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RESPONSES TO THE FIVE QUESTIONS: REFLECTIONS ON TERRORISM

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1. TEN YEARS AFTER 9/11, WHAT IS THE MOST SIGNIFICANT LEGACY LEFT BY THE TERRORIST ATTACKS? ARE WE SAFER?

I. Introduction: 11/9–9/11 and the three-tiered chessboard of power

The key to understanding 9/11 is to situate the War on Terrorism within the transformation from the Cold War paradigm to a new framework for projecting force and defining national interests. These developments are being played out on a three-tiered chessboard—one board features military power, a second international norms (treaties/diplomacy), and the third economic interests. The three boards are wired together by the rule of law and social forces, and upheaval on any of the three boards can affect the others. The end of the Cold War and the 9/11 attacks combined to substantially disrupt the board on all three levels. Since the fall of the Berlin Wall (“11/9”), the United States, as guarantor of the system, has been trying to maintain an evolving

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stability by striking a new balance on each level of the board.

II. Cold War Paradigm: Division of labor between the United States and the USSR

During the Cold War era, failed states were limited by the two-power system—the United States strove for “full spectrum dominance” and nuclear deterrence checked superpower responses. Unrest in areas on the boundaries of the USSR was repressed (e.g., Hungary, Czechoslovakia) under a neosphere of influence doctrine. Successful revolutions/regime changes resulted in a shift in loyalty from one power to the other (e.g., Cuba, Iran 1953/1979, Chile, Vietnam). States were supported by Russia, or the United States, based on a Cold War allegiance structure so failed-state difficulties were restricted. Proxy wars over spheres of influence and international treaties (e.g., the Warsaw Pact, NATO) combined to ably adjudicate disputes and check rogue actors. Domestically, the national security community under the National Security Act of 1947¹ (NSA) was a relatively stable and efficient structure; intelligence was divided between the FBI (domestic) and the CIA (international) while military matters were left to the Department of Defense (DoD).

III. 11/9: End of the Cold War paradigm—no more “patterns”

With the fall of the USSR as a super power on 11/9, rogue actors or treacherous states could remain unchecked and secure space for international perfidy. The collapse of the Warsaw Pact resulted in a weakening of the International Treaty “board.” Commensurately, the North Atlantic Treaty Organization (NATO) searched for a mission. The old trope for the role of NATO—to “*keep the Russians out, the Americans in, and the Germans down*”²—no longer seemed relevant. In the 1990s, NATO barely managed to harness the strength to end the genocides in Bosnia and Kosovo (and failed to act in numerous other arguably exigent cases). While this operation took place under the NATO Treaty, bypassing the United Nations, it edged the United States towards unilateralism (away from collectivism) as a model for the way to legitimize force in the international system.

1. National Security Act of 1947, ch. 343, 61 Stat. 495 (1947).

2. DAVID REYNOLDS, *THE ORIGINS OF THE COLD WAR IN EUROPE* 13 (quoting Lord Ismay, NATO’s first Secretary-General).

Domestically in the United States, 11/9 led to calls for a “peace dividend”³ and a reduction of intelligence/military spending. For many, the fall of the Berlin Wall (11/9) meant the Cold War was over. At the same time, the complexity and layering of world politics increased due to the power vacuum created by the erosion of the bipolar system featuring the United States versus the USSR. Also, the United States’ “pieces” on the military “board” changed: The old national security structure system seemed to fit less and less as we moved towards 9/11, away from 11/9. Al Qaeda’s attacks on the embassies in Africa highlighted not only a rise in terrorist activity, but also flaws in the U.S. intelligence system; traditionally, extraterritorial issues were the domain of the CIA (or military), yet FBI agents were deployed to solve the “case.”⁴ The nature of the problem, the rigidity of bureaucratic interests coupled with a waning political will, resulted in the hard questions and realities about authority and structure remaining unaddressed. Less prepared and more inclined to act quickly and reflexively, the United States became increasingly vulnerable to attacks that could be characterized as “empire baiting.”

IV. 9/11 and the “War on Terrorism”

The 9/11 attacks violently changed the national security reform political environment from gridlock to perceived need for institutional changes. Political will led to critical reform initiatives in the Intelligence Community (IC) and DoD. The Bush administration eventually felt compelled to work with Congress and make structural changes, but bureaucratic forces resistant to centralized control were able to maintain power and influence. Continuing control of budgets and authorities allowed the traditional “cylinders of excellence” or “silos of power” to resist centralized reform.

Rapid transitions are usually problematic. The military exigencies of the post-9/11 world, combined with the technological developments of the IT movement, necessitated rearmament and reorganization of the armed forces. This trend, in tandem with the more versatile military requirements of the post-11/9 world (where

3. See, e.g., Sanjeev Gupta et al., *The Elusive Peace Dividend*, INT’L MONETARY FUND (Dec. 2002), <http://www.imf.org/external/pubs/ft/fandd/2002/12/gupta.htm>.

4. See *FBI Raids Nairobi Hotel over Bomb Attack on US Embassy*, FIN. TIMES MANDATE, Aug. 20, 1998, available at 1998 WLNR 5351123.

we have no peer military competitor), led to the military adopting many different roles: peacekeeping, special ops, asymmetrical warfare, nation building, intelligence gathering, etc.

The IC system, largely still a creature of the 1947 NSA, remained a subject of ongoing reform, *both ideologically and mechanically*. The old division of labor among the FBI, CIA (and other civilian intelligence agencies), and DoD no longer seemed fully applicable. The agencies continued to strive for a new balance; the CIA underwent an increase in military-style operations and has overlapped with the DoD. The military continued to define “traditional military affairs” under its Title 10 and 1947 NSA authorities. The FBI became more of a national security institution and undertook a strategic shift toward an “intelligence-driven” model (rather than simply using a law enforcement model), while the Director of National Intelligence (DNI) defined its new appropriate role as head of the community.

V. Conclusion

For all these reasons, it would be inaccurate to characterize the “legacy” of the 9/11 attacks as a static history question. After ten years, we have yet to fully calibrate the IC and military to the new dynamic environment of nonstate actors with multiple geographical alliances exploiting regional conflicts. Moving forward, we continue our adaptation initiatives while also responding to concurrent challenges relating to rapid technological development and economic difficulties. Our safety depends on these ongoing adjustments in an increasingly resource-constrained environment. We are moving in the right direction, but there is more work to do and there are roles to be specified.

2. WHAT IMPACT WILL THE “ARAB SPRING” HAVE ON AMERICAN NATIONAL SECURITY?

Historically, there are two dominant paths for the dissolution of autocratic regimes:

PATH A: Post-defeat regimes, such as those of Germany and Japan after World War II, emerged after a period of incubation of democratic values and institution building premised on the view that all peoples want democracy and liberty. Thus, rather than being imposed, the desire for democracy is allowed to flower from internal sources.

PATH B: Internal movements attack failed corrupt governments, resulting in situations such as the 1848 Liberal revolutions or the more recent East-European “color” revolutions. In 1848, these disorganized protest movements produced provisional governments that had no legitimacy with the masses, failed to govern, and resulted in the reintroduction of semimilitary autocratic regimes returning to power.

The impact of the “Arab Spring” on American national security depends on whether the “Arab Spring” follows Path A or Path B. We would like to encourage Path A, but this is largely a domestic issue, and it is unclear how one pursues a policy to assist this outcome without delegitimizing the forces we support. All should feel good about the “Arab Spring” as a step in the right direction; in the case of the 1848 revolutions, while some of the monarchies interrupted by 1848 eventually regained power, they were no longer able to rule with the same level of absolutism.

Analyzing the “Arab Spring,” historian Eric Hobsbawm hypothesizes that should the revolution fall short as in 1848, it would not be because of the participants/ideology of the movement, but rather its corruption by other forces⁵—in this case, by the forces of Islamism or a mass ideology divergent from that animating the reform movement. It remains an open question whether extreme Islamic forces will “hijack” the “Arab Spring” movement or whether militaries will step in to shore up ineffective governments.

The near-term future of these Arab countries will depend on the primacy of certain values: liberty, democratic government, the rule of law, containing corruption, and encouraging critical institutional capacity building. If the “new” leaders can achieve these goals, Egypt, Tunisia, Yemen, and Libya will be on the right track. The stakes are high. However, as with 1848, it may be some time before the ideals of the reform movement are fully recognized and yield the results we hope for. The world is watching and holding its collective breath.

5. See Andrew Whitehead, *Eric Hobsbawm on 2011: 'It reminds me of 1848 . . .'*, BBC NEWS (Dec. 22, 2011, 7:38 PM), <http://www.bbc.co.uk/news/magazine-16217726>.

3. WHAT LESSONS CAN BE LEARNED FROM THE OBAMA
ADMINISTRATION'S HANDLING OF THE *AHMED WARSAME* CASE?

This is an ongoing case and therefore we will only comment in general and not on the specifics of the case.

The facts of the case are that Warsame was captured overseas in the Gulf Region, then held for several months on a ship and interrogated for intelligence purposes.⁶ After he was read his *Miranda* rights, which he waived, he spoke to law enforcement agents. Finally, he was moved to the United States, where he will face charges for (nine counts total):

1. Conspiracy to provide material support to a designated terrorist organization (two counts);
2. Material support to a designated terrorist organization (two counts);
3. Possession of firearms and destructive devices (two counts);
4. Conspiracy to teach and demonstrate the making of explosives;
5. Conspiracy to receive military training from a designated foreign terrorist organization; and
6. Receipt of military training from a designated terrorist organization.

Warsame's transfer to the United States occurs against a political backdrop of the National Defense Authorization Act of 2012,⁷ in which Congress took steps to prevent the transfer of detainees (to the United States) from overseas and Guantanamo Bay.

Over the last ten years, the left and the right of the political spectrum have debated the best forum for the trials of terrorism suspects—Article III courts or military commissions.

The tension of protecting classified information and sources and methods has been brought to bear in these cases when the government has to carry its burden of proof on essential elements of association and material support. Article III courts have the Classified Information Procedures Act⁸ to handle such

6. Sealed Indictment, United States v. Warsame, No. 11-cr-559 (S.D.N.Y. 2011), available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Warsame-Indictment.pdf>.

7. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (1st Sess. 2011).

8. Classified Information Procedures Act, 18 U.S.C. app. §§ 1-16 (2006) (concerning crimes and criminal procedures).

information.⁹ One twist of the military commission system is that in order to establish jurisdiction in a military commission, the government often has to establish that the individuals (1) engaged in hostilities against the United States or its coalition partners, (2) provided material support to hostilities against the United States or its coalition partners, or (3) participated in al Qaeda under the statutes (this is not necessary in Article III trials).¹⁰

These are very much conspiracy cases that involve a great deal of nuance and supposition that are akin to, but not exactly aligned with, conspiracy cases in the criminal context. The association question as to how one becomes part of a “criminal enterprise”—and what are the overt acts that are sufficient to establish participation—can become a specialized skill of fact finding. How one resigns from the group or activity also requires analysis of what is an overt act that requires special definition.

These forums for trial—military and Article III—each will have to make many different types of calibrations given the context of the cases. Military commissions have been reformed and new rules have been issued over the last ten years that have an important role to play in the legitimization process in the struggle against terrorism. Clearly, there will also be times when Article III courts may be appropriate. The executive branch should have the power to choose the appropriate instrument based on the strategic goal of demonstrating to the world that we have fair and just adjudicative processes that follow the rule of law.

4. OF ALL THE THREATS TO NATIONAL SECURITY, WHICH TYPE IS THE UNITED STATES LEAST PREPARED TO HANDLE? WHERE IS THE UNITED STATES MOST VULNERABLE TO ATTACK?

Three Points:

1. The great issue of the twenty-first century is the fusion of the IT revolution and the information revolution, married to the rise of the new powers and how these developments affect the three-level chessboard of power—military, diplomatic, and economic. We

9. In the past couple of years, the commissions system has incorporated similar procedures so that they, too, can handle classified information similarly to Article III courts.

10. See Robert Chesney, *Warsame and the Obstacles Associated with the Military Commission Option in This Particular Instance*, LAWFARE (July 6, 2011, 10:49 AM), <http://www.lawfareblog.com/2011/07/warsame-and-the-obstacles-associated-with-the-military-commission-option-in-this-particular-instance>.

have cybercrime, cyberespionage, and cyberwar. The Internet is primarily owned by the private sector and it has become the domain of commerce, communication, and war. The IT sectors of most modern economies are the most dynamic. Our generation's nuclear challenge is how to regulate cyberspace and to what degree.

2. For many, it is unclear whether terrorism is an existential threat. To quote Audrey Cronin:

Terrorism, like war, never ends; however, individual terrorist campaigns and the groups that wage them always do. A vague U.S. declaration of a war on terrorism has brought with it a vague concept of the closing stages of al-Qaida rather than a compelling road map for how it will be reduced to the level of a minor threat.¹¹

3. The modern fear is the linkage between "cyber-" and terrorism. Nonstate actors armed with state-of-the-art cyberweapons have the potential to cause severe damage.

5. WHAT FACTORS WILL HELP DETERMINE WHETHER AL QAEDA HAS BEEN DEFEATED?

First, it is important we not view al Qaeda as monolithic, exclusive, and unprecedented. As pointed out by Audrey Cronin, while some of al Qaeda's tactics are new and innovative (particularly its use of electronic media), viewing al Qaeda as unprecedented and exclusive represents a compelling narrative, creating an allure, which makes recruitment easier. While al Qaeda boasts about its size and reach, this is in fact a weakness we must exploit; al Qaeda incorporates many groups from many areas under one narrative. These variant segments have different goals and needs. We should divide and conquer—expose inconsistencies and cut off pieces.

Regardless of whether al Qaeda may be different from terrorist groups/campaigns in the past, according to Cronin we have defeated such terrorist groups in the past via the following seven methods:

1. Capture or killing of the leader;
2. Failure to transition to the next generation;
3. Achievement of the group's aims;

11. Audrey Kurth Cronin, *How al-Qaida Ends*, 31 INT'L SECURITY 7, 48 (2006), available at http://belfercenter.ksg.harvard.edu/files/How_alQaida_Ends.pdf.

4. Transition to a legitimate political process;
5. Undermining of popular support;
6. Repression; and
7. Transition from terrorism to other forms of violence/illegal activity.¹²

So how do we score our actions against these seven criteria?

1. Killing Bin Laden has clearly been a blow, but it will not mean the immediate end of al Qaeda.
2. Al Qaeda has already successfully transitioned through several generations. As long as a group has a pronounced ideology and a fluid agenda, it can leverage world events for recruitment. Can it become a “virtual caliphate?”
- 3-4. Al Qaeda’s aims—the achievement of a pan-Islamic caliphate (the deaths of all infidels, etc.)—are unattainable. Likewise, it is hard to envision al Qaeda being merged into the political process considering its goals. However, one area to stress is that al Qaeda comprises groups from many different countries with a vast array of aims and tactics; if we view al Qaeda as monolithic, we lose the opportunity to use a wedge to pry off pieces through negotiation.
5. Reducing al Qaeda’s popular support is difficult. Democratization will take decades. Rather, we would be best served to capitalize on al Qaeda’s mistakes by publicizing their killings of innocent people—this is especially important considering al Qaeda’s innovative use of cyberspace for recruitment. We can be more successful in this area.
6. Our effort to track and block terrorism-financing is an important long-term arm in our fight against al Qaeda, but only to a point; terrorist attacks are not that expensive: The USS Cole attack cost \$50,000, and the 9/11 attacks cost under \$500,000.
7. Al Qaeda already does this (e.g., with narcotics-trafficking in Afghanistan). However, al Qaeda uses trafficking as a means to fund their larger efforts (“narco-terrorism”) rather than seeking financial gain as an end unto itself.

CONCLUSION: DEFEATING AL QAEDA

In the end, success against al Qaeda requires smooth transition from a large U.S. military to a spec-ops-based military with an “over

12. *Id.* at 17–18.

the horizon” strike capacity, married to regional regimes that possess legitimacy and share our core values. Defeating al Qaeda depends in large part on the Arab Spring, expressed in greater dimension; in the words of Cronin: “Al-Qaida will end when the West removes itself from the heart of this fight, shores up international norms against terrorism, undermines al-Qaida’s ties with its followers, and begins to exploit the movement’s abundant missteps.”¹³

13. *Id.* at 47.