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## RESPONSES TO THE FIVE QUESTIONS

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

These questions are best addressed in reverse order, that is, by celebrating the fact that Americans have, with few exceptions, been kept safe since 9/11, if we define security as avoiding the dangers presented by the sort of nonstate terrorists who conducted the 9/11 attacks.

The numbers tell the story. As former Director of National Intelligence Admiral Dennis Blair points out, since 9/11 only seventeen Americans have been killed on U.S. soil by terrorists (and most of those in a single incident at Fort Hood, Texas).<sup>1</sup> As tragic as those deaths are, consider that “some 150,000 people have been murdered in the United States since 9/11.”<sup>2</sup> Of course, it also should not be forgotten that thousands of American servicemen and women have been killed or wounded in overseas operations intended to ensure the safety of their countrymen at home, and it appears that they have largely succeeded. The price of domestic security has been very steep.

As further context, we should keep in mind that terrorism, however loathsome and fearful, is nevertheless, a non-existential

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1. Noah Shachtman, *Former Intel Chief: Call Off the Drone War (And Maybe the Whole War on Terror)*, WIRED (July 28, 2011, 9:48 PM), <http://www.wired.com/dangerroom/2011/07/call-off-the-drone-war/>. Admiral Blair also said that fourteen of those deaths were the result of one incident at Fort Hood, Texas. Actually, thirteen persons were killed and forty-three were wounded at Fort Hood on November 5, 2009 by a shooter alleged to be Army Major Nidal Hasan. See DEP'T OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD 1 (2010), available at [http://www.defense.gov/pubs/pdfs/DOD-ProtectingTheForce-Web\\_Security\\_HR\\_13jan10.pdf](http://www.defense.gov/pubs/pdfs/DOD-ProtectingTheForce-Web_Security_HR_13jan10.pdf).

2. Scott Shane, *Al Qaeda's Outsize Shadow*, N.Y. TIMES (Sept. 8, 2011), <http://www.nytimes.com/2011/09/08/us/sept-11-reckoning/qaeda.html>.

threat. That is, whatever havoc and heartbreak al Qaeda or similar terrorists might wreak in a particular situation, they lack the capacity under any circumstances to physically destroy the United States as that would require the concerted action of one or more powerful nation-states. In that regard, we cannot be as sanguine about our security, especially as we look to a future in which we must expect to find peer competitors who aim to match our military prowess.

With that background, the most significant legacy left by the terrorist attacks may not be the destruction, per se, but rather the rise of what Fareed Zakaria calls the “national-security state” that “now touches every aspect of American life, even when seemingly unrelated to terrorism.”<sup>3</sup> A variety of post-9/11 legislation—the USA PATRIOT Act<sup>4</sup> being the quintessential illustration—arguably operates to make us safer. At the same time, however, critics are becoming increasingly concerned that it has come at an excessive cost to civil liberties. Among other things, they contend that the PATRIOT Act is being interpreted in a way that allows “the Federal Bureau of Investigation (FBI) to conduct some kind of unspecified domestic surveillance that they say does not dovetail with a plain reading of the statute.”<sup>5</sup>

Moreover, in the years since 9/11, “the U.S. intelligence system has exploded in size” and nearly tripled its collective budget.<sup>6</sup> Interestingly, technology developed for military applications is migrating to domestic law enforcement uses. Clearly, such technology has vastly empowered government’s ability

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3. Fareed Zakaria, *What America Has Lost: It’s Clear We Overreacted to 9/11*, NEWSWEEK MAG., Sept. 4, 2010, available at <http://www.newsweek.com/2010/09/04/zakaria-why-america-overreacted-to-9-11.html>.

4. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered titles of U.S.C.). For a summary of the highlights of the USA PATRIOT Act, see generally *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/archive/ll/highlights.htm> (last visited Apr. 22, 2012).

5. See, e.g., Charlie Savage, *Public Said to Be Misled on Use of the PATRIOT Act*, N.Y. TIMES, Sept. 21, 2011, at A15, available at <http://www.nytimes.com/2011/09/22/us/politics/justice-dept-is-accused-of-misleading-public-on-patriot-act.html>.

6. Liz Goodwin, *Top 10 Blockbuster Revelations from the Washington Post’s Intelligence Complex Exposé*, THE UPSHOT-YAHOO! NEWS (July 21, 2010), <http://news.yahoo.com/blogs/upshot/top-10-blockbuster-revelations-washington-post-intelligence-complex-152517904.html>.

to monitor U.S. civilians.<sup>7</sup> For example, unmanned aircraft, not unlike the drones developed for battlefield use, have found their way into the inventories of local police departments.<sup>8</sup>

Perhaps the “poster child” of this phenomenon is the landmark case of *United States v. Jones*,<sup>9</sup> decided by the Supreme Court in January, which involved global-positioning systems (GPS) devices.<sup>10</sup> GPS was deployed by the military for navigation and weapons’ targeting purposes, but is available to the public as well as other governmental agencies, including police forces. *Jones* addressed the question of whether police agencies can, without a warrant, attach a GPS device to a suspect’s car in order to track him over an extended period.<sup>11</sup> Dissecting the Court’s decision is beyond the scope of this essay, but suffice it to say that it represents a refreshing indication that the Court is willing to begin to draw some lines with respect to the burgeoning use by the police of powerful new technologies that often were originally designed for military purposes.

Lower courts for some time have been troubled by the use of these new technologies originally designed to combat foreign enemies. The *New York Times* reports that “[i]n a series of rulings on the use of satellites and cellphones to track criminal suspects, judges around the country have been citing George Orwell’s ‘1984’ to sound an alarm.”<sup>12</sup> And Congress is concerned as well.<sup>13</sup>

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7. See, e.g., Margaret Hu, *Big Brother Surveillance: Getting Bigger*, ACS BLOG (Nov. 10, 2011), <http://www.acslaw.org/acsblog/big-brother-surveillance-getting-bigger> (describing the government’s use of technology to monitor civilians).

8. Ana Campoy, *The Law’s New Eye in the Sky*, WALL ST. J. (Dec. 13, 2011), <http://online.wsj.com/article/SB10001424052970204319004577088891361782010.html>.

9. 132 S. Ct. 945 (2012).

10. Concerning global-positioning system technology, see generally *Global Positioning Systems Directorate*, LOS ANGELES AIR FORCE BASE (Jan. 13, 2012), <http://www.losangeles.af.mil/library/factsheets/factsheet.asp?id=5311>.

11. The Court held that the installation of a GPS device on a vehicle is a search within the meaning of the Fourth Amendment, but did not reach the question whether it was a “reasonable” search since the Court concluded that the government had waived that argument. *Jones*, 132 S. Ct. at 954.

12. Adam Liptak, *Court Case Asks if ‘Big Brother’ Is Spelled GPS*, N.Y. TIMES., Sept. 10, 2011, at A1, available at <http://www.nytimes.com/2011/09/11/us/11gps.html>.

13. See generally RICHARD M. THOMPSON, CONG. RESEARCH SERV., R42109, GOVERNMENTAL TRACKING OF CELL PHONES AND VEHICLES: THE CONFLUENCE OF PRIVACY, TECHNOLOGY, AND LAW (2011), available at <http://www.fas.org/sgp/crs/intel/R42109.pdf> (describing Congressional efforts to modernize the law in light of technological changes).

Senators Mark Udall and Ron Wyden warn that “[r]ecent advances in geolocation technology have made it increasingly easy to secretly track the movements and whereabouts of individual Americans on an ongoing, 24/7 basis.”<sup>14</sup> Consequently, they have demanded that intelligence agencies disclose the authorities they are relying upon for domestic operations.<sup>15</sup>

The potential for further exploitation is extant because new technologies do not just enhance the surveillance capabilities of police forces; they can “data mine” vast quantities of information to produce reports on individual citizens. This capability has become an important homeland security tool, even as concerns are raised about data quality and privacy.<sup>16</sup> Ongoing developments do indeed have an Orwellian flavor; one company claims that its program has enabled police agencies to stop repeat offenders by “identifying who is most likely to break the law again.”<sup>17</sup>

In another development, the use of what are called “national security letters” (NSLs) by various investigative agencies has grown remarkably since 9/11. According to the Congressional Research Service, NSLs—which do not require court approval—are “roughly comparable to administrative subpoenas” and “[i]ntelligence agencies issue them for intelligence gathering purposes to telephone companies, Internet service providers, consumer credit reporting agencies, banks, and other financial institutions . . . .”<sup>18</sup> The American Civil Liberties Union (ACLU) contends that NSLs allow the Federal Bureau of Investigation to “compile vast dossiers about innocent people.”<sup>19</sup> According to the ACLU, the FBI issued 200,000 NSLs between 2003 and 2006 and, in doing so, the FBI’s own inspector general found the Bureau committed “serious . . .

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14. Spencer Ackerman, *Senators Ask Spy Chief: Are You Tracking Us Through Our iPhones?*, WIRED (July 14, 2011, 9:26 AM), <http://www.wired.com/dangerroom/2011/07/senators-ask-spy-chief-are-you-tracking-us-through-our-iphones/>.

15. *Id.*

16. See generally JEFFREY W. SEIFERT, CONG. RESEARCH SERV., RL31798, DATA MINING AND HOMELAND SECURITY: AN OVERVIEW (2008), available at <http://www.fas.org/sgp/crs/homesecc/RL31798.pdf> (discussing data mining as an important aspect of homeland security and its increasing prevalence in both the private and public sector).

17. Bill Lochten, *Improving Prediction*, C4ISR JOURNAL, Nov./Dec. 2011, at 39.

18. CHARLES DOYLE, CONG. RESEARCH SERV., R4169, NATIONAL SECURITY LETTERS: PROPOSALS IN THE 112TH CONGRESS 1 (2011), available at <http://www.fas.org/sgp/crs/intel/R41619.pdf>.

19. *National Security Letters*, AM. CIV. LIBERTIES UNION (Jan. 10, 2011), <http://www.aclu.org/national-security-technology-and-liberty/national-security-letters>.

abuses of [its] NSL power.”<sup>20</sup>

Additionally, after 9/11 the vast technological capabilities of the Department of Defense’s National Security Agency (NSA)<sup>21</sup> were harnessed to address the threat of terrorism, both abroad and at home. Regrettably, abuse occurred here as well. Government lawyers believed that the president had the authority to authorize NSA to conduct a surveillance program without court approval.<sup>22</sup> However, a federal judge ruled in a lawsuit arising out of such activity “that [the NSA] illegally intercepted the electronic communications without warrants.”<sup>23</sup> Consequently, the court ordered the government to pay \$2.5 million in attorney fees and damages.<sup>24</sup>

Rather remarkably, Americans do not seem to be overly concerned about the cost in terms of civil liberty that post-9/11 efforts to provide security have imposed. A poll taken in August 2011 found that 51% of Americans feel that “as a result of steps taken by the government to fight terrorism, they have lost some of their personal freedoms.”<sup>25</sup> At the same time, however, the poll also showed that 60% of Americans believe that the “government is doing enough to protect rights and freedoms.”<sup>26</sup> Law professor Jonathan Turley describes the seeming paradox:

After 9/11, President George W. Bush greatly expanded the scope of warrantless surveillance, and President Obama has maintained and even increased those powers. Citizens have largely accepted the false premise that privacy is the enemy of security and have supported ever-

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20. *Id.*

21. Reportedly, the NSA “intercept[s] and store[s] 1.7 billion e-mails, phone calls and other types of communications” every day. See Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/>.

22. U.S. DEP’T OF JUSTICE, *THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS: MYTH V. REALITY* (2006), available at [http://www.justice.gov/opa/documents/nsa\\_myth\\_v\\_reality.pdf](http://www.justice.gov/opa/documents/nsa_myth_v_reality.pdf).

23. Paul Elias, *Judge Orders Feds to Pay \$2.5M in Wiretapping Case*, WASH. TIMES (Dec. 22, 2010), <http://www.washingtontimes.com/news/2010/dec/22/judge-orders-feds-pay-25m-wiretapping-case/>.

24. *Id.*

25. D. HIMBERGER ET AL., *CIVIL LIBERTIES AND SECURITY: TEN YEARS AFTER 9/11*, ASSOCIATED PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH 4 (2011), available at <http://www.apnorc.org/Common/pdfs/AP-NORC-Civil-Liberties-Security-9-11-Report.pdf>.

26. *Id.*

widening surveillance powers. The problem is that privacy remains an abstraction, while crime, or terrorism, is a concrete threat.<sup>27</sup>

This does not mean that it is inevitable that the rise of advanced technologies will necessarily require excessive compromises of individual rights. For example, with respect to cyber threats, Lt. Gen. Keith B. Alexander, the commander of U.S. Cyber Command and director of the National Security Agency, believes that not only can the United States “come up with a defensive program that . . . can defend this country and our companies in cyberspace,” it can do so in a way that “can protect civil liberties and privacy.”<sup>28</sup>

Of course, the concerns about civil liberties are not limited to technologies as more traditional police approaches can raise alarms as well. Not long ago it was revealed that the New York Police Department was targeting the city’s Moroccan community in the name of fighting terrorism. The Associated Press (AP) reported that:

Undercover officers snapped photographs of restaurants frequented by Moroccans, including one that was noted for serving “religious Muslims.” Police documented where Moroccans bought groceries, which hotels they visited and where they prayed. While visiting an apartment used by new Moroccan immigrants, one officer noted in his reports that he saw two Qurans and a calendar from a nearby mosque.<sup>29</sup>

The AP quoted an official as conceding that “[a] lot of these locations were innocent” and that they “just happened to be in the community.” Yet no effort appears to be made to eliminate or narrow the program.<sup>30</sup>

Ominously, the future will present even more new and complex challenges. The Brookings Institution recently held a

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27. Jonathan Turley, *Supreme Court’s GPS Case Asks: How Much Privacy Do We Expect?*, WASH. POST, Nov. 11, 2011, [http://www.washingtonpost.com/opinions/supreme-courts-gps-case-asks-how-much-privacy-do-we-expect/2011/11/10/gIQAN0RzCN\\_story\\_1.html](http://www.washingtonpost.com/opinions/supreme-courts-gps-case-asks-how-much-privacy-do-we-expect/2011/11/10/gIQAN0RzCN_story_1.html).

28. Donna Miles, *Cyber Defense Requires Teamwork, Agility, Alexander Says*, U.S. DEP’T DEF. (Oct. 27, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=65846>.

29. Matt Apuzzo, *AP Impact: NYPD Ethnic Tracking Included Citizens*, GUARDIAN (Sept. 22, 2011), <http://www.guardian.co.uk/world/feedarticle/9860821>.

30. *Id.*

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forum, *Constitution 3.0: Freedom, Technological Change and the Law*,<sup>31</sup> which posed the technologically foreseeable scenario where the ever-increasing number of cameras surveilling public places as crime prevention and counterterrorism tools were fused in a way that permitted *anyone* with access to the Internet to track the movements of individuals.

Other scenarios included hypotheticals involving the application of brain-scanning technology to otherwise silent terrorism suspects to glean information from them, raising the question whether it would violate “cognitive liberty” protected by the Fifth Amendment’s proscription against self-incrimination, or the Fourth Amendment’s protection against unlawful search and seizure.

Few fully satisfactory answers were produced at the forum, but the questions illustrate what may be the most lasting legacies of 9/11, that is, the growing normalization of the application of advanced intelligence-gathering technologies into civilian settings, to include situations beyond counterterrorism, and the consequent loss of privacy, if not civil liberties. It is not yet clear how these phenomena might change American life, but it appears rather certain that they will.

Finally, we should not forget that respected experts still insist that “[i]f anything . . . the terrorist threat today is even greater and more multifaceted than ever.”<sup>32</sup> One need not accept that dark premise to nevertheless agree it would be dangerous to become complacent. Persistence, vigilance, and continual evaluation and re-evaluation of threats and our response to them are necessities of the twenty-first century life.

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

The impact of the “Arab Spring” on American national security is, of course, still evolving. One can be hopeful that it will produce if not liberal democracies in an American sense, at least governmental structures that are responsive to their peoples, have a sense of human dignity, and are supportive of an economic system

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31. *Constitution 3.0: Freedom, Technological Change and the Law*, BROOKINGS INST. (Dec. 13, 2011), available at [http://www.brookings.edu/~media/Files/events/2011/1213\\_constitution\\_technology/20111213\\_constitution\\_technology.pdf](http://www.brookings.edu/~media/Files/events/2011/1213_constitution_technology/20111213_constitution_technology.pdf).

32. Clark Kent Ervin, *Department of Insecurity*, ASPEN IDEA, Winter 2011/2012, at 78.

capable of providing an acceptable standard of living to their constituents.

According to the Middle East Institute, the “Arab Spring” will produce effects that may have mixed impacts on U.S. security interests.<sup>33</sup> The Institute says, for example, that while the “Arab Spring” shows that the United States no longer has the “prestige and resources to dominate Middle East affairs,” the U.S. role in the Arabian Gulf particularly “remains paramount.”<sup>34</sup> Importantly, the Institute also says that on “terrorism, the Arab Spring uprisings underscore the bankruptcy of Islamic extremist philosophy sanctioning violence as the only way to attain societal changes.”<sup>35</sup>

Dr. W. Andrew Terrill of the U.S. Army’s Strategic Studies Institute contends that “the spread of less corrupt and more democratic governments in the Middle East will be of tremendous benefit to the United States,” but warns that “it must be understood that democracy is not an inevitable outcome for any of the countries involved.”<sup>36</sup> He says that thus far, “the role of the United States in this region has not emerged as a central or even important part of the disagreement between revolutionaries and members of the government.”<sup>37</sup>

In any event, Dr. Terrill does not believe the new leaders will have “the political clout or repressive capability to demand more sacrifice from their populations in order to challenge the West.”<sup>38</sup> Still, Dr. Terrill counsels that “[w]hatever policies the United States adopts toward the Arab Spring countries some risk will have to be assumed because of their uncertain futures.”<sup>39</sup>

This is good advice. Americans would be wise to temper their expectations, and have an appreciation for the sheer difficulty of transforming societies imprinted with decades of authoritarian rule. There is simply little in recent history to show that such states, particularly in the Middle East, can transform themselves without

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33. Allen L. Keiswetter, *The Arab Spring: Implications for U.S. Policy and Interests*, MIDDLE EAST INST. (Jan. 13, 2012), <http://www.mei.edu/content/arab-spring-implications-us-policy-and-interests>.

34. *Id.*

35. *Id.*

36. Dr. W. Andrew Terrill, *The Arab Spring and the Future of U.S. Interests and Cooperative Security in the Arab World*, STRATEGIC STUD. INST.: U.S. ARMY WAR COLL. (Aug. 2, 2011), <http://www.strategicstudiesinstitute.army.mil/index.cfm/articles/The-Arab-Spring-and-the-Future-of-US-Interests/2011/8/2#summary>.

37. *Id.*

38. *Id.*

39. *Id.*

considerable social angst, not to mention bloodshed. There will likely be much of both in the years ahead.

Furthermore, it may be that some of the newly formed governments may seize the opportunity to emphasize their independence from Western influences (and especially from that of the United States) as something of a totem of their liberation from decades of autocratic rule. We may hear disturbing rhetoric emerge from the still-volatile region that might suggest a turning away from the United States, even in places such as Egypt where the United States has enjoyed cordial if not truly friendly relations.

It would be prudent, perhaps, not to make too much of such almost inevitable pronouncements. America's importance—and value—will not likely be lost on whatever governments emerge. As former Secretary of Defense Robert Gates observed:

The fact is, governments deal with the United States because it's in their interest, not because they like us, not because they trust us, and not because they believe we can keep secrets. Many governments—some governments deal with us because they fear us, some because they respect us, most because they need us. We are still essentially, as has been said before, the indispensable nation.<sup>40</sup>

Given that it proved to be the centerpiece of the “Arab Spring,” the no-boots-on-the-ground military methodology America employed in NATO's Libya operation is worth noting. Why? Judging from polls, Americans are disillusioned with large “footprint” military operations like those in Iraq and Afghanistan that proved so costly in terms of blood and treasure.<sup>41</sup> After a decade of attempting to use masses of U.S. troops on the ground to accomplish political objectives, the fact that U.S. near-term goals in Libya were achieved by an air-only campaign at relatively little cost—and with the loss of no American lives—will certainly give

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40. *DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon*, U.S. DEP'T DEF. (Nov. 30, 2010), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4728>.

41. A November 2011 poll found that 63% of Americans oppose the United States war in Afghanistan. *See Afghanistan*, POLLINGREPORT.COM, <http://www.pollingreport.com/afghan.htm> (last visited Apr. 22, 2012) (citing a CNN/ORC Poll. Nov. 18–20, 2011). Similarly, a November 2011 poll about Iraq found that 67% of Americans believed that the result of the war with Iraq was not worth the loss of American lives and other costs. *See Iraq*, POLLINGREPORT.COM, <http://www.pollingreport.com/iraq.htm> (last visited Apr. 22, 2012) (citing a CBS News Poll. Nov. 6–10, 2011).

policymakers something to think about in terms of military options in future contingencies.<sup>42</sup>

It also may shape U.S. defense resourcing as well. The experience with Libya and, even more so, the much-discussed “pivot” towards Asia,<sup>43</sup> could bring a greater prominence to air and naval modernization, and a de-emphasis on land force spending that has dominated the last decade.<sup>44</sup> *Time Magazine* contributor Mark Thompson wrote that the Libya operation, along with reflection on the conduct of the wars in Iraq and Afghanistan, may inspire a realization of the limitations of military force.<sup>45</sup> “It’s good” he says, “for whacking someone—punishment, vengeance—but far less helpful when it comes to remaking a foreign land.”<sup>46</sup> As to what this will mean for the future, Thompson says:

[H]istory offers important clues here: the last land war we cleanly won was the European theater in World War II—nearly 70 years ago. Since then, U.S. victories in land wars—Korea, Vietnam, Iraq and Afghanistan—have been elusive (the first Gulf War lasted less than 100 hours on the ground; air power did all the heavy lifting). So after the exclamation point generated by Gaddafi’s death, the nation is left with a question mark: why keep a big and costly land army hanging around if all it does is encourage the nation to engage in wars it has little chance of winning?<sup>47</sup>

Answering that complicated question may be an unexpected but important impact of the “Arab Spring” on American national security.

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42. John A. Tirpak, *Lessons from Libya*, AIR FORCE MAG., Dec. 2011, at 34, available at <http://www.airforce-magazine.com/MagazineArchive/Documents/2011/December%202011/1211libya.pdf>.

43. Elisabeth H. Bumiller, *U.S. Pivots Eastward to Address Uneasy Allies*, N.Y. TIMES, Oct. 25, 2011, at A4, available at <http://www.nytimes.com/2011/10/25/world/asia/united-states-pivots-eastward-to-reassure-allies-on-china.html>.

44. This appears to be the case as reflected in the U.S. Department of Defense guidance issued in January 2012. See generally U.S. DEP’T DEF., SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21<sup>ST</sup> CENTURY DEFENSE (Jan. 2012), available at [http://www.defense.gov/news/Defense\\_Strategic\\_Guidance.pdf](http://www.defense.gov/news/Defense_Strategic_Guidance.pdf).

45. Mark Thompson, *Libya’s Lessons*, TIME BATTLELAND BLOG (Oct. 20, 2011), <http://battleland.blogs.time.com/2011/10/20/libyas-lessons/#ixzz1gzthZwNr>.

46. *Id.*

47. *Id.*

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

The Ahmed Warsame case represents one of the central questions for counterterrorism policymakers, that is, what to do with terrorists who are picked up by U.S. forces somewhere in the world? The problem is particularly exacerbated given America's exit from Iraq, and Afghanistan's understandable reluctance to incarcerate foreigners not apprehended in their country.

According to the Justice Department, Warsame "was captured in the Gulf region by the U.S. military on April 19, 2011, and was questioned for intelligence purposes for more than two months."<sup>48</sup> He was then transported to the jurisdiction of the Southern District of New York where he was "indicted on charges of providing material support to al Shabaab and al Qaeda in the Arabian Peninsula (AQAP) . . . as well as conspiring to teach and demonstrate the making of explosives, possessing firearms and explosives in furtherance of crimes of violence, and other violations."<sup>49</sup>

In deciding to resolve the case in civilian courts, John Brennan, Assistant to the President for Homeland Security and Counterterrorism, revealed that:

[T]he President's national security team unanimously agreed that the best option for prosecuting him was our federal courts, where, among other advantages, we could avoid significant risks associated with, and pursue additional charges not available in, a military commission. And, if convicted of certain charges, he faces a mandatory life sentence.<sup>50</sup>

Writing in the *New York Times*, journalist Charlie Savage reports the administration "settled on the civilian trial option because officials did not want to add a new inmate to the Guantánamo prison."<sup>51</sup> In addition, he says that some considered a military trial

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48. *Accused Al Shabaab Leader Charged with Providing Material Support to Al Shabaab and Al Qaeda in the Arabian Peninsula*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/cjs/docs/news-07052011.html> (last visited Apr. 22, 2012).

49. *Id.*

50. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Address Before Program on Law and Security at Harvard Law School: Strengthening our Security by Adhering to our Values and Laws, (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

51. Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*,

to be “problematic” because of the uncertain status of “material support” as a war crime, a necessary showing for military commission jurisdiction.<sup>52</sup> Still, the decision to forgo military commissions was subject to criticism. Senator Mitch McConnell argued that the “administration’s actions are inexplicable, create unnecessary risks here at home, and do nothing to increase the security of the United States.”<sup>53</sup>

Another feature of the Warsame case was the determination to create two different interrogation statuses. The first was the interrogation by intelligence officers prior to his entry into the civilian judicial system. During this period he was not advised of his *Miranda* rights.<sup>54</sup> After his delivery to civilian authorities and prior to his interrogation by law enforcement personnel, the Justice Department says he “was read his *Miranda* rights, and after waiving those rights, he spoke to law enforcement agents for several days.”<sup>55</sup>

These differing interrogation statuses can create further complications because the first, unwarned interrogation might raise questions about the voluntariness of the subsequent waiver of rights. Moreover, even if the second interrogation otherwise conforms to constitutional standards, the prosecution must ensure that no information from the earlier, unwarned but custodial interrogations is allowed to bleed into the criminal case in a way that taints the proceedings.

Importantly, Savage also reports that Senator Lindsey Graham, while having no particular objection to a civilian trial, nevertheless “contended that the administration had rushed the man’s initial interrogation because it had no good place to detain him for a longer period, showing the need for a prison like Guantánamo for other current and future detainees.”<sup>56</sup> This set the stage for a clash with the administration over detainee policy that very nearly caused the President to veto the National Defense Authorization Act (NDAA).<sup>57</sup>

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N.Y. TIMES, July 7, 2011, at A10, available at <http://www.nytimes.com/2011/07/07/world/africa/07detain.html>.

52. *Id.*

53. *Id.*

54. *Miranda v. Arizona*, 384 U.S. 436 (1966), held that custodial interrogations would not be admissible at trial absent a showing that the suspect was advised of his rights to counsel, as well as his rights against self-incrimination.

55. U.S. DEP’T OF JUSTICE, *supra* note 48.

56. Savage, *supra* note 51.

57. Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 14, 2011, at A30, available at

In its *Statement of Administration Policy*, the administration formally argued that provisions in drafts of the NDAA would “disrupt the Executive branch’s ability to enforce the law and impose unwise and unwarranted restrictions on the U.S. Government’s ability to aggressively combat international terrorism . . . [and] inject legal uncertainty and ambiguity that may only complicate the military’s operations and detention practices.”<sup>58</sup> To avoid a possible veto, last-minute revisions produced a bill that, according to the White House, does not “challenge or constrain the President’s [ability] to collect intelligence, incapacitate dangerous terrorists, and protect the Nation.”<sup>59</sup>

The revisions, however, did not silence critics. Professor David Cole criticizes the compromise for creating “a presumption in favor of indefinite military detention” for foreign terrorism suspects.<sup>60</sup> “Equally problematic,” in his view, is that the law provides for indefinite detention of “anyone who has provided ‘substantial support’ to groups that are ‘associated forces’ of al Qaeda.”<sup>61</sup> Moreover, he objects to various provisions and requirements that “effectively prevent President Obama from closing Guantanamo.”<sup>62</sup>

Ironically, shortly after this agreement was reached, came the news that a terrorist accused of the killings of American soldiers was released to Iraqi authorities as U.S. troops departed the country.<sup>63</sup> Subject to sharp criticism, one reason alleged for the release was that “Obama had not allowed new detainees to be sent to the Guantánamo prison in Cuba.”<sup>64</sup> Senator Kelly Ayotte said that “Daqduq [the detainee released] could have been detained at Guantánamo, and this decision by the administration is yet more

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<http://www.nytimes.com/2011/12/15/us/politics/obama-wont-veto-military-authorization-bill.html>.

58. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1867—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012 (2011), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s\\_20111117.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf).

59. *Id.*

60. David Cole, *A Bill of Rights for Some*, NYRBLOG (Dec. 16, 2011, 2:46 PM), <http://www.nybooks.com/blogs/nyrblog/2011/dec/16/bill-rights-some/>.

61. *Id.*

62. *Id.*

63. Eli Lake, *U.S. Turns Over Terrorism Suspect Ali Musa Daqduq to Iraq*, THE DAILY BEAST (Dec. 17, 2011, 12:17 AM EST), <http://www.thedailybeast.com/articles/2011/12/17/u-s-turns-over-terrorism-suspect-ali-musa-daqduq-to-iraq.html>.

64. *Id.*

evidence of the need for a coherent detention policy for terrorists.”<sup>65</sup>

Actually, any release to U.S. authorities would have required the cooperation of the Iraqi government, which evidently chose to deal with Daquduq through their own legal processes.<sup>66</sup> Regardless, the Warsame case and now the Daquduq matter illustrate that the United States still has not achieved political consensus for an overall plan to deal with terrorism suspects. As concerning as this is, in the near term it may well be that the best—and most realistically viable—solution is an *ad hoc*, case-by-case one, with decisions guided by the specific facts of each situation.

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

It is important to note that even among government officials there is no consensus as to what exactly menaces the nation most. In November 2011, *Foreign Policy* blogger Joshua Keating plaintively asked “[c]an anyone agree on what America’s ‘greatest threat’ is?” and recorded the wide divergence of views by various opinion-makers.<sup>67</sup> The assessments ranged from the Chinese nuclear arsenal, to cyber attacks, to Iran.<sup>68</sup>

Some experts think of threats in strategic, albeit indirect, terms. Former Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, for example, said in 2010 that the “single biggest threat to national security is the national debt.”<sup>69</sup> His erstwhile boss, Secretary of Defense Leon Panetta, surprised many observers when he told workers at a submarine plant in November 2011 that “[w]e face the threats from rising powers, China, India, others that we have to always be aware of”—comments his aides immediately

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65. Charlie Savage, *U.S. Transfers Its Last Prisoner in Iraq to Iraqi Custody*, N.Y. TIMES, Dec. 16, 2011, at A11, available at <http://www.nytimes.com/2011/12/17/world/middleeast/us-transfers-last-prisoner-to-iraqi-government.html>.

66. *Id.*

67. Joshua Keating, *Can Anyone Agree on What America’s ‘Greatest Threat’ Is?*, FOREIGN POL’Y (Nov. 3, 2011, 11:37 AM), [http://blog.foreignpolicy.com/posts/2011/11/03/can\\_anyone\\_agree\\_on\\_what\\_americas\\_greatest\\_threat\\_is](http://blog.foreignpolicy.com/posts/2011/11/03/can_anyone_agree_on_what_americas_greatest_threat_is).

68. *Id.*

69. Michael J. Carden, *National Debt Poses Security Threat, Mullen Says*, AMERICAN FORCES PRESS SERVICE (Aug. 27, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=60621>.

disavowed.<sup>70</sup>

More formally, Mr. James Clapper, the Director of National Intelligence, enumerated a number of threats around the globe in his February 2011 *Statement for the Record* in connection with his testimony before the House Permanent Select Committee on Intelligence.<sup>71</sup> Clapper insisted, however, that “[t]errorism will remain at the forefront of our national security threats over the coming year.”<sup>72</sup>

How serious is the threat of terrorism, *qua* terrorism? In 2010, analysts writing in *Foreign Affairs* asserted that the terrorism peril is “hardly existential” and the risk of it is “so low that spending to further reduce its likelihood or consequences is scarcely justified.”<sup>73</sup> Regarding nuclear terrorism, experts agree that it “is commonly held to be the single most serious threat to the national security of the United States,” but some also insist that “the likelihood that a terrorist group will come up with an atomic bomb seems to be vanishingly small.”<sup>74</sup>

Cyber attacks are also often cited as the kind of threat for which the United States is unprepared. Certainly, cyber security can be improved, especially defenses against cyber theft and cyber espionage. Congress is rightly considering a number of proposals.<sup>75</sup> However, it is also becoming increasingly clear that the threat of actual cyberwar may well be over-hyped. For example, while cyber authority Jerry Brito concedes that “there is the possibility of a cyber attack so severe that it could result in casualties, thus qualifying as an act of war,” he further adds the caution that “it is

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70. Phil Stewart, *Defense Chief Calls China, India “Threats,”* REUTERS (Nov. 17, 2011, 4:45 PM EST), <http://www.reuters.com/article/2011/11/17/us-usa-panetta-threats-idUSTRE7AG2H520111117> (quoting Leon Panetta).

71. See JAMES R. CLAPPER, DIR. OF NAT’L INTELLIGENCE, STATEMENT FOR THE RECORD ON THE WORLDWIDE THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY FOR THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE (Feb. 10, 2011), available at [http://www.dni.gov/testimonies/20110210\\_testimony\\_clapper.pdf](http://www.dni.gov/testimonies/20110210_testimony_clapper.pdf).

72. *Id.* at 2.

73. John Mueller & Mark G. Stewart, *Hardly Existential: Thinking Rationally About Terrorism*, FOREIGN AFFAIRS (Apr. 2, 2010), <http://www.foreignaffairs.com/articles/66186/john-mueller-and-mark-g-stewart/hardly-existential>.

74. See, e.g., John Mueller, Presentation at the Program on Int’l Sec. Policy, University of Chicago: The Atomic Terrorist: Assessing the Likelihood (Jan. 15, 2008), available at <http://polisci.osu.edu/faculty/jmueller/APSACHGO.PDF>.

75. See ERIC A. FISCHER, CONG. RESEARCH SERV., R42114, FEDERAL LAWS RELATING TO CYBERSECURITY: DISCUSSION OF PROPOSED REVISIONS (Dec. 22, 2011), available at <http://www.fas.org/sgp/crs/natsec/R42114.pdf>.

extremely rare and unlikely.”<sup>76</sup> Similarly, a report by British experts in January of 2011 concluded that “[i]t is unlikely that there will ever be a true cyberwar.”<sup>77</sup>

It is not hard to see why. Contrary to popular belief, cyber operations that are militarily significant are difficult to conduct, even on the tactical level. In its report about the rejection of cyber methodologies for the operations against Muammar Gaddafi’s air defense forces in Libya, the *New York Times* observed that:

While popular fiction and films depict cyberattacks as easy to mount—only a few computer keystrokes needed—in reality it takes significant digital snooping to identify potential entry points and susceptible nodes in a linked network of communications systems, radars and missiles like that operated by the Libyan government, and then to write and insert the proper poisonous codes.<sup>78</sup>

Thus, while cyberwar remains a genuine concern, the vulnerabilities of the United States may be overstated by some. Indeed, the U.S. Department of Defense (DoD) declared in November 2011 that it could defend the United States, including the use of offensive operations if necessary. Specifically, DoD asserted that it “has the capability to conduct offensive operations in cyberspace to defend our Nation, Allies and interests.”<sup>79</sup> The report also makes it clear that the United States would not necessarily limit its defensive response to cyber attacks to responses in kind; kinetic counters would also be considered.<sup>80</sup>

This is significant. To the extent that cyber war is an authentic threat, the kind of attacks that could cripple the entire nation

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76. Jerry Brito, *Is Cyberwar Real or Just Hype?*, TIME TECHLAND (July 8, 2011), <http://techland.time.com/2011/07/08/is-cyberwar-real-or-just-hype/>.

77. Eric Pfanner, *Apocalypse in Cyberspace? It’s Overdone*, N.Y. TIMES (Jan. 16, 2011), [http://www.nytimes.com/2011/01/17/technology/17cache.html?\\_r=1](http://www.nytimes.com/2011/01/17/technology/17cache.html?_r=1) (quoting PETER SOMMER & IAN BROWN, ORG. FOR ECON. COOPERATION AND DEV. PROJECT ON “FUTURE GLOBAL SHOCKS,” REDUCING SYSTEMIC CYBERSECURITY RISK 6 (Jan. 14, 2011), available at <http://www.oecd.org/dataoecd/57/44/46889922.pdf>).

78. Eric Schmitt & Thom Shanker, *U.S. Debated Cyberwarfare in Attack Plan on Libya*, N.Y. TIMES (Oct. 17, 2011), [http://www.nytimes.com/2011/10/18/world/africa/cyber-warfare-against-libya-was-debated-by-us.html?\\_r=1](http://www.nytimes.com/2011/10/18/world/africa/cyber-warfare-against-libya-was-debated-by-us.html?_r=1).

79. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE CYBERSPACE POLICY REPORT: A REPORT TO CONGRESS PURSUANT TO THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011, SECTION 934, 5 (Nov. 2011), available at [http://www.defense.gov/home/features/2011/0411\\_cyberstrategy/docs/NDA%20Section%20934%20Report\\_For%20webpage.pdf](http://www.defense.gov/home/features/2011/0411_cyberstrategy/docs/NDA%20Section%20934%20Report_For%20webpage.pdf)

80. See *id.*

could be mounted, *if at all*, only by nation-states. In doing so, such nation-states must calculate the U.S. response, not just in cyber terms, but also with respect to the enormous kinetic capabilities of the U.S. armed forces. There is no reason to think that nation-states currently deterred by America's military might would assume that a cyber attack would not generate a debilitating response, either by a counter-cyber assault or by a more traditional strike from the world's foremost military power.

Much the same can be said about the threat of bioterrorism. Somewhat surprisingly, Secretary of State Hillary Clinton recently insisted that a "crude but effective terrorist weapon can be made by using a small sample of any number of widely available pathogens, inexpensive equipment and college-level chemistry and biology."<sup>81</sup> She further contends that "less than a year ago, al-Qaeda in the Arabian Peninsula made a call to arms for, and I quote, 'brothers with degrees in microbiology or chemistry to develop a weapon of mass destruction.'"<sup>82</sup>

Actually, however, Clinton's recitation of al Qaeda's call to arms indicates that they were seeking expertise, not that they already had it. This is the same reason some experts insist that the threat of bioterrorism has been over-hyped.<sup>83</sup> If as Secretary Clinton says, the pathogens were really "widely available" and their manufacture only required "inexpensive equipment" and "college-level" training, why have we not seen attacks from extremists bent on harming Americans in any way they can? The reason may well be that, like cyber attacks, it is harder to do than popular perceptions would have one believe.

None of this is to suggest that cyber attacks or bioterrorism are threats to be ignored; rather, it is merely to say that reasoned decisions must be made in an era of austere security resources. In the case of bioterrorism, for example, the United States has spent "at least \$33 billion since 2002 to combat the threat of biological terrorism."<sup>84</sup> The question is the degree to which further expenditures are warranted.

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81. Suzanne Presto, *Clinton Warns of Bio-Weapons Threat, Terrorism*, VOICE OF AMERICA (Dec. 7, 2011), <http://www.voanews.com/english/news/usa/Clinton-Warns-of-Bio-Weapons-Threat-Terrorism-135175433.html> (quoting U.S. Secretary of State Hillary Clinton).

82. *Id.*

83. See Milton Leitenberg, *Bioterrorism, hyped*, LOS ANGELES TIMES (Feb. 17, 2006), <http://articles.latimes.com/2006/feb/17/opinion/oe-leitenberg17>.

84. *Id.*

What then about the threat posed by nation-states? Mr. Clapper, in testimony before the Senate, reiterated his claim that terrorism was his “first and foremost” concern, but nevertheless admitted that Russian and Chinese nuclear arsenals represented a “mortal” threat to the United States.<sup>85</sup> Again, this is the critical *non-existential* versus *existential* distinction in threat analysis. This is the difference between arguably more likely—albeit less dangerous—events such as an act of terrorism, and the remote but vastly more “mortal” threats posed by nation-states armed with nuclear weaponry.

Iran is the *potential* nuclear power currently causing the international community the most anxiety. The United States identifies Iran and its nuclear ambitions as “a major threat to U.S. national security interests,”<sup>86</sup> yet seems to have enjoyed only limited success in addressing it. Nevertheless, Secretary of Defense Panetta recently insisted that the “the combination of economic and diplomatic sanctions that have been placed on Iran have had a serious impact,” and represents it is the “best way” to “ultimately weaken this nation, so that ultimately they have to make a decision about whether they continue to be a pariah or whether they decide to join the international community.”<sup>87</sup>

Panetta admitted that force was a “last resort.”<sup>88</sup> If it would come to that, it can be said that the United States is as “prepared to handle” it as any nation on earth. Moreover, as terrible as a nuclear-armed Iran might be to U.S. interests, the threat, *per se*, does not represent a direct “vulnerability” to the United States as possession of the weapon is only one element; an effective delivery system is also needed. Much the same can be said about North Korea, even as its future becomes even more uncertain with the death of Kim Jong Il.

That cannot, however, be said about Russia or China. China

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85. *Hearing to Receive Testimony on the Current and Future Worldwide Threats to the National Security of the United States Before the U.S. Senate Committee on Armed Services*, 112th Cong. 6, 33 (2011) (statement of Hon. James R. Clapper, Jr., Director of National Intelligence), available at <http://armed-services.senate.gov/Transcripts/2011/03%20March/11-11%20-%203-10-11.pdf>.

86. KENNETH KATZMAN, CONG. RESEARCH SERV., RL 32048, IRAN: U.S. CONCERNS AND POLICY RESPONSES (2011), available at <http://www.fas.org/sgp/crs/mideast/RL32048.pdf>.

87. Cheryl Pellerin, *Panetta: Keeping Iran Free of Nuclear Weapons a Common Goal*, AMERICAN FORCES PRESS SERVICE (Dec. 2, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=66341>.

88. *Id.*

seems to present something of a conundrum for American security officials. On the one hand, they seem to want to down play its military potential, apparently in the hopes of not appearing provocative, yet on the other, they are forced to recognize China's increasingly ominous potential. Thus, although Michèle Flournoy, Undersecretary of Defense for policy, declared that as a matter of official policy, the United States does "not view China as an adversary;"<sup>89</sup> there is no question that China's military strength continues to grow and the Pentagon knows it.

In its 2011 report to Congress about China, for example, the Pentagon was obliged to concede that:

Since the early 1990s PRC [People's Republic of China] leaders have sustained an ambitious and broad-based military modernization program intended to transform the PLA [People's Liberation Army] into a modern force. Although the PLA currently retains a large number of legacy platforms and weapons, the percentage of modern equipment in the force is growing rapidly. China has closed important technological gaps and achieved some capabilities<sup>90</sup> that are on par with or exceed global standards.

This, perhaps, suggests a peril for which the United States has a real vulnerability, that is, whether or not America can continue to maintain technologically superior arms. Barry Watts, a Senior Fellow at the Center for Strategic and Budgetary Assessments, told Congress last October that the "prospects for the continued success of for-profit defense firms in providing the U.S. armed forces with superior weaponry and equipment—especially at affordable costs—may be at risk unless both the defense industrial base itself and the business practices of the U.S. government undergo fundamental restructuring."<sup>91</sup>

According to Watts, the Department of Defense's approach of

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89. Christopher Bodeen, *U.S.: Asia Military Pacts Not Aimed at China*, ASSOCIATED PRESS (Dec. 8, 2011), <http://www.armytimes.com/news/2011/12/ap-us-asia-military-pacts-not-aimed-at-china-120811/>.

90. U.S. DEP'T OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 27 (2011), *available at* [http://www.defense.gov/pubs/pdfs/2011\\_CMPR\\_Final.pdf](http://www.defense.gov/pubs/pdfs/2011_CMPR_Final.pdf).

91. Barry Watts, Senior Fellow, Ctr. for Strategic and Budgetary Assessments, Statement Before House Armed Servs. Comm.: The Defense Industrial Base: A National Security Imperative, at 2 (Oct. 24, 2011), *available at* [http://armedservices.house.gov/index.cfm/files/serve?File\\_id=fa9a0449-f7cc-4b83-b20c-855d61657f47](http://armedservices.house.gov/index.cfm/files/serve?File_id=fa9a0449-f7cc-4b83-b20c-855d61657f47).

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relying on market forces to maintain an adequate industrial capability misperceives how the U.S. defense industry functions. In reality, he says, “the defense industrial base is highly regulated by both DoD and Congress” and is structurally “unique in having a monopsony buyer—the U.S. government (which is also the regulator)—and a few oligopoly suppliers in each sector due to the consolidations of the 1990s.”<sup>92</sup>

Watt’s comments are just the latest in a growing cacophony of warnings heard from a number of experts. For example, Ilan Berman of the American Foreign Policy Council cautioned that unlike “practically every declared nuclear weapon state,” the United States “has allowed its strategic infrastructure to atrophy since the end of the Cold War.”<sup>93</sup> Moreover, retired Air Force Lt. Gen. David Deptula declared in 2010 that “we have a geriatric bomber force, [and] a geriatric fighter force. We have a geriatric Air Force, quite frankly.”<sup>94</sup> All of this may indicate a declining defense industrial base, which, actually, constitutes the “threat” that the United States is “least prepared to handle”.

Looking ahead, U.S. defense strategists also need to concern themselves with the rise of a new kind of peril; one that is occasioned by the rise of violent entities that some call “criminal insurgencies.” The accuracy of the appellation is subject to debate,<sup>95</sup> but what is not debated is the level of violence these entities are causing, especially for America’s southern neighbor, Mexico. A 2011 RAND report points out that there were more than 30,000 drug-related deaths in Mexico between December 2006 and December 2010.<sup>96</sup> In addition, the violence has extended beyond the killings of rival gang members and innocent bystanders,

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92. *Id.*

93. Ilan Berman, *Stagnation Threatens U.S. Arms Superiority*, DEFENSE NEWS (Jan. 4, 2010), [http://www.afpc.org/publication\\_listings/viewArticle/885](http://www.afpc.org/publication_listings/viewArticle/885).

94. Lt. Gen. David Deptula, Deputy Chief of Staff for Intelligence, Surveillance and Reconnaissance, Anticipating a Change, Speech to the Air Force Association (Sept. 13, 2010), *available at* <http://www.afa.org/events/conference/2010/scripts/AFA-100913-Deptula.pdf>.

95. See Whitney Eulich, *Pervasive Insecurity in Mexico: If This Isn’t ‘Terror,’ What Is?*, CHRISTIAN SCIENCE MONITOR, Dec. 3, 2011, at 28, *available at* <http://www.csmonitor.com/World/Americas/2011/1203/Pervasive-insecurity-in-Mexico-If-this-isn-t-terror-what-is>.

96. CHRISTOPHER PAUL, AGNES GEREKEN SCHAEFER & COLIN P. CLARKE, RAND, THE CHALLENGE OF VIOLENT DRUG-TRAFFICKING ORGANIZATIONS 1 (2011), *available at* [http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND\\_MG1125.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1125.pdf).

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to representatives of the state, including assassinations of politicians and judges, and attacks on police and other security forces, as well as their families.<sup>97</sup>

As described by RAND, the situation in Mexico has acquired characteristics of an insurgency, with the likelihood of continued high-levels of violence. Rep. Connie Mack declared the situation along the U.S. border a “threat to national security” and proposed legislation that “would treat Mexican drug cartels like terrorists and apply a counterinsurgency strategy to the growing violence along the Southern border.”<sup>98</sup> A study by the Center for a New American Security (CNAS) came to a similar conclusion, and plainly identified the national security implications:

Criminal networks linking cartels and gangs are no longer simply a crime problem, but a threat that is metastasizing into a new form of widespread, networked criminal insurgency. The scale and violence of these networks threaten civil governments and civil societies in the Western Hemisphere and, increasingly, the United States as well.<sup>99</sup>

The threat of these criminal insurgencies destabilizing Mexico is troubling enough, but the evidence that Guatemala and perhaps the rest of Central America is at risk is—or should be—a matter of grave concern.<sup>100</sup> That realization however, may not have infiltrated the thinking of the defense bureaucracy as far as it needs to penetrate. Specifically, the CNAS report says that “American policymakers have been slow to recognize the evolution of the drug cartels and gangs from purely law enforcement problems to the strategic threat they now pose.”<sup>101</sup>

This may be another key threat for which the United States is not as prepared as it should be, even though the vulnerabilities to

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97. *Id.* at ix.

98. Elizabeth Harrington, *Republicans Propose Bill to Treat Mexican Drug Cartels as ‘Terrorist Insurgency’*, CNSNEWS.COM (Dec. 15, 2011), <http://cnsnews.com/news/article/republicans-propose-bill-treat-mexican-drug-cartels-terrorist-insurgency>.

99. BOB KILLEBREW & JENNIFER BERNAL, CENTER FOR A NEW AMERICAN SECURITY, *CRIME WARS: GANGS, CARTELS AND U.S. NATIONAL SECURITY* 5 (2010) (footnote omitted), *available at* [http://www.cnas.org/files/documents/publications/CNAS\\_CrimeWars\\_KillebrewBernal\\_3.pdf](http://www.cnas.org/files/documents/publications/CNAS_CrimeWars_KillebrewBernal_3.pdf).

100. See Karen Hooper, *The Mexican Drug Cartel Threat in Central America*, PROSUMERZEN (Nov. 18, 2011), *available at* <http://prosumerzen.net/2011/11/18/the-mexican-drug-cartel-threat-in-central-america-read-more-the-mexican-drug-cartel-threat-in-central-america-by-karen-hooper/>.

101. *Id.*

“spill over” to the domestic environment are readily apparent. Indeed, the U.S. Justice Department’s *National Drug Threat Assessment for 2011* says that what it calls “transnational criminal organizations” were operating “in more than a thousand U.S. cities during 2009 and 2010.”<sup>102</sup> Addressing this dangerous situation needs to be a top priority of America’s security establishment.

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

An obvious factor in determining the viability of al Qaeda will be the public statements of U.S. officials with access to America’s immense intelligence apparatus. In that regard, Secretary of Defense Leon Panetta famously (infamously?) announced in July 2011 that he is convinced that “we’re within reach of strategically defeating al Qaeda.”<sup>103</sup> One presumes, therefore, that at some point in the not-too-distant future America will be told that al Qaeda’s “strategic defeat” has been achieved.

Even those without access to intelligence information will have some objective data to measure al Qaeda’s current capability. Given that al Qaeda is ideologically committed to attacking the United States, the most convincing factor indicating its downfall will be the absence of an attack on the U.S. homeland connected with al Qaeda. It really is that simple.

Although a few attacks have been attempted, the fact that there have not been more of them cannot be attributed to some sudden change of disposition on the terrorists’ part, but rather a combination of better security at home, and direct strikes against al Qaeda lairs in Iraq, Afghanistan, Pakistan, Yemen, Somalia, and elsewhere. In addition, the security forces of many nations have hunted al Qaeda operatives with some real success.

In any event, the death of Osama bin Laden seems to have been near-catastrophic for the organization. Indeed, his demise, along with the killing of many of his lieutenants as a result of the U.S. drone campaign, has led many experts to believe the group is on the verge of defeat. The *Washington Post* reported in November

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102. U.S. DEP’T OF JUSTICE, NATIONAL DRUG THREAT ASSESSMENT 2011, NATIONAL DRUG INTELLIGENCE CENTER, 8 (2011), available at <http://www.justice.gov/ndic/pubs44/44849/44849p.pdf>.

103. Craig Whitlock, *Panetta: U.S. ‘Within Reach’ of Defeating al-Qaeda*, WASH. POST (July 9, 2011), [http://www.washingtonpost.com/world/panetta-us-within-reach-of-defeating-al-qaeda/2011/07/09/gIQAvPpG5H\\_story.html](http://www.washingtonpost.com/world/panetta-us-within-reach-of-defeating-al-qaeda/2011/07/09/gIQAvPpG5H_story.html).

2011 that counterterrorism officials said that al Qaeda's leadership cadre was "reduced to just two figures whose demise would mean the group's defeat."<sup>104</sup>

Still, even if "al Qaeda," *qua* al Qaeda, is "defeated," that does not mean that similar threats will likewise cease to exist. It seems clear that other groups around the globe will continue to emerge, and they will no doubt try to employ the al Qaeda terror strategy as a template even if they are actually wholly distinct entities pursuing a different agenda. We must accept that, from time to time, they probably will achieve some measure of success.

In short, terrorism—at least at some level—is here to stay. As the Supreme Court said in *Boumediene v. Bush*, the "real risks, the real threats, of terrorist attacks are constant and not likely soon to abate."<sup>105</sup> In dealing with this harsh reality, Americans may well want to carefully contemplate Benjamin Franklin's famous dictum that "[a]nyone who trades liberty for security deserves neither liberty nor security" in working towards achieving the right balance of those two most precious ends.<sup>106</sup>

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104. Greg Miller, *Al-Qaeda Targets Dwindle as Group Shrinks*, WASH. POST (Nov. 22, 2011), [http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAxBXJNmN\\_story.html](http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAxBXJNmN_story.html).

105. 553 U.S. 723, 793 (2008).

106. *Benjamin Franklin Quote*, FAMOUS QUOTES, <http://www.1-famous-quotes.com/quote/4722> (last visited Apr. 22, 2012).