbated long-standing issues. Congress, especially those members and committees involved in authorizations and appropriations, did little to help solve these competitions. Some members of Congress, operating behind the scenes in their oversight role, protected their committee turf by supporting certain Executive Branch entities at the expense of other agencies.

It is clear that the USG must ameliorate this internal competition and focus on the task at hand. The National Strategy, The 9/11 Commission Report, and The Robb/Silberman WMD Report all emphasize the necessity of applying all elements of national power in a harmonious and coherent manner.[28] In addition, any single element of the USG should not expect to dominate the other branches. For example, the military, a blunt instrument, is not the long-term answer to countering the Islamist insurgency. Counterinsurgency campaigns are by essence political struggles, and require the application of all elements of national power, especially diplomacy and information, along with intelligence, law enforcement, and financial/economic power and policies.[29]

The United States must also continue to use the military decisively into the near future, although not as the lead government agency. The front line in this conflict consists of U.S. diplomats, intelligence operatives, information specialists, and law enforcement agents working in close coordination with U.S. allies overseas. The U.S. military can play a key role in training and advising host countries' security forces, and denying sanctuaries when political measures fail. The military can also reinforce host nation security forces when invited, and, in rare cases, intervene directly to support U.S. agencies. Special Opera-

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28 See, among many others sources, The 9/11 Commission Report, 363-364; National Strategy for Combating Terrorism; Michael Donley, Hicks and Associates, Inc. "Rethinking the Interagency System," March 2005; George W. Bush. "Address to a Joint Session of Congress and the American People." The White House Office of the Press Secretary, September 20, 2001.

tions Forces can conduct surgical raids, especially in uncontrolled regions, to capture or kill high value targets and destroy training camps and base areas.

Over-reliance on the military as a counterterrorism tool has negatively impacted U.S. efforts to gain allies in key regions. For example, the 2002 US National Security Strategy, which conveyed the "Bush administration's intention to wage a total and disproportionate war against asymmetrical opponents," was perceived by many allies and friends as the "radical militarization of the war on terror," because it explicitly espoused preemption.[30] The perception created by the National Security Strategy was undoubtedly strengthened by the U.S.-led invasion of Iraq, a preventive, not preemptive, attack. The new "assertive unilateralism," as one author from Southeast Asia argues, could "trigger further political turmoil" in politically weak states such as Indonesia, effectively hampering regional counterterrorism efforts and giving more power to the Muslim extremist elements which were created out of and thrive on instability.31 As described by another analyst, "no politician can afford to antagonize his Muslim constituencies, and many perceive the war on terror as a political liability."[32] Granted, the U.S. must play a strong hand by using force when absolutely needed, but a rhetoric that alienates allies essential to U.S. diplomatic and political counterinsurgency initiatives is decidedly not useful.

It is clear that reforms are needed to enable the diverse elements of the USG to work together for the common good.[33] Many actions are underway. Reorganization or "moving the deck chairs" is one approach. The creation of the vast and well-endowed Department of Homeland Security by the Executive Branch is an important initiative that will probably take years to realize. Congressional legislation has created the Patriot Act and will likely extend these much needed legal remedies and authorities in some modified form in the near future. The most systemic approach to addressing some of the more egregious 9/11 shortcomings appears to be the recent Intelligence Reform and Terrorism Prevention Act of 2004.[34]

Before and following 9/11, many influential commissions and internal U.S. government agencies and reports called for Congress to streamline the entire federal government. Some suggested a new master plan with Goldwater-Nichols-like legislation. However, the fundamental changes crafted by the Goldwater-Nichols Act were the result of several years of intense debate, and Congress did not have the time to enact such broad, government-wide reor-

29 Dana Priest. "Help from France Key in Covert Operations: Paris's 'Alliance Base' Targets Terrorists," Washington Post, 3 July 2005.

30 See, for example, Renato Cruz De Castro. "Addressing International Terrorism in Southeast Asia: A Matter of Strategic or Functional Approach?" Contemporary Southeast Asia, vol. 26, No. 2, (August 2004), 208.

31 Ibid., 209.

32 Zachary Abuza. "Learning by Doing: Al-Qaeda's Allies in Southeast Asia." Current History, vol. 103, No. 672, (April 2004), 172.

ganization. Instead, the Congress chose to address just the intelligence community, but included more than just the collection of information and data. They also included inter-agency operational planning and added direct access to the president in order to gain hands-on management of the war.35 The new law creates a National Counter Terrorism Center (NCTC) that reports to the Director for National Intelligence (DNI) on intelligence matters and directly to the president with respect to "planning and progress of joint counterterrorism operations (other than intelligence operations)."36

Time will tell how the newly created DNI intends to exercise his charter, especially with respect to the defense department's vital and large intelligence agencies. Likewise, the president's use of the NCTC as an operational planning

Recommendation #3: Create a global community of shared interest

Cooperation with other governments is crucial, since the United States cannot conduct a worldwide counterinsurgency campaign unilaterally. The state department–not the defense department–must step up and lead America in this long term conflict. Allies, old and new, must have a common understanding of the threat and view it in their best interest to cooperate and work together. Only a "global community of shared interest" will allow the United States to be the proverbial "city on the hill" as opposed to what Zbigniew Brzezinski calls a "fortress on the hill." We must fight the common enemy with allies who share a common purpose and understanding.37

The National Strategy assumes that "willing" and "able" partners are a given.38 This is not the case, as we have seen. The USG must gain the international support needed to achieve the strategic intent and the 4D goals by devoting greater effort towards strengthening and nurturing old alliances. Among traditional U.S. partners, the European countries remain the most important. As evidenced by the 7/7 attacks in London, the Van Gogh murder in Amsterdam, the Madrid bombings, and the Salafist cells in Hamburg, Milan, and numerous other locations, Europeans no longer view Islamist terrorism abstractly. Alienated Muslims in many European countries have become a real threat to security, and provide an important source of aid and recruits to the Salafist cause.39 "The future of Islam is in Europe," says distinguished French Arabist

33 See, for example, Michael Donley, Hicks & Associates, Inc., "Rethinking the Interagency System," an excellent summary of the options available to reform the interagency system.

34 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No.108-458, 118 Stat. 3638 (Dec. 17, 2004).

35 This obvious solution is considered dangerous by many in the Executive Branch. One aftermath of the 1980s Iran Contra affair is a strong reluctance for the White House and the president to be associated with operational activities because of the possible domestic "blow-back" when policies fail or problems occur. The counter argument is that the nation is involved in a war which requires extraordinary measures. The nation expects a president to take active charge and manage the affairs of state. It is hard to imagine Roosevelt or Truman in WW II being reluctant to exercise these powers in a direct and forceful manner.

36 The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). Sec. 1021.

Gilles Kepel. In Europe, he argues, alienated Muslim constituencies are vulnerable to cooption in the absence of successful state intervention.40 In large part because Europe could provide an effective staging area for future attacks, the USG must pursue policies that appeal to the constituencies of the governments we are attempting to enlist in the campaign.

John Lewis Gaddis makes an apt comparison between the United States now and during the Cold War. During the Cold War, he argues, the United States was able to wield disproportionate power over the Soviet Union because its own sphere of influence "operated with the consent of those within it." At the international level, influence requires not only power but the lack of resistance or friction. Strategically, the United States must exhibit "better manners," and speak in "clear language" while articulating a vision that connects the survival of the state system–something of key multinational interest–with the global counterinsurgency campaign.[41]

To move forward on common ground, the United States must reshape its declaratory policy to connect the objectives of the global counterinsurgency campaign with other states' vital national interests.

The worldviews of the United States and Europe diverge on some important issues, especially on the meaning of power and multilateralism. According to Robert Kagan,

> On the all-important question of power–the efficacy of power, the morality of power, the desirability of power–American and European perspectives are diverging. Europe is turning away from power, or to put it a little differently, it is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation... The United States, on the other hand,... exercise[es] power in the anarchic Hobbesian world where international laws and rules are unreliable and where true security and the defense and promotion of a liberal order still depend on the possession and use of military might.[42]

37 Zbigniew Brzezinski, The Choice: Global Domination or Global Leadership, New York: Basic Books, 2004, 30, 35, 229.

38 National Strategy for Combating Terrorism, 29.

39 Kathryn Haahr-Escolano. "Italy: Europe's Emerging Platform for Islamic Extremism." Terrorism Monitor (Jamestown Foundation), Vol. 3, No. 4, 24 February 2005. See also Daniel Williams, "Italy Targeted By Recruiters For Terrorists," Washington Post, 17 December 2003, for a description of how the suicide bomber believed responsible for the August 2003 bombing of the UN Headquarters in Iraq, which killed top UN official Sergio DiMello and prompted the UN's withdrawal, was recruited in Italy.

40 Gilles Kepel cited in Wright, 16. See also Dutch General Intelligence and Security Service, all, for a complex assessment of the threat posed by radical Islam to the democratic legal order, in the context of the Netherlands.

41 John Lewis Gaddis. "Grand Strategy in the Second Term." Foreign Affairs, Vol. 84, Issue 1 (January/February 2005).

42 Quoted in Norman Podhoretz, "World War IV: How It Started, What It Means, and Why We Have to Win." Commentary Magazine, September 2004. Retrieved from www.commentarymagazine.com/podhoretz.htm, April 2005.

43 Quoted in Ibid.

Europeans, in Kagan's view, "are quicker to appeal to international law, international conventions, and international opinion to adjudicate disputes," emphasizing "process over result, believing that ultimately process can become substance," a tendency that grates on the instincts of a U.S. administration in-

BATTLEGROUND STATES
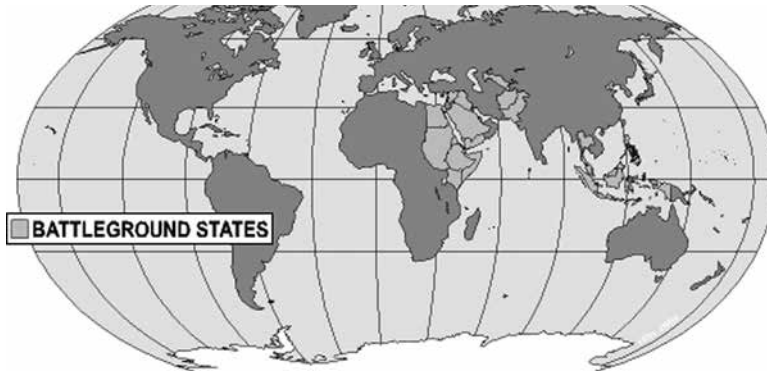
clined to act unilaterally.[43] Since they view costly defense/military establishments as unnecessary, Western European countries tend not to support the development of such institutions within their own borders. Instead, they choose to rely on U.S. military power to ensure regional security, as illustrated by NATO Operation ALLIED FORCE in Kosovo, March-June 1999.

We must strike a fundamental balance between U.S. superpower politics and European reservations regarding U.S. foreign policy without sacrificing our own vital national interests. Besides rethinking our participation in some of the treaties of importance to our allies, the USG should also acknowledge the UN's recent definition of terrorism and formulation of a counterterrorism strategy, finally achieved after many years of wrangling. Although it was ignored by the media to a large extent, the release of the UN secretary-general's high level report represents a watershed in how all states collectively agree to view the challenge of terrorism. Most notably the strategy outlined in the report is quite close to the "4D goals" espoused by our own National Strategy.[44] Fully embracing the UN's efforts will go a long way toward delegitimizing extremist acts on a global scale.[45]

44 Report of the Secretary-General's High-level Panel on Threats, Challenges, and Change. "A more secure world: Our shared responsibility." The UN report emphasizes a fifth D, the defense of human rights. The U.S. strategy does not address this area. United Nations Publications, 2005, 48-52, retrieved from www.un.org/secureworld/, May 2005.

45 See, for example, Richard N. Haass. "Delegitimizing Terrorist Acts Is Everyone's Responsibility." Tapei Times, 10 April 2005, retrieved from www.cfr.org/pub8048/richard_n_haass/delegitimizing_terrorist_acts_is_everyones_responsibility.php, May 2005.

46 All of the maps in this section were created by Michael Rifer.

Recommendation #4: Focus on key battleground states and regions[46]

In addition to our estranged Cold War allies in "old" Europe, the United States must engage governments of other states. The U.S. outreach to Eastern or "new" Europe, the former Soviet Union states (especially in Central Asia, the so-called Stans), and traditional allies in Southeast Asia has led to mixed results. Special attention must also be focused on other critical areas. To win the global counterinsurgency campaign, the United States must enlist support of moderate and modern Islamic governments in a low key manner. Operating behind the scenes, the United States should work with reform-minded governments to turn back extremism, continuing our record of assisting Islamic states such as Afghanistan, Kuwait, Jordan, Bosnia, Kosovo, and now Iraq.

Political reform will be required in some of these critical states in order to win over the disenfranchised and disenchanted citizens (many of them educated and informed) who could opt to join the Jihad against the West. Some of these countries are priority Salafist targets, but are in denial and continue to deny their citizens the right of political process. This situation creates a great challenge for American diplomatic efforts.

While every state and region has its own unique challenges, Pakistan, Southeast Asia, the Gulf states and Africa offer useful ground for analysis. U.S. efforts must help the host countries achieve two imperatives implied by counterinsurgency theory: first, to convince "fence-sitters" to reject extremism, and second, to connect the disenfranchised citizens more effectively with their own governments. We must also execute a public diplomacy campaign, a vitally needed area of improvement that should have a measurable impact in all the regions discussed below. The process will take years, but unless we start now, we will never stop the endless cycle of dissatisfaction, radicalization, recruitment, jihad, and martyrdom that fuels the Salafist insurgency.

Pakistan

One of the most critical battleground states, Pakistan is home to numerous militant Islamic organizations, including Lashkar-e-Taiba (LeT) and Jamiat-e-Ulema Islami (JUI). In addition, Pakistan continues to wrestle with the difficult challenge of installing law and order in its Tribal Area, where Osama bin Laden

47 Marin J. Strmecki, "Our Ally, Our Problem," National Review, 1 July 2002, pp. 16–17C, cited in Christine Fair. "Militant Recruitment in Pakistan: Implications for Al-Qaeda and Other Organizations." Studies in Conflict & Terrorism, Vol. 27, No. 489 (2004), 492-493.

and his number two, Ayman Zawahiri, have sought refuge. Although the Salafist franchises each fight for their specific cause, they all gain supporters today in large part due to strong anti-U.S. sentiment arising since 9/11. The terrorist attacks on the United States provided a flash point that crystallized the views of disenfranchised youth, many of whom already took a dim view of U.S. support of the "Israeli occupation," or perceived an essential hypocrisy in articulated U.S. support of oppressive regimes, such as President Musharraf's government, and continued U.S. stated resolve to support democracy worldwide.[47]

President Musharraf controls his country, but just barely. The traditionally lawless Tribal Area in western Pakistan remains uncontrolled, and likely still harbors the al-Qaeda leadership. Musharraf has repeatedly suspended democratic processes as he seeks to establish sufficient security to stabilize the country. It may be decades before Pakistan returns to civilian rule. Musharraf must balance security operations with the sensibilities of the Pakistani people, so as to avoid driving Pakistani citizens into the arms of the Salafist groups. While the Islamic schools, or madrassahs, are clearly a source of Islamic militancy, 40 percent of militant recruits may come from the regular public school and higher education system.[48] Students' worldviews throughout the Pakistani educational system are so "polarized on issues of militancy (regarding Kashmir) and tolerance (of religious minorities and women) that they seem to inhabit different, and violently opposed, worlds."[49] Moreover, it is widely known that Salafist groups take advantage of the recruitment opportunities presented by their provision of social services to slum areas.

The cessation of U.S. military aid following the 1989 sanctions has practically severed the once strong ties between the two countries' militaries.[50] The Salafist groups have been able to capitalize on discontent within the military ranks, fueling increased radicalization within the Pakistan armed forces.[51]

In Pakistan, the United States must support a multifaceted campaign to win over the citizens to the government's cause, and limit and then reverse the radicalization of the Pakistani military. The International Crisis Group recommends that Pakistan immediately regulate madrassahs, reform the pub-

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48 Some analysts note that Madrassahs do not themselves comprise a primary source of terrorist expertise, since these religious schools "do not teach the technical or linguistic skills necessary to be an effective terrorist." See, for example, Peter Bergen and Swati Pandey. "The Madrassa Myth." New York Times, 14 June 2005, A1.

49 Tariq Rahman. "Denizens of Alien Worlds: A Survey of Students and Teachers at Pakistan's Urdu and English Language-Medium Schools, and madrassahs." Contemporary South Asia, Vol. 13, No. 3, (September 2004) 307-326. See also Abigail Cutler and Saleem Ali, "Madrassa Reform Is Key to Terror War," Christian Science Monitor, 27 June 2005.

50 A similar estrangement has occurred with the Indonesian military due to U.S. Congressional actions.

51 Fair, 494-499.

52 International Crisis Group. "The State of Sectarianism in Pakistan." Crisis Group Asia Report N°95, 18 April 2005, 29.

53 Adopted from Ashley J. Tellis. "U.S. Strategy: Assisting Pakistan's Transformation." The Washington Quarterly, 28:1, Winter 2004-05, 97-116, 113-114.

lic education sector, consti-
tutionally prohibit private
armies and hate speech, and
eliminate state-sponsored
religious extremism.[52] In-
stead of publicly advocating
wholesale reform, the Unit-
ed States should quietly fund
the provision of services as
alternatives to those provid-
ed by the sectarian groups,
and officially acknowledge
and help secure Pakistan's

nuclear arsenal through technology transfer in return for Pakistan's acceptance
of a Kashmir solution acceptable to India.[53] The United States could use target-
ed incentives such as the renewal of military ties as additional leverage to gain
meaningful Pakistani cooperation on eliminating sectarian violence.

Southeast Asia

Since 9/11, Southeast Asia has gained renewed prominence in U.S. stra-
tegic thinking. Salafist franchises in Southeast Asia remain strong and appear
to be getting stronger. In Indonesia, despite the arrest of about 250 of its oper-
atives, Jemaah Islamiyah (JI), which attacked the Bali nightclubs in 2002 and
the Jakarta Marriot nightclub in 2003, not only "retains the capacity and will
to reconstitute itself and launch devastating attacks across Southeast Asia," but
now displays global reach as it reportedly plans to attack the U.S. homeland.[54]
JI's comparatively hierarchical structure presents an opportunity for the U.S.
and its allies, since the group relies in part on centralization of authority to
operate. Nevertheless, JI, like other Salafist groups in the region, is flexible and
resilient, as exemplified by its resurgence following the arrest of the JI leader,
Hambali, in 2003.

The JI threat goes beyond Indonesia. The Islamists hope to create a region-
al Salafist state encompassing the traditionally Muslim areas in the southern
Philippine Islands, southern Thailand, and Malaysia. A wide network of poor-
ly regulated Islamic charities and banks, extensive criminal networks engaged
in drug running, human trafficking, and forgery, weak immigration policies,
and porous borders have attracted al-Qaeda to Southeast Asia since the early
1990's.[55] To reduce the capacity of Salafist franchises in the region, the govern-

54 Abuza, 171.

55 Ibid., 172.

56 See David Martin Jones et al, "Looking for the Pattern: Al-Qaeda in Southeast Asia–The Genealogy of a Terror Network." Studies in Conflict &
Terrorism, Vol 26, No. 443 (2003), and De Castro.

ments of the United States and host nations must address all of these problems in a coordinated and determined way. In May 2002, Indonesia, Malaysia, and the Philippines signed an agreement to run joint counterterrorism military exercises, share intelligence and other information such as airline passenger lists, and improve border control. Soon afterwards, all 10 members of the Association of Southeast Asian States (ASEAN) signed this agreement. ASEAN also established the U.S.-funded Southeast Asia Regional Center for Counter-Terrorism in Kuala Lampur. The United States should help the host governments enhance the capability of these programs, all of which have stalled since the beginning of the Iraq war.[56]

In Southeast Asia, the United States must prioritize two major sets of issues. First, the region is home to the largest potential group of "fence-sitting" Muslims, potential Salafist supporters who remain unconvinced. The host countries supported by the United States and other allies have a major opportunity to win over these groups through comprehensive political, economic, and social campaigns. This traditional battle for the "hearts and minds" of the people must be won by local governments. At the same time, the United States must actively encourage regional efforts such as those made by ASEAN, including committing further resources and manpower for training and support of local police, military, and intelligence services. The United States must leverage its intelligence capabilities in partnership with the host governments to both infiltrate JI and destroy its financial capacity, focusing on pinpointing criminal activity within the informal financial sector.

Gulf States and Saudi Arabia

The United States must encourage moderate factions arrayed against Salafist extremism in the Gulf region without undermining their independence and legitimacy with their citizens. Similarly, we must address continuing evidence that the Gulf states remain key financial supporters of the Salafists. These states must understand they cannot have it both ways. If they choose not to cooperate with the United States in this struggle against the Salafists and continue to support the insurgency, the regimes must be made to understand that the insurgency seeks to ultimately depose their governments and impose harsh and tyrannical Taliban-style regimes in their stead. And some of these elite

supporters would be the first to feel the executioner's blade.

Saudi Arabia, a long-term ally, must contend with a simmering, long-term power struggle between competing factions of the royal family, which could potentially impact the stability of the state. Religious traditionalists in the royal family, many of whom have suspected ties to al-Qaeda and other Salafists, oppose political reformers. The outcome of this behind-the-scenes fighting will determine the evolution of this strategic state. In the meantime, Saudi Arabian citizens continue to provide recruits to the war in Iraq, and Saudi money bankrolls many Salafist cells around the world.

Africa

U.S. engagement in both the Horn and Sub-Saharan Africa has begun and must continue. Combined law enforcement action has produced results, such as the arrest of those responsible for the 1998 embassy bombings. However, Somalia and other areas in central Africa are close to becoming, if not already, failed states, creating a unique set of challenges. "Somalia is a safe haven, it is ungoverned space," says U.S. Marine Maj. Gen. Samuel Helland, Commander of the Combined Joint Task Force-Horn of Africa, "We, the international community, have to do something to take away that safe haven."[57] Salafist groups profit greatly from international crime, which runs rampant in the region. According to David Crane 1980, prosecutor for the Special Court in Sierra Leone, "diamonds fuel the war on terrorism. Charles Taylor [former Liberian dictator, now an indicted criminal in exile in Nigeria] is harboring terrorists from the Middle East, including al-Qaeda and Hizbullah, and has been for years."[58] No evidence suggests that such activity has lessened.

Although the United States already fields the CJTF-Horn of Africa, comprised of about 1,200 soldiers in Djibouti, as well as units engaged in infra-

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57 Quoted in Chris Tomlinson. "Horn of Africa: Somalia Remains Terror Haven." Associated Press, 14 May 2004, retrieved from www.theunionleader.com/articles_showa.html?article=54727, May 2005.

58 Quoted in Matthew Levitt, "Terrorists, Criminals, and Counterfeit Goods." Statement before the Senate Homeland Security and Governmental Affairs Committee, 25 May 2005. See also Douglas Farah. Prepared testimony before the Subcommittee on Africa of the House Committee on International Relations, 1 April 2004. In addition, President Robert Mugabe of Zimbabwe may not only have tolerated al-Qaeda's presence, but provided "transit and laundering facilities." See R W Johnson. "Tracking Terror Through Africa." The National Interest, Vol. 75 (Spring 2004), 169.

59 Martin Plaut. "Watching over Africa." The World Today. Vol. 60, No. 7 (Jul 2004), 19.

structure building in various other states, the political reality implies that any direct, large-scale intervention will be unlikely.[59] However, given the necessary political will from the regional hegemons South Africa and Nigeria, regional organizations such as the Southern African Development Community (SADC) can, with resources and training from the United States, form an effective counterterrorism regional body, well-positioned to "recommend appropriate anti-terrorist legislation to member parliaments in the name of regional harmonization."[60] Such action should be in these states' interest, since, for example, at least one Islamist movement, Al-Sunna wal Jamma, "seeks to create a Taliban-style state" in Nigeria.[61] Since the Africans have not implemented a regional counterterrorism strategy, the United States must actively fund and encourage the creation of regional counterterrorism priorities, strategy, and capacity throughout the region, focusing on better training for local counterterrorism forces. The recently announced $500 million defense department program along these lines must be expanded.[62] Finally, the United States must encourage all states to align their national laws with the "Kimberley Process," a UN Resolution-initiated effort aimed at preventing the trade of conflict diamonds by enhancing diamond certification regulations for both import and export.[63]

Recommendation #5: Turn the tide in the war of ideas, distance Islamic society from radical Salafist ideology

U.S. efforts to sell its anti-terrorism message overseas have not succeeded in the battleground states.[64] The initial wave of support enjoyed by the United States following the 9/11 attacks was by no means universal. From September 14 to 17, 2001, Gallup surveyed individuals in 14 foreign countries on whether

60 Michael Rifer. "SADC and Terrorism: Where is the regional strategy?" African Security Review, Vol. 14, No. 1, 114. For additional details on U.S. counterterrorism training efforts on the continent, see Pope, Testimony before House Intelligence Committee, and Hamlin B. Tallent, "Eliminating Terrorist Sanctuaries." Testimony before the International Terrorism, Nonproliferation, and Human Rights Subcommittee of the House International Relations Committee, 10 March 2005.

61 Ambassador Princeton N. Lyman and Scott Hazzard Allan. "Prevent the Rise of Another Taliban." The Baltimore Sun, 19 October 2004, retrieved from www.cfr.org/pub7463/princeton_n_lyman_scott_hazzard_allan/prevent_the_rise_of_another_taliban.php, May 2005.

62 Ann Scott Tyson, "U.S. Pushes Anti-Terrorism in Africa Under Long-Term Program, Pentagon to Train Soldiers of 9 Nations," Washington Post, 26 July 2005.

63 See, for example, "UN Backs Scheme to Block Blood Diamond Trade," Environmental News Services (ENS), 15 April 2003, retrieved from www.minesandcommunities.org/Mineral/diamonds1.htm, June 2005, and "Conflict Diamonds: Sanctions and War." United Nations, retrieved from www.un.org/peace/africa/Diamond.html, June 2005.

64 Public diplomacy refers to government-sponsored programs intended to inform or influence public opinion in other countries; its chief instruments are publications, motion pictures, cultural exchanges, radio, and television. US Department of State, Dictionary of International Relations Terms, 1987, p. 85. Public Diplomacy seeks to promote the national interest and the national security of the United States through, understanding, informing, and influencing foreign publics and broadening dialogue between American citizens and institutions and their counterparts abroad. (USAID Definition).

65 Nations polled were Israel, India, United States, Korea, France, Czech Republic, Italy, South Africa, United Kingdom (excluding N. Ireland), Germany, Bosnia, Columbia, Pakistan, Greece and Mexico. The two nations with less than a majority supporting trial and extradition, Israel and India, overwhelmingly supported an attack (77% and 72%, respectively). As cited in: Peter Ford, "Why Do They Hate Us?," Christian Science Monitor, 27 Sep 2001.

they thought the United States should attack the country (or countries) serving as a base for the 9/11 terrorists "once the identity of the terrorists is known. While well over half of the respondents in almost all the countries supported extradition and trial for suspected terrorists, only Israel and India supported a military attack."[65] Since the beginning of the current war in Iraq, support for U.S. policy abroad has eroded even further. America is failing to get its message across, nowhere more so than in the Islamic world and on the Arab street. "The facts," states one writer, "sad but stubborn, are that hatred of the United States in the Muslim world is greater today than ever before, and shows no sign of diminishing; and that Washington's efforts to counter it have had little success."[66] Muslims on the whole perceive actions taken by the United States in the conduct of the global counterinsurgency campaign as anti-Islamic, which fuels the jihad by creating sympathy and recruits.

U.S. foreign policy angers many Muslim populations.[67] Surveys conducted by the University of Jordan's Center for Strategic Studies in Jordan, Syria, Lebanon, Egypt, and the Palestinian territories show that U.S. regional policies, not a clash of values, religion, or the "al Jazeera factor" influence anti-American attitudes in the Middle East. According to a Pew Center survey, since the Iraq war "many Muslims, even in countries with reasonably good relations with the United States, such as Nigeria, Indonesia, and Pakistan, fear that the United States may attack them."[68] Al-Qaeda clearly focuses on this source of discontent. According to Michael Scheuer, Osama bin Laden has "turned Clausewitz on his head." "The biggest fear al-Qaeda has, besides fighting a superpower," he says, "is that that superpower will somehow change some of the policies that have been in place for the last 20 years."[69]

Recognizing that the foreign audience differs vastly from the audience at home, the United States must transmit believable, persuasive, and explicit messages beyond the current themes of "freedom is on the march," "freedom-haters," and "evil-doers." The United States and its allies must convince the Is-

66 Derk Kinnane. "Winning Over the Muslim Mind." The National Interest. Vol. 75 (Spring 2004), 93. The sentiment expressed here has been widely echoed by scholars and practitioners alike. For example, in June 2004, the Diplomats and Military Commanders for Change, a "collection of 27 distinguished diplomats, flag officers, and other senior officials," stated publicly that "Muslim youth are turning to anti American terrorism. Never in the two and a quarter centuries of our history has the United States been so isolated among the nations, so broadly feared and distrusted." Cited in Augustus Richard Norton. "The United States in the Middle East: Grand Plans, Grand Ayatollahs, and Dark Alleys," in Louis J Cantori and Augustus Richard Norton, eds. "Evaluating the Bush Menu for Change in the Middle East." Middle East Policy, Vol. 12, No. 1, (Spring 2005), 101-102.

67 B. Raman. "Counterterrorism Revisited." Asia Times Online, 8 March 2005. See also the World Values Surveys, retrieved from www.worldvaluessurvey.org/statistics/index.html, May 2005, and cited in United National Development Programme, "Arab Human Development Report 2004: Towards Freedom in the Arab World." New York, NY: United Nations Publications, 2005, 68. See also Pew study cited in Muqtedar Khan. "Prospects for Muslim Democracy: The Role of U.S. Policy." Middle East Policy, Fall 2003, retrieved from www.brookings.edu/views/articles/khan20031001.pdf, April 2005, 7, in which people in all countries surveyed (except the U.S.) thought the U.S. was too pro-Israel. Even in Israel, "47% felt that the United States was not balanced, while only 38% felt that the United States had a fair approach to the conflict." In addition, many Muslims interpret U.S. offers of aid to other countries as evidence of imperialist designs, while not offering aid is certain proof that the U.S. does not care. See Michael Mousseau. "Market Civilization and Its Clash with Terror." International Security Vol. 27, No. 3 (2002/03) 5-29, 23.

68 Khan, 7, citing Pew survey retrieved from: people-press.org/reports/display.php3?ReportID=185.

69 Byman et al, 5.

lamic people (and the world) that it counters oppression and poverty abroad while providing opportunity and education. The United States must gain the moral high ground from the Islamists, discredit their tactics, and persuade the majority of Islamic fence sitters to oppose the Islamist agenda. Promulgating important constituent elements of democracy can work, since some scholars recognize that there is no fundamental dichotomy between democracy and Islam. Bangladesh, Kuwait, Jordan, Turkey, Pakistan, Malaysia, Egypt, Indonesia, Tunisia, Algeria, and Nigeria all identify themselves as "democratic" political systems as opposed to "Islamic."[70] These democratic states are, as we have seen, unacceptable to the Salafists, who have declared democracy an apostasy that must be ruthlessly exterminated.[71] Overlapping mutual interests exist between the Islamic democracies and the United States on this fundamental issue, and must be exploited by American diplomacy.

Scientific and technological collaboration represents another potential area of mutual agreement since these elements of "progress" enjoy unprecedented acceptance among Muslims abroad. According to one study, "in the Islamic world, widespread hostility to the West results partly from the perception that people there are disconnected from progress that is being made elsewhere, and from a sense of dependence on foreign, more prosperous countries."[72] A 2004 Arab American Institute/Zogby International survey found that 90 percent of those surveyed in Morocco, 83 percent in Jordan, 52 percent in Lebanon, and 84 percent in the United Arab Emirates view U.S. science and technology favorably. According to the same study, these countries have a profoundly unfavorable view toward U.S. terrorism policy–13 percent, 21 percent, 10 percent, and 9 percent, respectively[73] Because 40 percent of the populations in the countries surveyed connected science and technology with their attitudes towards the U.S., one may reasonably assume that a strong effort to emphasize

70 Khan, 12. See also Dutch General Intelligence and Security Service, 22, which concludes that "by and large, Islam and democracy are not incompatible, citing the correlation between old Islamic sources such as "Shura" (providing for social consultation) and "Bajat" (a kind of social contract), and democratic principles.

71 Sageman, 73.

72 Michael A. Levi and Michael B. D'Arcey. "Untapped Potential: US Science and Technology Cooperation with the Islamic World." Brookings Institutional Analysis Paper, Number 8 (March 2005), 3. Retrieved from www.brookings.edu/fp/saban/analysis/darcy20050419.pdf, April 2005.

73 Zogby International, "Impressions of America 2004." Washington, DC: Zogby International, 2004, 3, retrieved from www.aaiusa.org/PDF/Impressions_of_America04.pdf, April 2005.

74 Levi and D'Arcey, 10. The authors recommend: (1) prioritizing technology over research and development because it is tied more directly to economic and social development, (2) paying attention to the political structure of scientific interactions–i.e. whether initiatives cover a wide or narrow area, (3) leveraging the Islamic scientific community living and working abroad, (4) actively promoting and publicizing scientific collaborations and accomplishments as part of a comprehensive public diplomacy campaign, (5) not overstating the political and diplomatic benefits of scientific cooperation, and (6) creating an integrated arms control and nonproliferation strategy. See Levi and D'Arcey, Executive Summary, VI-VII. See also, Zogby, 3.

75 United States Government Accountability Office. GAO-05-323 "US Public Diplomacy: Interagency Coordination Efforts Hampered by the Lack of a National Communication Strategy." Washington, DC: Government Printing Office, April 2005, retrieved from www.gao.gov/new.items/d05323.pdf, 3.

U.S.-Muslim scientific cooperation on the basis of equals would positively impact the perception of the United States on the Muslim street.[74]

Making productive scientific cooperation with Islamic states a reality hinges on a coordinated campaign of public diplomacy. This campaign has yet to take full shape. The White House established the Office of Global Communications (OGC) in January 2003. To date, the OGC has not developed an overarching strategy, nor has it produced the guidance necessary to "promote the effective coordination of U.S. public diplomacy efforts."[75] Established in September 2002, another effort, the National Security Council's Strategic Communications Policy Coordinating Committee, failed to issue a national communications strategy and was disbanded in 2003. Other efforts are also underway, such as the Muslim World Outreach Policy Coordinating Committee, tasked by the National Security Council to develop "strategic and tactical plans to help guide and coordinate U.S. communications with Muslims around the world."[76] Overall strategic guidance remains absent, however.

According to the U.S. Government Accountability Office (GAO), "the absence of a national strategy complicates the task of conveying consistent messages and thus achieving mutually reinforcing benefits."[77] Because no strategy has come down from the Executive Branch, messages to the Muslim world lack consistency and are prone to mistakes, lessening the "efficiency and effectiveness of government-wide public diplomacy efforts."[78] State Department and USAID officials interviewed by the US GAO echo the findings of the Defense Science Board, which issued a report stating that the OGC has "evolved into a second-tier organization devoted principally to tactical public affairs coordination."[79] Instead of formulating a strategy, looking at methods of message delivery, ensuring message consistency, and coordinating teams of communicators, OGC prepares "message briefs" and "holds conference calls."[80]

Despite the apparent lack of coordination or an overarching strategy, money floods into projects of all sorts targeting the Muslim world. According to a US News & World Report story, the U.S. Agency for International Development (USAID) directs over half of its spending–which has tripled since 9/11–at Muslim countries. In nine countries, according to the report, including Egypt, Pakistan, Turkmenistan, and Kyrgyzstan, the United Sates funds restoration

76 Ibid.

77 Ibid.

78 Ibid., 11.

79 Report of the Defense Science Board Task Force on Strategic Communication. Washington, D.C., September 2004, cited in ibid., 12.

80 US GAO, 12.

81 David E. Kaplan. "Hearts, Minds, and Dollars: In an Unseen Front in the War on Terrorism, America is Spending Millions...To Change the Very Face of Islam." US News & World Report, 25 April 2005,

82 Peter Maass. "The Way of the Commandos." New York Times Magazine. 1 May 2005, 38.

of historic mosques and preservation of manuscripts. In Indonesia, USAID contributes to the funding of over 30 Muslim organizations whose work cuts across all sectors of society, including education, religion, and media. Efforts are also underway to make American media more accessible in the Muslim world. As an example of what supporters call "Muppet diplomacy," the United States helps fund the broadcast of the popular show Sesame Street in Egypt.[81]

At the opposite end of the spectrum, the American-funded Al Iraqiya network shows a popular prime-time show called "Terrorism in the Grip of Justice." On air for less than a year but already a major hit throughout Iraq, the show attempts to counter the vision of the fierce, brave, and pure insurgent fighter as promoted by Salafist propaganda videos and web sites by showing imagery of captured insurgents. As vividly described by the journalist Peter Maass, "the insurgents, or suspected insurgents... come off as cowardly lowlifes who kill for money rather than patriotism or Allah. They tremble on camera, stumble over their words, and look at the ground as they confess to everything from contract murders to sodomy. The program's clear message," Maass continues, "is that there is now a force more powerful than the insurgency: the Iraqi government."[82] While extending American values and ideals through Muppet diplomacy has its place in the war of ideas, shows like "Terrorism in the Grip of Justice" put an indigenous face on global counterinsurgency efforts, serving to more strongly connect potentially disenfranchised citizens with their governments while discrediting extremism.

Winning the war of ideas will entail a dedicated and sustained effort towards improving education in the Arab world. The United Nations Development Programme (UNDP) Arab Human Development Report 2004 gives the following insight into the role played by education in Arab societies:

> Once children enter school, they find an educational institution, curricula, teaching, and evaluation methods which tend to rely on dictation and instill submissiveness. This learning environment does not permit free dialogue and active exploration and consequently does not open up the doors to freedom of thought and criticism. On the contrary, it weakens the capacity to hold opposing viewpoints and to think outside the box. Its societal function is the reproduction of control in Arab societies.[83]

Clearly, making progress in the war of ideas entails influencing education at the earliest level. In Uganda, the U.S. embassy built three Islamic elementary schools, and in the primarily Muslim countries in the Horn of Africa, the U.S. military builds public schools and strengthens local infrastructure in

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83 UNDP, 17.

84 According to the 2003 Trends in International Mathematics and Science Study (TIMSS 2003), the average eighth grade student in Jordan, Bahrain, Tunisia, Syria, Palestine, Lebanon, Egypt, Morocco, and Yemen scored a 392 and 416 in mathematics and science, respectively, compared to international averages of 476 and 474. See TIMSS 2003, cited in ibid., 36.

85 The Under Secretary for Public Diplomacy and Public Affairs helps ensure that public diplomacy (engaging, informing, and influencing key international audiences) is practiced in harmony with public affairs (outreach to Americans) and traditional diplomacy.

areas where intelligence has uncovered proposed religious schools. In Pakistan, where 500,000 students attend madrassahs, USAID very quietly funds and trains madrassah teachers in science, math, civics, and health. In math and science, where Arab countries lag behind the rest of the world, the United States could contribute significant resources to help reduce the hegemony of religion-based curricula, without appearing to wield political influence.[84]

The United States has taken important steps, but still appears to lack a comprehensive strategy that coordinates and prioritizes the various efforts. The president's new Undersecretary for Public Diplomacy and Public Affairs, long-time presidential advisor Karen Hughes, must reform the Executive Branch's programs.[85] The United States must better exploit existing media outlets in the Arab world, such as Al-Jazeera and Al-Arabiya, to "directly challenge and counter the misperceptions that they foster."[86] Overall, to incorporate the war of ideas fully into the global counterinsurgency campaign, the Executive Branch must develop a coordinated strategic information strategy prioritizing education and media aimed specifically at discrediting extremism, preferably using Arab media outlets, and avoiding overt U.S. sponsorship as appropriate.[87] The United States must also develop a sophisticated campaign unique to each country and region. The use of domestic arguments abroad has not only been unsuccessful, but in many cases such arguments have further alienated and incensed foreigners, especially in developing countries.

Recommendation #6: Inhibit insurgent access to nuclear weapons and nuclear materials

Based on interviews with key incarcerated al-Qaeda leaders and information from captured computers, manuals, writings, and manuscripts, we know that al-Qaeda is fascinated with weapons of mass destruction, including nu-

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86 Bruce Hoffman, "The Changing Face of Al-Qaeda and the Global War on Terrorism." Studies in Conflict and Terrorism, Vol. 27 (2004), 549-560, 557.

87 Pervez Hoodbhoy. "Can Pakistan Work?" Foreign Affairs, Vol. 83, Issue 6 (November/December 2004). The new center could operate as part of a proposed, larger "Trust for Democracy in the Middle East," comprised predominantly of NGOs, but supported by the U.S. and European governments. See Steven Everts. "The Ultimate Test Case: can Europe and America forge a joint strategy for wider Middle East?" International Affairs, Vol. 80, No. 4, 677-679, 684. One unfortunate example of blowback is Pakistan, where USAID funds were used to publish a book–still widely available in Pakistan and Afghanistan–that told children to "pluck out the eyes of their enemies and cut off their legs."

88 IND: A device incorporating radioactive materials designed to result in the dispersal of radioactive material or in the formation of nuclear-yield reaction. Such devices may be fabricated in a completely improvised manner or may be an improvised modification to a US or foreign nuclear weapon. (DOD Definition). RDD: Radiological dispersal devices, also known as "dirty bombs," consist of radioactive material combined with conventional explosives. They are designed to use explosive force to disperse the radioactive material over a large area, such as multiple city-blocks. Around the world, there are many sources of radioactive material that are not secure or not accounted for. Rogue nations and/or terrorist groups can obtain these materials for dirty bombs. These explosive weapons may initially kill a few people in the immediate area of the blast but are used primarily to produce psychological rather than physical harm by inducing panic and terror in the target population. Their use would also result in costly cleanup for decontamination. (OSHA Definition).

clear weapons, improvised nuclear devices (INDs), and radiological dispersal devices (RDDs).88 Al-Qaeda and the Salafist franchises make no distinction between weapons of mass destruction and other, less lethal, weapons. Moral reservations on mass casualties, the availability of conventional weapons, lack of precedent, and risk aversion do not constrain Salafist use of weapons of mass destruction (WMD).[89]

The Salafists could gain access to nuclear weapons in several ways. First, they could steal a device. Despite the excellent mutual cooperation engendered by the Cooperative Threat Reduction (CTR) program, great concerns remain regarding warhead and weapons-grade material security in the former Soviet Union (FSU). Second, the Salafists could obtain the weapons from a nuclear power like Pakistan; a distinct possibility if Musharraf were overthrown and a Salafist regime emerged. Finally, the Salafists could also construct a warhead out of stolen weapons-grade nuclear material or weapons-usable material obtained from waste byproducts of spent nuclear fuel from civilian nuclear power reactors.[90] Our enemies could well fashion a homemade "nuke" by outsourcing the job to very capable Islamic nuclear engineers. Pakistan again emerges as a source of concern. AQ Khan, the father of the Pakistani nuclear program and a known proliferator, has disturbing ties to bin Laden and al-Qaeda leadership.[91]

In order to prevent the insurgents from acquiring nuclear weapons, the United States should further improve the safeguards on nuclear weapon and weapons-grade material storage sites both at home and abroad. Of equal importance, the United States must ensure that all weapons-usable material obtained from nuclear power plants remains securely within the control of the

89 Richard A. Falkenrath, "Confronting Nuclear, Biological and Chemical Terrorism," Survival, Vol. 40, No. 3 (Autumn 1998), pp. 43-65, 28, 44.

90 Weapons-grade material is typically defined as uranium enriched to about 90 percent or greater uranium-235 or uranium-233, or plutonium containing about 90 percent or greater plutonium-239. Weapons-usable nuclear material is defined as uranium enriched to 20 percent or greater in the uranium-235 or uranium-233 isotopes (highly enriched uranium, HEU) and any plutonium containing less than 80 percent of the isotope plutonium-238. A 10 kt gun-type fission weapon would cause between half a million and two million immediate deaths if detonated in lower Manhattan, not to mention a huge impact on the American economy and infrastructure. See William C. Potter, Charles D. Ferguson and Leonard S. Spector, "The Four Faces of Nuclear Terror and the Need for a Prioritized Response," Foreign Affairs (May/June 2004), and Ashton B. Carter, "How to Counter WMD," Foreign Affairs, Vol. 83, No. 5 (September/October 2004), pp. 72-85, 76. See also the arguments made by Joseph Cirincione, Director of the Non-Proliferation project at the Carnegie Endowment for International Peace and author of Deadly Arsenals: Tracking Weapons of Mass Destruction. Washington, DC: Carnegie Endowment, 2002.

91 Seymour M. Hersh, "The Deal." The New Yorker, 8 March 2004.

92 For example, 20,000kg reportedly are loosely secured in civilian research facilities.

93 US DOD CTR Web site, www.defenselink.mil/pubs/ctr/.

94 We base these recommendations on Matthew Bunn, John P. Holdren, and Anthony Wier. "Securing Nuclear Weapons and Materials: Seven Steps for Immediate Action." Project on Managing the Atom, Belfer Center for Science and International Affairs, John F. Kennedy School of Government, Harvard University, May 2002, Executive Summary. See also Joby Warrick. "An Easier, but Less Deadly, Recipe for Terror." The Washington Post, 31 December 2004, A1.

95 IAEA PRIS data base, June, 2005.

96 For further reference on this G8 initiative, see the US State Department Bureau of Nonproliferation Global Partnership homepage, at www.state.gov/t/np/c12743.htm.

97 France, Germany, the UK, and Belgium among other western countries are all key players in these initiatives.

responsible government agencies. While the CTR has successfully secured hundreds of tons of nuclear weapons building material and nuclear weapons, its funding must be increased. Significant amounts of weapons-grade plutonium and highly-enriched uranium (HEU) remain in old Soviet military storage facilities throughout the region, many of which are very poorly guarded.[92] The U.S. must improve its cooperation with Russia, Ukraine, Belarus, and Kazakhstan. By transforming CTR from an assistance-based program to a genuine partnership with robust standards of accountability, in which Russia's experts would fully participate, we can accelerate Russian nuclear facility security upgrades.[93] In addition, both the United States and Russia must fully capitalize on the opportunities to incorporate securing nuclear arms into the ongoing Nuclear Nonproliferation Treaty (NPT) additional protocol negotiations.[94]

Next, the United States must lead the effort to establish international controls on nuclear waste from commercial power plants in order to prevent unauthorized acquisition of weapons-usable material. Over 400 civilian nuclear power plants exist in 31 geographically diverse countries.[95] Several of these countries, including Russia and the Ukraine, must contend with serious security problems, and none are immune to sophisticated pilferage or an actual raid to gain materials. All 31 countries are essential partners in this effort to account for and control nuclear waste.

The decentralization of counterproliferation programs and the complex web of interagency responsibility have not been conducive to the development of an overarching set of counter proliferation strategic priorities. To its credit, the U.S. will most likely meet its commitment as a key member of the Global Partnership against the Spread of Weapons and Materials of Mass Destruction to invest 10 billion dollars to "eliminate[e]...WMD stockpiles and...keep these weapons and related material and technology from falling into the hands of terrorists."[96] As part of the ongoing Global Partnership negotiations, the United States should encourage all governments possessing weapons-grade or industrial nuclear materials to appoint counter proliferation officials solely responsible for controlling WMD and fissile materials.[97]

It is possible that the National Counterproliferation Center (NCPC) that was also created by the 2004 Intelligence Reform Act could be a useful coordinating mechanism for U.S. initiatives. Like the National Counterterrorism Center (NCTC), the NCPC has both an intelligence and an operational planning function. Unlike the NCTC, the NCPC is not required just suggested.[98]

98 The Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458). Op. cit. Sec. 1022.

Current problems also demand attention:

In refocusing its counterinsurgency strategy, the U.S. must address several other broad, immediate challenges.

Prepare for a long-term struggle in Iraq–and win!

The Salafists realize that the stakes in Iraq are enormous, and have made this new state a key battleground in their global insurgency. The elections in January were a strategic victory for the Iraqi people. In spite of dire warnings from Salafist insurgents and predictions of widespread bloodshed, on January 30, 2005, 58 percent of the Iraqi population went to the polls in a relatively peaceful election. Despite the Sunni boycott, the elections produced a government representative of 80 percent of the population. More broadly, the Iraq election underscored President Bush's resolve to "seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in [the] world."[99]

The continued strengthening of the Iraqi insurgency, however, brings challenges for both U.S. security and the progress toward viable Iraqi statehood. A 2004 CIA study states that "Iraq and other possible conflicts in the future could provide recruitment, training grounds, technical skills, and language proficiency for a new class of terrorists who are 'professionalized' and for whom political violence becomes an end in itself."[100] The increasingly focused ability of the insurgents to strike politically sensitive targets, despite concerted–and successful–efforts by Iraqi and coalition forces in capturing operatives, makes it more difficult for the elected interim government to continue the electoral processes that will result in the much-awaited ratification of the Constitution and the elections in early 2006.[101] The insurgency has also slowed much-needed economic reform and initiatives, as well as social programs designed to create a functioning, stable state.

Sunni Salafist hatred of the Shia further intensifies the conflict, driving it towards the brink of civil war. As early as December 2004, Salafist insurgents specifically targeted the Shiite Imam Ali and Imam Hussein shrines in Najaf and Karbala, respectively, undoubtedly hoping to incite sectarian violence and derail the electoral process.[102] Widespread distrust exacerbates communal tensions among the Sunni groups, since many Shiites and Kurds view all Sunnis as affiliated with the insurgents. Coalition forces and Iraqi police regularly target Sunnis in the crackdown on the insurgency, and the insurgents themselves at-

99 Cited in Peter Katel. "Exporting Democracy: Will President Bush's Efforts Succeed?" CQ Researcher, Vol. 15, No. 12 (April 1, 2005), 269-292, 271.

100 Ibid., 278.

101 Richard A. Oppel, Jr. "A New Political Setback for Iraq's Cabinet." New York Times, 9 May 2005, A1.

102 See, for example, John F. Burns. "At least 64 dead as rebels strike in 3 Iraqi cities." New York Times, 20 December 2004, A6.

103 Robert F. Worth. "For Some in Iraq's Sunni Minority, a Growing Sense of Alienation." New York Times, 8 May 2005, A1.

tack would-be Sunni middlemen for attempting to negotiate with the government.[103]

Despite their boycott of the January election, the Iraqi government gave Sunnis parliamentary seats, as well as representation on the committee drafting the new constitution. The U.S. and Iraqi governments currently identify Sunni moderates and try to convince them that they have a stake in the new government. This task remains exceedingly difficult, however, since the insurgents continue to target Sunni moderates for assassination.[104] According to one U.S. official with extensive regional experience, "we need people who can go out to places like Tikrit and Ramadi, and persuade them that violence is not the answer."[105]

Heartened and bolstered by the fact that no freely elected government has been deposed by insurgents in modern times, the United States and its allies must now provide the requisite level of security for the political, economic, and social development of a stable and democratic Iraq. Training, equipping, and standing up the Iraqi Security Forces are the keys to security, but the military alone will not defeat the insurgency. The politicians must draft an inclusive constitution and sell it to the Iraqi people, while improving the citizens' lives and protecting their rights. Counterinsurgency campaigns are by their nature long term affairs, lasting for decades. This one must be successful.[106]

Capitalize on Middle East Peace Process Opportunities

The Israeli-Palestinian conflict must remain a vitally important foreign policy priority for the United States. Prior to the 2003 invasion of Iraq, "no other issue... so colored the perception of the United States in the Muslim world."[107] The Untied States has been severely criticized, not only in Islamic nations but also in much of the world, for its lack of involvement in solving the Palestinian problem. The United States will need to stand by its commitment to an independent and democratic Palestine, existing in peace beside Israel. If the United States truly desires success in its counterinsurgency campaign, words and deeds must match. The death of Yasser Arafat opens up a great opportunity to re-energize the talks leading to an independent Palestine.108 Moreover, bring-

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104 See most recently Dexter Filkins and David S. Cloud. "Defying U.S. Efforts, Guerrillas in Iraq Refocus and Strengthen." New York Times, 24 July 2005, A1.

105 Worth.

106 Eliot A. Cohen. "A Hawk Questions Himself as his Son Goes to War", Washington Post. 10 July 2005, B1.

107 National Strategy, 24. Now, of course, Iraq has become the dominant issue in the Muslim world.

108 In a speech given at the White House on 24 June 2002, President Bush stated that "My vision is two states, living side by side in peace and security." Cited in Robert E. Hunter and Seth G. Jones, "An Independent Palestine, the Security Dimension." International Affairs, Vol. 80, No. 2, (2004), 203.

109 See, for example, Deputy Secretary of State Richard Armitage, quoted in Levitt. The entire piece by Levitt provides an excellent description of Hezbollah's activities, clearly outlining the threat posed by this dangerous group.

ing peace to the Middle East would deal a major blow to Hezbollah, described by many as "the A team of terrorism."[109]

The United States must play a lead role in uniting the international community behind any solution worked out between the Israelis and Palestinians. The United States must lead both sides to the creation of a viable Palestinian state. Vitally important in the struggle against Islamist extremism, a Palestinian state would remove an important motivating factor bringing individuals throughout the Sunni Muslim world to the Salafist cause.[110] Visible, verifiable, and unwavering U.S. commitment would also address the fundamental concern expressed in the surveys of Muslim sentiment cited above regarding U.S. policy. Not only advocating, but creating the conditions necessary for a Palestinian state, including gaining the support of the Palestinian people to the point that Hamas and other groups view terrorist tactics, rather than a role in politics, as too costly, offers just the sort of policy shift that would convince many fence-sitters that the United States is serious about creating a stable civil society in the Middle East. This effort, argues Dennis Ross, former Special Middle East Coordinator and envoy to the region, is vitally necessary.[111]

To solve the Israel/Palestine issue, the international community must without question make a strong, concerted effort. As noted by Martin Indyk, incremental negotiations between the two sides have failed repeatedly, and will continue to do so absent a strong international commitment to alter the status quo.[112] One idea gaining steam in both the United States and European NATO country policy circles involves a NATO peacekeeping force deployed to Gaza and the West Bank following an agreement and Israeli pull-out. Such a force would address Israeli concerns about maintaining security post-pullout, making an initial agreement easier to reach. This idea would be good both for NATO and the United States. On the one hand, a solution of the Palestinian problem would provide proof of NATO's capacity to enforce peace accords, and on the other, promotion of a post-agreement NATO force would illustrate Washington's embrace of multilateralism.[113]

The NATO peace-enabling force would undertake tasks of monitoring and patrolling borders and checkpoints using both mobile and static means, ensuring compliance with whatever agreement was worked out, facilitate confidence-building measures such as prisoner exchanges, act as an information

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110 The Salafist extremists themselves will violently oppose any Israeli-Palestinian settlement. However, the most important factor here is that a settlement will go a long way towards driving a wedge between Muslims "on the fence" and the Salafist factions, decreasing the pool of potential Salafist recruits.

111 Dennis Ross. "The Middle East Predicament ." Foreign Affairs, Vol. 84, No. 1, (January-February 2005).

112 Martin Indyk. "A Trusteeship for Palestine?" Foreign Affairs, Vol. 82, No. 3 (May-June 2003), cited in Everts, 665.

113 Everts, 672.

114 Hunter and Jones, 212-213.

conduit from other regional states to the two parties, and supervise population transfers.[114] Rules of engagement would have to be carefully thought through and defined, based on concrete assertions from both sides that neither will return to armed conflict. Although a successful solution demands meaningful Hamas participation in the negotiation process, Hamas could be incorporated into the political process given its reduced expectations and increased pragmatism.[115]

Endgame

The National Strategy is designed to ultimately reduce the geographic reach of the insurgents and diminish their lethality (see Figure 2). Operating through a global community of shared interest, initiating and strengthening political, economic, and social programs to address the root causes of the insurgency, and pursuing mutually beneficial campaigns to kill or capture the insurgents
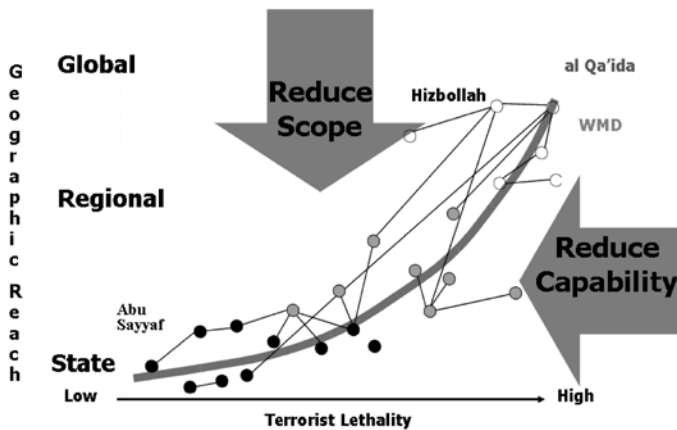
Figure 2. Endgame: Executing the Strategy

will reduce the magnitude of insurgent activities, shrinking Salafist operations from the global to the regional, then to the state, and ultimately to the local level. Implementing the counterproliferation imperatives discussed earlier will keep nuclear weapons and materials out of the hands of the insurgents, precluding future devastating attacks against the United States or other countries.

Strong local police forces operating in an efficient and honest judicial system will constitute the most effective defense against insurgent groups. Because disrupting and halting insurgent violence entails intensive, sustained police action, U.S. aid to host countries' judicial systems, including both law enforcement and legal/institutional elements, must be consistently applied. The U.S. federal, state, and local law enforcement elements must work in concert with

their foreign counterparts to detect the threat, share information, and act decisively.

After curtailing the global reach of the Salafist franchises and reducing their capability to commit violence, (i.e. forcing them into the lower left quadrant of Figure 2), the United States, its allies, and host countries cannot ease the pressure. Recent experience with the Abu Sayyaf Group (ASG) in the southern Philippines serves as a cautionary tale of how independent and networked insurgent groups can quickly reconstitute following a setback. The ASG's leader, Abu Sabaya, was killed along with other key leaders in June 2002 following a prolonged and combined Filipino/U.S. operation in Zamboanga Province. The Philippine government declared the group mortally wounded and U.S. support paused. However, in the absence of continued government pressure, the ASG recovered. In February 2003, the de facto operations officer of the group, Abu Soliman, announced plans for a "welcome party" for U.S. troops on a military exercise.[116] The ASG backed up this threat with action and continues to kill Americans and Filipinos, as well as take hostages. The United States and its allies cannot afford to take pressure off these types of groups.

The United States must retain the will to stay the course for as long as it takes to reduce the threat posed by the Salafist insurgents. The National Strategy recognizes that this is a long-term struggle. It declares, "We will be resolute. Others might flag in the face of the inevitable ebb and flow of the campaign… But the American people will not. We understand that we cannot choose to disengage from the world, because in this globalized era, the world will engage us regardless."[117] However, because our struggle will constitute a prolonged American "test of will" like the Cold War, spanning many presidencies, we cannot afford to let U.S. counterinsurgency efforts become a domestic political issue. The continued escalation of the current bickering and charges could erode America's patience and resolve, ultimately causing a premature withdrawal from key battleground states. For the good of the country and the world, both political parties must act responsibly, and conduct debates on the foreign and domestic policy issues associated with the counterinsurgency campaign in a civil, bi-partisan manner.

The American people need to perceive some measure of progress in the struggle. To ensure the strategy's longevity, robustness, and nonpartisanship, performance metrics appropriate to the counterinsurgency must be created, distributed, and emphasized in policy discussions. The announcement by the state department to stop publishing terrorism statistics as part of its annual

116 Arlyn de la Cruz. "Abu Sayyaf prepares 'welcome' for U.S. Forces." Philippine Daily Inquirer, 19 February 2003, retrieved from www.inq7.net.

117 National Strategy for Combating Terrorism, 29-30.

118 For a good description of the arguments on both sides, see Susan B. Glassner. "Global Terrorism Statistics Debated; New Report Leaves Some Wondering How to Measure the Number of Attacks." Washington Post, 1 May 2005, A23.

119 A possible title is "Patterns of Global Extremism".

Patterns of Global Terrorism report sends the wrong signal to the American peo-
ple.[118] This report, perhaps reformatted with a new title and compiled specifically to
measure the results of actions taken as part of the recast National Strategy, would
be a useful tool to better inform the American people and retain their support.[119]

Challenge and Providence

Thus far, the United States has successfully prevented further attacks on the
homeland, and has killed and captured large numbers of the enemy. Some analysts
even argue that the Salafists may already be losing the strategic struggle.120 The
United States has assembled an effective coalition to carry on the long-term fight,
but it needs more international support. Allied success has led the enemy to shift
attacks to other geographic regions and against softer targets, in attacks which have
killed and injured Americans and U.S. allies, as evidenced by the July 7, 2005 co-
ordinated attacks in London. We can expect these tactics to continue, and for bin
Laden and the Salafists to broaden the war between Islam and the West. Additional
terrorist attacks at home and abroad are likely, and the insurgents will surely use
WMD if they possess such weapons. U.S. popularity abroad is at an all-time low,
and many new recruits have joined the insurgency as a result of perceived U.S. in-
sensitivity and unilateralism. The stakes in Iraq are immense, since the threat of a
democratic state has energized and focused the extremists. Survival of a democratic
Iraq would deal a terrible blow to the Salafist insurgency and constitute a major
victory for the U.S. global counterinsurgency campaign.

Time does not appear to be on our side. As the scope and intensity of the con-
flict increases, the United States faces increasing pressure to drive a wedge between
the extremists and the rest of the Islamic world, in so doing preempting Osama
bin Laden and the Salafist franchises' ability to persuade Muslims to join the fight
against a common enemy–the United States (and the West).

Every nation in the world will feel the impact if Osama bin Laden and his fellow
Salafists achieve victory in this struggle. The creation of Salafist states and regions
will have a devastating impact on the world order as we know it today. It is in ev-
ery country's best interest to work together to combat this Salafist insurgency and
benefit from a safer world. The opportunity exists for mutually beneficial, win-win
outcomes in place of the zero-sum games that characterized international conflict
throughout the Cold War, but making these outcomes a reality will require state-
craft of the highest order.

While that earlier struggle provides stark contrasts to today's global counter-
insurgency, striking similarities do exist. George F. Kennan wrote at the height of
the Cold War:

> In the light of these circumstances, the thoughtful observer of Rus-
> sian-American relations will experience a certain gratitude for a Providence
> which, by providing the American people with this implacable challenge, has
> made their entire security as a nation dependent on their pulling themselves

together and accepting the responsibilities of moral and political leadership that history plainly intended them to bear.121

The neoconservative thinker Norman Podhoretz is absolutely correct in urging us to take Kennan's statement to heart, changing "Russian-American relations" to "global Islamic extremist insurgency."122 We should keep Kennan's words foremost in our minds as we transition to fighting a long-term global counterinsurgency campaign. We must seize the opportunity to do things better, with ingenuity, innovation, and the strength of the American people. Actions by the United States as it opposes this threat will determine the course of the 21st century.

ALTERNATIVE VIEWS OF THE TERRORIST THREAT

The Global Salafi Jihad

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The Evolution of the Global Salafi Jihad Ideology

The History of the Global Salafi Jihad

Methodology

Profiles of the al-Qaeda Terrorists

Group Dynamics

Network Analysis

Conclusion

The terrorist threat to the United States comes from a violent Islamist born-again social movement, united by a utopian vision of justice and fairness. The effort to deal with this threat is hampered by common beliefs about terrorism. The conventional wisdom offers several explanations: they are products of poverty and broken families; ignorance; lack of skills and opportunities; lack of occupational or family responsibilities; weak-mindedness and vulnerability to brainwashing; mental illness, psychopathy, or sociopathy; plain criminality, religious fanaticism, or simply evil. The present study attempts to empirically test this conventional wisdom through accumulation and analysis of biographical data on the terrorists who wished to harm the United States. (Sageman, 2004).

Traditionally, the study of terrorism has been slowed by attempts to define terrorism. A common quip is that one man's terrorist is another's freedom fighter. So, the first task was to identify whom to include in this sample. This study was interested only in the terrorists connected to the perpetrators of the attacks of 9/11. The sample was constructed by starting from the index perpetrators of the 9/11 attacks, and adding people who were operationally linked with them. In the process, it was discovered that other terrorists such as the Palestinian terrorists or Tamil Tigers, whom many people lump together, were not linked to the 9/11 perpetrators. However, the perpetrators were part of a larger violent social movement and it became important, in extending the sam-

ple, to delineate who belongs in the sample, to define the threat to the United States.

The terrorists who flew into the World Trade Center and the Pentagon and crashed in a field in Pennsylvania on September 11, 2001 were part of al-Qaeda. The term al-Qaeda is confusing, because it refers both to a specific organization and to a more diffuse and global social movement at war with the United States. Al-Qaeda, the formal organization, is the vanguard of this violent Islamist revivalist social movement. The rest are fellow traveler terrorists who belong to this terrorist social movement, which I called the global Salafi jihad, because many of the terrorists are not formally in al-Qaeda, in the sense of swearing an oath of loyalty to Osama bin Laden, its leader. They are included in the sample because they belong to this social movement, whose nature we need to understand.

The Evolution of the Global Salafi Jihad Ideology

This terrorist social movement is held together by a common vision. This arose in the context of gradual Muslim decadence over the past five hundred years, during which Islam fell from its dominant position in the world. Because Islam claims to be the last and perfect revelation from God, this decline presents a problem. Many explanations, secular and religious, have tried to deal with this obvious mismatch between claim and reality. One of the more popular religious explanations is simply that Muslims have strayed from the righteous path. The source of strength of the original and righteous Muslim community was its faith and its practices, which pleased God. Recapturing the glory and grandeur of the Golden Age requires a return to the authentic faith of the ancient ones, namely the Prophet Mohammed and his companions, the Salaf, from the Arabic word for predecessor or ancient one. The revivalist versions of Islam advocating such a return are called Salafi. Their strategy is the creation of a pure Islamist state, which would create the conditions for the re-establishment of such a community.

Most Salafists advocate a peaceful takeover of the state, either through face to face proselytism or the creation of legitimate political parties. Their peaceful strategy was undermined by President Nasser's brutal crackdown in the name of a pan-Arabist socialist project. Some Islamists like Sayyid Qutb concluded that Nasser would never give up power peacefully and preached his violent overthrow (Qutb, n.d.). He argued that Muslim countries had reached a state of decadence, injustice and unfairness, which was similar to the state of barbarism, jahiliyya, prevailing in the Arabian Peninsula just before the revelations of the Quran. This was due to a "crisis of values," namely greed, corruption, and promiscuity, which could only be redressed from above by capturing the state. Because their rulers were accused of having abandoned true Islam, they were branded apostates, and the Quranic punishment for apostasy was death.

Mohammad Abdal Salam Faraj (Faraj, 1986) further claimed that the violent overthrow of these rulers, the "near enemy," was the forgotten duty of each Muslim, a sixth pillar of Islam.

The Soviet invasion of Afghanistan internationalized the militant Islamist movement. Sheikh Abdallah Azzam preached a traditional jihad against the Soviet invaders. Many militants from all over the Muslim world answered his call. As the Soviets withdrew, Azzam extended the defensive jihad into a more global one. He preached that all former Muslim lands dating back to the 15th century, from the Philippines to Spain, had to be liberated from the infidels. After the Soviet withdrawal from Afghanistan, these militants focused on the other lands under infidel occupation. They gathered in the Sudan where they held intense discussions about their failure to capture a core Arab state and transform it into an Islamist state. Some militants, led by Osama bin Laden, argued that this failure was due to the United States propping up the local regimes. The strategy that the most militants advocated was to switch priorities and fight the "far enemy" (the United States and Jews) in order to expel them from the Middle East, so that they could overthrow the "near enemy", their own regimes. This argument split the Islamist militant community, for many did not want to provoke and take on a powerful enemy like the U.S. Osama bin Laden and his followers returned to Afghanistan and declared war on the United States (bin Laden, 1996). In February 1998, bin Laden extended his "Jihad against Jews and Crusaders" to civilians outside the Middle East, ruling that "to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible to do it" (bin Laden, 1998).

With the evolution of this ideology and social movement in mind, it is now possible to select the terrorists that belong in this sample. They are those who use violence against any foreign or non-Muslim government or population (the "far enemy") to establish an Islamist state, based on their utopian conception of the Salaf.

The History of the Global Salafi Jihad

The historical roots of the present terrorist Islamist revivalist social movement go back to Egypt in the 1970s, when President Anwar al-Sadat encouraged the formation of Islamic societies at universities to counter the leftist supporters of Nasser. Some of these militants adopted the radical views of Qutb and Faraj and turned against Sadat himself when he made peace with Israel. They were responsible for his assassination in 1981. Most of these militants were arrested and tortured in a crackdown after this assassination. Those not directly involved were released three years later and found their way to Afghanistan, in support of Sheikh Azzam's jihad against the Soviets.

The presence in Afghanistan and Peshawar of so many Islamist militants from all over the world transformed the jihad from a collection of local attempts to overthrow their governments to a more international movement reclaiming former Muslim lands lost to the infidels over the past five centuries. After the victory in Afghanistan, most of the foreigners returned to their countries. But those who could not, mostly because of prior terrorist activities at home, stayed behind and became the nucleus of al-Qaeda, the organization. After many Middle Eastern countries complained to Pakistan that it was harboring terrorists, Pakistan expelled them. The most militant went to the Sudan, invited by the new militant regime of Hassan al-Turabi, who tried to unify the disparate local Islamist terrorist movements under one umbrella. His greatest supporter in this enterprise was Osama bin Laden, who set up camps in the Sudan and Afghanistan for the training of terrorists coming from the whole world. During this Sudanese episode, the most militant terrorists switched priorities to target a common enemy, the United States. The imposition of international sanctions on the Sudan after its support for a serious assassination attempt on Egyptian President Hosni Mubarak during a state visit in Addis Ababa, Ethiopia forced the Sudan to expel the terrorists. The few Islamist militants who agreed with bin Laden's strategy of going after the "far enemy" returned to Afghanistan, and within two months of their arrival, declared war on the United States. So the threat to the United States came from a process of self selection, in which the most militant of the most militant of the most militant switched their targets from their own governments to the United States.

The return to Afghanistan heralded the start of a close collaboration with the Taliban leader Mullah Omar, who provided sanctuary to the now-global Salafi jihad. This allowed Osama bin Laden to gain control over this social movement through his monopoly on training and funding support for the various local Islamist terrorist groups scattered around the world. This gave the appearance of a hierarchical organization, with al-Qaeda (Osama bin Laden's organization) at the top with strong command and control over the whole movement. During the five years leading to September 11, 2001, this was mostly true, as bin Laden and his lieutenants provided training for local Islamist terrorists, housed them and their families in protected areas in Afghanistan, supported them with logistics and funds, and gave advice on their operations. In a sense, for about five years, Osama bin Laden achieved in Afghanistan what Turabi had tried to do in the Sudan.

U.S. reaction to the 9/11 terrorist operation changed the movement. The elimination of sanctuaries in Afghanistan, the destruction of the training camps and the disruption of the financial "golden chain" for the jihad undermined bin Laden's and al-Qaeda's control over the social movement, which degraded back into smaller local networks of operatives, now linked through the Internet. To the extent that these smaller clusters of terrorists respond to the Salafi vision

and general guidance from al-Qaeda, they are still part of this global Salafi jihad. There is no more need for a strong command and control structure. Now, this social movement is self generated from below, very similar in structure and behavior of the World Wide Web itself, which shows that there is no need for top-down control for the network to grow and prosper.

Methodology

The present study is based on the collection of biographical details of people who belong to this global Salafi jihad. There is a paralyzing assumption in terrorism research that there is no good data for research. First, terrorists would not grant interviews to serious researchers for security reasons. Second, the state would not grant access to captured terrorists for national security reasons. Third, one is never sure whether the terrorists would be honest with the interviewer. This has prevented the emergence of evidence-based terrorism research. However, with the development of the Internet, open source data has become more available even in one's home. All the data collected for this study came from the public domain. I did not have direct access to the terrorists or to any governments' secret reports. Despite the problems listed above, there is enough information in open sources to support an empirical analysis of the global Salafi jihad. My sources included the documents and transcripts of legal proceedings involving global Salafi terrorists and their organizations, government documents, press and scholarly articles, and Internet articles. The information was often inconsistent. I considered the source of the information in assessing facts. In decreasing degrees of reliability, I favored transcripts of court proceedings subject to cross examination, followed by such government documents as The 9/11 Commission Report, followed by reports of court proceedings, then corroborated information from people with direct access to the information provided, uncorroborated statements of people with that access, and finally statements from people who had heard information secondhand. "Experts" fall into the last category, for their reliability as sources of information depends on their diligence as historians.

The collected information suffers from several limitations. First, the terrorists selected are hardly representative of the global Salafi jihad as a whole. Journalists and scholars tend to focus on the unusual: leaders, people they can investigate and unusual cases. This bias toward leaders and unusual cases tends to ignore those who cannot be investigated and downplays the rank and file. Second, reliance on journalistic accounts is fraught with danger. In the rush to publish, the initial information may not be reliable. Lack of direct access to information feeds the wildest rumors, and journalists are born storytellers, who fill in gaps in knowledge. These initial inaccuracies can be corrected by following the developing stories over time, rather than simply relying on initial reporting. Third, reliance on retrospective accounts from principals and witnesses are subject to the biases of self-report and flawed memory. These

accounts were often the only available information, and were very occasionally able to be corroborated with existing contemporaneous documents. Finally, there is a lack of a relevant control group that would allow the generation of statements specific to the terrorists. It is difficult to make specific statements about these terrorists without comparison to a group of Muslims with similar backgrounds and activities who did not participate in terrorism despite having had an opportunity to do so.

Nevertheless, the hope is that even though each piece of information may be of questionable validity, the emerging pattern would be accurate given the large numbers involved. A description of the potential sample might be able to support or refute the conventional wisdom about al-Qaeda terrorism. Using the definition of a terrorist elaborated in the previous section, I was able to identify 394 terrorists, on whom there existed enough background information to include them in empirical generalizations as to age, origin, religious commitment, and education. I was able to codify these factors in a matrix with 34 variables, most of which dealt with the terrorists relationships to each other.

Profiles of the al-Qaeda Terrorists

As mentioned above, the common stereotype is that terrorism is a product of poor, desperate, naïve, single young men from third world countries, vulnerable to brainwashing and recruitment into terrorism. Unpacking this formula, the geographical origins of the mujahedin should be not only in the third world, but in some of the poorest countries of the third world. It also implies that they come from the lowest socio-economic strata. Their naïve vulnerability implies that they either are brainwashed early into hatred of the West or are relatively uneducated and susceptible to such brainwashing as young adults. In this sense, they are relatively unsophisticated and local in their outlook. A broad experience of the world might be protective against the alleged brainwashing that presumably led to their conversion to terrorism. The desperation implies that their occupational opportunities are extremely limited. They are single, for any strong family responsibilities might prevent their total dedication to a cause that demands their ultimate sacrifice.

In fact, most of the global Salafi terrorists come from core Arab countries, immigrant communities in the West, Indonesia, or Malaysia. They do not come from the poorest countries in the world, including Afghanistan. Surprisingly, there is no Afghan in my sample. In terms of socio-economic background, three-fourths come from upper- and middle-class families. Far from coming from broken families, they grew up in caring intact families, mildly religious, and concerned about their communities. In terms of education, over 60 percent have some college education. Most are in technical fields, such as engineering, architecture, computers, medicine, and business. This is all the more remarkable because college education is still relatively uncommon in the countries or immigrant communities from which they come. Far from being

immature teenagers, the men in my sample joined the terrorist organization at the average age of 26. Most of the terrorists have some occupational skills. Three-fourths are either professional (physicians, lawyers, architects, engineers, or teachers) or semi-professionals (businessmen, craftsmen, or computer specialists). They are solidly anchored in family responsibilities. Three-fourths are married and the majority have children. There was no indication of weak minds brainwashed by either their family or their education. About half of the sample grew up as religious children, but only 13 percent of the sample, almost all of them in Southeast Asia, were madrassa educated. The entire sample from the North African region and the second generation Europeans went to secular schools. About 10 percent were Catholic converts to Islam, who could not have been brainwashed into Islam as children.

Another popular set of explanations of terrorism centers on mental illness or innate criminality. Such popular explanations are based on the belief that "normal" people do not kill civilians indiscriminately. Such killing, especially when combined with suicide, is viewed as irrational. The mental illness thesis is dealt a strong blow by the fact that only 1 percent of the sample had hints of a thought disorder, which is below the base rate for thought disorder worldwide. A variant of the abnormality thesis is that terrorists are sociopaths, psychopaths, or people with antisocial personality disorder. These terms are used to mean that terrorists are recidivist criminals, due to some defect of personality. Such recidivism implies that this personality defect had some antecedents in childhood. Out of the third of my sample where I had some fragment of childhood data, less than 8 percent showed evidence of a conduct disorder. The rest of this group seems to have had a normal childhood without any evidence of getting in trouble with the law.

On a logical basis, although antisocial people might become individual terrorists, they would not do well in a terrorist organization. Because of their personalities, they would not get along with others or fit well in an organization, and indeed would be least likely to join any organization that would demand great sacrifices from them. They would be weeded out early if they attempted to join. Likewise, very few people in my sample had any criminal background. Those who did came from the excluded North African immigrant community in Europe and Canada, where they resorted to petty crime to survive. But there were no previously violent criminals in this sample. Therefore, it is more parsimonious to argue that in an organized operation demanding great personal sacrifice, those least likely to do any harm individually are best able to do so collectively.

The failure of mental illness as an explanation for terrorism is consistent with three decades of research that has been unable to detect any significant pattern of mental illness in terrorists. Indeed, these studies have indicated that

terrorists are surprisingly normal in terms of mental health (Silke, 1998 and 2003).

Group Dynamics

The above findings refute the conventional wisdom about terrorists. The global Salafi terrorists were generally middle-class, educated young men from caring and religious families, who grew up with strong, positive values of religion, spirituality, and concern for their communities. They were truly global citizens, conversant in three or four languages, and skilled in computer technology. One of the striking findings of this sample is that three-fourths of the terrorists joined the jihad as expatriates, mostly as upwardly mobile young men studying abroad. At the time, they were separated from their original environment. An additional 10 percent were second generation in the West, who felt a strong pull for the country of their parents. So a remarkable 84 percent were literally cut off from their culture and social origins. They were homesick, lonely, and alienated. Although they were intellectually gifted, they were marginalized, underemployed and generally excluded from the highest status in the new society. Although they were not religious, they drifted to mosques for companionship. There, they met friends or relatives, with whom they moved in with, often for dietary reasons. As their friendships intensified, they became a "bunch of guys," resenting society at large, which excluded them, developinga common religious collective identity, and egging themselves on to greater extremism. By the time they joined the jihad, there was a dramatic shift in devotion to their faith. About two-thirds of those who joined the jihad did so collectively with their friends or had a long time childhood friend already in the jihad. Another one-fifth had close relatives already in the jihad. These friendship or kinship bonds predated any ideological commitment. Once inside the social movement, they cemented their mutual bonds by marrying sisters and daughters of other terrorists. There was no evidence of "brainwashing:" the future terrorists simply acquired the beliefs of their friends.

Joining this violent social movement was a bottom-up activity. Al-Qaeda had no top-down formal recruitment program. There was neither a central committee with a budget dedicated to recruitment nor any general campaign of recruitment, because there was no need for either. There were plenty of volunteers who wanted to join the jihad. Al-Qaeda's problem was never recruitment but selection. It was akin to applying to a very selective college, in which many apply but few are accepted. Likewise, al-Qaeda was able to assess and evaluate potential candidates who showed a desire to join by coming to Afghanistan for training. It invited only about 15 to 25 percent of that group to join the jihad. However, this reliance on self-recruits had a drawback, namely gaps in the distribution of the jihad. One of the gaps was the United States. The few volunteers from the United States who came to Afghanistan to join the jihad were shocked by the anti-Americanism in the training camps, which was based on beliefs and

ideas about the United States that they knew from personal experience to be false. Some, like the Lackawanna Six, tried to leave early or simply forget about this experience. Because of this gap, al-Qaeda had to import terrorists from elsewhere to wage their war on U.S. soil. This was easier to do before 9/11 when there was easy access to Saudi citizens. But since 9/11, the United States has hardened the entry to the country and increased its vigilance against suspicious foreign activities, making such operations much more difficult. The lack of an indigenous terrorist population ("sleeper cells") and the hardening of the U.S. target account for the lack of major al-Qaeda operations in the United States. In contrast, most of the global Salafi jihad operations conducted elsewhere in the world after 9/11 relied heavily on indigenous global Salafi terrorists.

The process just described is grounded in social relations and dynamics. To look at it through individual lenses, as a Robinson Crusoe on a deserted island narrative, is to miss the fundamental social nature of this process. And this is where women play a critical role. So far the account of the global Salafi jihad seems to be a purely male story of heroic warriors fighting the evil West. Yet, women also play a critical role in this process by providing the invisible infrastructure of the jihad. As influential parts of the social environment, women often encourage their relatives and friends to join the jihad. Many Christian converts or secular Muslims joined because of marriage to a committed wife. Indeed, invitation to join the Indonesian Jemaah Islamiyah depends on the background of the applicant's spouse. And once in the jihad, single members often solidify their participation by marrying the sisters of other members. This further separates the new recruit from the rest of society and increases his loyalty to the social movement.

So far, this account has neglected the religious ideological contribution to the transformation of alienated young Muslims into fanatic terrorists. The specific interpretation of Islam that promoted this violent strategy with respect to the United States played a crucial role in this transformation by providing the script for these distressed cliques of men to follow. Very few mosques worldwide preached this aberrant strategy to transform society using the utopian Salafi community as a model. Indeed, about 10 mosques worldwide generated about 50 percent of my sample. This is a very small number, suggesting that the global Salafi jihad is a small collection of localized networks of people rather than a single, more widely, and randomly distributed network.

This script stressing the justice and fairness of the original Muslim community appeals to gifted young men, excluded from the higher rewards of society. Combined with natural group processes, it transforms their values to conform to those of their ever closer friends. Faith and commitment are grounded and sustained in intense small group dynamics as friends and peers provide support and strength to help cope with any potential hardship. These born-again believers welcome struggles in this life as a test of their faith. Over time,

"authentic" Islamic spirituality and religious growth replace dominant "Western" values of career advancement and material wealth, which had contributed to their original feelings of exclusion, frustration, unfairness, and injustice. They embrace Qutb's diagnosis that society faces a "crisis of values," for its main problems are not material, but spiritual. The progressive detachment from the pursuit of material needs allows them to transcend their realistic frustrated aspirations and promotes satisfaction with spiritual goals more consistent with their limited resources and opportunities, relieving the malaise arising from their exclusion and marginalized status. Their sacrifice and participation in this Islamist vanguard provide them with a sense of moral superiority, optimism, and faith in the collective future. Their activism and firm belief in the righteousness of their mission generate a sense of efficacy that enables them to overcome the apathy and fear that would otherwise inhibit high-risk terrorist operations. Over time, there is a general shift in values: from the secular to the religious; from the material to the spiritual; from short-term opportunity to long-term vision; from individual concerns to communitarian sacrifice; from apathy to active engagement; from traditional morality to specific group morality; and from worldly gains to otherworldly rewards. This transformation is possible only within intense, small group, face-to-face interactions. The values and fellowship of these groups not only forge intense bonds of loyalty and a collective identity but also give a glimpse of what a righteous Islamist society could be like. The small size of these cliques and the mutual dedication of their members allow them to spontaneously resolve their problems among themselves. The quality of these small and dense networks promotes in-group love, transforming self-interest into self-sacrifice for the cause and comrades. The militants' experience in these groups deludes them into believing that social problems would also be spontaneously resolved in a righteous Islamist society, accounting for their curious lack of concern about what this ideal society would actually look like or how it might function politically or economically.

On a less positive perspective, these same group dynamics account for their hatred of Jews and the United States, as illustrated by police wiretaps of their apartments in Montreal, Hamburg, and Milan. This hatred is grounded in their everyday experience of humiliating exclusion from society at large and promoted within the group by a vicious process of one-upmanship of mutual complaints about the alienating society. This "bunch of guys" phenomenon escalates resentment into a hatred and rejection of the ambient society itself. They expressed their hatred by cursing its symbols and legitimizing myths and by endorsing a conspiracy theory of Jews corrupting a now totally degenerate and unredeemable society. The wiretaps give a hint of this visceral hatred that seeks to destroy society even at the cost of their own lives. This virulent rejection of society finds a home in the doctrine of takfir or excommunication of

society, which is popular in militant circles and sanctions the commission of crimes against infidels in the pursuit of the jihad.

This trajectory from low-risk participation with an increasingly closer set of friends, to medium-risk proselytism for an ideal way of life, to high risk terrorist activities, is a progressive and insidious one. This progression embraces an ideology that frames activism as a moral obligation demanding self-sacrifice and unflinching commitment to the jihad. This particular interpretation of Islam stands apart in challenging the validity of mainstream Islamic faith and practices, and it isolates the new adherents to this doctrine. Their self-sacrifice is again grounded in group dynamics. The terrorist is ready to show his devotion to his now exclusive friends, their group, and their cause by seeking death as a way to show his devotion to all of them. In-group love combined with out-group hate is a strong incentive for committing mass murder and suicide.

Network Analysis

The above analysis suggests that this form of terrorism is an emergent quality of dense networks rather than an aberration based in individual pathology. Conducting a qualitative social network analysis on this sample generates statements that simply cannot be generated from a more individualistic perspective.

The topology of the network representing the interpersonal links in the global Salafi jihad is divided into four major clusters of terrorists that evolved individually into four different structures. There are many links between members within a specific cluster, but very few spanning two large clusters. At the center is the Central Staff cluster, which used to connect to the rest of the clusters before the U.S. fall 2001 campaign against al-Qaeda dramatically interfered with its communication to the social movement, and broke its operational links to the other clusters. This Central Staff consists mostly of Egyptian Islamist militants who were released from prison after Sadat's assassination and went to Afghanistan to join the jihad against the Soviets. They formalized their bonds of friendship and kinship into al-Qaeda proper after the Soviets announced their intention to withdraw. They provide the leadership, training, and ideological guidance to the movement. The structure of this cluster is difficult to describe, as most of their relationships date back to the 1970s in Egypt. It is both an informal self-organizing group of friends forged during their militant activities in Egypt and during their fight against the Soviets, and a hierarchical organization with bin Laden as its emir, supported by a shura composed of about a dozen members and dominated by Egyptians. The al-Qaeda staff is divided into four committees: finances, military affairs, religious affairs, and public relations.

A second cluster consists of the Southeast Asian part of the social movement, dominated by the Jemaah Islamiyah, which is hierarchically organized

around the leadership of Abu Bakar Baasyir. This cluster evolved out of the recruitment of Baasyir's students at his two schools, Pondok Ngruki in Indonesia and Pesentren Luqmanul Hakiem in Malaysia. As would be expected from top-down recruitment of former disciples, this cluster looks like a rigid pyramid, where all the significant decisions are taken at the top and show very little local initiative. This cluster is vulnerable to decapitation if the political will to destroy this cluster existed. This cluster has been mostly eliminated in Malaysia through aggressive government counter-terrorist action but still exists in Indonesia due to internal political reasons. This type of structure may also promote splinter group formation in the future, as has been the case in the Philippines.

The other two clusters constitute the great majority of the global Salafi terrorist social movement. They consist of Core Arabs coming out of core Arab countries from the Arabian Peninsula, Jordan, and Egypt; and Maghreb Arabs coming out of Tunisia, Algeria, and Morocco and their expatriate communities, mostly in France. These clusters organized themselves spontaneously around local charismatic members, often in the vicinity of very radical Salafi mosques. This preferential attachment to the jihad resulted in a small world or cellular structure, which is decentralized with much local initiative and flexibility. As such, this structure is very robust, and resistant against attacks, such as random arrests of its members or decapitation of its leadership.

This small world structure provided for rapid diffusion of terrorist innovation through popular social hubs and provided for flexible communication in all directions, rather than slow and vulnerable vertical communications required in strict hierarchical organizations. This communicative flexibility, based on pre-existing social bonds of kinship, friendship, and later, informal cliques, was a major contributing factor in the successful execution of terrorist operations. These informal communications bypassed the various rules of tradecraft advocated in the terrorist manuals, which reflected a more theoretical orientation to operational security, based on the "need to know" principle. This principle implies a hierarchical topology, with strict vertical communication. Such a communicative topology would ensure the failure of any operation because it would flood the vertical links of communication and prevent people in the field from talking to each other to overcome the inevitable obstacles arising in the field during the execution of a terrorist operation. Informal communications among intimates who knew each other, often from birth, and bypassed this security regulation, violated this rule of tradecraft. This explains an apparent inconsistency found when comparing the actual execution of global Salafi terrorist operations to policies found in their manuals. The execution of their operations was characterized by very poor tradecraft on the part of the terrorists–leaving behind documents which would immediately identify them, not using aliases but real names, using their personal phones when they knew

they could be monitored, and so on. Paradoxically, it is this poor use of trade-craft that made their success possible, especially when the authorities were not paying attention to the threat. In the new post-9/11 environment, this poor tradecraft makes their detection possible and hampers their operation.

After the U.S. intervention in Afghanistan eliminated al-Qaeda command and control, this social movement reverted back to its original morphology. Now, its boundaries have become very fuzzy as these new terrorists no longer formally belong to a terrorist organization. Instead, they are often a "bunch of guys" inspired by al-Qaeda messages on the Internet. There is no fixed num-ber of terrorists. The pool of potential terrorists fluctuates according to local grievances and the world situation. Activated cliques of militant friends swarm together for a specific operation. They do not respond to central command and control anymore, but are self organizing from the bottom up, fueled by local initiative. Like the Internet, they function very well with little coordination from the top. Gaps in the network don't last long, but become opportunities for the most aggressive members to step up and fill the voids created by the elimination of the old leadership. While the old leadership has been gradually eliminated through death and capture, a complete new leadership has been reconstituted. Aggressive new leaders, lacking the training and support of their predecessors, conduct more frequent, reckless, and hurried operations. Often, the time between conception and final execution of the operation is just weeks, not years as was true before the 9/11 operation. The difficulty of communication between the central staff and these local groups has degraded the ability of the social movement to mount operations with the same degree of sophistication and coordination of the 9/11 hijacking and the 1998 East African embassies bombings. The wave of future terrorist operations will be similar in scale and execution to the bombings in Saudi Arabia, Casablanca, Istanbul, and Madrid.

The distribution of the global Salafi jihad is based on the presence of mil-itant mosques preaching the specific script advocating violence against West-ern civilians. This script interprets U.S. foreign political action, and transforms local grievances into global ones. Groups of friends, who had minimal to no previous connection to the movement, may elect to answer these exhortations for violence and carry out terrorist operations. This makes them very difficult to detect beforehand, for the first indication of their participation in the jihad might very well be the successful execution of their operation. This has been the scenario in Casablanca, Istanbul, and Madrid.

The global Salafi jihad is a unique terrorist social movement. Traditionally, terrorist organizations consist of people from country A, living in country A and attacking the government of country A. The global Salafi jihad consists of people from country A, living in country B, and targeting country C. This im-parts a very different dynamic to this terrorist social movement as opposed to more traditional ones. One of the major differences is that because the terrorists

are completely disconnected from their target, they are not socially embedded in the society they target, as is the case of more traditional terrorist organizations. This embeddedness refers to the rich nexus of social and economic linkages between the terrorists and the society they live in. These multiple bonds act as a limit to the damages the terrorists can bring to their environment. The lack of such bonds frees them from this responsibility and local concerns. Unrestrained by any responsibility to their target, this free floating network is free to follow the logic of its abstract ideology and escalate the scale of terror, culminating in the 9/11 operations. This lack of embeddedness in the target society makes possible a strategy of vast devastation and damages against the target, including the use of weapons of mass destruction, which more traditional terrorists would avoid in order not to destroy their own society. This makes the global Salafi jihad especially dangerous to the United States and its allies.

New information technology has made the global Salafi jihad possible. Prior to the 1991 Sudanese exile, Osama bin Laden and his lieutenants could not have led this social movement from the remoteness of Afghanistan. By the time bin Laden returned in 1996, technology had solved his communication problems. Satellite telephones allowed him to speak extensively with his followers in Yemen, England, and Saudi Arabia facsimiles carried his press releases to his London public relations firm and laptops and e-mail made quick and extensive communication possible. The Internet also had a strong impact on the new more sophisticated recruits by diffusing the violent Salafi message of the jihad, bypassing traditional imams. Since most of these computer savvy recruits had little prior religious training, they were most vulnerable to the appeal of such sites that encouraged a very aberrant interpretation of Islam and rejected traditional interpretations of Islam. The more traditional religious teachers simply could not compete with the more sophisticated militant web sites, which did not require much knowledge in religion but a great deal of technical knowledge. The egalitarianism of chat rooms on these sites also fostered a feeling of unity with other members, creating a virtual Muslim community on the web, sustaining and encouraging extreme interpretation of the Quran and world events.

The vulnerability of the new electronic devices to interception has given the Internet more prominence in the global Salafi jihad. After the 1998 embassy bombings, bin Laden discovered through a media leak that the United States was monitoring his satellite phone conversations. He abandoned its use and communicated with his followers via his lieutenants. The post-9/11 crackdown further eroded his ability to communicate with their subordinates in the field. The old al-Qaeda leadership started using Islamist web sites on the Internet as indirect means of communication. This allows it to continue to provide general guidance even if it no longer exerts direct command and control over operations. For instance, it appears that the Madrid bombings were inspired by a

document anonymously posted on the Internet advocating the use of bombs just before the Spanish election in order to influence the government to withdraw its troops from Iraq. In the future, this trend will continue and the leadership of the global Salafi jihad will rely more and more on the Internet to broadcast its message and to discuss tactics, as is already done in the proliferating virtual magazines. Since it is difficult to detect people who read these postings, identification of future terrorists will become even more difficult.

Conclusion

The global Salafi jihad has now become a fuzzy idea-based network, self-organizing from below, and inspired by posting on the Internet. It will expand spontaneously from below according to international political developments, without coordination from above, except for general and blind guidance. From a counter-terrorist perspective, such a loose and ill-defined network does not present hard targets for military options. More subtle methods should be used to disrupt the formation of these networks by changing the social conditions promoting them, and challenging the ideas encouraging mobilization into them.

Fighting such a network requires the United States to address the ideology uniting this social movement. This is something that the American public is loath to do as it believes in transparency, namely that the facts speak for themselves. Any attempt to engage in a war of ideas raises the specter of disinformation or propaganda. But the United States cannot afford to concede this ideological war, waged on the battlefield of interpretations, to the militant Islamists. It needs to develop a coherent and comprehensive strategy to deal with this new and unique threat. This involves discrediting the legitimacy of the leaders and the ideology behind the global Salafi jihad and replacing it with an inspiring vision of a just and fair partnership with Islam. Unfortunately, the United States is poorly set up to wage such a war. Our free media broadcasts statements targeted for domestic consumption anger international audiences, but in politics the domestic agenda will always trump foreign concerns. Such an ideological war would also require the United States to regain the credibility that it has lost in the Muslim world in the past four years because of its lack of evenhandedness in the Israeli-Palestinian problem, its invasion of Iraq on false premises, and its support of repressive Muslim regimes. U.S. words and public diplomacy would need to be matched with deeds to regain this lost trust and credibility. Otherwise, any statement, no matter how laudable, would simply be dismissed as hypocritical and further encourage the spread of the global Salafi jihad.

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Countering the Global Jihad International Terrorism

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The Threat of International Terrorism

Dangerous Characteristics Unique to International Radical Islamic Terrorists

Belief in Divine Command

Battle Seasoned Warriors

Suicide Tactics

Willingness to Use Non-conventional Weapons

The Counter-terrorism Equation

From International Cooperation to a Joint Counter-Terrorism Campaign

Establishing a "League of Nations Fighting Terrorism"

Legislative and Judicial Action

Collecting and Sharing Intelligence

Interdisciplinary Civilian Research

Educational and Informational Activity

Establishing Joint Frameworks of Action

On September 11, 2001, the face of international terrorism changed. From that point forward the world faced a new brand of threat, of a scope and severity that was heretofore unknown. To understand the significance of the threat posed by international terrorism, we need to go back to the Afghanistan War (in the late 1970s and early 1980s), when the Soviet army invaded Afghanistan to support the pro-Communist regime against the threat of the Muslim mujahideen (Coll, 2004). The mujahideen called upon their allies from all over the Muslim world to come to their aid in the battle against the world's second greatest superpower. Volunteers came en masse and joined in the fighting throughout Afghanistan. (Shay, 2002) After 10 years, the mujahideen and Islamic

fundamentalist mercenaries who had come from all over the world scored a stunning victory, and forced the Communist power to retreat unconditionally from Afghanistan. The fundamentalist warriors, flush with victory, needed no other proof that "God was with them," as if only the hand of God could have changed the balance of power so profoundly and led them to victory.

The Threat of International Terrorism

The Muslim mercenaries who had completed their mission now divided into three groups: one group remained in Afghanistan and its members were united by Osama bin Laden to form the "al-Qaeda" organization (Sageman, 2004). Members of the second group returned to their native countries and joined Islamic fundamentalist terrorist organizations that were already active in those countries. (Some had been members of these organizations even before volunteering to fight in Afghanistan.) Members of the third group also wanted to return home, but they were refused entry by their native governments, who feared their negative and dangerous influence. Armed with this official refusal, they appealed to Western nations for political asylum–which was granted. That is how radical activists spread throughout the Western world, in countries like the United States, Great Britain, and other countries in Europe. These "Afghan veterans" settled in the West, and in many cases, served as dormant terrorist cells, recruiters and spiritual leaders who enlisted locals and other Muslim immigrants into the ranks of radical Islam.

It is this network of Islamist radicals that threatens the Western world, as well as the moderate Muslim regimes of the Arab world. This network of Islamic radical activists headed by bin Laden has an ultimate goal they wish to achieve–to spread their version of Islam all over the world. Put simply, bin Laden wants to conquer the world–to spread his version of radical Islam to every region of the globe, so that there will be no place not ruled by Islamic religious law. This notion is based in the distinction in fundamentalist Islam between Dar el-Harb (the realm of the Sword) and Dar el-Islam (the realm of Islam). The realm of Islam–that part of the world ruled by Islamic law–stands forever opposed to the realm of the Sword–the regions not yet under Islamic control. In this war of radical Islam there is no gray area–either you are an Islamic radical or you are an enemy.

It should be noted that the Islamic religion is not necessarily more or less violent than any other religion, whether it is Judaism or Christianity. In fact, the Islamists view moderate Muslims as their enemies no less than the Jews and the Christians; perhaps even more, since the moderate Muslims are seen as heretics.

It seems that bin Laden has adopted a three-stage strategy toward the ultimate goal of spreading Islamic radicalism all over the world. The first stage is to spread his version of Islam to Muslim countries in central Asia and the Middle

East. Why these countries specifically? Because they are already home to Islamic radical organizations, some of which have large numbers of supporters. Among the countries with Islamic movements that could serve as the nucleus of radicalism are Afghanistan, Pakistan, Egypt, Israel, the Palestinian Authority, and Jordan. Once this first stage is achieved, these "Islamized" countries can serve as the staging ground for the second stage—the spread of radical Islam to countries with large Muslim minorities: Turkey, the former Islamic republics of the USSR, Xinjiang area in west China, the Philippines, Indonesia, Malaysia, and countries in the north of Africa. Looking at the major terrorist attacks since 9/11, most of them have occurred in Muslim countries: Turkey, Morocco, Saudi Arabia, Egypt, Indonesia, and so on. These acts are aimed at shaking the stability of Muslim countries whose economies rely largely on tourism. Only upon the completion of these stages will Islamic radicalism be ready for the final stage—the ultimate battle to spread Islamic rule to the rest of Western society.

Bin Laden recognized, or at least believed, that to achieve the first stage he must keep the Americans from interfering with his plans for the moderate Muslim regimes by forcing them to withdraw their military forces and their influence from Arab soil–from Saudi Arabia, Kuwait, and so on. In effect, the spread of radical Islam to these moderate states cannot be accomplished unless the United States can be forced into isolationism.

Bin Laden had a plan to accomplish this–a campaign of terrorism against American interests, combined with a propaganda blitz designed to reinforce his message. The terrorist campaign was exemplified by the horrific attacks in New York and Washington in September 2001. The 9/11 attacks were not meant therefore to destroy the United States or destroy the American economy; they were intended to create anxiety that would pressure the government to shift its policy. But these attacks in themselves would not be sufficient to make the Americans isolationists; they needed to be accompanied by the appropriate propaganda. Thus, bin Laden launched a campaign to sell his message to the American audience, via videotapes and speeches aimed to reinforce the message. But the Americans were not terrorized by the horrific attacks. They were afraid, but their reaction was a wave of patriotism—the very opposite of what Bin Laden wanted to achieve.

In explaining their terrorist attacks, the Islamists and their supporters argue that they are fighting a defensive war against American militarism and American colonialism. But the Islamists are not fighting against American troops; instead they are in combat against Coca-Cola, McDonalds, the Internet, and Microsoft. They feel threatened by the Western way of life, by modernism, and by the American culture. This implies that withdrawing American troops will solve nothing.

The problem of international radical Islamic terrorism is not the problem of one individual –Osama bin Laden, or a single organization–al-Qaeda. Rather, it is that of a vast, international terrorist network with global reach, which includes activists from different backgrounds living and working in Arab and Muslim nations, as well as Western states and Third World countries.

The existence of this international terrorist network is not a new phenomenon, nor is it unique to modern history. The world has already witnessed various terrorist networks in the past, headed by the network of Communist and anarchist organizations that operated during the late 1960s and through the 1970s under the direction of the Soviet Union. But the international radical Islamic terrorist base poses an unprecedented threat to the enlightened world, if for no other reason than the dangerous combination of several characteristics that are unique to this group.

Belief in Divine Command

The fundamentalists believe in the divine command instructing the network's members to disseminate their radical Islamic world view across the globe, through the use of extreme violence and terrorism. The belief in jihad (holy war) makes these activists particularly dangerous because if this is the will of God, then neither argument nor compromise is acceptable. What is needed is all-out war. There are those who erroneously believe that the reason for the outbreak of militant Islamic fundamentalism is rooted in the Israeli-Palestinian conflict. However, the roots of radical Islamic terrorism are steeped in religious sources, rather than being based on any particular national conflict. The Palestinian conflict serves merely as lip service for Bin Laden and his associates; in fact, they are not really interested in the fate of the Palestinian people but are cynically exploiting the conflict as a unifying Islamic cause, based on incitement and religious indoctrination. In this regard, Israel is not the cause for the eruption of radical Islamic. On the contrary, Israel is the victim, by virtue of its being identified with the West, and as being a defensive shield that is preventing radical Islam from realizing its objectives and spreading into Europe and the West.

Battle-Seasoned Warriors

In contrast with members of other terrorist networks in the past–frustrated, middle-class students who decided to be momentary revolutionaries–members of the radical Islamic networks are not novices. Rather, in many cases, they are battle-seasoned warriors who gained their combat experience during the Afghan campaign.

Suicide Tactics

Members of this network do not hesitate to use the modern terrorist method that has proven more effective than any other–suicide terrorism. As a result

of their extreme religious beliefs, they are even happy to undertake this type of attack, out of their conviction that with such action they will not die at all. This type of attack is certainly not suicide (which is forbidden by Islamic religious law); rather, it is a sacrifice for the sake of martyrdom (istishad), guaranteeing them eternal life in Paradise. A suicide attack is an "operational method in which the very act of the attack is dependent upon the death of the perpetrator." (Ganor, "Suicide attacks in Israel," p.134) The terrorist is fully aware that if he does not kill himself, the planned attack will not be implemented. The attack is carried out by activating explosives worn or carried by the terrorist in the form of a portable explosive charge, or planted in a vehicle he is driving.

It is important to correctly define a suicide attack, for there are different types of attacks, which may be mistakenly considered as belonging to this special category. On many occasions, the perpetrator of an attack sets out with the knowledge that there is a good chance of being killed in the course of an attack (for example, in trying to force a bus over a cliff). In spite of the imminent danger to the terrorist's life, as long as there is a possibility of the attack being carried out without him being forced to kill himself during the course of it, this should not be considered "a suicide attack." In a true suicide attack, the terrorist knows full well that the attack will not be executed if he is not killed in the process. Suicide attack is the most effective method of modern terrorism. The use of suicide tactics guarantees that the attack will be carried out at the most appropriate time and place with regard to the circumstances at the target location. This guarantees the maximum number of casualties (in contrast to the use of technical means such as a time bomb or even a remote controlled explosive charge). In Israel, between 2000 and 2004 the number of suicide attacks, as a portion of all terrorist acts was less than 0.5 percent. Yet over 50 percent of casualties resulting from terrorist attacks come from suicide bombings.

In this regard the suicide bomber is like a "smart bomb"–a carrier that brings the explosive device to the right location and detonates it at the right time. But this is not the only "advantage" that the terrorist organizations have by committing a suicide attack. Since suicide attacks result in many casualties and cause extensive damage, these kinds of attacks attract wide media coverage. A suicide attack is a newsworthy event for the media as it indicates a display of great determination and inclination for self-sacrifice on the part of the terrorists. In a suicide attack, as soon as the terrorist has set off on his mission his success is virtually guaranteed. It is extremely difficult to counter suicide attacks once the terrorist is on his way to the target; even if the security forces do succeed in stopping him before he reaches the intended target, he can still activate the charge and cause damage. Suicide attacks require no escape plan. And since the perpetrator is killed during the course of the suicide attack, there is no fear of him being caught afterwards, being interrogated by the security forces and passing on information liable to endanger other activists. This explains why

all suicide attacks (under the above definition) are "organized attacks," initiated, prepared, and organized by a terrorist organization and not the result of "personal initiative." The method of this modern effective terrorism tactic is therefore an outcome of rational decision making both at the level of the organization and of the perpetrator himself. The Islamic radical suicide attacker believes that a shahid (a martyr) and his family will reap substantial rewards and that his social status will improve after death as will that of his family. Furthermore, the family of the shahid is showered with honor and praise, and receives financial rewards for the attack. In addition to these "benefits," the shahid also receives some personal benefits (according to his belief), including: eternal life in paradise, the privilege to promise a life in heaven to 70 of his relatives, and the loving kindness of 72 young virgins who will serve him in heaven.

Willingness to Use Non-Conventional Weapons

Statements made by leaders of the international radical Islamic terrorist network, and the successful prevention of attacks by others belonging to this system, indicate that the global radical Islamic terrorists have no qualms about using non-conventional means if necessary–chemical, biological, or even nuclear weapons–to achieve their goals. To determine the probability of a non-conventional attack it would be helpful to classify the types of possible non-conventional attacks. (Gunaratna, 2005, p. 55) While it is customary to differentiate between attacks according to which substance is used–chemical, biological, nuclear, or radiological–one can also classify attacks by the intended result. Thus, attacks using non-conventional means can be "limited" or "unlimited" in nature.

A "limited" non-conventional attack differs from the usual terrorist bombing only in the means used. As in the case of a conventional attack, the limited non-conventional attack aims to cause multiple casualties at the site of the attack or in its immediate vicinity. And like a conventional terror attack, this type of terror attack attempts to draw media and public attention to the messages and demands of the terror organization by inflicting extensive casualties and spreading public anxiety—the ultimate goal being to influence political processes of the target population. A limited non-conventional terror attack could be carried out by dispersing a chemical substance in an enclosed space, by contaminating food and water sources, or by using explosives to disperse a radiological agent at a selected location. Another example of a limited non-conventional attack would be a destructive assault on a facility containing dangerous substances, such as a military or industrial facility. In all of these examples, the damage is of limited scope, albeit potentially far more serious than a conventional attack on the same target. In general, the majority of chemical attacks would be "limited" in scope (see Figure 1).

In contrast to "limited" attacks, "unlimited" attacks are not meant to mere-ly incur damage and carnage in a specific and focused public area. Rather, they

Types of Non-Conventional Terrorism

Figure 1. Chemical attacks are mostly "limited" in scope, while biological attacks are mostly "unlimited" with a few exceptions such as Anthrax and other non-contagious agents. Nuclear attacks are always "unlimited" due to their severe ecological impact, while radiological attacks are always "limited" in scope.

are designed to cause mass casualties in large areas (a town, village, city, a spe-cific geographical area, etc.). The conceptual basis for these two categories of attacks differs. While tactical, or limited, non-conventional terror is designed to serve as leverage to alter a political reality through the use of intimidation, unlimited non-conventional terror strives to change the political reality itself de facto by annihilating large populations, contaminating extensive geograph-ical regions, etc. This type of attack may have a severe psychological impact on public morale—an impact that may completely undermine the population's confidence in government institutions and their values. Yet even without this effect, the unlimited non-conventional attack causes grave and prolonged damage to the area under attack, thus immediately affecting reality.

For unlimited non-conventional terror attacks, terror organizations will primarily prefer nuclear or biological weapons, followed by some types of chemical weapons; radiological substances are generally unsuited to this type of attack. One of the main questions is what are the indicators that may point to the possibility that a terror organization will indeed perpetrate non-conven-

tional terror? Only when an organization has both the operational capability and the motivation to perpetrate a particular type of attack will the attack come to pass. With regard to key predictors that indicate the terror organization's motivation and operational ability to perpetrate non-conventional attacks, based on the post-9/11 trends of international terrorism, one can conclude that the likelihood of the occurrence of limited non-conventional attacks is much greater than that of unlimited attacks. But radical Islamic terrorist organizations might have the motivation to also perpetrate unlimited non-conventional attacks and this motivation may materialize once they acquire the operational capability.

The Counter-terrorism Equation

The terrorism equation is, as stated, a combination of the motivation to perpetrate terrorist acts and the ability to act on that motivation (Ganor, 2005). These two essential conditions determine the scope and nature of past, present, and future terrorism. From the terrorism equation, we can extrapolate a counter-terrorism equation. When combating terrorism, one must carry out various types of activities aimed at reducing or eliminating the terrorist organizations' ability to perpetrate attacks, and activities aimed at reducing or eliminating the terrorists' motivation to carry out attacks. Naturally, the hope is to diminish both of these variables, but the principal dilemma in fighting terrorism is the fact that the more successful one is in carrying out actions that damage the terrorist organizations' ability to perpetrate attacks, the more we can assume that their motivation will only increase. Figure 2 illustrates this dilemma and pres-

Figure 2 – Types of Non-Conventional Terrorism

ents the necessary counter-terrorism combination between the means to reduce operational capability and to reduce motivation to commit terrorist acts.

The "level of terrorism" line in the illustration represents the line above which it is possible terrorist attacks will take place, and below which terrorist acts cannot be carried out. The red line represents the level of motivation of a particular organization to carry out attacks at any given point in time, while the blue line represents the organization's ability to carry out an attack at that particular time.

The illustration starts out with the motivation of a group of people to achieve a particular political aim (A). At first their level of motivation is lower than the threshold needed to decide to perpetrate terrorist attacks, but quickly, for one reason or another, that group of people decides to employ violent means against civilians, that is, terrorism, to achieve its aims. This is when motivation rises above the minimum threshold for perpetrating terrorist attacks (B). At this point, the group of people who have banded together into an organization begins to attempt to gain capabilities that will enable it to act on its motivation to perpetrate terrorist attacks (C). When these capabilities exceed the minimum required for committing terrorist acts (when they cross the "terror" line), the organization is liable to perpetrate attacks. At this point, the nation coping with terrorism takes effective offensive activity against the terrorist organization (D). Such activity reduces the organization's operational capability and the more focused and successful this action may be, the more likely it is to reduce the organization's capability below the terror line–to the minimum capability needed to commit terrorist acts. But the influence of the offensive activity, no matter how effective it is, is usually short-term and after a certain period of time (E) the organization works to repair the damage it suffered and compensate for the damage to its operational capability. Then the capability line begins to go up once again, until it crosses the terrorism threshold. At the same time, as stated, the offensive activity raises the organization's motivation to continue perpetrating, and perhaps even to escalate, terrorist activity in retaliation and in response to the country's actions. The rise in motivation stabilizes after some time at a level that is higher than it was prior to the nation's offensive activity.

When the country carries out non-effective offensive activity against the terrorist organization (F), the organization's operational capability is not damaged at all, and its motivation to carry out revenge attacks only increases.

Planning and carrying out effective offensive counter-terrorism activity is a complex task and difficult to achieve, but this difficulty is negligible compared with that of carrying out activity to counter an organization's motivation for terrorism. It would appear that the ultimate counter-motivation measure would be to accede to the political demands of the terrorist organizations. But giving in to terrorism, even without getting into the substance of the organization's demands, cannot and must not be a viable alternative to coping with ter-

rorism, if only because such compromise could whet the organization's appetite to increase its demands from the nation and encourage other organizations looking to achieve their own political aims to use violence and terrorism in order to achieve those aims. In spite of all this, taking steps to reduce the motivation for terrorism is essential when formulating a sound and effective counter-terrorism policy. Such steps might include: humanitarian actions aimed at the organization's supporting population; social welfare activities; education and publicity within this sector; and negotiating with public representatives of the organization's supporting population–those who oppose terrorist activity or who, at least, are not involved in committing attacks and are not secretly in contact with those who are.

All these activities are aimed at mitigating the conflict, attempting to bring about a solution or an interim agreement through non-violent means, to win people over, to demonstrate that there is a way out. The more immediate and tangible the influence of effective offensive counter-terrorist activity, the greater the chance that counter-motivation measures will be long term; the more effective these are, the more possible it will be to identify their consequences in years to come, not to mention future generations. Then the level of motivation to perpetrate terrorist acts drops (G). This drop in motivation doesn't necessarily represent the feeling of the terrorists themselves, but primarily, the feeling of the organization's supporting population. Steps taken to counter motivation must be directed, first and foremost, towards this population in order to prevent their support of terrorism, to isolate the terrorists, and to make it easier to undertake offensive measures against the organization's hard core. In essence, the goal of counter-motivation measures is to distance the terrorists from their supporting population. The more effective the counter-motivation measures, as stated, the more we can expect a decline in the level of motivation to perpetrate terrorist attacks over time, until the level dips below the terror threshold (H).

However, a decline in motivation does not impinge on the level of capability to commit terrorist attacks. This may be compared with someone sitting on a barrel of explosives, where the lack of attacks is the result of limited motivation but the ability to perpetrate attacks is higher than the threshold needed to carry them out. In this case, any factor that causes a temporary rise in motivation–offensive activity by the nation, interorganizational or intraorganizational relationships, external pressures, etc.–without restricting the operational capability, could lead to a terrorist attack or a series of attacks. Therefore, the combination needed in an effective counter-terrorism campaign is counter-motivation activity to distance terrorists from their supporting population, together with repeated offensive activity against the terrorist organization's hard core, its leaders, perpetrators, and its physical and financial infrastructure in such a way

that the organization will not be able to recover and improve its operational capability between one blow and the next (I).

From International Cooperation to a Joint Counter-Terrorism Campaign

The scope and nature of terrorism at the dawn of the third millennium constitutes a tangible threat to the peace of modern Western civilization, and poses a serious challenge to the enlightened world. As such, there is a primary need to approach a new level of international cooperation in the effort to confront radical Islamic terrorism. It is no longer enough to improve and enhance international cooperation on the basis of the familiar formula; rather, there is a need to develop a joint international counter-terrorism campaign. The transition from international cooperation to a joint counter-terrorism campaign is not merely a semantic change, but rather, it entails a new understanding regarding the essence of the struggle and the means needed for coping on an international scale. Naturally, the transition to a joint international campaign does not contradict the need to enhance cooperation as described above; but at the same time, it demands that we establish joint frameworks of action for a more effective international effort, which relate to almost all spheres and elements of counter-terrorism.

Establishing a "League of Nations Fighting Terrorism"

To promote effective action against terrorist organizations and the states that support them, a permanent, international anti-terrorism institution must be given the authority to identify nations and organizations considered to be involved in terrorism, and determine sanctions and actions to be taken against them. This institution would operate on the basis of a clear and approved mandate. It would include experts from different countries who would study global terrorism and, on the basis of their findings, would publish an annual list of nations supporting terrorism. International sanctions could then be adopted against countries included on that list, in accordance with the scope of their support, so as to force them to stop or limit their involvement.

This is a particularly challenging task and would require a broad international consensus regarding a definition of terrorism, and a classification of the different levels of involvement. Most likely any international effort in this direction would be doomed to fail, although perhaps some of the goals can be achieved through the establishment of a "League of Nations Fighting Terrorism" by a few countries, with others joining later on. The United Nations should fulfill this role, but past experience shows that it cannot be expected to lead an effective campaign against international terrorism, and certainly not against specific sponsors of terrorism.

Legislative and Judicial Action

An international court for terrorist crimes should be instituted. The idea is to fill the lacuna that presently exists since the establishment of the International Court of Justice in the Hague, is authorized to try any person–leader and common citizen alike–but only for criminal acts or war crimes–no mention is made of prosecuting terrorist activity. Instead, an international court for terrorism would focus on trials for terrorists, and would be based on an accepted definition of terrorism and international charters ratified accordingly. This court could also recommend that international institutions develop new international charters, if necessary.

Collecting and Sharing Intelligence

This international entity should employ its own independent intelligence sources against terrorist agents throughout the world. The international intelligence body should make available to the League of Nations committed to the uncompromising struggle against international terrorism, real-time warning data, as well as information concerning the movements, intentions, capabilities, and characteristics of terrorist operations.

Interdisciplinary Civilian Research

Terrorism is an interdisciplinary issue more than any other phenomenon. Almost every academic discipline is relevant to one aspect of terrorism or another–political science, international relations, Middle Eastern studies, sociology, psychology, economics, computer science, law, biology, chemistry, physics, and many more. For this reason, the issue of coping with terrorism demands a perspective and analytical ability as broad as possible. The academic system must be prepared by making available all relevant knowledge and information. As part of this effort, an international academic research network should be set up with the finest academic minds, directing them toward research questions that are particularly relevant for prevention agencies, providing them with the necessary financial resources, forging links between different researchers from around the world and conducting working meetings, and helping to build joint academic databases.

Educational and Informational Activity

To enlist international public opinion in the vital struggle, informational and educational activities must be dovetailed in nations coping with terrorism, and other nations as well. An international committee of experts should be established to formulate joint public relations and educational policies, and to work with education systems in the different nations. It is especially important that this framework offer assistance to education and information systems in Muslim countries as part of the effort to counter radical Islamic indoctrination.

The experience garnered by various nations with regard to counter-terrorism could be used to help other nations that lack relevant experience in this sphere, making their struggle more effective. Information about these issues can be transmitted via joint training activities–shared counter-terrorism courses, exchange programs for officers and fighters, tactical drills, strategic education, etc.

Another form of cooperation has to do with sharing technological knowledge. There should be a united effort to develop a variety of technological means: to identify and neutralize terrorists from a distance; intelligence equipment for wiretapping, surveillance, and command and control; means for locating and neutralizing explosives, as well as chemical and biological agents; and methods for supervising crowds and restoring order. A joint, international technological effort in all of these areas can help improve the final outcome, reduce development costs, and shorten time frames. Joint technological teams can more easily overcome typical technical problems and obstacles on the road to product development, while basing their efforts on technological experience gained in various countries.

Establishing Joint Frameworks of Action

The system of international charters must include provisions that will require nations to act against infrastructures of foreign terrorist organizations located in their territory, and against communities that aid terrorist organizations operating on their soil; charters that obligate nations to fight terrorist financing–raising funds aimed at terrorist activity, money-laundering and camouflaging funds under the guise of philanthropic social welfare activities; charters that compel banks to divulge information to security forces regarding terrorist organizations or those suspected of involvement in terrorist activity; treaties for extraditing terrorists and their associates; treaties that prohibit membership in terrorist organizations and perpetrating various types of terrorist acts–suicide bombings, extortion attacks, killing and sabotage; treaties that establish a nation's right to carry out counter-terrorist activity against terrorist organizations in the territory of another nation under certain circumstances; and so on. Such a system of international charters requires first the formulation of a normative common denominator in the form of an accepted definition for the term "terrorism." This definition must be as narrow and limited as possible so that it represents the broadest possible basis for shared agreement, and makes a distinction between the goals of terrorists and their modes of operation, that is–deliberate use of violence aimed against civilians. With such a definition it will be possible to formulate international charters for combating terrorism.

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LEGAL CONSIDERATIONS IN THE WAR ON TERROR

Seeking Common Ground in the Fight Against Terrorism: Coercive Interrogation as an Example

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Introduction

Introduction

Juliette Kayyem of the Kennedy School of Government and I sought and received funding from the Oklahoma Memorial Terrorism Center to assemble a richly experienced, truly distinguished group of academic, intelligence, military, and law enforcement experts from the United States and the United Kingdom to advise us (for the two of us alone were responsible for the product) on what might be wise legislative answers to 10 of the hardest questions the United States will face in the decades ahead.[1]

The 10 questions included the use of highly coercive interrogation, detentions, targeted killings, military commissions, agent attendance at political or religious meetings, state-based profiling, and gathering and use of large

amounts of commercially available information. We found we could reach very considerable agreement among a group that was purposefully chosen to range from the left to the right, from civil-liberties oriented to national-security oriented. Our recommendation on highly coercive interrogation has received by far the most attention. But it is also illustrative of our contention that honest, open discussion can bring us all far nearer to agreement on extremely challenging issues for any democracy; and that such discussion should be followed by legislation, the way a democracy resolves major questions about the conditions of freedom.

The Shared Factual Background

Assume there are between 250 and 2,500 (or even more) people scattered around the world, mostly outside the United States, whose shared politics or religion leads them to plan very serious attacks on the United States. At the very least, the probability of this fact is high enough that we have to take it seriously. We should also assume that they will do their very best to hide their plans by mixing in with a much broader population that is somewhat hostile to the United States, though not murderous; and that the threat of a successful attack will remain with us for some time in the form of new generations or new groups with new causes.

Although the director of the Federal Bureau of Investigation (FBI) has said there is no evidence of terrorist cells within the United States, he fears they may be there. But we can find dangerous people abroad. The evidence of their dangerousness may be calling for attacks on the United States or calls for jihad. It may be close association with those who are more firmly believed to be terrorists or those one-degree of separation further removed. It may be a history of having traveled to al-Qaeda camps in Afghanistan. It may be electronically overheard conversations or simply being a number called or calling another suspect. It may also be the testimony of an informant or, our present focus, of someone interrogated after capture and detention on one of these other grounds.

The list of potentially dangerous suspects is not fanciful. There is in fact reason to suspect most of the people on it. But of course it is far from perfectly reliable. We have good reason to believe–and the various statistics seem to bear this out–that a sizable number of those identified are not, in fact, planning attacks.[2]

One needn't agree that it is useful to treat even this dangerous form of terrorism as war to agree that it is more dangerous than any more traditional

criminal activity we've confronted and far more dangerous than the terrorism the United States has seen in the past. Any argument that the danger is not far, far greater than it was must rely either on a lack of capacity or a lack of desire to do us great harm on the part of Al-Qaeda or its successors.[3] The former is surely a weak reed. Suicide bombers with ordinary car bombs could, at any time, target the tunnels in New York or the Golden Gate Bridge or any of our multitudes of skyscrapers with parking facilities in the basement. They could spray a football stadium with poisonous chemicals or create panic by setting off a dirty bomb made of familiar explosives laced with radioactive waste. What would be much harder for terrorists, but even then, not clearly beyond their capacity, would be to use a small nuclear device or biological weapon.

So, if the danger is not far greater after September 11th, it is because we can somehow still rely on the traditional unwillingness of criminals or terrorists to engage in extraordinarily dangerous and harmful attacks on civilians. Yet this is hardly more plausible. How many of us would bet on that after September 11th, the Madrid bombings, the planned attacks on our airlines flying over the Pacific, or the devastation of our embassies in Tanzania and Kenya?

U.S. Strategy

The administration's approach to the problem this fact situation presents is to treat the list of suspects generated as described above, as illegal enemy combatants and war criminals in a war where the normal rules do not apply to either side. The notion of war can relate to the allocation of powers within the United States and among nations or to a menu of strategies. The administration claims that it operates in both realms. As to the latter realm, our mission is described as being to kill or capture the enemy forces.[4] More precisely, the strategy is to hunt enemy combatants down, with the help of other intelligence agencies and security forces, with the object of either killing them or trying them before special military commissions or simply detaining them indefinitely or interrogating them under more or less coercive conditions to learn who else is planning what. This is the heart of the National Defense Strategy released by Secretary Donald Rumsfeld on March 1, 2005: "taking the war to the enemy," rather than waiting, as President Bush has warned us is too dangerous, for the enemy to come to us.[5] Reassuring as legality is to other nations whose help we

2 Dan Eggen and Julie Tate, "U.S. Campaign Produces Few Convictions on Terrorism Charges, Statistics Often Count Lesser Crimes," Washington Post, June 12, 2005, available at www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html; see also Tim Golden and Don Van Natta Jr., "U.S. Said to Overstate Value of Guantanamo Detainees," New York Times, June 21, 2004; Douglas Jehl and Neil A. Lewis, "Captured Insurgents; U.S. Said to Hold More Foreigners in Iraq Fighting," New York Times, January 8, 2005; Detainee Transfer Announced, News Release (Dept. of Defense), April 19, 2005, available at www.defenselink.mil/releases/2005/nr20050419-2661.html (see generally www.defenselink.mil/news/Combatant_Tribunals.html) (noting that 214 detainees have departed Guantanamo of which 149 were released and that 520 detainees remain in custody).

3 Boaz Ganor, The Counter-Terrorism Puzzle A Guide for Decision Makers 41-2 (Transaction Publishers 2005) (explaining the terrorism and counterterrorism equations: Terrorism = motivation + operational capacity).

4 The White House, National Strategy for Combating Terrorism (February 2003), available at www.whitehouse.gov/news/

would like, international law itself is seen by the administration as a danger. In the startling words of the National Defense Strategy: "Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism."[6]

The advantage of the administration's approach is that it is very likely to be highly disruptive of the activities of those on the list including, of course, those who are really planning attacks. It may also tend to discourage some others who might assist or become terrorists. The disadvantage, besides losing the support of needed allies, is that it will inevitably treat very harshly as illegal combatants many who are not and that in doing so it will increase the support that those planning terrorist attacks enjoy. That was certainly the experience in Northern Ireland and the Palestinian territories. It will also tend to spawn new and unidentified groups who see the U.S. strategy as a war on Islam, not terrorism. Most experts believe this has happened in many places.

Whatever its effects on actually reducing terrorism, there is also relatively widespread agreement on the huge political effects of any strategy. Calling our danger "war" increases the political risks Congress and the courts would face if either seeks to impose constraints on executive action. Within the United States, the administration, its Democratic opponents, and the human rights community are also all very well aware that the political effect of another, even moderate-sized, terrorist attack within the United States would be a public demand for increased executive powers, reduced civil liberties, less role for the legislature, and less concern for claims by our allies of infringements on their sovereignty. Every month without a terrorist attack produces the opposite political effect.

Even without a new attack, one unlikely scenario has a special place in the imagination of the American public as a justification for relatively unconstrained powers of interrogation, whether simply assumed by the president or delegated by the Congress. As of yet, no evidence exists of a "ticking bomb" case where a danger to many lives will materialize within a relatively short period of time and might be prevented by learning the location of the bomb with brutal interrogation methods. There is much to be said about the merits and demerits of that answer to this scenario. For my purposes it is enough to note that it has a special role in our politics.

releases/2003/02/20030214-7.html; James Risen and David Johnston, "Bush Has Widened Authority of C.I.A. to Kill Terrorists," New York Times, December 15, 2002.

5 Department of Defense, "The National Defense Strategy of the United States of America" 6 (March 2005), available at www.defenselink.mil/releases/2005/nr20050318-2245.html.

6 Id. at 6.

The political effects among Islamic opponents of adopting the imagery and strategies of "war" are undoubtedly to increase the number of those who hate or distrust the United States, at the same time as it discourages active participation in terrorism by reducing the hope of success and by increasing the fear of American response. The very steps that discourage active participation are likely to increase hatred and active or tacit support for terrorists. In Israel, for example, success in thwarting suicide attacks by military measures since 2002 has been accompanied by a sharp increase in total attempted bombings.[7]

More specifically, the political response to efforts to discourage participation in terrorist groups by making that appear an ineffective and dangerous path may be to increase the motivation of old or new leaders of the terrorists to accomplish a spectacular attack; for that could encourage demoralized supporters and give hope to that angry and defeated part of the Muslim world. To the extent we have in the last four years increased anger and resentment but discouraged its mobilization as useless, a new spectacular attack, rather than something less, might seem the most promising way to mobilize terrorists.

The Overall Impact on Civil Liberties and Human Rights

Assessing the overall impact on civil liberties and human rights of the steps the administration has taken since September 11th, 2001 requires making at least three distinctions.

The first goes to the legal source of the actions having the most significant effects. Surprisingly to most Americans and Europeans, the president has looked far less to the USA PATRIOT Act for powers, than to a claim of presidential war powers, either under the authority of the very general resolution passed by Congress soon after September 11th or under the inherent Article II powers of the president as commander-in-chief. The impact of the PATRIOT Act was first overstated by the Bush administration to show action and then the statute was treated as far more radical and dangerous than it is by a civil liberties community that needed a public focus for its concerns. Thus the Act became a symbol both in the United States and Europe of the most dramatic new steps brought about by the war on terrorism. But it does not fit that role. One can agree or disagree with a half-dozen of its provisions, but none are nearly as important as the steps taken under a claim of war powers. The 10 questions that Juliette Kayyem and I addressed involve matters far more important than anything in the PATRIOT Act.

The second distinction is between the dangers posed by assertions of new powers and authority and the dangers posed by actions taken. In the United States the danger is far more from the former than the latter, although there is some danger from each. Foremost in the realm of dangerous powers at home is the pres-

7 See Ganor, supra note 3, at 71.

ident's claim to authority to detain American citizens, as well as others, on his sole determination that they are involved in planning or executing terrorism–without any judicial review, without an attorney, and in secret locations without access to anyone outside the government. That power has only been used two or three times, but its mere existence creates vast possibilities of abuse.

As to actions taken at home, we have been unusually aggressive bringing prosecutions in the United States, often against minor figures, and in conducting far more court-authorized electronic surveillance than in the past.[8] We have pursued innovations in discovering and processing information about citizens and others in areas where privacy law has not yet limited federal actions. We have been very vigorous, and sometimes discriminatory, in enforcing immigration laws and in monitoring aliens. But none of these actions, nor all together, begins to approximate the importance of the presidential claims of new powers.

Third, the claim to war powers abroad has supported detentions of thousands, coercive interrogation of hundreds, renditions of one hundred and fifty, and targeted killing. Here action has plainly matched the claims of power and the claims too are far broader than at home or those involving Americans. The legal authorization is found in a gap between the coverage of the Geneva Conventions and the coverage of the U.S. Constitution, statutes, and treaties–a gap creating a status of illegal combatants. That in itself is part of a broader self-empowerment with regard to human rights and sovereignty abroad based upon the power of administration lawyers to "helpfully" interpret our treaty obligations, as in the case of the meaning of "torture" and the limitation to our shores of "cruel, inhumane, and degrading treatment" –both terms defining our obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which protects against these activities. Unilateral interpretation is a great power. Recognizing this, in his 2005 defense strategy Secretary Donald Rumsfeld described the risk of replacing American interpretation with that of international institutions as one of the great dangers facing the United States.

Empowerment with regard to both Americans and aliens, both at home and abroad, has also come from a series of efforts to limit the jurisdiction of U.S. courts to review actions taken under war powers. Finally, unprecedented claims of secrecy are themselves a form of empowerment.

The U.S. approach to civil liberties, human rights, and the sovereignty of other nations is likely to change in the years ahead. The scandals of Abu Ghraib and Guantanamo have plainly had an effect. So has the passage of time without

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8 Dan Eggen and Julie Tate, supra note 2; Devlin Barrett, "Wiretaps in U.S. Jumped 19 Percent in 2004," Associated Press, April 29, 2005.

9 Oren Gross, Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience, 88 MINN. L. Rev. 1481 (2004).

another attack. Beginning with a famous question by Secretary Donald Rumsfeld to his staff, we may come to believe far less in the efficacy of killing and capturing al-Qaeda leaders if the means (and their mistakes and collateral damage) create lasting hostility in a vast population. The administration has come to see more clearly the need for cooperation from a broader range of allies.

Coercive Interrogation

Against this background, our recommendations took the middle of three possible alternatives. The first is that the president must have discretion to use any form of highly coercive interrogation, including torture, openly or secretly, and even without specific statutory authorization for use of that type of interrogation. The second, our alternative, was that the president should use highly coercive forms of interrogation only with statutory authority and even that should be limited to using only such forms of interrogation as he could lawfully use in the United States under similar circumstances. The third alternative, embraced by most of the human rights groups, is that the president and the United States should comply with even the somewhat aspirational provisions of international treaties, which, besides forbidding all torture, also forbid whatever is meant by the lesser category of "cruel, inhuman, or degrading treatment". In ratifying those treaties the United States has limited its commitment, at most, to not engaging in any form of interrogation that would violate the 5th, 8th, or 14th Amendments of the U.S. Constitution.

Our "middle-ground" recommendation has been greeted with opposition ranging from administration disinterest to active hostility by much of the human rights community. The administration has seen no benefit in allowing itself to be bound, when it is presently free of almost any constraints in conducting a secret war on terrorists. It has vigorously opposed a bill introduced by Senator McCain that is very similar in effect to our proposal. It passed overwhelmingly in the Senate. The human rights community has thought it inconsistent, or at least unrealistic, of us to suggest that certain highly coercive forms of interrogation could be used on rare occasions where the immediate necessity to save lives is found and certified by the president, even if that form of interrogation was something that the United States would be ashamed to adopt or see a dictator use as a general practice. The passion of the debate, at least on the side of human rights groups, is surprising, because our views on most of the background facts probably differ very little. It is handling five additional areas, where no one can be certain of the facts, which separate us.

The Uncertainties

Five factors highly relevant to choosing between the three alternatives for using coercive interrogation are unknown. Being unknown and not the subject of broad-based agreement, arguments by partisans based on confident assertions about these matters deserve a good measure of skepticism. Wise decision

must recognize and deal with these uncertainties, not simply hide them to support preferred policies. We should turn now to these uncertainties, leaving to a last section why we handled them as we did.

The Effectiveness of Coercive Interrogation

The advantages of authorizing highly coercive interrogation in any situation depend upon how much this technique can add to a variety of other ways of getting information or even to the narrower set of ways of getting information from an unwilling individual. In rejecting the use of coercive forms of interrogation for confessions, the United States Supreme Court has often emphasized that it is likely to turn out to be a lazy way of getting evidence that could as readily be obtained by searches, interviews of willing witnesses, or any of a number of other ways. Even if the information is only in the hands of a particular individual, probably a rare occasion, there are a number of alternatives to coercive interrogation.

Federal law enforcement relies on recruiting informants, electronic surveillance, and placing law enforcement agents undercover within an organization to obtain information from individuals who would not willingly disclose it without being deceived in one of these ways. Physical surveillance could be added to that list. Even when U.S. law enforcement wants to extract information from an individual disinclined to talk, it relies on relatively non-coercive interrogation (after Miranda rights have been waived) or the threat of far longer sentences for an individual who does not cooperate in furnishing information. We have no useful way of assessing how much a power to engage in coercive interrogation would add in light of the available alternatives. It is even hard to assess whether its effect is counterproductive: to offer the benefits of having to use less imagination and energy at the expense of obtaining information that is far more likely to be false.

Among those experienced in counter-terrorism or related operations there is a sharp division about the usefulness of sustained coercion. Every one agrees such coercion can and is likely to produce statements designed to satisfy the interrogator. Interrogators from Israel and Northern Ireland say that the likelihood such statements will not be true is very high, compared, for example, to a statement obtained using rapport as an interrogation device. My Harvard colleague Michael Ignatieff argues that torture would not be used so widely if it were not considered effective. But confusion about the likelihood of getting some statement (very high) or a confession (also quite high, whether true or false) as opposed to getting useful information about an ongoing operation or organization seems ample to account for the frequent use of torture.

As to the "ticking bomb," we have no adequate sense of how often coercive interrogation would be helpful. We will frequently have the wrong person. Even if we have the right person, he is likely to hold out until the information he has is no longer useful. He is likely to lie and in a clever way developed by

his organization. Even if a particular plan is stopped, his colleagues may change the plan and substitute another. If all of this adds up to a one in ten chance that he will tell the truth, law enforcement would need the time to check out a number of false stories, not just the time to go directly to where the bomb is located.

Costs of Interrogation

We can identify the types of costs, but we do not have the information to weigh them. Stories about Abu Ghraib and Guantanamo have plainly made us new enemies, strengthened the support among Islamic publics for terrorism, and emboldened new terrorists. That has been the history of the Palestinian intifada against Israel.

Highly coercive interrogation also undermines support we need for U.S. objectives. Within the U.S. population we have been watching a contest between support for the United States generated by democratic elections in Iraq and opposition to the United States generated not only by the cost in dollars and lives, but also by the cost in national self-respect accompanying tales of sadistic or depraved interrogation in Iraq, Afghanistan, or Guantanamo. A similar array of moral embarrassments cost President Lyndon Johnson dearly in terms of support for a continued war in Vietnam.

Highly coercive interrogation alienates allies in Western democracies making it, at a minimum, far harder to find coalition partners. The practice also gives away our capacity to criticize brutality by others in the world. We can hardly lecture Egypt or Saudi Arabia.

Such interrogation may endanger our soldiers. It may cause grave harm to the interrogators too. These types of harm are plainly real. But no one can measure them with exactness.

The Slippery Slope and its Relatives

Without being able to weigh these costs, we may be able to reduce them by carefully specifying the circumstances in which highly coercive interrogation could be used, but that creates another cost which is the most difficult of all to measure: the risk that highly coercive interrogation will spread from the limited area in which it is permitted to broader and broader areas; from foreigners to resident aliens to American citizens; and from use against terrorism to criminal drug trafficking and then to ordinary crimes. We know how to write standards and how to allocate responsibility for decisions and even how to monitor those decisions with devices of legislative or judicial oversight. Still we do not know how these efforts to control and direct discretion would apply when an administration believes we are at war and is not restrained by the desire for reciprocity that lies behind willing compliance with the Geneva Conventions.

Some would argue, plausibly, that even if no "slippery slope" develops, any exception may cause disrespect for crucial principles. The argument here is

that a deeply held principle ceases to be deeply held once any exceptions are admitted, especially because then every country can define its own exceptions. Those taking this view contend that it would even be better for the President to engage in civil disobedience when he thought that necessary to save lives and take the admittedly small risks of punishment than to authorize any exception to the prohibition of torture.[9] Alternatively, they would urge that the president or the secretary of defense should act and defend his conduct as falling within a justification of "necessity" –a position taken by Israel's Supreme Court. Perhaps even secret exceptions (although it is difficult to keep mistreatment secret) are better than openly approving exceptions in some circumstances. Opponents of these views find something profoundly dishonest about expecting and wanting officials to act in a way that we have previously defined as unlawful. But until we can weigh the cost of institutionalized hypocrisy against the cost of each country creating its own exceptions to even the most sacred of principles, still another measure of uncertainty is built into the question.

Moreover, some of the costs would be incurred whenever an exception is made, however rarely–i.e. even if the there is no slippery slope. They flow from violating a treaty obligation or publicly stated principles; for one category of cost involves a loss of trust. A minister or judge who lies or cheats once will never be trusted again. A judge who makes a single blatantly racist remark at a cocktail party cannot benefit from the fact that it was a rare occasion. A company that once knowingly sells a harmful drug cannot effectively point to the percentage of useful drugs it sells. An accounting firm that juggles the books in even one audit is likely to have no credibility left. A stockbroker who has been shown to boost stocks he secretly considers worthless will have no customers. In each of these situations others may have little basis for judging whether an action is a rare exception or a revelation of frequent deception about a general practice. In each, the alternative to not trusting again someone who has fooled us once may be so cheap and effective that trusting that someone again seems foolish.

Looking for "weights" for such imponderables may be a utilitarian way of expressing the choice between a utilitarian philosophy and a Kantian morality. It is in fact very difficult to answer the question put, at least implicitly, by those insisting that morality requires an exception to any universal prohibition, even of torture. The brutally simple argument asks, "Would you torture to save two lives? If not, what about two hundred or twenty thousand or two million?" The Kantian answer is that no action more clearly treats a person as a means rather than an end than imposing pain until he reveals what his self-respect and social identity are making him withhold. It is only after reaching and resolving this impasse that one can confidently announce a preferred policy.

National Understandings about the Relative Value of Non-U.S. Lives

Our normal criminal procedure has to address the risks, inconveniences, and embarrassment we may impose on an individual who is suspected of crime but may well be innocent. In general, he is promptly furnished a lawyer and, unless there is a risk that an American suspect will flee or endanger others before trial, very little harm can be done to an American citizen until he has been convicted of a crime. We may question these understandings in the area of suspicion of terrorism, for the risks of harm pending trial may be far greater and the needs for information about associates to prevent another attack may be far greater. Moreover, if the suspect has no substantial ties to the United States, the political dangers to American democracy of unchecked executive power over its own citizens will generally not be involved; and, even more significantly, the government's activities are not likely to threaten us, our neighbors, and our friends, whose welfare many consider more important than the welfare of strangers abroad.

But even these difficulties are vastly compounded by the fact that we have no national agreement on how to put weights on the trade-off between dangers to Americans from the activities of others and dangers to others from the efforts of our government to protect Americans from terrorism. Americans do not agree on what weight to give to the interests of alien suspects compared to the interests of innocent Americans who may be victimized.[10]

Our recommendation insists that American citizens be subject to the same risks that would apply to foreigners abroad–no more and no less. The administration has in fact applied very different practices for suspects from abroad and suspects within the United States. Except for two or three Americans, no American has been detained except for trial and, almost without exception, no American has been subjected to torture or, perhaps, any treatment that would be considered cruel, inhuman, and degrading. That is manifestly untrue of our past practices with regard to non-U.S. persons abroad whether the subject is detention (of thousands) or interrogation (with one hundred deaths)

The Costs of Lost Respect for Legality

Our Senate Reservation to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines our understanding of the prohibition against "cruel, inhuman, and degrading" treatment that is not torture, as only including conduct prohibited by three Amendments to our Constitution and not lesser forms of interrogation. Arguing that these Constitutional provisions do not apply to aliens abroad, the administration

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10 See Michael Walzer, Arguing About War 23 (Yale University Press, 2004) (discussing the related problem of how much responsibility the U.S. military should have toward civilians whose lives are put at risk by military operations).

claims that our treaty obligation is therefore applicable only in the one place where it is wholly and utterly superfluous--the United States. Here, as the administration notes, the 5th, 8th, and 14th amendments of the Constitution obviously already ban whatever conduct violates them. Our obligations would be far greater, the administration acknowledges, if this were a war against a signator to the Geneva Conventions whose troops wore uniforms and were under firm command.[11] But we have few, if any, obligations to foreigners in a war against terrorism although it is likely to continue indefinitely. For decades to come, refraining from "cruel, inhuman, and degrading" treatment of those aliens abroad whom we suspect of terrorism is, according to the administration, not required or promised.

We don't know the effects of adopting such an implausibly narrow interpretation of our treaty obligations. We know that it is of great value to us as a nation that we can make promises that can be taken as reliable in the form they are likely to be understood by the recipient states. This is not because otherwise the United States will be sanctioned for violating a treaty obligation; there may be such a sanction but that would be rare and its use and practice would be even rarer. International agreements are far more frequently supported by the mutual benefits of compliance with promises. We enter into them because we care about other nations complying. If we ignore, or interpret unreasonably narrowly, our commitments, we can expect to receive less from the commitments that were made in exchange for our promise.

More broadly, nations develop reputational value from being law-abiding and promise-keeping. That this is an area of potential cost from ignoring either the Geneva Conventions or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is clear, but what weight it should be given is far less clear. In the area of these particular treaties, and perhaps more generally of human rights agreements, the subject matter may be sufficiently distinct and isolated as not to bear on our other commitments in, for example, the fields of trade or national security. If so, then we would have to know how much we had to gain from others' compliance with treaties in the area of human rights, and we would have to assess whether there was some reason to think that the extent of compliance by others would be affected by our actions.

Our early interpretations of the Geneva Convention and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment were stretched beyond what others would believe were good faith interpretations of our promises. That applied to the severity the Administration

11 Cf. arguments by the administration that the Geneva Conventions do not apply to non-signators, al-Qaeda, and the
   Taliban. Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special
   Counsel, on Application of Treaties and Laws to al-Qaeda and Taliban Detainees, to William J. Haynes II, General

said was required for torture. It applied to the administration's interpretation of cruel, inhuman, and degrading punishment, the effect of which was to make our promise applicable only within the United States (where the Constitution already forbade what we agreed to forbid) and not outside the United States. This interpretation would have seemed implausible to any state entering into the treaty in partial reliance on the benefits to be realized from U.S. promises, affecting its future behavior. But we cannot easily weigh the costs of this loss of credibility.

Choosing Among the Alternatives

I began this essay by suggesting we must choose as a country between: (1) allowing the president to assert that he has discretion under Article II of the U.S. Constitution to authorize any form of interrogation, including torture (which he deplores as a matter of policy) secretly when he regards that as appropriate; (2) insisting that in this area the president's discretion should be constrained by a statute such as the McCain bill and subject to legislative and judicial systems of accountability; and (3) insisting that the national decision on these troublesome questions has already been made–that the president is bound by international treaties, including the vague and somewhat aspirational prohibition of cruel, inhuman, and degrading treatment, and therefore the president has neither unlimited discretion nor should be given bounded discretion by U.S. legislation. The choice among these three broad systems will depend upon answers to the uncertainties described above.

Why Not Torture at the Discretion of the President?

Only very broad assessments of likelihood about a number of these uncertainties seemed necessary to us to decide against the first alternative. We would not give the president unbounded discretion to approve, secretly and without oversight in any form, any form of interrogation he regards as necessary, because: (1) as we have described above, the benefits of coercion even in the "ticking bomb" case depend on a quite unlikely set of conditions; (2) an inadequate level of care has been used so far in resorting to highly coercive or degrading interrogation whenever the power to choose this path was delegated to subordinates, creating real evidence of a "slippery slope"; and (3) a number of the costs of even personal presidential decision to use highly coercive interrogation, much less power delegated by the president, are likely to be great, and, if these concerns leave grave doubt about the wisdom of this alternative, as they do, we should not abandon either treaty commitments we have sol-

emnly signed or a federal statute forbidding torture we have very deliberately enacted.[12] Moreover, the possible effects on American loyalty and morale of such a sharp abandonment of the claim that the United States is a world leader in fairness and decency make authorizing torture a gamble not to be taken without far more evidence of usefulness than is now available. Nor would we accept as such evidence anecdotal statements from officials involved in highly coercive interrogation when the only evidence as to how often and how well it has worked compared to far less costly ways of gathering information is systematically withheld by the Administration. Neither international embarrassment at what we do nor any plausible need for secrecy even years later warrants preventing a fact-based evaluation of such a highly controversial abandonment of U.S. tradition. In short, that some resolution of admitted uncertainties are much more likely than others and that critical continued uncertainty is often the result of executive secrecy together led us to reject any form of authorization of torture.

Why Allow Limited Forms of Cruel, Inhuman, and Degrading Treatment?

Most of what has been a costly experiment with interrogation during the "war on terrorism" involves activities that fall short of torture, but fall into whatever the meaning might be of the somewhat vague label "cruel, inhuman, and degrading treatment." The considerations here are somewhat different. The forms of coercion that fall within this prohibition may not bear all the costs of the powerful and historic social condemnation that is plainly associated with torture. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, specifically precludes any exception to the prohibition of torture; it does not include a similar provision forbidding departures from the commitment not to engage in cruel, inhuman, and degrading treatment.

The great price we have already paid in alienating the communities and nations whose support we will need in the "war on terrorism" is a strong argument for not continuing to delegate authority to use degrading treatment, let alone cruel and inhuman treatment short of torture. How different would the consequences be if such practices were generally prohibited, but the president remained free to personally make very rare exceptions to save human lives? I have discussed above the difficulties of assessing the political costs of occasional exceptions, even assuming, as I do, that a properly drafted executive power could prevent slipping down a slope of abuse. Moreover, the benefits of this lesser form of coercion might well not include a substantially increased chance of obtaining a quick and truthful answer in the case of the "ticking bomb".

torture by treaty or statute and those traditionally allowed in seeking a voluntary confession under the due process clauses of the U.S. Constitution.

Still for three reasons we would permit the president personally to approve any form of interrogation short of torture in an emergency where multiple lives could be saved in no other way and where that form of interrogation would be Constitutionally permitted even if the subject was an American citizen and the interrogation took place in the United States.

1. We would be fully honoring the commitments we made by treaty. At the time the Senate ratified The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, they made clear that "cruel, inhuman, and degrading treatment" was to be understood as any form of interrogation that would violate the 5th, 8th, or 14th Amendments of the Constitution. That means that as a nation we agreed to prohibit only what was forbidden in a line of Constitutional decisions about government conduct that "shocks the conscience." In each of the cases, the necessity for what the government did is treated as entirely relevant to assessing the Constitutionality of its actions. We believe that the use by the president of a form of coercive interrogation that was not torture in an emergency where it was necessary to save multiple lives might well not "shock the conscience" of a court reviewing that action in a suit for damages months later. There is much to be said for sticking with what was carefully decided a decade ago in a situation where arguments could still be made on either side of the issue.

   Under our recommendation, judicial review will create accountability in the form of damage actions and will allow a careful review of the facts. That eliminates, as the Senate desired, much of the great vagueness of the phrase "cruel, inhuman, and degrading." Finally, there is a real guarantee of fairness and a significant reduction in resentment that flows from the Senate's decision to use the standard applicable to interrogation of Americans as the standard for interrogation of "illegal combatants." We will not treat anybody anywhere in the world one touch worse than we would treat an American citizen at home. But we are not obligated to treat suspects abroad more carefully than we would treat U.S. citizens.

2. Giving the president a very limited, procedurally guarded, discretion to create an exception to the prohibition of "cruel, inhuman, and degrading" treatment is only responsible and prudent in a world where a small nuclear bomb is a distinct possibility. While we do not think that power will help the president much, we were not prepared to have our judgment replace that of the president's if he is willing to decide personally and accountably that using an interrogation technique short of torture is necessary.

   That exception brings the handling of captured terrorists into line with the criminal law of most Western countries and with other steps that are accepted to prevent a terrorist attack. Under the criminal law of almost every Western nation, even the killing of innocent people is permitted to save

more innocent lives under a doctrine called the "lesser of evils" or "necessity" defense. This part of the U.S. criminal law would apply to the president in acting to diffuse a "ticking bomb." It should apply to interrogation techniques short of torture if it would authorize, in closely related circumstances, lethal force to prevent the same attack.

Similarly the exception makes sense in terms of the president's admitted capacity and certain plans to take far more drastic steps when a serious terrorist event is imminent. He will shoot down an airliner with 240 of us aboard if it has been hijacked and is heading for the Capitol or Empire State Building. He should be able, in similar circumstances, to order an interrogation under coercive conditions less than torture. Our presidents have and would send cruise missiles or bomber attacks to prevent such an attack.

3. Realistically, giving the president some power to act exceptionally in highly exceptional circumstances is a minimum condition of legislation and would be even if we had a Democratic Congress and a Democratic president. If the legislature is to act with executive agreement, there ultimately has to be a trade of legitimacy for one set of presidential actions (which he is presently taking without clear authority) in exchange for the president accepting both a prohibition of some others and a set of procedures, standards, and oversight for a broader range of interrogation techniques.

All this would be unimportant if having legislation made no difference–if judicial review were a promising and full substitute for legislation. But judicial review ignores one-third of the separation of powers and, even more serious, will be extremely deferential to presidential authority unless and until the Congress acts. The courts will not stand in the way of a president who is asserting national security interests unless the Congress provides its support. In that circumstance, made famous by a concurring opinion of Justice Jackson in the Steel Seizure case, the courts will step in. But they will not step in alone. So if we want to reestablish separation of powers in the United States, we have to get the Congress to act. Only this will empower the legislature and the courts to share in deciding the future of the United States.

This resolution of uncertainties led us to leave a narrow exception for highly coercive interrogation, short of torture, in life-threatening emergencies.

Conclusion

For few truly hard questions of policy or morality are there conclusive answers. That there is not a single certain answer to the question of what the position of the United States should be on coercive interrogation of a suspected terrorist–and on who should make that decision and with what procedures,

standards, and oversight–is hardly surprising. Indeed, it is almost mandated by the fact that while there is agreement on some critical facts, there is no agreement on others that are both of great moment and deeply contested. What we can ask for the nation is that we debate a matter as relevant to our national identity as coercive interrogation and that the arguments seek as much transparency as possible and not hide behind either feelings of pride in hard-headedness or of satisfaction in being holier than others and not be hidden behind conclusive assumptions about unknown facts.

Juliette Kayyem and I have tried to take that unusual path by assembling a group of law enforcement, intelligence, and academic experts from the United States and the United Kingdom to consider 10 very difficult questions, none harder than what our position should be on highly coercive interrogation. Not all of our experts agreed with all of our conclusions. The results are solely the responsibility of Juliette Kayyem and I.

Our conclusions, with reasoning as transparent as possible, went like this: if you believe that laws and practices of war between states had to change after the development of atomic weapons because suddenly there were risks orders of magnitude greater than those before, then it is reasonable to believe that the danger of devastating forms of terrorism also require some changes in domestic law and international law. We believe that the world has not changed enough to have the executive operate without legal constraints or accountability to other branches of government, but it has changed enough to require some new laws and international understandings. Our assumption has been that the administration's picture of a relatively ruthless "war," where the goal of survival justifies almost every means, is no better than an exclusive preoccupation with general rules of righteous behavior–that what is needed is an intelligent effort to maximize both humaneness and national security.

Our specific handling of one of the ten hardest issues–highly coercive interrogation–is attached as Appendix A. We thought that the extremely questionable benefits of adding torture to an array of already available and widely accepted methods of gathering intelligence were very likely to be outweighed by the types of costs that I have described. A balance that was close at best could hardly justify a case for violating a treaty obligation we had solemnly adopted. We also thought the use of renditions and near-renditions to bring about torture at the hands of other nations, should be flatly prohibited and not tolerated with an executive wink at hypocritical assurances.

The United States should freely use any interrogation technique that can be used in a police station within the United States without making a resulting confession excludable as "coerced" under the due process clause of the U.S. Constitution. But any technique forbidden in this context but to be used on terrorists should be proposed by the attorney general and approved by the presi-

dent. For accountability we require that list of approved coercive techniques to be sent to appropriate committees of Congress.

Nothing on that list should violate either the torture provisions or the provisions forbidding "cruel, inhuman, and degrading" treatment. Particular findings must be made in the field before an individual can be subjected to any technique on the list–any technique which would not be consistent with due process in a U.S. police situation. For a violation of any of these rules a party could bring suit for damages against the United States in federal district court. The effect would be to develop, after the fact, law as to whether or not a technique violates the prohibitions we formally accepted and ratified, with particular reservations.

To all these protections we added one exception: that the president could personally decide to use techniques that would, as general practices, be forbidden by the "cruel, inhuman, and degrading" clause if he or she made written findings that in a particular emergency this was necessary to save lives imminently threatened and if the technique he approved would be Constitutional if applied to an American citizen in the United States in a similar circumstance. This does not, in any circumstance, authorize torture. It is substantially the same as the provision that would allow a necessity defense to a killing of innocent people by an ordinary person in most Western countries. The situation is also one in which the president would feel authorized to use military and lethal force. When exercising that exception the president's findings would have to be formally sent to Congress. He would have to announce the number of occasions in any year in which the exception was invoked.

The benefit of these provisions is that they honor our commitments, protect our national security in the one situation where more than normal police interrogation may be necessary, and provide a variety of forms of accountability to replace the secrecy that now hides our interrogation practices. The effect would also be to remove any doubt that the prohibition on cruel, inhuman, and degrading treatment applies abroad.

One might want to change these provisions. They were not handed down on Mt. Sinai. They are simply our effort to deal realistically, but under a rule-of-law regime, with the increased dangers posed by the risk of massive terrorist attacks. The very idea of addressing these issues thoughtfully and publicly has not so far been embraced by either the basic rights community or the administration. But the process is necessary for a self-governing, proud nation.

Appendix A

Long-Term Legal Strategy Project

Preserving Security and Democratic Freedoms in the War on Terrorism

Recommendation on Coercive Interrogation

Rules proscribing the use of torture and other cruel and inhuman treatment by the United States provide little guidance as to the legitimacy of specific interrogation techniques and when they can be used. The exact coverage of the international torture prohibition is far from clear. The same is true of the U.S. reservations and understandings on ratifying it. Whether it binds the president is disputed, as are the conditions, if any, on which the lesser prohibition (Article 16) of cruel and inhuman treatment can be waived. No other set of specific rules and procedures regarding highly coercive interrogation, not forbidden by the U.N. Convention Against Torture or the Geneva Conventions, exists. In this context of uncertainty, the use of particular coercive techniques remains and has been subject to serious abuse. On the other hand, the controversy surrounding interrogation tactics, and the resulting criminal charges against military personnel, has resulted in a dramatic swing of the pendulum that may discourage lawful interrogation tactics. That, too, is not a beneficial response. Our recommendations seek to provide guidance on which standards ought, and ought not, to be utilized.

I. Treaty and Statutory Commitments

    A. Without exception, the United States shall abide by its statutory and treaty obligations that prohibit torture.

    B. Consistent with the provisions under "Emergency Exception," the United States shall abide by its statutory and treaty obligations that prohibit cruel, inhuman, or degrading treatment. Lawfulness under the U.S. reservation to Article 16 of the Convention Against Torture ("cruel, inhuman, or degrading treatment") requires at least compliance with the due process prohibition against actions that U.S. courts find "shock the conscience." Nothing in the following effort to define compliance with these obligations is intended to supplant our additional obligations when particular circumstances make applicable the Third and Fourth Geneva Conventions.

II. Transfer of Individuals

A. The United States shall abide by its treaty obligations not to transfer an individual to a country if it has probable cause to believe that the individual will be tortured there. If past conduct suggests that a country has engaged in torture of suspects, the United States shall not transfer a person to that country unless (1) the secretary of state has received assurances from that country that he or she determines to be trustworthy that the individual will not be tortured and has forwarded such assurances and determination to the attorney general; and (2) the attorney general determines that such assurances are "sufficiently reliable" to allow deportation or other forms of rendition.

B. The United States shall not direct or request information from an interrogation or provide assistance to foreign governments in obtaining such information if it has substantial grounds for believing that torture will be utilized to obtain the information.

C. The United States shall not encourage another nation to make transfers in violation of the prohibitions of the Convention Against Torture.

III. Oversight of the Use of any Highly Coercive Interrogation (HCI) Techniques[13]

A. The attorney general shall recommend and the president shall promulgate and provide to the Senate and House Intelligence, Judiciary, and Armed Services Committees, guidelines stating which specific HCI techniques are authorized. To be authorized, a technique must be consistent with U.S. law and U.S. obligations under international treaties including Article 16 of the Convention against Torture, which under "Treaty and Statutory Commitments" above, prohibits actions that the courts find "shock the conscience." These guidelines shall address the duration and repetition of use of a particular technique and the effect of combining several different techniques together. The attorney general shall brief appropriate committees of both houses of Congress upon request, and no less frequently than every six months, as to which HCIs are presently being utilized by federal officials or those acting on their behalf.

B. No person shall be subject even to authorized HCI techniques unless (1) authorized interrogators have probable cause to believe that he is in possession of significant information, and there is no reasonable alternative to obtain that information, about either a specific plan that threatens U.S. lives or a group or organization making such plans whose capacity could be significantly reduced by exploiting the information; (2) the determination of whether probable cause is met has been made by senior

government officials in writing and on the basis of sworn affidavits; or (3) the determination and its factual basis will be made available to congressional intelligence committees, the attorney general and the inspectors general of the pertinent departments (i.e., Department of Justice, Department of Defense, etc.).

IV. Emergency Exception

A. No U.S. official or employee, and no other individual acting on behalf of the United States, may use an interrogation technique not specifically authorized in this way except with the express written approval of the president on the basis of a finding of an urgent and extraordinary need. The finding, which must be submitted within a reasonable period to appropriate committees from both houses of Congress, must state the reason to believe that the information sought to be obtained concerns a specific plan that threatens U.S. lives, the information is in possession of the individual to be interrogated, and there are no other reasonable alternatives to save the lives in question. No presidential approval may authorize any form of interrogation that would be prohibited by the 5th, 8th, or 14th Amendments of the U.S. Constitution if applied to a U.S. citizen in similar circumstances within the United States.

B. The president shall publicly report the number of uses of his special necessity power biannually to Congress.

V. Individual Remedies and Applicability

A. An individual subjected to HCI in circumstances where the conditions prescribed above have not been met shall be entitled to damages in a civil action against the United States.

B. No information obtained by highly coercive interrogation techniques may be used at a U.S. trial, including military trials, against the individual detained.

Preventive Interrogational Torture

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Introduction

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"[I]t is naïve to suppose that there is a solution to every moral problem with which the world can face us. We have always known that the world is a bad place. It appears that it may be an evil place as well."[1]

"Purity is an idea for a yogi or a monk. You intellectuals and bourgeois anarchists use it as a pretext for doing nothing. To do nothing, to remain motionless, arms at your sides, wearing kid gloves. Well, I have dirty hands. Right up to the elbows... But what do you hope? Do you think you can govern innocently?"[2]

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1 Thomas Nagel, War and Massacre, in War and Moral Responsibility 3, 24 (Marshall Cohen et al. eds., 1974). See also Alan M. Dershowitz, Why Terrorism Works 133 (2002) (suggesting that we are ill-equipped to "choose among unreasonable alternatives, each so horrible that our mind rebels even at the notion of thinking about the evil options.").

2 Jean-Paul Sartre, "Dirty Hands," reprinted in No Exit and Three Other Plays 125, 218 (I. Abel trans., Vintage Int'l. ed. 1989).

Introduction

Since the 19th century, Western societies have considered torture as "the supreme enemy of humanitarian jurisprudence and of liberalism, and the greatest threat to law and reason."[3] Reflecting strong universal condemnation and reprobation of such practices, torture is absolutely prohibited under all major international human rights and humanitarian law conventions.[4] This absolute ban is considered universal and has become part of customary international law. In fact, it amounts to a preemptory norm of international law.[5]

This paper supports an absolute legal ban on torture. However, I also suggest that in truly catastrophic cases the appropriate method of tackling extremely grave national dangers and threats may call for going outside the legal order, at times even violating the otherwise entrenched absolute prohibition on torture. Truly exceptional cases may give rise to official disobedience: Public officials may act extralegally and be ready to accept the legal ramifications of their actions. However, even if we recognize that torture may be morally defensible in exceptional cases, that fact should not affect an uncompromising legal ban on torture.[6]

This paper deals only with preventive interrogational torture, i.e., torture whose aim is to gain information that would assist authorities in foiling exceptionally grave terrorist attacks. Hence, the aim is exclusively forward-looking. Preventive interrogational torture does not seek to obtain confessions or other

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3 Edward Peters, Torture 75 (expanded ed. 1996).

4 See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/708 (1984) (entered into force June 26, 1987); African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, OAU Doc. CAB/LEG/67/3/Rev. 5 (entered into force Oct. 21, 1986); American Convention on Human Rights, Nov. 22, 1969, art. 5, 9 I.L.M. 673, 676–77, O.A.S. Official Records OEA/ser. K/XVI/1.1, doc. 65, rev. 1, corr. 2 (entered into force July 18, 1978); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175, 6 I.L.M. 368, 370; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, 224 (entered into force Sept. 3, 1953); see also Tomasi v. France, 241 Eur. Ct. H.R. (ser. A), at 42 (1992). Torture is also considered a grave breach of the four Geneva Conventions for the Protection of Victims of War of 1949. Oren Gross, "The Grave Breaches System and the Armed Conflict in the Former Yugoslavia," 16 Mich. J. Int'l L. 783, 801–09 (1995); see also M. Cherif Bassiouni and Daniel Derby, "The Crime of Torture," in 1 International Criminal Law 363 (M. Cherif Bassiouni ed., 1986); J. Herman Burgers and Hans Danelius, The United Nations Convention against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1988).

5 See, e.g., Kadic v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (remarking that in light of the unanimity of international law, "it would be unthinkable to conclude other than that acts of official torture violate customary international law"); Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (suggesting that torture violates international law to such an extent that the "torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind"); Council of Europe, Guidelines on Human Rights and the Fight Against Terrorism (2002); Inter-American Commission on Human Rights, Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, Doc. 40 rev., Feb. 28, 2000, at § 118; Restatement (Third) of the Foreign Relations Law of the United States, § 702, cmt. n (1990); Roland Bank, "International Efforts to Combat Torture and Inhuman Treatment: Have the New Mechanisms Improved Protection?," 8 Eur. J. Int'l L. 613 (1997); Sanford Levinson, "Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11, 81 Tex. L. Rev. 2013, 2013–17 (2003); see also Sissela Bok, Common Values 15–16 (1995); Seth F. Kreimer, Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s, 5 Wm. & Mary Bill Rts. J. 427, 510–11 (1997); Jeremy Waldron, "How To Argue for a Universal Claim," 30 Colum. Hum. Rts. L. Rev. 305, 305 (1999).

6 See, e.g., Tibor R. Machan, "Exploring Extreme Violence (Torture)," 21 J. Soc. Phil. 92, 95–96 (1990) ("Sometimes acts may be morally justified even if the law ought, as a matter of its generality, forbid them... Although it is credible that even a police officer ought to employ extreme violence in certain circumstances, it does not follow from this that the law... ought to sanction such violence.").

evidence that may be used to bring the subject of interrogation to criminal trial. Nor is it concerned with punishing individuals for past actions.

I should also say a word about "torture." Much of the legal discussion in this area revolves around the definition of "torture." For example, the jurisprudence developed under the European Convention on Human Rights has tended to tackle the issue through the prism of a "severity of suffering" test.[7] According to this test, a distinction can be drawn among various categories of ill-treatment (e.g., ill-treatment that amounts to "degrading" or "inhuman" treatment or to "torture") as well as between ill-treatment and treatment that does not cross the threshold of suffering which would render such treatment impermissible.[8] Governments have invoked the "severity of suffering" test to argue that interrogation techniques utilized by their agents, while rough and coercive, did not cause so much suffering as to brand the interrogators' conduct "ill-treatment."[9] Thus, the threshold test of suffering has been used in an attempt to fly below the radar of the absolute prohibition on torture. I find such definitional wizardry to be uninteresting and unsatisfactory. Rather, the argument developed below seeks to address head-on instances where interrogation methods are used that clearly fall within the ambit of "torture." Preventive interrogational torture is far too complex to be addressed by definitional juggling.

The Debate About the Morality and Legality of Preventive Interrogational Torture

Absolutists—those who believe that an unconditional ban on torture ought to apply without exception regardless of circumstances—frequently base their position on deontological grounds. For them, torture is inherently wrong. It is an evil that can never be justified or excused. It violates the physical and mental integrity of the person subjected to it, and negates her autonomy and humanity and deprives her of human dignity. It reduces her to a mere object, a body, from which information is to be extracted, while coercing her to act in a manner that may be contrary to her most fundamental beliefs, values, and interests, depriving her of any choice and controlling her voice.[10] Torture is also wrong because of its depraving and corrupting effects on individual torturers and society at large.

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7 Fionnuala Ni Aolain, "The European Convention on Human Rights and Its Prohibition on Torture," in Torture: A Collection 213 (Sanford Levinson ed., 2004).

8 See, e.g., Evans and Morgan, Preventing Torture: A Study Of The European Convention For The Prevention Of Torture and Inhuman or Degrading Treatment or Punishment 69-98 (1998); Yutaka Arai-Yokoi, "Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR," 21 Neth. Q. Hum. Rts. 385 (2003); Anthony Cullen, "Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights," 34 Cal. W. Int'l L.J. 29 (2003).

9 See, e.g., Levinson, supra note 5, at 2036–41.

10 A classic discussion is Elaine Scarry, The Body in Pain 27-59 (1985). See also Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," 6 U. Pa. J. Const. L. 278, 295-99 (2003); Mordechai Kremnitzer, "The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the "Needs" of the Security Service?," 23 Isr. L. Rev. 216, 248–51 (1989).

Under this view, torture is an evil that can never be justified or excused. Under no circumstances should the resort to torture be morally acceptable or legally permissible. It is a reprehensible action whose wrongfulness may never be assuaged or rectified morally even if the consequences of taking such action in any particular case are deemed to be, on the whole, good. "[T]he wrong of torture can be taken as a trump or side constraint on welfare maximization in all possible cases."[11]

Yet, as I suggest below, even those who generally believe that no aggregate social benefits may ever justify or excuse preventive interrogational torture are hard pressed to maintain that position in cases where there is a real likelihood that a harm of catastrophic proportions will materialize if torture is not used. Many who support absolute, categorical rights (and, where relevant, prohibitions) realize that their position is untenable, not only practically but also morally speaking, when applied to such catastrophic cases.

Others support an absolutist view of the ban on torture by arguing that the social costs of permitting the use of torture, even in narrowly defined exceptional circumstances (assuming that those exceptional circumstances lend themselves to such narrowly tailored definitions), would always outweigh the social benefits that could be derived from applying torture. In other words, torture would always be a good-diminishing, rather than good-enhancing, activity. Hence, there is no point in balancing on a case-by-case basis with respect to the question of torture. A correctly calibrated cost-benefit analysis must always, ab definitio, lead to the same conclusion, i.e., that torture should not be allowed regardless of any specific context. Any analysis that leads to a contrary conclusion is based on miscalculation which is the result of distorted focus on isolated cases while ignoring long-term and systemic implications of particular courses of action. In fact, the general rule against torture must be followed and applied even if doing so may truly lead to less beneficial consequences in the particular instance than a contextual decision-making process would yield. Applying the rule to all circumstances is beneficial inasmuch as it minimizes the possibility of errors in the decision-making process.

But it is precisely this last point that presents the most critical challenge to such rule consequentialist position: In those concrete cases where it seems that deviating from the rule may bring about better results than following the rule, one can either follow a rule-based decision-making process or adhere to consequentialist reasoning, but not do both. To strictly follow the rule becomes irrational from a consequentialist point of view. Yet to ignore the rule and adopt a particularist view makes the rule meaningless. The rules cannot be subject to particularistic challenges that seek to rebalance the basic values and interests

11 Frederick Schauer, "Commensurability and Its Constitutional Consequences," 45 Hastings L.J. 785, 790 (1994).

that underlie the rule. Thus we come full circle back to the fundamental dilemma of what is to be done about the particular, concrete case where following the absolutist rule strikes us as unjust or inefficient (depending on our relevant set of values).

In its purest form, the absolutist point of view does not accept the permissibility or the usefulness of talking about the possibility of using torture in exceptional circumstances. Indeed, even attempting to conduct a rational conversation about torture may be deemed wrong as it can undermine the commitment to a general absolute prohibition. Torture is impermissible and that is all there is to it.

This uncompromising point of view is castigated by its opponents as utopian, naïve, or even outright hypocritical. It is not that they deny the awfulness of torture. Rather, in place of an absolute ban, they offer a "conditional ban" approach, which accepts the overridability of the prohibition on torture if certain conditions are present. Invariably, most arguments in support of the conditional ban approach are act consequentialist, which means that the "value" of torture (or of not torturing) is assessed by regard to the real-world consequences—the costs or benefits—of its occurrence on a case-by-case basis. Such an approach may lead to the conclusion that, at least in some specific cases, the social benefits of torture exceed the social costs that attach to such practices.[12] In such cases, using torture would maximize good consequences or minimize bad ones. For example, a standard argument is that torturing one person may be justified when it is necessary to save the lives of many innocent persons who would otherwise meet a certain death. When the choice is between the physical integrity and dignity of a suspected terrorist and the lives of a great many innocent persons, an absolute ban on torture cannot be morally defensible.[13]

Aside from the important question of what constitute good (and bad) consequences, this sort of analysis is often charged with leading to too much, rather than too little, torture. First, there is a bias towards immediate consequences while discounting (or ignoring entirely) long-term consequences of the use of torture. We tend to undervalue future benefits and costs when comparing them with present benefits and costs. Thus, longer-term costs for the rule of law and individual rights and liberties tend to be overly discounted. The intangible and abstract nature of such future costs, in comparison with the very tangible pending catastrophe, exacerbates this defect in our risk assessment.

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12 See, e.g., W.L. Twining and P.E. Twining, "Bentham on Torture," 24 Northern Ireland Legal Q. 305 (1973).

13 See, e.g., "Winfried Brugger, May Government Ever Use Torture? Two Responses from German Law," 48 Am. J. Comp. L. 661 (2000); Leon Sheleff, "The Necessity of Defense of the Truth: On the Tortuous Deliberations About the Use of Torture," 17 Bar-Ilan L. Stud. 459, 485-88 (2002); Dershowitz, supra note 1, at 131-63.

Even more troubling is the fact that torture is treated, in and of itself, as morally neutral, since all that really matters are the results. Act consequentialism has no built-in limitations. No act is undesirable per se.[14] The consequences of the act in each and every concrete case determine moral worth and value. If, for instance, in order to save the lives of a thousand innocent civilians, we must torture an innocent child, cost-benefit arguments appear to support using torture.[15]

Pragmatic Absolutism

The case for an absolute prohibition on interrogational torture seems to me to be a compelling one. Yet, while non-consequentialist reasoning supports a ban on torture, it does not, in and of itself, present a compelling case for an absolute ban. To arrive at the conclusion that absolute prohibition on torture is justified more is needed. I anchor that necessary addition in pragmatic reasoning. In short, I believe that there are pragmatic, instrumental reasons that provide additional support for an absolute legal prohibition on torture and that promote and facilitate further the noninstrumental goals and values that are usually associated with such an absolute ban.

Setting general policy, accommodating exceptional cases

While such scenarios as the "ticking bomb in the crowded mall" are not merely hypothetical cases, they are extremely rare in practice. When we set out to chart a general policy on the issue of torture we must ask ourselves whether our general policy ought to be shaped around the contours of these rare exceptions. Or is there an independent value in striking a strong position in favor of an absolute ban on torture? Those who believe, as I do, that the ticking bomb case is a hard one from both ethical and legal perspectives, must be mindful of the risk of creating bad law and ethics to answer the particular needs of the hard case. "Hard cases," Justice Holmes notably warned, "make bad law." There is a difference, though, between ignoring completely truly catastrophic cases and focusing our attention elsewhere when designing general rules and policies.

Symbolism, myths, and education

A categorical prohibition on the use of torture is desirable in order to uphold the symbolism of human dignity and the inviolability of the human body. Such a prohibition not only approximates what decent people believe, but also what society we want to live in and belong to.[16] Moreover, even if one believes

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14 See, e.g., Nagel, supra note 1, at 6 (arguing that absolutist intuitions "are often the only barrier before the abyss of utilitarian apologetics for large-scale murder."); Dershowitz, supra note 1, at 146 ("Even terrorism itself could be justified by a case utilitarian approach."); Sanford H. Kadish, "Torture, the State and the Individual," 23 Isr. L. Rev. 345, 353 (1989).

15 Samuel Scheffler, Introduction, in Consequentialism and Its Critics 3 (Samuel Scheffler ed., 1988).

16 Charles L. Black, Jr., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," Harper's Magazine 63, 67 (Feb. 1961), reprinted in Charles Black, The Occasions of Justice: Essays Mostly on Law 89–102 (1963); See also H.C. 5100/94, Pub. Comm. Against Torture in Israel v. The State of Israel, 53(4) P.D. 817, 845 (Barak, P.).

that an absolute ban on torture is unrealistic, as a practical matter, there is independent value in upholding the myth that torture is absolutely prohibited. Such a position may serve as an obvious notice that fundamental rights and values are not forsaken, whatever the circumstances, and that simple cries of national security, emergency, and catastrophe, however sincerely proclaimed, do not automatically trump fundamental individual rights and liberties. In fact, the more entrenched a norm is—and the prohibition on torture is among the most entrenched ones—the harder it will be for government to convince the public that violating that norm is necessary. An absolute prohibition on torture also plays a significant educational function. It helps to educate not only the citizens within the particular legal system by attaching special (moral, political, social, and legal) condemnation to torture as abhorrent;[17] upholding it also sends a clear and strong message to other countries around the world about the impermissibility of such practices.

Strategy of resistance

It may well be that use of preventive interrogational torture under certain extreme circumstances is inevitable. If government agents perceive such use to be the only way to procure critical information that is deemed necessary to foil an imminent massive terrorist attack, which would result in thousands of casualties, they are likely to resort to such measures, whether they are legally permissible or not. However, even when we acknowledge that inevitability, it still makes good sense to say an absolute "no" to the use of torture. As Fred Schauer argues, "Resisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous."[18] What is "less inevitable but more dangerous" is, for example, the expanded use of interrogational torture to less-than-catastrophic cases. Once we authorize state agents to use interrogational torture in one set of cases, it is unlikely that we will be able to contain such use to that limited subset of cases. Rather, such powers and authority are likely to expand far beyond their original intended use. The insistence on an absolute ban on torture may slow down the rush to resort to torture practices even in truly exceptional cases. Such an absolutist position not only imposes moral inhibitions on government officials, but also raises the specter of public exposure if a measure is later considered to have been unnecessary, and the (albeit remote) possibility of criminal proceedings and civil suits brought against the perpetrators.

Rejection of balancing tests

It is easier to justify the use of torture when engaging in "balancing." As Charles Black suggested, "[a]s a matter of attitude, the language of 'balancing'

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17 Gross, supra note 4, at 791–93; Kadish, supra note 14, at 352; Kremnitzer, supra note 10, at 253–54.

18 Frederick Schauer, "May Officials Think Religiously?," 27 Wm. & Mary L. Rev. 1075, 1085 (1986).

is apt language, easily conformable language, for the job of cutting down to what somebody thinks is comfortable size the claims to a sometimes awkward human freedom which the Bill of Rights set out to protect."[19] An absolute ban on torture rejects the legitimacy of pursuing any form of balancing in particular cases between the ban on torture and competing values. Such balancing is going to be factually difficult to conduct and subject to inherent biases that would result in more, rather than less, torture. As Thomas Nagel suggests: "Once the door is opened to calculations of utility and national interest, the usual speculations about the future of freedom, peace, and economic prosperity can be brought to bear to ease the consciences of those responsible for a certain number of charred babies."[20]

Slippery slopes

Slippery slope arguments constitute a significant part of the absolutists' arsenal. They come in the form of "if X then Y; Y is bad; therefore even if X is good, we must refrain from X because of Y." X, in this case, is allowing the use of preventive interrogational torture in truly exceptional cases. The feared Ys include: (1) use of interrogation torture for non-preventive purposes (including for purposes of retribution and early punishment); (2) use of interrogational torture in less-than-truly-exceptional cases; and (3) expansion of the use of interrogational torture beyond the particular confines of anti-terrorism, such as applying similar methods to "ordinary" criminals.

The risk of sliding down those slippery slopes has to do with more than just the character of the individuals who are likely to engage in acts of interrogational torture. In fact, it exists even if we assume that security services and their members act in good faith and out of the purest motives when deciding whether particular circumstances constitute a catastrophic case that may justify or excuse interrogational torture—an assumption that many are unwilling to accept. This is so because of the creation of a constituency for torture, and the general dilution of moral restraints in the relevant society.[21] Thus, assuming that torture may be deemed a more effective interrogation technique than its alternatives, we can expect members of security services to become increasingly more dependent on the use of such coercive techniques in specific cases, justifying categorization of a larger number of cases as catastrophic. Their careers depending on their ability to foil future attacks, interrogators are likely, when they believe they can get away with it, to opt for those interrogation methods

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19 Black, supra note 16, at 66; See also Guido Calabresi, A Common Law for the Age of Statutes 174 (1982); Mordechai Kremnitzer, "National Security and the Rule of Law: A Critique of the Landau Commission's Report," in National Security and Democracy in Israel 153, 170–71 (Avner Yaniv ed., 1993).

20 Nagel, supra note 1, at 9.

21 See, e.g., John H. Langbein, The Legal History of Torture, in Torture: A Collection 93 (Sanford Levinson ed., 2004) (suggesting that, "once legitimated, torture could develop a constituency with a vested interest in perpetuating it"); Kadish, supra note 14, at 353 ("[T]he legitimation of repugnant practices in special cases inevitably loosens antipathy to them in all cases.").

that are deemed to provide the fastest answers.[22] And what starts off as using exceptional methods in exceptional circumstances may, with time, be internalized and applied in a growing number of cases. "So it always happens that whenever a wrong principle of conduct, political or personal, is adopted on a plea of necessity, it will be afterwards followed on a plea of convenience."[23]

Identity of those subject to torture

As David Cole argues, the "security versus liberty" language is misleading. What is really sacrificed are mostly the rights of "others"—aliens, immigrants, foreigners—not our own rights and liberties.[24] The clearer the distinction and division between "us" and "them" and the greater the threat "they" pose to "us," the greater is our willingness to accept use of more radical measures by the government against "them." We allow for more repressive measures when we believe that those will not be turned against us in the future. This is certainly true in the context of interrogational torture, where the perception is that torture is "reserved" for "others" and that the distinction between "us" and those "others," namely the terrorists, is clearest. While the benefits that derive from its application (e.g., preventing particular terrorist attacks) accrue to all members of society, its heavy costs are borne by a distinct, smaller, and ostensibly well-defined group of people. The danger is that the state will tend to strike a balance disproportionately in favor of security and impose too much of a cost on the target group without facing much resistance (and, in fact, receiving strong support) from the general public.[25]

Times of great danger (real or perceived) bring about a confluence of two mutually reinforcing trends, namely the tendency of the public to fear and hysteria, and nativistic tendencies that are reflected in an "intense opposition to an internal minority on the ground of its foreign (i.e., 'un-American') connections."[26] Under such circumstances, use of torture may function to create an "illusory sense of overcoming vulnerability by the thorough domination of others."[27]

As I have argued elsewhere, reliance on the separation between "us" and "them" only provides us with a false, illusory sense of security. History and experience teach us that what we do to others today will be done to us tomorrow.[28] Thus, if for no other reason than self-interest, those that are trigger-hap-

22 Philip B. Heymann, Terrorism, Freedom, and Security: Winning Without War 110 (2003).

23 Juilliard v. Greenman, 110 U.S. 421, 458 (1884) (Field, J., dissenting).

24 David Cole, Enemy Aliens 5-6 (2003).

25 See William J. Stuntz, "Local Policing After the Terror," 111 Yale L.J. 2137, 2164–65 (2002).

26 John Higham, Strangers in the Land 4 (1971).

27 John T. Parry, "What Is Torture, Are We Doing It, and What If We Are?," 64 U. Pitt. L. Rev. 237, 247 (2003).

28 Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?," 112 Yale L.J. 1011, 1085–89 (2003). See also David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 85-179 (2003).

py when it comes to using torture in interrogations of suspected terrorists in the name of national security must be wary of history's lessons. Counterterrorism measures tend to expand and extend over time beyond their original, "limited" goals and specific targets.

In sum, the only realistic barrier against governmental abuse of powers in the context of interrogational torture may be the setting of an absolute prohibition on such practices. Even if a legal prohibition prevents what may be deemed as necessary action in certain situations, this cost may be worth paying, e.g., due to the small probability of such cases arising, further discounted by the small probability that government is unable to deal with them effectively by utilizing available legal measures. Furthermore, such cost may be negligible in comparison with the greater costs entailed in the far more probable abuse of powers by the government in a broader—and arguably more realistic—set of cases.

Catastrophic Cases

To deny the use of preventive interrogational torture even when, for example, there is good reason to believe that a massive bomb is ticking in a mall is as cold hearted as it is to permit torture in the first place. It is cold hearted because in true catastrophic cases the failure to use preventive interrogational torture will result in the death of many innocent people. Upholding the rights of the suspected terrorist will lead to the negation of the rights, including the very fundamental right to life, of innocent victims. As Sissela Bok observes, "it is a very narrow view of responsibility which does not also take some blame for a disaster one could easily have averted, no matter how much others are also to blame."[29] To deny the use of preventive interrogational torture in such cases is, as the Landau Commission in Israel suggested, also hypocritical.[30] Experience tells us that when faced with serious threats to the life of the nation, government will take whatever measures it deems necessary to abate the crisis. Ignoring those real-life consequences of extreme cases may lead to the portrayal of the legal system as unrealistic and inadequate. As a result, particular norms, and perhaps the legal system in general, may break down, as the ethos of obedience to law may be seriously shaken and challenges emerge with respect to the reasonableness of following these norms. Thus, legal rigidity in the face of severe crises is not merely hypocritical, but is, in fact, detrimental to long-term notions of the rule of law. It may also lead to more, rather than less, radical interference with indi-

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29 Sissela Bok, Lying 41-42 (2d ed. 1999).

30 Israeli Gov't. Press Office, Commission of Inquiry into the Methods of Investigation of the General Security
Service Regarding Hostile Terrorist Activity (1987), reprinted in 23 Isr. L. Rev. 146, 183 (1989).

31 See, e.g., Bruce Ackerman, "The Emergency Constitution," 113 Yale L.J. 1029, 1030 (2004).

vidual rights and liberties.[31] A conditional ban on torture imposes high social and individual costs, but so, too, does an absolute ban.

Supporting an uncompromising absolute prohibition on torture amounts to setting unrealistic standards that no one can hope to meet when faced with a truly catastrophic case. As the drafters of the Model Penal Code explain: "Law is ineffective in the deepest sense, indeed… it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise."[32]

Even if each of us, as moral agents, would be supportive of an absolute prohibition on torture, we would still not want those who are entrusted with keeping us safe from harm to be strictly bound by similar constraints. We want our leaders and our public officials to possess the highest moral character. But I do not believe we want them to be brazen Kantians. Recall Kant's celebrated example of an unconditional duty to tell the truth, a duty that is not suspended even when an assassin (A) asks a person (B) whether a friend of B, who A wishes to murder, is hiding in B's house. I agree with Sissela Bok that: "A world where it is improper even to tell a lie to a murderer pursuing an innocent victim is not a world that many would find safe to inhabit."[33] Few people would want either as a friend or a leader someone who follows Kant's absolutist view to its extreme rather than lie in order to save the lives of innocent civilians. The same may be true of torture. To paraphrase Michael Walzer, sticking by the absolute prohibition on torture no matter what reflects a "radicalism of people who do not expect to exercise power… ever, and who are not prepared to make the judgments that this exercise… require[s]."[34] Similarly, Judge Posner argued that, "if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."[35] Michael Walzer, who considers injunction against torture to form part of a set of standards to which all societies can be held,[36] famously suggested that a moral politician is recognized by "his dirty hands."[37] The moral official would do the right thing to save innocent lives, when faced with a catastrophe such as the ticking bomb case, while openly acknowledging and recognizing that such actions are morally wrong—that is, openly admitting that her hands are indeed dirty. The ques-

32 1 Model Penal Code and Commentaries, § 2.09 at 372-75 (1985), quoted in Yale Kamisar, "Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case," 88 J. Crim. L. & Criminology 1121, 1143 (1998).

33 Bok, supra note 29, at 42.

34 Michael Walzer, Arguing About War 14 (2004).

35 Richard A. Posner, "The Best Offense," The New Republic, Sept. 2, 2002, at 28, 30; Richard A. Posner, Torture, Terrorism, and Interrogation, in Torture: A Collection 291 (Sanford Levinson ed., 2004).

36 Michael Walzer, Moral Minimalism, in From the Twilight of Probability: Ethics and Politics 3, 9 (William R. Shea & Antonio Spadafora eds., 1992); Michael Walzer, Thick and Thin: Moral Argument at Home and Abroad 10 (1994).

37 Michael Walzer, "Political Action: The Problem of Dirty Hands," in War and Moral Responsibility 62, 70 (Marshall Cohen et al. eds., 1974).

tion then becomes not whether state agents will use preventive interrogational torture in the face of a moral principle to the contrary (they will), but rather what moral judgment and legal effect should be attached to such action.

The catastrophic case presents the open-minded absolutist with a real dilemma. Thus Thomas Nagel, who would usually be placed in the deontological camp, writes: "[W]hile it seems to me certainly right to adhere to absolutist restrictions unless the utilitarian considerations favoring violation are overpoweringly weighty and extremely certain—nevertheless, when that special condition is met, it may become impossible to adhere to an absolutist position."[38] Nagel is not alone in conceding that the catastrophic case calls for a special, exceptional treatment. Absolutists that face the dilemmatic choices that catastrophic cases present often engage in definitional balancing, carving out relatively narrow definitions of, or relatively broad exceptions to, the relevant rights and duties. Accordingly, it may still be possible to contend that the prohibition on torture is absolute when applied, while conceding that it is not applicable to every situation. Similarly, supporters of an absolutist perspective may argue that certain measures taken by government agents in specific catastrophic cases do not amount to "torture" and thus do not violate the fundamental prohibition.[39] In a similar vein, many writers have developed distinctions to determine the extent to which the general prohibition on torture is applicable. One example is Philippa Foot's distinction between "what one does or causes and what one merely allows." Under this distinction, one would violate the ban on torture by torturing another. However, the ban would not be violated when we allow torture to take place in circumstances where we cannot prevent some torture from happening and opt to minimize the social costs by, for example, choosing to save a greater number of individuals from being tortured.[40]

However, many have sought to resolve the dilemma by conceding that the catastrophic case calls for a special, exceptional treatment. While the nature of such exceptional treatment may be the subject of further debate. Thus, for example, Charles Fried has argued that rights may be absolute within their scope of application. He acknowledges, however, that this argument runs into difficulties when applied to a case "where killing an innocent person may save a whole nation."[41] Fried concedes that "[i]n such cases it seems fanatical to

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38 Thomas Nagel, Mortal Questions 56 (1979). See also Michael S. Moore, "Torture and the Balance of Evils," 23 Isr. L. Rev. 280 (1989).

39 See, e.g., Levinson, supra note 5, at 2036–41; "Is Torture Ever Justified?," The Economist, Jan. 11, 2003, at 9 (expressing support for strict adherence, even at heavy cost, by the prohibition against torture, which "expresses one of the West's most powerful taboos," but accepting, at the same time, that "vigorous questioning short of torture—prolonged interrogations, mild sleep deprivation, perhaps the use of truth serum" may be justified in some cases).

40 Philippa Foot, "The Problem of Abortion and the Doctrine of Double Effect," 5 Oxford Rev. 15 (1967), reprinted in Philippa Foot, Virtues and Vices 19, 28 (1978). For discussion of other distinctions see Moore, supra note 38, at 299–312.

41 Charles Fried, Right and Wrong 10 (1978).

maintain the absoluteness of the judgment, to do right even if the heavens will in fact fall."[42] The regular norms that ought to apply in ordinary times lead to a "fanatical" result when made to apply in exceptional situations. Fried resolves the tension between the general absolutist view of rights and the relativist approach taken in such "extreme cases" by appealing to the notion of the "catastrophic" case and regarding it as "a distinct concept just because it identifies the extreme situations in which the usual categories of judgment (including the category of right and wrong) no longer apply."[43]

Others, such as Charles Black,[44] Ronald Dworkin,[45] Robert Nozick,[46] Michael Walzer,[47] Thomas Nagel,[48] Michael Moore,[49] and Martha Nussbaum[50] have similarly recognized the catastrophic case as one to which their respective general theories either do not apply entirely or are applicable subject to necessary modifications.

Extreme cases present us with a truly tragic choice. Any attempt to relegate the extreme case to mere irrelevance does not make the choice less tragic, nor does it make a real problem "go away." We can only hope to arrive at a meaningful solution to the legal and moral dilemmas presented to us by the catastrophic case by acknowledging, and accounting for, all the relevant values and interests.

Official Disobedience and Ex Post Ratification

As the previous sections demonstrate, there are two perspectives from which we ought to approach the question of the use of preventive interrogational torture, namely the general policy perspective and the perspective of the catastrophic case. Unlike most absolutists and conditionalists, I suggest that both perspectives ought to be considered as valuable and relevant. We can only focus on one to the exclusion of the other at our peril. However, we must not use the two perspectives simultaneously. Instead, I suggest that the primary perspective ought to be the general one, which, as indicated above, supports an absolute ban on torture due to a combination of moral and pragmatic consid-

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42 Id.

43 Id. See also T. Alexander Aleinikoff, "Constitutional Law in the Age of Balancing," 96 Yale L.J. 943, 1000 (1987).

44 Black, supra note 16, at 67-68.

45 Ronald Dworkin, The Rights of Myron Farber, N.Y. Rev. Books, Oct. 26, 1978, at 34 (arguing that although policy must yield to principle when the two argue in opposite directions, this may be qualified to the extent that "considerations of policy are of dramatic importance, so that the community will suffer a catastrophe if they are ignored").

46 Robert Nozick, Anarchy, State, and Utopia 30 n.* (1974) ("The question of whether... side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.").

47 Walzer, supra note 37.

48 Nagel, supra note 1, at 6 ("[W]hile it is certainly right to adhere to absolutist restrictions unless the utilitarian considerations favoring violation are overpoweringly weighty and extremely certain—nevertheless, when that special condition is met, it may become impossible to adhere to an absolutist position.").

49 Moore, supra note 38.

erations. Once this general policy is set in place, we should attend to the real problems that are presented by the catastrophic case. But can we really examine preventive interrogational torture from both perspectives and still get a coherent, morally and legally defensible picture? I believe we can.

I peg my belief on the twin notions of pragmatic absolutism and official disobedience. Section III above dealt with the former, namely with the claim that an absolute legal ban on torture is the right thing to do when we wed moral and pragmatic considerations. What I wish to add to this conclusion now is the argument that the way to reconcile that absolute ban on torture with the necessities of the catastrophic case is through a mechanism of extralegal action which I call official disobedience: in circumstances amounting to a catastrophic case, the appropriate method of tackling extremely grave national dangers and threats may entail going outside the legal order, at times even violating otherwise accepted constitutional principles.[51]

When catastrophic cases occur, governments and their agents are likely to do whatever is necessary to neutralize the threat, whether legal or not. Yet, to say that the authorities are going to use preventive interrogational torture in catastrophic cases is not the same thing as saying that they should be authorized to do so through a priori, ex ante legal rules. It is extremely dangerous to provide for such eventualities and such awesome powers within the framework of the existing legal system primarily because of the enormous risks of contamination and manipulation of that system, and the deleterious message involved in legalizing such actions.

The model of official disobedience calls upon public officials having to deal with catastrophic cases to consider the possibility of acting outside the legal order while openly acknowledging their actions and the extralegal nature of such actions.[52] The officials must assume the risks involved in acting extralegally. Rather than recognize ex ante the possibility of a lawful override of the general prohibition on torture, as suggested by the presumptive approach, official disobedience focuses on the absolute nature of the ban while accepting the possibility that an official who deviates from the rule may escape sanctions in exceptional circumstances. If an official determines that a particular case necessitates her deviation from the prohibition on torture, she may choose to depart from the rule. But at the time she acts extralegally, she will not know what the personal consequences of violating the rule are going to be. Not only does the basic prohibition continue to apply to other situations (that is, it is not cancelled or terminated), it is not even overridden in the concrete case at hand. Rule departure constitutes, under all circumstances and all conditions, a viola-

50 Eyal Press, "In Torture We Trust?," The Nation, Mar. 13, 2003 (quoting an e-mail from Professor Nussbaum to The Nation in which Nussbaum suggests, "I don't think any sensible moral position would deny that there might be some imaginable situations in which torture... is justified.").

51 For a fuller discussion see Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," 88 Minn. L. Rev. 1481 (2003).

tion of the relevant legal rule. Yet, whether the actor would be punished for her violation remains a separate question. Society, as the imposer of authority, retains the role of making the final determination whether the actor ought to be punished and rebuked, or rewarded and commended for her actions. It should be up to society as a whole, "the people," to decide how to respond ex post to extralegal actions taken by government officials in response to extreme exigencies. The people may decide to hold the actor accountable for the wrongfulness of her actions, or may approve them retrospectively. Thus, even when acting to advance the public good under circumstances of great necessity, officials remain answerable to the public for their extralegal actions.

Society may determine that the use of torture in any given case, even when couched in terms of preventing future catastrophes, is abhorrent, unjustified, and inexcusable. In such a case, the acting official may be called to answer for her actions and make legal and political amends. She may, for example, need to resign her position, face criminal charges or civil suits, or be subject to impeachment proceedings. Alternatively, the people may approve the actions and ratify them. Such ratification may be formal or informal, legal as well as social or political. Legal modes of ratification include, for example, the exercise of prosecutorial discretion not to bring criminal charges against persons accused of using torture, jury nullification where criminal charges are brought, executive pardoning or clemency where criminal proceedings result in conviction, and governmental indemnification of state agents who are found liable for damages to persons who were tortured.

Political and social ratification is also possible. A president who personally authorizes the use of torture may be reelected by a substantial majority in free and democratic elections where the issue of torture constitutes a major part of the pre-election public agenda. Alternatively, she may need to resign her position or face impeachment proceedings. Yale Law Professor Charles Black apparently put the matter to his constitutional law class in the following terms: "[o]nce the torturer extracted the information required... he should at once resign to await trial, pardon, and/or a decoration, as the case might be."[53] Honorific awards can establish ex post ratification in appropriate circumstances. Withholding a decoration may also send a strong message of rejection and condemnation.[54] The requirement of ex post ratification ensures that public officials are not above the law. Even when acting to advance the public good under circumstances of great necessity, such actors remain answerable to the public for their extralegal actions.

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52 See generally Gross, supra note 28, at 1096–113.

53 A. Michael Froomkin, "The Metaphor Is the Key: Cryptography, the Clipper Chip, and the Constitution," 143 U. Pa. L. Rev. 709, 746 n.153 (1995) (relating Professor Black's discussion of torture and morality).

54 See, e.g., Michael Walzer, Just and Unjust Wars 323-25 (3d ed. 2000).

The proposed solution emphasizes an ethic of responsibility not only on the part of public officials but also the general public. Public officials will need to acknowledge openly the nature of their actions and attempt to justify not only their actions but also their undertaking of those actions.[55] Such open acknowledgement and engagement in public justificatory exercise is a critical component in the moral and legal choice made by the acting officials. The public will then need to decide whether to ratify the relevant extralegal actions. In the process of deciding that latter question, each member of the public becomes morally and politically responsible for the decision. Each member of society, in whose name terrible things have been done, must become morally responsible. Such responsibility is assumed by and through the process of ratification or rejection of the particular terrible things that have been done.

The possibility of acting extralegally in catastrophic cases facilitates, in and of itself, an absolute prohibition on torture. Under the proposal advocated here, courts need not be concerned with the prospect of taking an expansive view of constitutional rights coming back to haunt the nation when faced with catastrophic cases, which may necessitate limitations on those rights. The courts need not worry because if the situation is serious enough, there is always the possibility of government officials acting extralegally to protect the nation and its citizens. Hence, the very possibility of extralegal action reduces the pressures for incorporating built-in exceptions to protected rights in general and to limit the scope of the ban on torture, in particular, by way, for example, of definitional hocus pocus "demonstrating" that certain coercive interrogation techniques fall short of "torture" and thus are not subject to the general prohibition.

To acknowledge the possibility of extralegal action is not the same thing as accepting willy-nilly limitless powers and authority in the hands of state agents. In a democratic society, where values such as constitutionalism, accountability, and individual rights are entrenched and are traditionally respected, we can expect that the public would be circumspect about governmental attempts to justify or excuse illegal actions even if such actions have been taken, arguably, to promote the general good. Moreover, we can and should expect public officials to feel quite uneasy about possible resort to extralegal measures even when such actions are deemed to be for the public's benefit. This feeling of uneasiness would be even more pronounced in nations where the "constitution is old, observed for a long time, known, respected, and cherished."[56] The knowledge that acting in a certain way means acting unlawfully is likely to have a restraining effect on government agents even while the threat of catastrophe persists. This is especially true in the context of torture. Here, the strong commitment

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55 Mortimer R. Kadish and Sanford H. Kadish, Discretion To Disobey 5-12 (1973).

56 Guy Howard Dodge, Benjamin Constant's Philosophy of Liberalism: A Study in Politics and Religion 101 (1980) (quoting Benjamin Constant).

to the rule of law and the mood of veneration towards constitutional norms,[57] are strengthened by the fact that the prohibition on torture "expresses one of the West's most powerful taboos."[58] The absolute ban on torture has been internalized by a great number of people around the world. This internalization inherently makes it more difficult for conscientious officials to resort to torture, whatever the circumstances, since torture simply "is not done." In addition to self-policing internalization, the fact that the ban on torture is among the most powerful taboos and torture is the subject of special moral and legal condemnation means that an official who elects to deviate from this widely accepted and entrenched norm is likely to suffer significant reputational damage. This adds yet another layer to the ban's effectiveness.[59]

The need to give reasons ex post, that is the need to publicly justify or excuse (not merely to explain) one's actions, is a critical ingredient of my proposal. By requiring transparency and publicity, it emphasizes accountability of government agents. The proposed model of official disobedience puts the burden squarely on the shoulders of state agents who must act, sometimes extralegally, without the benefit of legal pre-approval of their actions by, for example, the courts. Public officials have no one to hide behind. They must put themselves in the frontline and act at their own peril. If they believe that the stakes are so high that an extralegal action is merited, they may take such action and must then hope that they are able to convince the public to see things their way. The need for public justification may also limit the government's choice of measures ex ante. Moreover, the public acknowledgment of the nature of emergency actions taken by government may contribute not only to reasoned discourse and dialogue between the government and its domestic constituency, but also between the government and other governments as well as between the government and nongovernmental and international organizations. Thus, the need to give reasons is not confined to the domestic sphere. It also has international implications, both political and legal.

By separating the issues of action (preventive interrogational torture) and public ratification, and by ordering them so that ratification follows, rather than precedes, action, the proposed solution adds a significant element of uncertainty to the decision-making calculus of state agents. This raises both the individual and national costs of pursuing an extralegal course of action and, at the same time, reinforces the general ban on torture.

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57 Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 Tex. Tech L. Rev. 2443, 2451–52 (1990); see also Max Lerner, "Constitution and Court as Symbols," 46 Yale L.J. 1290, 1294–95 (1937); Sanford Levinson, "The Constitution" in American Civil Religion, 1979 Sup. Ct. Rev. 123, 123 (1979).

58 Is Torture Ever Justified?, supra note 39, at 9.

59 See Richard H. McAdams, "The Origin, Development, and Regulation of Norms," 96 Mich. L. Rev. 338, 355–65 (1997).

With the need to obtain ex post ratification from the public, the official who decides to use torture undertakes a significant risk because of the uncertain prospects for subsequent public ratification. Perhaps the public would disagree after the fact with the acting official's assessment of the situation and the presumed need to act extralegally. Ratification would be sought ex post, when more information about the particular case at hand may be available to the public and possibly after the particular danger (which the use of preventive interrogational torture sought to avert) has been removed and terminated. Under such circumstances, it is possible that calm and rationality, rather than heightened emotions, would govern public discourse, emphasizing further the risk for the official in acting first and only then seeking approval. Of course, the public may also determine that the actions under consideration violated values and principles that are too important to be encroached upon as a matter of general principle or in the circumstances of the particular case. The higher the moral and legal interests and values infringed upon, the less certain the actor should be of the probability of securing ratification.

Indeed, even if there is a very good chance that ex post ratification will be forthcoming eventually, there are still significant costs attached to acting extralegally. Even if the public ratifies the decision to use preventive interrogational torture in a specific case, there may be personal implications for the officials involved in the decision to apply torture. Such implications emanate, for example, from the fear that ratification will not follow or from the fact that ratification may not be comprehensive and fully corrective (seen from the perspective of the acting agent). Thus, for example, subsequent ratification may shield the actor against criminal charges but not bar victims of torture from obtaining compensation in civil proceedings. Similarly, when ratification assumes the guise of an executive pardon or clemency it wipes the criminal penalty that was imposed on the individual actor, but it does not remove the ordeal of criminal prosecution and the condemnation that is involved in criminal conviction.

Once we broaden our view to incorporate international, in addition to domestic, legal rules and norms, the costs of acting extralegally are further elevated, introducing additional disincentives to engage in such conduct. Even if the use of torture in any given case is domestically excused ex post, it may be subject to a different judgment on the international plane. This may have significant consequences both for the individual actor (the interrogator) as well as her government. First, torturers may be subject to criminal and civil proceedings in jurisdictions other than their own, and may also be subject to international criminal prosecution. Second, the ban on torture is nonderogable under the major international human rights conventions. It cannot be abrogated or derogated from whatever the surrounding circumstances may be. As such, no argument of public emergency can justify or excuse a deviation

from the prohibition. State agents who engage in acts of preventive interrogational torture implicate their government in violation of the nation's international obligations and expose it to a range of possible remedies under the relevant international legal instruments.

Recognizing the possibility of ex post ratification is not the same as authorizing the use of preventive interrogational torture ex ante. Unlike the latter, ex post ratification may serve, at most, as an ad hoc, individualized defense to specific state agents against civil or criminal charges in particular cases. It cannot serve as a general, institutional, conduct-guiding rule to be relied upon ex ante. Subsequent ratification may only be available to individual public officials after the fact, as opposed to setting a priori guidelines for action. Ratification functions as an ex post excuse, rather than justification, of a particular conduct. Like other excuses it serves not as indication of policy goals or as mechanism to guide future behavior by state agents, but rather as "expression[] of compassion for human failings in times of stress."[60] This expression of compassion is particularly significant for what it does not imply. An extralegal action, even if followed by subsequent ratification, is unlikely to establish legal precedent for the future. Although the sequence of extralegal action and subsequent public ratification may bring about an eventual change in the law, turning a political precedent into a legal one, such a shift cannot happen under the proposed solution without informed public participation in the process. In addition, because of its individualized nature, it would be hard to generalize ex post ratification into a forward-looking legal norm.

In fact, there is a strong argument that an extralegal action, even if followed by subsequent ratification, does not establish moral precedent for the future. Even those who argue that the moral obligation not to torture may be overridden in particular instances do not seem to argue that such an obligation is either cancelled or terminated for all future cases. In other words, such an obligation survives a specific override, which may apply in a concrete catastrophic case, and continues to apply to future cases. Furthermore, even in the catastrophic case when such obligation may be overridden it is not cancelled. Using torture, therefore, may be argued to result in a certain degree of moral loss even if we were to consider it legally permissible.[61] Seen from either perspective, a subsequent public ratification does not cancel nor terminate the general duty not to torture.

The individualized, rather than institutional, nature of the subsequent ratification is significant for yet another reason. Institutionalizing interrogational torture reinforces, by conferring imprimatur of legality and legitimacy, social,

60 George P. Fletcher, "Fairness and Utility in Tort Theory," 85 Harv. L. Rev. 537, 553 (1972).

61 See Daniel Statman, "The Absoluteness of the Prohibition Against Torture," 4 Mishpat Umimshal 161, 190-92 (1997).

hierarchical structures that authorize individuals, namely the interrogators, to act violently. As Robert Cover warned in his aptly named article Violence and the Word, "Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously."[62] In such circumstances it is much more likely that resort will be made to violence in interrogations. On the other hand, the need to act extralegally and hope for subsequent ratification focuses on individual behavior. It is not amenable to institutionalization. Interrogation manuals cannot spell it out in great detail. It is left up to the individual interrogator to determine whether to use violence in any given case. Acting at her own peril, the interrogator acts much more as an autonomous moral agent than as an agent for the hierarchical institution which it serves.

Thus, the official disobedience model imposes a significant burden on public officials. They must act in the face of great uncertainty. At the same time the model does not completely bar the possibility that interrogational torture will be used by officials and later ratified by the public. It simply makes it extremely costly to resort to such drastic measures, limiting their use to exceptional exigencies. As Sanford Kadish notes, "Would not the burden on the official be so great that it would require circumstances of a perfectly extraordinary character to induce the individual to take the risk of acting? The answer is of course yes, that's the point."[63]

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62 Robert Cover, "Violence and the Word," 95 Yale L.J. 1601 (1986), reprinted in Narrative, Violence, and the Law 203, 221 (Martha Minow et al eds. 1992).

63 Kadish, supra note 14, at 355.

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Dr. David Kay

Dr. David Kay served as the IAEA/UNSCOM chief nuclear weapons inspector, leading numerous inspections into Iraq following the end of the Gulf War. He was appointed by the director of the Central Intelligence Agency (CIA) in June 2003 to lead the search for weapons of mass destruction in Iraq. In January 2004, having concluded there had been no stockpiles of weapons of mass destruction in Iraq at the time of the war, Kay reported that conclusion and resigned his position. Today he is a senior fellow at the Potomac Institute for Policy Studies. He has 15 years of international management experience, and has served on a number of official U.S. government delegations and advisory commissions, including the Defense Science Board and the U.S. Delegation to the United Nations General Assembly.

Dr. Marc Sageman

Dr. Marc Sageman is a clinical assistant professor of psychiatry at the University of Pennsylvania. He joined the Central Intelligence Agency (CIA) in 1984, spent a year on the Afghan Task Force, and then served in Islamabad from 1987 to 1989. In 1991 Sageman resigned from the CIA to return to medicine. Since 1994 he has been in the private practice of forensic and clinical psychiatry. After September 11, 2001 he started collecting biographical information on al-Qaeda terrorists to test the validity of the conventional wisdom on terrorism. This research has been published as Understanding Terror Networks (University of Pennsylvania Press, 2004). Dr. Sageman has testified before the 9/11 Commission and has become a consultant on terrorism to various government agencies.

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