

TOOLS AGAINST TERROR: ALL OF THE ABOVE

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With the impending inauguration of a new President, now is an opportune time to assess whether the homeland is safer today than on the morning of September 11, more than seven years ago. It is also a fitting time to discuss the implications of that assessment for our long-term strategy against terrorism. Simply put, if indeed we are safer, then as part of any future legal or policy strategy, we must continue to improve our deployment of the various tools, from law enforcement to the military, which have ably served the country against our foes.

Are we safer today than we were on 9/11? When confronting this question, there are two opposite extremes that must be avoided: on the one hand, hysteria and fear, and on the other hand, complacency and an almost blithe disregard of the threats we face. "Hysteria" refers to rhetoric of the following sort: "Here we are, seven years after 9/11 and lo and behold, al Qaeda still exists, Osama bin Laden remains at large, and terrorists continue to plot and commit atrocities in various places. Nothing we have been doing has worked. Everything is a failure. We are no safer now than we were then." Obviously, such statements glaringly omit that, as of the date of publication, there have been no 9/11-style strikes on the country since the attacks on the World Trade Center and Pentagon were launched on that fateful morning. This fact can hardly be attributed to sheer luck or coincidence.

The United States is indeed safer today, and the reason is clear: Since 9/11, this nation and its overseas friends and allies have acted decisively to enhance their own security and the security of freedom-loving people across the globe. Our armed forces have destroyed al Qaeda's original headquarters and platform in Afghanistan. The United States has dramatically improved its intelligence capabilities abroad. Moreover, the

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United States has captured and killed terrorists, both leaders and foot soldiers, on nearly every continent. We have developed exceptionally strong partnerships with allies in sharing information and combining efforts to deal with terrorism. We have built a new Department of Homeland Security to prevent dangerous individuals and items from entering the country and wreaking havoc and destruction upon its people.

Today, al Qaeda no longer has a state sponsor, as it did when the Taliban ruled Afghanistan before September 11. Consequently, al Qaeda neither owns nor has free reign over an entire country anymore. Much of its original leadership has been brought to justice in one way or another.

Al Qaeda is also losing in Iraq, which General David Petraeus has called the "central front" of terrorism.¹ It is losing in part because the Sunni tribes have rejected the al Qaeda fighters and their ideology of extremism, instead partnering with the United States in our "surge" against this terrorist death cult.² Additionally, al Qaeda has suffered an overall loss of its reputation, even in the communities it seeks to influence. Its repeated attacks on innocent Muslims have sullied its image across the Islamic world. When al Qaeda blew up a wedding party in Amman, Jordan, more than two years ago, it sparked an intense backlash in that country and elsewhere.³ Its more recent attacks on Algerian schoolchildren resulted in bin Laden's deputy, Ayman al Zawahiri, actually being confronted in an Internet chat by indignant Muslims and challenged to justify the slaughter of these civilians.⁴

Here at home, because of the founding of the Department of Homeland Security nearly seven years ago, the United States has greatly increased its ability to keep terrorists and other lethal individuals out of the country. Seven years ago, America did not have the biometric or fingerprinting capability, analytical capacity, secure identity documentation regimen, or man-

1. Press Release, The White House, Setting the Record Straight: Iraq Is the Central Front of Al Qaeda's Global Campaign (May 3, 2007), available at <http://www.whitehouse.gov/news/releases/2007/05/20070503-6.html>.

2. See, e.g., Sudarsan Raghavan, *Sunni Factions Split With Al Qaeda Group: Rift Further Blurs Battle Lines in Iraq*, WASH. POST, Apr. 14, 2007, at A1.

3. See, e.g., *Al-Qaeda 'sorry' for Muslim dead*, TIMES (London), Nov. 19, 2005, at 8.

4. See Ian Black, *Al-Qaida deputy goes online to justify attacks*, GUARDIAN, Apr. 4, 2008, at 22.

power it now has at its ports of entry.⁵ The same is true regarding America's borders. The nation has dramatically expanded its Border Patrol and has installed new technology and infrastructure, including a border fence, that will further protect the homeland from those seeking to do it harm.⁶

In concert with these efforts, the United States has pushed its security perimeter beyond its borders by working with foreign countries to conduct more analysis and screening overseas. Our country has developed comprehensive security plans and procedures to protect critical infrastructure.⁷ It has built nearly two dozen layers of security into its aviation system. It now fuses and shares intelligence at the state, local, and federal levels in a way that was impossible prior to September 11. Finally, it has overhauled the Federal Emergency Management Agency (FEMA), increasing FEMA's ability to deal with national disasters. Taken together, these actions have made the United States a tougher target for terrorists and other violent individuals. The changes do much to explain the failure of America's enemies to carry out another successful attack on the homeland.

Certainly the terrorists' failure is not for lack of trying. Perhaps the most disturbing example of terrorist efforts is the August 2006 airline plot directed at transatlantic flights arriving in North America from the United Kingdom—a plot that, if successful, would have had an impact, in scale and in loss of life, comparable to September 11.⁸ The plot, however, along with a number of others in recent years, was disrupted.

In short, the notion of a completely vulnerable and unprepared nation facing an unscathed foe is readily refuted by a veritable arsenal of indisputable facts. It is a denial of all we have learned and accomplished these last seven years. But it is here that Americans need to make a critical distinction: The fact that America is safer does not mean that we are completely safe and the job is done. If Americans believe that they are no

5. See, e.g., Press Release, U.S. Dep't of Homeland Sec., 9/11 Anniversary Progress and Priorities (Sept. 10, 2008), available at http://www.dhs.gov/xnews/releases/pr_1221078411384.shtm.

6. See, e.g., *id.*

7. See, e.g., U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN (2006), available at http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf.

8. See, e.g., Dan Eggen, *Air Plot Said to Target Cities*, WASH. POST, Nov. 2, 2006, at A7.

longer threatened, they are oblivious to the dynamic nature of the threat and the adaptive capability of the enemy. If we believe that we are completely safe, then we are falling prey to the opposite of hysteria: the peril of complacency.

The voice of complacency sounds something like the following: "Here we are, seven years after 9/11, and because there have been no attacks on our soil, 9/11 must have been some freakish aberration that is unlikely to repeat itself. Al Qaeda's strength has been hyped by the government, which is exaggerating the threat. We have other things to worry about. This problem has gotten boring, and we should move to something else and focus on other elements of the public agenda."

This is clearly a "September 10" mindset. It is an outlook that cannot conceive of a serious and successful attack on American soil. On September 10, 2001, that mindset may have been understandable because a truly momentous assault had yet to occur. It represented a failure to think the unthinkable. But in our post-9/11 world, with the unthinkable having occurred, such a mindset is hard to fathom, let alone justify. Yet in certain circles, the view that the threat we face is exaggerated has rapidly gained currency. It is precisely this attitude of complacency that led to the tragedy of September 11. In their recent book, *America Between the Wars*, Derek Chollet and James Goldgeier chronicle U.S. policy between the close of the Cold War and 9/11. Tellingly, the book pins the blame less on any one Administration and more on a public mindset that hampered Washington in addressing the gathering storm clouds.⁹ Charles Krauthammer ironically described this period as a "holiday from history."¹⁰ In reality, it was a *false* holiday from history.

As a response to the threat the nation faces, complacency is at least as wrongheaded as hysteria. In the words of the National Intelligence Estimate issued in the summer of 2007, the United States "will face a persistent and evolving terrorist threat over the next three years."¹¹ It is a threat the nation has

9. DEREK CHOLLET & JAMES GOLDGEIER, *AMERICA BETWEEN THE WARS* xvi (2008).

10. Charles Krauthammer, Op-Ed., *History Will Judge*, WASH. POST, Sept. 19, 2008, at A19.

11. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: THE TERRORIST THREAT TO THE U.S. HOMELAND (2007), available at http://dni.gov/press_releases/20070717_release.pdf.

successfully handled over the past seven years, but because the threat is rapidly evolving, we will fail in the future if we fail to adapt today.

Looking ahead, al Qaeda certainly remains the most salient terrorist threat to this country. Although al Qaeda has suffered setbacks, it has also developed some breathing space in Pakistan and in certain parts of eastern and northern Africa.¹² That does not place al Qaeda in the same position it was in Afghanistan, but it means that al Qaeda now has the opportunity to recruit, plan, train, and potentially launch strikes against Europe or the United States.

Nonetheless, it would be a mistake to conclude that al Qaeda is the only potential long-term security threat our nation faces. There are others on the horizon. Among them is Hezbollah, which has been described by Richard Armitage as “the A-team of terrorism.”¹³ Long before al Qaeda was formed, Hezbollah pioneered suicide bombing, including the bombing of our Marine peacekeepers in Lebanon a quarter century ago¹⁴ and the 1996 bombing of the Khobar Towers in Saudi Arabia.¹⁵ Hezbollah is a well-armed, well-disciplined paramilitary force capable of taking on Israel and mounting a serious challenge to its armed forces. It remains a major presence in Lebanon’s government, the integrity of which it threatens.

Hezbollah also has a presence elsewhere, including in the Western Hemisphere; it launched attacks against Jewish facilities in Argentina in the early 1990s, as if to signal its arrival.¹⁶ In 1992, it bombed the Israeli embassy in Buenos Aires, killing twenty-nine people.¹⁷ Two years later, it murdered ninety-five people by bombing a Jewish community center in that city.¹⁸

12. See, e.g., Josh Meyer, *Risk of terror strike grows*, L.A. TIMES, July 12, 2007, at A1, A8.

13. See Nicholas Blanford, *A Lebanese-Israeli Water Conflict Threatens to Boil Over*, CHRISTIAN SCI. MONITOR, Oct. 21, 2002, at 8.

14. See U.S. DEP’T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 281 (2008), available at <http://www.state.gov/documents/organization/45323.pdf>.

15. See Press Release, Attorney General Statement on Khobar Towers Indictment (June 21, 2001), available at <http://www.fas.org/irp/news/2001/06/khobar.html>.

16. See, e.g., A.M. Rosenthal, Op-Ed., *On My Mind: The Buenos Aires Massacres*, N.Y. TIMES, Sept. 27, 1994, at A25.

17. See *id.*

18. See *id.*

Beside Hezbollah, the United States must also monitor homegrown groups in the Western Hemisphere. Among them is the Revolutionary Armed Forces of Colombia (FARC), a Marxist terrorist organization that has fought for decades against the Colombian government and raised funds through narcotics trafficking and kidnapping.¹⁹ While the FARC has suffered serious setbacks over the past year at the hands of the Colombian government, it has enablers in the region and must be watched.

From the standpoint of homeland security, the United States must also consider the threats posed by transnational groups that operate purely as criminal enterprises. These include criminal gangs, including MS-13, and some of the organized drug cartels that operate in northern Mexico, which are challenging the authority of the Mexican government and unleashing prodigious violence against law enforcement and civilians there.²⁰ For now, they are criminal organizations, but there exists the possibility that they may take on a more political coloration in the future.

These and other dangers should spur this nation to reject complacency, replacing it with a firm resolve to confront these evolving threats and adapt to them. They should also encourage the United States to continue to use the tools and approaches that have protected the homeland from further attacks thus far.

Unfortunately, in all too many legal and policy discussions about these tools and approaches, people have tended to divide into two mutually exclusive camps. One camp appears to advocate a military response to every major threat and challenge, while the other insists that the United States and its allies face solely a law-enforcement problem. If the past seven years have taught us anything, it is that both approaches are necessary. Indeed, all approaches, not just these, must be deployed where appropriate. We must use every tool in the security toolbox, and in the coming years we will also have to invent a few tools that do not yet exist.

19. See U.S. DEP'T OF STATE, *supra* note 14, at 304.

20. See, e.g., *Central America and the Merida Initiative: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 110th Cong. 9–13 (2008) (statement of Thomas A. Shannon, Ass't Sec'y of State for W. Hemisphere Affairs), available at <http://www.state.gov/p/wha/rls/rm/2008/q2/104479.htm>.

Clearly, the United States must not eschew the military option. The United States could never have inflicted the operational damage that we did on al Qaeda had we not taken the fight to Afghanistan. At the same time, however, the nation must continue to use nonmilitary or civilian tools and options. Since 9/11, the United States government has deployed intelligence-collection capabilities, including interception of communications. It has harnessed its ability to disrupt the flow of finance using some of our civil-law authorities and has utilized conventional law-enforcement tools, particularly in this country. In recent years, we have arrested and successfully prosecuted a number of people, either directly for terrorist acts or for acts that may not have been terrorist in nature but allowed us to incapacitate those for whom there was reason to believe were terrorists. Taken together, these approaches constitute a layered strategy against terrorism: deterring terrorists from entering the country; capturing or killing them in their home base whenever possible; stopping them in the course of their travel; and bringing them to justice once found here or elsewhere in the world.

Although clearly necessary, these measures are insufficient. None of them strikes at the root cause of terrorism: an extremist, dictatorial ideology that celebrates death and seeks the complete subjugation of hearts, minds, and nations to its totalitarian vision. The ultimate way to fight the terrorists is by engaging them ideologically as well as physically, challenging their destructive and deadly ideas with ideas of freedom and prosperity. We do this by promoting the rule of law, not the rule of man. We do this by advocating democracy, not despotism. We do this by supporting literacy, not ignorance. We do this by empowering people, in the very communities where terrorists seek recruits, to fight back ideologically, unmasking the terrorists as enemies of and strangers to mainstream Islam, the rule of law, and political democracy. In the battle against the terrorist foe, every tool and option belongs on the table. Those who would have us focus on just one to the exclusion of the others, and those who would have us remove any one of these tools, are seriously misguided.

Even so, some argue that deploying the military against al Qaeda elevates its status. That is what Seth G. Jones and Martin

C. Libicki assert in *How Terrorist Groups End*.²¹ To renounce or severely restrict the military option against terrorists, however, is to place ourselves back in the same box we were in before September 11, one that relied exclusively on the traditional tools of law enforcement and the courts. Had the United States failed to add military tools to the mix after 9/11, it could not have brought the 9/11 perpetrators to justice. With an outlaw enemy in control of a rogue state thousands of miles away, none of the traditional criminal justice tools—from obtaining search warrants to issuing indictments to seeking extradition—would have had an ounce of relevance against al Qaeda in Afghanistan. Al Qaeda would have continued to use Afghanistan as a platform to launch attacks against America.

At the opposite pole are those who have argued that the law enforcement option is outmoded and have insisted that the government operate entirely on a war footing. Remarkably, the *Washington Post* took this position in an editorial *against* the Bush Administration in its case against Zacarias Moussaoui in 2003.²² The *Post* argued that by bringing Moussaoui into an American criminal courtroom, the government was repeating the mistakes of the pre-9/11 past, and urged that the government try him before a military tribunal instead.²³ This position was contrary to the *Post's* initial support for a civilian trial.²⁴ The *Post* also contradicted itself in a later editorial on October 4, 2003, titled *A Way Out*, where it abandoned its support for a military tribunal.²⁵ As for the Bush Administration, it stayed the course. Moussaoui was prosecuted in a civilian criminal courtroom and convicted in 2006 for conspiring to kill American citizens as part of the September 11 attacks.²⁶

The approach the United States has taken since 9/11 has, contrary to urban legend, not mandated the use of military tools alone. It has utilized the military in concert with all of the other

21. SETH G. JONES & MARTIN C. LIBICKI, *HOW TERRORIST GROUPS END: LESSONS FOR COUNTERING AL QA'IDA* xvii (2008).

22. See Editorial, *The Moussaoui Mess*, WASH. POST, Sept. 29, 2003, at A18.

23. See *id.*

24. See Editorial, *U.S. v. Zacarias Moussaoui*, WASH. POST, Dec. 12, 2001, at A34 (“The fact that the indictment was filed in U.S. District Court—not before a military commission— . . . is encouraging.”).

25. See Editorial, *A Way Out*, WASH. POST, Oct. 4, 2003, at A18.

26. Special Verdict Form, *United States v. Moussaoui*, No. 01cr455 (E.D. Va. 2006).

approaches, including those of law enforcement. In November 2001, as head of the Justice Department's Criminal Division, I testified before Congress and emphasized that the government intended not only to use its military options, but also every law-enforcement tool at its disposal, as well as a full array of other tools, in the fight for the freedom and safety of the American people.²⁷ It is this comprehensive approach that must continue if the United States is to make further headway in the battle to secure the nation. Those who would insist on elevating or scrapping any of these tools, for political or other reasons, are doing a grave disservice to the nation.

I would go further. Even our full, current array of tools is not sufficient to deal with an ever-evolving threat environment. Today we remain locked into a set of legal authorities and processes that were designed for the prior century, a time when the world was neatly divided between nation-states that waged war and individual groups that committed crimes. Given the current ability of nonstate actors like al Qaeda to wage war, we need to make corresponding changes in how we approach this from a legal standpoint.

This question highlights the challenge: What should a free nation do when it finds someone in its midst who is clearly advocating and recruiting for terrorism but has not yet advanced from advocacy to incitement or actual execution of a criminal plan? If that person has entered the country illegally, one obvious answer would be to send him back to his home country. If he cannot be arrested, prosecuted, or otherwise incapacitated, at least he can be removed and deported.

Under contemporary law regarding migration, however, it is not quite that simple. Under that law, the same open advocacy of terrorism that makes one a threat in a host country allows one to argue that he will not be treated fairly in his home country.²⁸ Once that argument is raised, Western Civilization's

27. See *Department of Justice Oversight: Preserving our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 10–15 (2001) (statement of Michael Chertoff, Ass't Att'y Gen., Criminal Div., U.S. Dep't of Justice).

28. See, e.g., *Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 221; *Soering v. United Kingdom*, 11 Eur. Ct. H.R. 439 (1989) (prohibiting the extradition of a German national from the United Kingdom to the United States for a capital murder trial, holding that such an extradition would violate the prohibition against torture in Article 3 of the Conven-

hands are often tied. The individual cannot be deported, nor can he be held for something he has not yet done. The result is that a person who has no legal right to be in a country and poses a clear danger to its citizens cannot be jailed in that country nor removed from it.

This is no hypothetical case. It is happening today in Great Britain.²⁹ A radical Islamist Jordanian preacher named Abu Qatada, widely known as an outspoken advocate and supporter of terrorism, is illegally present in the United Kingdom.³⁰ According to the United Kingdom's Special Immigration Appeals Commission, he is "a truly dangerous individual" who was "heavily involved" in terrorist activities associated with al Qaeda.³¹ Even though he is in Great Britain illegally and is a danger to the country, the British cannot imprison him, nor can they deport him to Jordan; indeed, the British Court of Appeals ruled that he could not get a fair trial in Jordan because he was suspected of terrorism.³² The very fact that he poses a terrorist threat renders authorities powerless to remove him. This kind of challenge is common across Europe and is something the West must address. Either the rules should be modified to allow immigration authorities to balance the risks facing illegally-present terrorism suspects with the risks facing the public, or the law should allow temporary detention of dangerous illegal aliens until they can be safely removed from the country.

In the end, Abu Qatada is the poster child for a key point that must be reiterated: In the battle against terrorism, the challenge of this nation and its democratic allies is not to reduce the number of options or tools we have in this fight, but to expand them. It is my hope that both here and abroad, future Admini-

tion for the Protection of Human Rights and Fundamental Freedoms in light of possible imposition of the death penalty).

29. Duncan Gardham, *Osama's Right-Hand Man, Abu Qatada, Back on the Streets*, DAILY TELEGRAPH, July 11, 2008, at 11 (describing the release of a terrorism advocate illegally present in the United Kingdom).

30. *Othman v. Sec'y of State*, (2004) No. SC/15/2002 (U.K. Special Immigration Appeals Comm'n), available at <http://www.siac.tribunals.gov.uk/Documents/outcomes/documents/sc152002qatada.pdf>; see also Rosa Prince, *Still Here: 24 Terrorism Suspects Listed for Deportation*, DAILY TELEGRAPH, Aug. 18, 2008, at 10 (noting Abu Qatada's continued presence in the United Kingdom).

31. *Othman*, (2004) No. SC/15/2002.

32. See Richard Ford, *Bin Laden's 'right-hand man' wins deportation fight over torture fears*, TIMES (London), Apr. 10, 2008, at 2.

strations will not only continue to retain and deploy the tools we are using now, but will find new options, fashion new approaches, and adapt our system to the dangers ahead. That is how best to make the United States not only *safer*, but ultimately *safe* in this new century.