LAW VS. WAR:
COMPETING APPROACHES TO FIGHTING TERRORISM

CONFERENCE REPORT

Shawn Boyne
Michael German
Paul R. Pillar

With Introduction
by
Dallas D. Owens

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FOREWORD

The readings in this volume address one of the fundamental assumptions underlying the conduct of the War on Terrorism—the nature of our enemy, whether perpetrators of terrorist activities are criminals or soldiers (combatants). Although the United States recognizes that terrorist acts are certainly illegal, it has chosen to treat, in many ways, perpetrators as combatants; but much of the world, including many of our traditional allies, have opted for a purely legalistic approach. Disagreement about assumptions is not the only basis for divergent policies for confronting terrorism, but certainly explains much of our inability to agree on strategies to overcome what we recognize as a serious common and persistent international problem.

The three articles in this collection of readings were produced from a conference entitled "Beyond the U.S. War on Terrorism: Comparing Domestic Legal Remedies to an International Dilemma." The conference was sponsored by the John Bassett Moore Society of International Law, University of Virginia School of Law, in cooperation with the Strategic Studies Institute, U.S. Army War College, and was held February 25-26, 2005. This well-organized conference brought together an outstanding array of speakers, representing academia, government, military, and practitioners; individuals who are at the center of the debate about applying legal remedies to our most pressing international issue—the War on Terrorism.

The authors contributing to this collection provide excellent examples of the important dialogue taking place in their respective communities: federal government, law enforcement, and academia. Their insights into how our respective cultures and histories influence our definitions, assumptions, and subsequent policy decisions can help us respect and learn from competing strategies. They correctly surmise that our current international struggle is too important for us to ignore assumptions underlying our own and competing ideas.

The Strategic Studies Institute is pleased to offer these thought-provoking readings as a contribution to the national security debate about how we should fight the War on Terrorism.



DOUGLAS C. LOVELACE, JR.
Director
Strategic Studies Institute

INTRODUCTION

Dallas D. Owens

The three papers in this collection of readings resulted from a conference entitled "Beyond the U.S. War on Terrorism: Comparing Domestic Legal Remedies to an International Dilemma." The conference was sponsored by the John Bassett Moore Society of International Law, University of Virginia School of Law, in cooperation with the Strategic Studies Institute, U.S. Army War College, and was held February 25-26, 2005. Over 160 people participated in the conference conducted at The University of Virginia. Conference participants included representatives from government agencies involved in the U.S. war on terrorism, students and faculty members from other universities participating in fields related to the topic of the conference, and members of the local community and the University of Virginia.

The conference program was designed to discuss international legal remedies to terrorism in terms of: (1) the importance of definitions for war and terrorism, (2) the evolution of U.S. political and legal responses to terrorism, (3) the long and rich European experience, (4) the lessons from Latin America about terrorism and the dangers of oppressive reactions, (5) the Islamic world's role in and reaction to terrorism, and (6) the relationship between terrorism and the law of the battlefield. A panel, with members drawn from diverse backgrounds, was dedicated to each of these six topics.

Key insights from the conference are:

1. Competing definitions of terrorism and war yield different diplomatic, legal, and military consequences. The definition a policymaker chooses is a key consideration.
2. The United States defined the September 11, 2001, attacks as acts of war rather than crimes outside a war context. The resulting response was due in part to a lack of legal flexibility in U.S. law, not understanding the power imbedded in criminal categorization, and reliance on structural changes for solutions.
3. European countries have a long history of individually and collectively responding to terrorism through their legal systems, and the United States could profit from examining those responses.
4. Latin America has a long history of contending with terrorism in a context of guerrilla warfare.
5. Strategists and policymakers often incorrectly view the Islamic world as homogeneous and unchanging in its relationship to the West and to terrorism.
6. Policy formulation could benefit from the many historical examples, some in U.S. history, of problems associated with applying laws of war to insurgencies and other irregular warfare.
7. The United States should avoid: (1) limiting itself by adopting overly simple definitions; (2) characterizing offending groups by a tactic used and forgetting they have many other dimensions; (3) one-dimensional reactions to attacks; and, (4) underestimating the value of legal solutions to international problems.

The three papers herein represent presentations addressing the first three conference themes and reinforce all the key insights except 4, 5, and 6. In the first paper, Mr. Paul Pillar clearly articulates issues associated with basic concepts of terrorism and why definitions have diplomatic, legal, and military consequences. He cautions us to remain aware that the American perspectives about terrorism, and those of our friends, are the products of our particular cultures and histories. While we should learn from others' experiences, we must avoid their perceptual traps as readily as our own. Mr. Pillar concludes by

wisely pointing to the shared goals of international law and counterterrorism operations—to minimize human suffering, even in situations where the likelihood of suffering is increased, such as war. If we can keep that goal in mind, our motivation to save innocent people from future terrorism is more likely to outweigh revenge, expanding influence, and other less noble motivations.

In the second paper, Mr. Michael German illustrates why he believes the U.S. reaction to terrorism is not just inadequate, but rather, by being incorrect, our strategy compounds the problem. By defining activity as terrorist warfare rather than criminal behavior, we enhance perpetrators' status and provide them the legitimacy that they seek. The author's experience as an undercover Federal Bureau of Investigation agent has given him valuable insights into terrorists' desire for legitimacy among their supporters, sympathizers, and others who have potential to become part of those two groups. He discusses how these groups develop strategies to create overreaction by authorities and to avoid their most feared outcome, being labeled as mere criminal gangs. He likewise discusses the patterns of governmental overreaction that must be avoided if the government's legitimacy is to be preserved; fortunately, the U.S. Constitution provides an effective structure to avoid overreaction by guaranteeing individual rights and requiring open-source and transparent methods for criminal prosecution. Secrecy and increased governmental power is not the solution. He convincingly argues that his conclusions about domestic terrorists are applicable to their international counterparts and that the legalistic approach that has proven effective within the United States would be equally effective internationally.

Finally, Dr. Shawn Boyne discusses Germany's recognition of the Islamic terrorist threat, but rejection of the metaphor of war in favor of its constitutional law framework. That commitment provides for the same civil liberty protections for all acts, whether or not committed by citizens and without regard for motivation. She convincingly argues that the German approach is a consequence of its relatively long and active history of dealing with domestic terrorism and more recent internal debates. Germany decided, in contrast to the United States, not to view the September 11, 2001, attacks as the beginning of a war, but through the lens of German and international law. Germany's response was not to create new law, but to strengthen resources to investigate and enforce existing laws. Logically, its military forces were provided specifically for Afghanistan, mostly in noncombat roles, and not for the general war on terrorism. Germany's legalistic stance was not sufficient to avoid making difficult choices about the balance between internal security and civil liberties and may mean that democracies must remain vigilant in protecting human rights, no matter which tactics they choose to fight terrorism. At a minimum, the United States should view the German solution as an alternative to its own and compare its relative effectiveness for security and potential costs in civil liberties for its citizens.

I

PERCEPTIONS OF TERRORISM: CONTINUITY AND CHANGE

Paul R. Pillar

I am very pleased to be participating in this symposium devoted to an examination of different ways, at home and abroad, in which the law has been applied to the task of confronting international terrorism. My remarks have nothing to do with my current day job, and certainly do not represent an official view. They are instead the thoughts of one political scientist, taking a somewhat historical approach.

Of the two sponsorships of this event, most Americans—immersed in the vocabulary of what is commonly called a "war on terrorism"—probably would find the military one easier to understand. The role of international law is more likely to elude their understanding. But international law speaks directly to the core of what international terrorism is all about.

Indeed, one way in which terrorism can be defined is as a violation of international law, and in particular of the laws of war. Think about what terrorists do—what behavior makes them terrorists. They commit or threaten violence against innocent noncombatants, including civilians who have no connection with an armed force and are not themselves engaged in warfare. That is a key defining behavior, one that all terrorists share. And in addition, many terrorists commit such specific acts as taking civilians as hostages, committing reprisals against civilians or their own prisoners, abusing their prisoners up to and including murdering them, disregarding any concept of neutral territory and inflicting suffering on the citizens of neutral countries, and violating what is supposed to be the inviolability of embassies, diplomats, and other accredited representatives. All of these violate the laws of war as codified in the Hague and Geneva Conventions negotiated during the 19th and 20th centuries.

This observation alone suggests that a great deal of value exists in viewing international terrorism through a legal lens. It also suggests that there is a significant role for international cooperation, including cooperation that, like the conventions on the laws of war, center around certain legal concepts. And one could make many other points that would lead to the same conclusions.

I am not going to posit prescriptions for a counterterrorist strategy, however. Instead, I will offer a few observations about how we Americans tend to think about terrorism and counterterrorism, and also how some non-Americans tend to think about it. I make these observations in the spirit of what this symposium is about, and in the hope that some additional introspection about our own thought processes and what shapes them will sharpen our skills in self-criticism and enable us to combine the best of our own thinking and that of our foreign friends.

The first observation is that the perception that most Americans have of the terrorist threat they face, and of how it has waxed or waned, is not the same as how the actual terrorist threat has waxed or waned. The national mood regarding this topic needs to be clearly distinguished from the objective reality.

This is important in thinking about what the September 11, 2001 (9/11) attack meant to the United States, and to counterterrorism, and what changes it did and did not mark. For 3 1/2 years now, it has been common currency in public discussion in this country to say that that particular terrorist attack was one of the biggest epoch-defining discontinuities in American history. We speak of a "sea change" and a "new era" and how things will never be the same again. And there is no question that in terms of

the public's mood and response, and the policy response, it *was* a huge discontinuity—certainly in terms of counterterrorism, but also in terms of many other matters related to the suddenly and dramatically increased American preoccupation with terrorism.

For the American public, the danger from international terrorism seemed much, much higher on September 12, 2001, than it had on September 10. But the actual terrorist threat to this country did not suddenly increase. In one sense, one might say that the threat—remembering that "threat" means the prospect or possibility of *future* harm—had actually gone down, because the long-planned 9/11 operation, once it was carried out, became part of our past and no longer was in our future.

The threat of jihadist Islamist extremists—a broad and diffuse movement of which bin Ladin and al Qaida were to become the most infamous part, but only a part—had been present for some time, and certainly for most of the 1990s. Think about the first Islamist terrorist attack on the World Trade Center, the one that occurred 12 years ago. The objective of Ramzi Yousef, the leader of that attack, and his fellow conspirators was nothing less than to topple the twin towers and kill thousands. That they failed to do that and another group of conspirators succeeded 8 years later had to do partly with the better financing for the latter plot but mostly with the greater effectiveness of the particular tactic that the later group devised. The difference involved technical issues such as the effects of burning jet fuel on steel girders. It did not involve differences in ideology, motivations, the intent to do the United States severe harm, or the roots of the underlying hatred. If Yousef had solved his technical problems, we would have had our sea change, our epoch-defining moment, 8 years earlier.

Those in this country whose job it was to deal with the objective reality of that threat, and not just with public moods and perceptions, were well aware of that reality. A substantial record including not just of work and communications within our government, but of such available measures as public testimony at the time by the Director of Central Intelligence or later statements and memoirs by former senior officials, make it abundantly clear that the strategic threat that would be most dramatically manifested in the 9/11 attack was fully appreciated well before then.

But it is a fact of politics and public policy, because it also is a fact of human nature, that it often requires a calamity to muster the support for major new initiatives or major expenditures on behalf of a public good. That is true of the stoplight that does not get installed at an intersection until after a child is struck by a car while crossing the street. It is true of dealing with some natural disasters, such as the tsunami warning system in the Indian Ocean that will only now be erected after the tragic event of last December. And it was true for the United States of major new expenditures in aviation security, and going to war half a globe away in Afghanistan, sufficient support for which could be gathered only after a disaster as shocking to Americans as 9/11.

We Americans, in focusing our attentions and our energies on the threat of the moment, tend to overemphasize the newness and the discontinuities of recent events. We tend to underplay, or be unaware of, the historical continuity that those events so often represent. That is true of our perceptions of terrorism, which have a long pedigree. One could go far back in history, such as to the "assassins" of the medieval Islamic world, or the terror of the French Revolution, to gain some appreciation of the long-standing roots of the concepts and even the vocabulary that we apply to the terrorism that concerns us today. Even without going that far back, there are patterns in the waxing and waning of international terrorism that it behooves us to understand, because it provides a context for what we face today.

David Rapoport, one of the veterans of American studies of terrorism, has written about four "waves" of modern international terrorism.[1] The first was the anarchist wave, which featured Russian revolutionaries who openly called themselves "terrorists" and whose activities began in the 1870s and continued until World War I. The second was the anti-colonialist wave, which lasted from the 1920s until the completion of most decolonization in the early 1960s. The third was the "New Left" wave, which arose at the time of the Vietnam War and diminished to only remnants of its former self as the

20th century drew to a close. And the fourth, which has overlapped the third, has been the "religious wave" which began with the Iranian revolution and Afghan jihad against the Soviets in 1979.

Studying, or at least becoming aware of, these kinds of historical patterns could help significantly in sorting out our thinking and our policies toward current terrorist problems. It would help us to understand what really is new and what is not, what accounts for the rise—and the decline—of terrorist phenomena, how these phenomena are rooted in the global politics of their era, and how much longevity we can expect from threats that we may make significant sacrifices to combat. It would help us to differentiate the tactic of "terrorism" from the political or religious trends that may underlie a particular wave. And it might help prevent either despair or false hopes when we realize that these sorts of waves have tended to persist for 40 years or so, but that there is no reason not to expect still more waves of terrorism, of as yet unknown character, even after the current wave declines.

I am not arguing for a kind of determinism in which we are content merely to float and bob on historical waves. Rather, the point is that the broader context and perspective that are too often sorely lacking in discussions of international terrorism in this country would usefully inform a host of policy questions about countering it.

The lack of awareness of this type of history is not surprising. What Russian anarchists were doing in the late 19th century or what Kenyan Mau Mau were doing in the 1950s did not directly affect America, so naturally we Americans do not commonly factor those episodes into our thinking about terrorism. But there is a further sense in which historical waves and patterns have truncated or distorted our thinking about terrorism, and that has to do with our own political history. Our concern, or lack of concern, about terrorism has to a large degree reflected changing patterns in the political climate in the United States, the dominance at different times of different parties or ideologies, and preoccupations with particular sets of nonterrorist issues.

Historian Philip Jenkins has explored some of these patterns in his book, *Images of Terror*.[2] He points out there was, in fact, a brief but intense American focus on that first wave of terrorism, the anarchist wave, near its end right after World War I. This was partly a reaction to a series of anarchist and communist bombings and other crimes, highlighted by the detonation in September 1920 of a bomb on Wall Street that killed 40 people. Our government's response was a campaign of arrests and deportations that was severe enough to elicit a critical reaction from the likes of the American Civil Liberties Union. This was the era of the Red Scare, and the prevailing public mood that was defined by that scare was a reaction not only to the terrorist attacks themselves, but to a larger fear of, and animosity toward, those who were known as "the Reds." There was something similar with a later "Brown scare"—a concern over Nazis and fascists during the run-up to World War II.

Contrast those scares, and our current overriding concern about terrorism, with what was going on in this country in the early- to mid-1970s. There was a lot of terrorism occurring in the United States at that time, at the hands of both domestic and foreign terrorists. The attacks included, just to name some of them:

- A series of attacks by the leftist Weather Underground, which targeted police stations, corporate offices, and federal offices, including the U.S. Capitol, where the group set off a bomb in a bathroom.
- Assassinations of police officers in several major cities, as well as other attacks, by the Black Liberation Army.
- A campaign of assassinations, bank robberies, and kidnappings in California by the Symbionese Liberation Army.
- Dozens of bombings and other attacks by Puerto Rican militants, carried out on the U.S. mainland as well as Puerto Rico, including the bombing in 1975 of the Fraunces Tavern in New York City.

- The assassination of an Israeli colonel in Washington, DC, in 1973, an act claimed by the Popular Front for the Liberation of Palestine.
- A terrorist campaign by Croatian extremists in 1975 and 1976, including a bombing at LaGuardia Airport that killed 11, the placing of a bomb in Grand Central Station, and the hijacking of a TWA jet out of New York.
- A car bombing in Washington, DC, in 1976 by Chilean intelligence, in which former Chilean ambassador Orlando Letelier was killed.
- And a campaign of bombings in the Miami area, beginning in 1975 and including dozens of attacks, perpetrated by anti-Castro Cubans.[3]

That's just a partial list of the terrorism taking place in the United States during a 3 or 4-year period. Imagine anything like that taking place during the last 3 1/2 years, in our current climate. Imagine just the prospect, or fear, of anything like that taking place in our current climate. Where was our "war on terrorism" then? Where were the recriminations, the finger-pointing, the commissions of inquiry? Where was the 1970s version of the Patriot Act? The great difference in the national response to the terrorism of the 1970s and the terrorism represented by 9/11 is in large part due, of course, to the lethality of that latter event being orders of magnitude greater than that of anything taking place during the 1970s. But the breadth and frequency of the terrorism, right here in the United States during the 1970s—with Americans, not just foreigners, getting killed—certainly would warrant, by today's standards, far more of a response than did take place.

The other major reason why there was not such a response was, again, the temper of the times. And in those times, with the Watergate affair in the process of becoming one of the most compelling and wrenching chapters in American history, and stories of abuses of power and excesses involving U.S. security services, as showcased in fora such as the Pike and Church committees, whatever concern there was about terrorist threats was eclipsed by concern over what our own governmental institutions were doing. Far from there being a constituency for something like a Patriot Act to expand the powers of those institutions, the impetus was instead to curtail, or at least more tightly control, those powers.

Our counterterrorist policies, perspectives, and rhetoric have served, and have been shaped by, various other political and ideological needs and trends, not just the need to stand up to terrorist threats. That is as true of our current perspectives and rhetoric as it was of the earlier eras I mentioned. I am not going to take the time to discuss specifically the political and ideological factors that operate today, but let me mention one other need—more of an intellectual, as well as a rhetorical one—that is part of what is at play in how we think and talk about terrorism post-9/11. We seem to have a yearning to identify and demarcate eras, and to define each one in terms of a single, overriding goal or principle. During our modern history, the Cold War served this purpose admirably for 4 decades, with the era defined in terms of a competition with a single superpower foe. In the decade following the collapse of the Soviet Union, pundits, politicians, and political scientists struggled to come up with a comparably clear defining characteristic for the newest era, and for a name to apply to the post-Cold War era, other than "the post-Cold War era." The shock of 9/11 and the sudden surge in priority of counterterrorism solved the problem of those looking for a simple, era-defining characteristic. The era would be known as the era of warring against terrorism.

The rhetorical and intellectual simplicity of this kind of era-labeling has advantages, of course, but it also—especially because simplification all too readily becomes oversimplification—has disadvantages. And I think we Americans suffer more from the disadvantages than do some other peoples whose experiences have given them a better developed sense of historical continuity and complexity.

The business of demarcating eras gets to another deeply based and distinctly American way of thinking. We tend to see ourselves in a war, called the "war on terrorism," which we believe began in

a clear, distinct, well-demarcated way on September 11, 2001. That way of looking at counterterrorism appeals to a long-established American perspective—which goes beyond any one administration or political party—for looking at foreign policy challenges and at how we deal with foreign threats in general. The American perspective of which I speak is a non-Clausewitzian perspective. It does not regard war as a continuation of politics by other means. Instead, it looks at war and peace as two distinct states, which involve different sets of rules, which require different magnitudes of resources and effort, and which have clear beginnings and ends that set off times of peace from times of war. Admittedly, many people (at least the more thoughtful ones) who are comfortable in using the vocabulary of the "war on terrorism" would not describe things quite as starkly as this. But I am making the point starkly to clarify what is a pronounced tendency in the American way of confronting threats to our security.

Walter Russell Mead, in his book *Special Providence*, offers a perspective that can help to explain this American thought pattern.[4] Mead describes several traditions in American foreign policy thinking, which he names after famous statesmen, that have been exhibited throughout the republic's history and that continue to shape debates over policies today. Some of these traditions are readily apparent in current policies, and discussions of policy, concerning terrorism.

For example, the principle that we need to encourage more freedom and openness in political and economic systems in other parts of the world, especially the Middle East, to change the milieu that breeds terrorism, is an expression of the Wilsonian tradition, which sees the United States as having an obligation to spread its democratic and social values throughout the world. We heard an eloquent statement of this viewpoint in President Bush's second inaugural address, in which he said the expansion of freedom in the world is "an urgent requirement of our nation's security."[5]

The person who drives a fuel-efficient hybrid car with a bumper sticker that says "Terrorist Prevention Vehicle"—a reference to American dependence on Middle Eastern energy supplies, and the unavoidable connection between that dependence and the question of dealing with the Middle Eastern roots of international terrorism—is referring to issues of concern to the Hamiltonian tradition, which places particular importance on America's economic links to the outside world.

But the tradition that is most readily apparent in the current American perspective toward confronting terrorism is the Jacksonian tradition, the most militant and populist of the traditions. It is less an ideology than an expression of a folk community—one that resides today primarily in middle class suburbia and includes security moms, NASCAR dads, and some of those other political animals on whom the pollsters and pundits like to focus. And at the core of this tradition are certain values centered on honor and valor, and a belief in the need to use arms and use them vigorously when needed to counter threats to Americans' security.

Mead completed his book shortly before 9/11, but some of his discussion of the Jacksonian tradition describes with almost eerie accuracy the American reaction to that event. Jacksonians, for example, believe in extending honor to enemies who fight honorably, but not to dishonorable enemies who fight dirty—which certainly would include terrorists.[6] In dealing with the latter, the same rules do not apply—a principle that gets to the heart of such current issues as the treatment of detainees.

But what I want to highlight is this tradition's conception of war and nonwar as two distinct states. "Jacksonians," writes Mead, "see war as a switch that is either on or off. They don't like the idea of violence on a dimmer switch."[7] This is a view that is very comfortable with the idea of a "war on terrorism" that suddenly began one day 3 1/2 years ago. It is uncomfortable with the idea of counterterrorism as a long-term effort that already had been going on for years before 9/11; that concerns a variety of groups, movements, and issues; that uses a variety of policy tools with varying levels of intensity and violence; and that will have to continue into an indefinite future and—as Secretary Rumsfeld and other senior officials have correctly reminded us—will not have a definite end.

However valuable the Jacksonian tradition has been in mobilizing and energizing the American people, this simple, dichotomous war/nonwar outlook toward counterterrorism has perceptual,

analytical, and semantic disadvantages. It tends to throw several different issues and concepts into a single pot, obscuring the distinctions among them. Much—perhaps most—of the discourse in this country (from both supporters and critics of the current administration) that refers to a "war on terrorism" fails to make clear at the outset whether the reference is to a metaphorical "war"—meaning a major national effort against something, akin to a war on drugs or war on poverty—or a literal war, meaning application of military force and various other things that go with it, such as application of the laws of war. Much discourse also has failed to distinguish among the concepts of "war" as a way of characterizing the nature of a threat, a way of expressing the seriousness of the threat, and a way of countering the threat. Those are three different things.

The viewpoint of an on-off, war or no war, switch also tends to miss how much continuity there has been in U.S. counterterrorist policy. Like Mead, I wrote a book that came out shortly before 9/11. The opening sentence in that book referred to how combating international terrorism was a "major objective of the United States." Two sentences later, I mentioned how the fight against terrorism was often referred to as none other than a "war."[8] How soon we forget.

The common American way of looking at "war," and a failure to distinguish among the different usages of that term I mentioned a moment ago, have resulted in many words being uselessly expended on such debates as whether terrorism is best described as "war" or "crime." One has only to look at something like the military tribunals at Guantanamo to realize that is a false dichotomy, and that military actions and the use of some kind of criminal justice system are not two separate and mutually exclusive approaches to the problem. And one has only to look at the last several issues of the State Department's annual report on international terrorism, and specifically at the principles of U.S. counterterrorist policy that have been restated each year in that report in essentially unchanged form, to realize that. One of those principles—to quote from the most recent of those reports, a statement of the current administration made amid our "war on terrorism"—is "Bring terrorists to justice for their crimes."[9]

My overall point about the American perspective toward terrorism is that it unavoidably has a lot of baggage and blinders. It is a perspective that has as much to do with our history and culture, our politics and our ideologies, as with the terrorist threat itself. We need to realize that, and to reflect on that, as we consider ways to make our fight against terrorism even more effective. And we need to realize that being the target of 9/11 does not give us a monopoly of wisdom on thinking about international terrorism. We could learn a lot from others. Others, of course, have their own baggage and blinders, some of them similar to ours, and others—based on their own histories and foreign policy traditions—different from ours.

One pattern in foreign reactions to terrorism—akin to our reaction to 9/11—that shows up repeatedly is that it takes actual attacks and casualties, not just intelligence about a threat, to get publics and governments serious about counterterrorism. As an example from recent years, Saudi Arabia has shown a level of commitment to counterterrorism over the past 2 years substantially greater than it did before a series of attacks beginning in May 2003 demonstrated how much harm terrorism could do to Saudi Arabia's own citizens, not just to foreign interests in the kingdom.

That is a recent example, but some of our European and other allies have been attending the school of hard terrorist knocks for much longer. They have been there, learned lessons, and taken actions well in advance of some of the corresponding steps taken by the United States. One thinks, for example, of the attack by Palestinian terrorists at the 1972 Munich Olympics, where an unsuccessful operation by German security elements ended in confusion and tragedy. In response to this failure, the Germans created an elite counterterrorist commando unit that performed brilliantly 5 years later in a rescue of hostages from a hijacked airliner in Somalia. The United States would not follow suit until the next decade, after its own rescue failure at Desert One in Iran in 1980. The terrorist threats that several

European states faced from leftist groups in the 1970s and 1980s also led them to enact new laws relating to police and investigative powers—again, well ahead of some of the corresponding debates and legislation in the United States.

The Europeans' experiences with a variety of terrorist threats also have helped them to understand that terrorism is a tactic that has been used, and will continue to be used, by many different groups. They know from first-hand experience that Islamist terrorism is not just al Qaida, that Middle Eastern terrorism is not just the Islamists, and that terrorism that can strike their homelands is not just from the Middle East. The leftist wave was the main terrorist worry for many of them. But think also, for example, of France during the latter stages of the Algerian war for independence in the early 1960s, in which Paris had to deal both with terrorism from the Algerian nationalists and with a wave of attacks within France itself from the anti-independence Secret Army Organization.

The terrorist threats that some Europeans—as well as others, in countries ranging from Peru to Sri Lanka—have had to confront have been in an important sense even more serious, and the lessons from them thus more trenchant, than what we have faced in the United States. Yes, 9/11 was far more lethal and destructive than any other single attack of modern international terrorism. And yes, the United States continues to be the most salient terrorist target on the globe. But even 9/11 was not a strike at this country's territorial integrity, or a strike with a chance of bringing down our fundamental institutions, as distinct from bringing down buildings that may house them. Al Qaida's campaign against the United States has been mostly a way of waging a civil war within the Islamic world.[10]

With the terrorism against some of our friends and allies abroad, it has not just been a matter of getting caught up in *someone else's* civil war. The Basque terrorism that Spain has faced, for example, has been an attempt to use violence to do nothing less than carve a chunk out of Spain—and this in a country in which separatist sentiments may be not far below the surface (not just in the Basque country, but also elsewhere), and where a bitter and bloody civil war is still within the living memory of some Spaniards. Just across our northern border, some 35 years ago, Quebecois extremists were using terrorism to try to tear Canada apart, before the Canadian government responded with draconian measures to crush them. In the British Isles, there is a still unresolved issue of the capacity to commit terrorism (the so-called "decommissioning of arms" issue) on the part of the Irish Republican Army, whose objective in its terrorist campaigns, notwithstanding more recent political agreements, has been to tear apart the country whose full and formal name is the United Kingdom of Great Britain and Northern Ireland.

Beyond the separatists, the reach of terrorism all the way to the central political institutions of European countries has been demonstrated by, for example, how close that Secret Army Organization came on more than one occasion to killing the president of France, or by the Italian Red Brigades abducting one of Italy's leading politicians (a former prime minister, Aldo Moro) and depositing his dead body for the world to see in the trunk of a car. Think about those sorts of episodes the next time you may be tempted to regard the Spanish or Canadians or others of our allies as inexperienced wimps when it comes to terrorism.

While we learn what useful lessons we can from our foreign friends, we also have to be careful not to fall in line with some of their less helpful parochial ways of using or manipulating the terrorist issue. Whether it is Israel dealing with the Palestinians, Russia confronting the Chechens, India handling the Kashmiris, or China facing the Uighurs, a natural tendency is to apply the vocabulary of the "war on terrorism"—if for no other reason than to win support from the United States—to issues that have to do with much more than just terrorism itself. This is not to deny the interests we do share with those or other foreign interlocutors on terrorist-related matters—only to caution that we need to be aware, as well, of the ways in which our interests or values may diverge.

I close by returning to the subject of international law on the conduct of war. Its basic purpose is to minimize human suffering—to minimize it even among the hatreds and conflicts that give rise to wars in the first place. I prefer to think about counterterrorism in the same terms. Its purpose—what ought to

be the purpose of any "war on terrorism"—is to minimize terrorist attacks, and thereby to save the lives and limbs, and minimize the suffering, of innocent people. To stay true to that purpose and to pursue it with focus, skill, and clarity, both we and our foreign friends need to be aware of the various historical, cultural, political, and ideological influences on our respective ways of thinking about terrorism. We need to try to strip away, as well as we can, any extraneous objectives that grow out of those influences, whether it is to restore one's honor, exact revenge, expand one's influence, or anything else, other than saving innocent people from future terrorism. That is not easy, but we ought to try.

ENDNOTES - I

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2. Philip Jenkins, *Images of Terror: What We Can and Can't Know About Terrorism*, New York: Aldine de Gruyter, 2003.

3. A more comprehensive list is in *ibid*., pp. 61-62.

4. Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World*, New York: Routledge, 2002.

5. Text at *http://www.whitehouse.gov/news/releases/2005/01/20050120-3.html*.

6. Mead, pp. 251-252.

7. *Ibid*., p. 254.

8. Paul R. Pillar, *Terrorism and U.S. Foreign Policy*, Washington, DC: Brookings Institution Press, 2001, p. 1.

9. U.S. Department of State, *Patterns of Global Terrorism 2003*, April 2004, p. ix.

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II

SQUARING THE ERROR

Michael German

I have taken as the title to my paper a phrase that British counterinsurgency expert Sir Robert Thompson used to critique American military strategy in Vietnam during the 1960s.[1] When the military force applied in Vietnam failed to achieve the desired results, rather than reevaluate the strategy, we simply doubled the effort, and in doing so, squared the error. If the terrorist attacks of September 11, 2001 (9/11), taught us anything, it is that doing nothing in response to terrorism is unacceptable, and there is no doubt but that we are now making great efforts. But we also have to recognize that terrorism is a complex problem, and an incorrect response may compound our problems rather than resolve them, regardless of the amount of effort we apply to the task.

In the *Art of War*, Sun-Tzu counsels that we must both know our enemy and know ourselves to ensure victory.[2] Knowing ourselves is the easy part. We are a constitutional democracy; a nation of laws, a free and open society in which individual rights are inalienable, and government power is limited. Global terrorism threatens us by exploiting the very freedoms and openness that define us as a democratic society. Government's primary obligation in a hostile world is to protect its citizens.

But the efforts now underway to protect us from terrorism are changing America and changing the world in ways that actually assist the terrorists, because in the midst of all this change, very little effort has been made to truly understand terrorists. This is where I think my experience might be helpful since I have been on both sides, living simultaneously as a terrorist and a counterterrorist.

In the early 1990s, working as a Federal Bureau of Investigation (FBI) undercover agent, I spent over a year with white supremacist extremist groups engaged in a racial holy war. A few years later, after the Oklahoma City bombing, I spent another 6 months undercover with militia groups in the Pacific Northwest. I later served as a counterterrorism instructor at the FBI National Academy, but it is my experience working within terrorist groups and seeing the world from their perspective that has most influenced my understanding of the nature of the threat we are facing. My repeated success using constitutionally sound, proactive law enforcement techniques to infiltrate terrorist groups and prevent acts of terrorism convinces me that a criminal law approach to counterterrorism can be effective.

In my experience, terrorism, quite simply, is what "they" do to "us." Terrorist groups almost never refer to themselves as terrorists, but rather as soldiers, revolutionaries, holy warriors. And governments, no matter how oppressive, conduct only counterterrorism operations. You'll never see a Department of Terrorism on a government's organizational chart. As bodies pile up on both sides, each sees himself as the victim. In addition, terrorist acts are often so heinous they are seen not only as unjustified, but as unjustifiable. Anyone suggesting a rationality supporting the terrorist's behavior is branded a sympathizer, which chills intelligent discourse about the root causes of terrorism and the behavior of terrorists.

This again is where my experience helps. I am clearly not a terrorist sympathizer. The terrorists I befriended all went to prison because I betrayed them. Now some could argue that my experience with domestic terrorists, particularly right-wing extremists, is irrelevant to a discussion focusing on Islamic terrorism because right-wing extremists are just lightweights and amateurs compared to al Qaeda. I would simply remind them that, while al Qaeda failed in their first attempt to bring a building down in the United States, right-wing extremists succeeded in Oklahoma City, and, while no weapons of mass destruction (WMD) were found in Iraq, a cyanide bomb capable of killing every person in a 30,000 square-foot building was discovered in a storage locker in Noonday, Texas.[3] We ignore domestic

terrorists at our peril. "Amateurs" is probably a fair description of them, though, in the sense that they never had state sponsorship like al Qaeda enjoyed with the Taliban. But that they are able to continue operating without financing and without a safe haven arguably makes them a more formidable threat, not less of one. I often hear terrorism experts remark that al Qaeda's evolution into decentralized cells after the invasion of Afghanistan is a sign of organizational genius,[4] but they are really just imitating the leaderless resistance and lone wolf strategies right-wing extremists pioneered decades ago.[5] Nobody ever called them geniuses.

More to the point though, as a criminal investigator, I did not focus on the ideology of the group I was investigating, mainly because the First Amendment to the U.S. Constitution guarantees their right to their beliefs, but also because their beliefs were not going to hurt anyone, while the bombs they were making were. So I focused on the methodology; what the terrorists were doing to accomplish their criminal goals. I found the methodology is essentially the same for all terrorist groups, regardless of ideology. Hitler and Stalin had diametrically opposed ideologies, but the totalitarian regimes they established were remarkably similar in the methods they used to hold power. It is the same phenomena with terrorists.

Three universal truths about terrorists are: First, terrorists are unhappy with the status quo; second, terrorists lack the political power to alter the status quo through legitimate, peaceful means; and finally, terrorists lack the military power to force a change. A terrorist has a very black and white world view that divides "us," the virtuous and pure, from "them," the corrupt and unclean. Terrorists see the world at a tipping point, and their goal is to devise an attack that will alter the status quo; that will throw the world into chaos, a cleansing war, a jihad. White Supremacists call it RAHOWA, short for Racial Holy War.[6] Charles Manson called it Helter-Skelter. Whatever they call it, the terrorists believe that out of the chaos, their people will rise and dominate, either because God, or simply justice, is on their side.

They recruit in the places they find people who are similarly unhappy with the status quo: in prisons, among the unemployed. They seek idealistic young students eager to make a mark in the world. Typically there is a cleansing ritual to symbolize the separation of the group from the corrupt society; dress and dietary requirements are established, sexual taboos are either strictly enforced, or, as in the case of the Weather Underground, ceremonially violated. Sometimes there are physical manifestations of separation; neo-Nazi skinheads shave their heads, jihadists grow beards.

I have heard Richard Clarke, the former White House counterterrorism official, describe the jihadist movement as a series of concentric circles, with the smallest circle in the center representing hard-core al Qaeda members and the outer circles representing varying levels of support for the movement.[7] I think this analogy is helpful, but my version is a little different in that it is generic to any terrorist group rather than specific to one. Imagine a series of concentric circles with the hard-core terrorist group at the center. In the next circle are supporters, who assist the group but do not participate directly in terrorist attacks. The third circle contains people who sympathize with the cause but who do not actively support the terrorists. In the fourth circle are people who the terrorists consider part of their "us" community, but who do not identify themselves as part of a community represented by the terrorist group. White supremacists refer to this group as "sheeple," whites who do not believe in a Jewish conspiracy to destroy their race. The fifth and final circle represents "them," the population of others that support the status quo and benefit from it. Outside the circle is the oppressive force; the government, the Jewish conspiracy, communism, capitalism, the New World Order, whatever the terrorists are against.

The core terrorist group must do something in order to gain influence among its supporters. This can be something positive, like promoting sobriety or ridding a neighborhood of a criminal element that has been exploiting it, a further cleansing of the community. Getting attention from sympathizers in the next circle requires bolder action on behalf of the community, perhaps assassinating a corrupt police officer who has been shaking down the local businessmen. Now this is a critical stage for the

terrorists because at this point they look very much like a gang of criminals and if the government can brand them as criminals, it will be very difficult for them to retain support among sympathizers and impossible to gain any support among the sheeple in the fourth circle. This is also a critical stage because moving to the next level of influence requires outside assistance, and that assistance can only come from one source: their enemy. To accomplish their goals, terrorists need to trigger a severe government reaction, one that will impact the innocent in the community as well as the guilty, to stir resentment and validate the terrorist's propaganda that "they" are persecuting "us." The over-reaction will divide the population along the lines the terrorist wants them divided, driving the sheeple in the fourth circle to the cause of the terrorist. This strategy is laid out in Carlos Marighella's "Mini-manual of the Urban Guerilla," a virtual how-to guide for terrorists.[8] That a how-to guide for terrorists exists surprised me when I started working in counterterrorism, and I think it underscores what truly is an intelligence failure on the part of our government. Osama bin Laden has followed the how-to guide to a tee, and we fell far too easily into the role of the oppressor, just as it was scripted.

If you have seen Gillo Pontecorvo's film, "The Battle of Algiers," lately, you might have noticed that my description of the development of a terrorist organization mirrors the first part of the movie in which the National Liberation Front, known by its French acronym FLN, starts a terrorist campaign against French colonial forces in Algiers.[9] It is often dismissed as propaganda, but I think it has tremendous intelligence value because the original screenplay was actually written by an FLN terrorist, Yacef Saadi. In the film, as in real life, the security forces do overreact to the terrorist attacks, uniting the Algerian community behind the FLN. The French military resorts to torturing detainees to develop intelligence and they succeed in breaking the FLN, but the political fallout from the abuse energizes the Algerian resistance, undermines French support for the effort, and alienates the international community. France wins the battle of Algiers, but loses the war for Algeria. This is the crucial final stage of a terrorist campaign, when the people in the fifth circle start to believe their government is unjust and incapable of solving the terrorist problem. The film was made in 1967 but here, almost 40 years later, we find ourselves on the brink of that final stage, divided at home, alienated from allies abroad, fighting an enemy all over the globe that can strike when and where it wants.

Marighella's genius is that he understands that governments are compelled to overreact to terrorism: "The government has no alternative except to intensify its repression. The police networks, house searches, the arrest of suspects and innocent persons, and the closing off of streets makes life in the city unbearable." Written in 1969, is this applicable to our current situation? How about this quote from Osama bin Laden shortly after 9/11: "I tell you freedom and human rights in America are doomed. The U.S. Government will lead the American people—and the west in general—into an unbearable hell and a choking life."[10] Just as a terrorist's actions are designed to speak to his community, the government has an audience it must answer to as well. When a terrorist attack occurs, the victim population rightly questions why the government charged with protecting it has failed and the people demand more effective security. The easiest way for the government to satisfy this constituency, their own "us" in that fifth circle, is to take restrictive measures against "them" by expanding the powers of the security services.

Creating an effective security service is fairly easy. Militarize the police and consolidate military, intelligence, and law enforcement functions under one central authority. Make that authority accountable only to the executive branch of government. Authorize "emergency" powers that suspend traditional protections of personal liberties. Permit extra-judicial detentions and the use of coercive investigative techniques. Establish a tribunal system separate from the normal criminal justice system and allow the use of secret evidence. Ignore inconvenient international treaties and conventions. Restrict travel. Encourage people to inform on their neighbors, to report all suspicious activity, and then follow-up on every report to reinforce the perception that the government is in control. Gather and retain intelligence on the general population. Most importantly, give the security services the power to operate in secret

so no one will know what the true security situation is, and so mistakes and abuses can be hidden. There are plenty of examples we can use as models; authoritarian regimes throughout history are defined by the effectiveness of their security services. But unchecked power and freedom from public accountability always lead to abuse, which undermines the legitimacy of the governing authority. The effectiveness of these security solutions tends to be short-lived and ultimately illusory.

This is Marighella's trap: measures we take to win each battle make it more likely we will lose the war. The good news is we can avoid the trap, not by increasing the power of the security services, but by increasing their efficiency. To be truly effective, a counterterrorism program must be efficient, not only in that its resources are used wisely, but in that all of the counterterrorism efforts are directed squarely at the terrorists. But increasing efficiency is much more difficult than simply increasing power. Governments by their very nature tend to be bureaucratic and inefficient. Luckily, our founding fathers created a mechanism that compels efficiency in government: the U.S. Constitution. We need to recognize that our Constitution and the freedoms it guarantees are not weaknesses, but rather the source of our strength. Nothing makes it more difficult for a terrorist to convince people that the government is oppressive and unjust than scrupulously protecting his rights in a public criminal trial.

First we need to take Sun Tzu's advice and get to know ourselves a little better by being honest about why our counterterrorism efforts before 9/11 were ineffective. In the wake of the attacks, officials in the Bush administration denied the government had any forewarning of the plot. A lack of intelligence was cited as the cause of the failure, so Congress acted quickly, passing the U.S. Patriot Act to give the administration powers it said it needed to get the intelligence necessary to prevent another attack. Meanwhile, the administration resisted the investigations that ultimately revealed the true cause of the failure. It turned out that the government had a tremendous amount of intelligence and simply failed to respond to it, but by that time the idea that 9/11 was an intelligence failure had already taken root. The intelligence reform train had left the station.

The issue was further confused when the Justice Department and the FBI blamed their lapses on their over-reliance on a criminal justice approach to counterterrorism,[11] which also was simply not true. In fact, while domestic terrorism cases like mine were treated as criminal matters, the FBI has always handled international terrorism cases as counterintelligence matters. Each of the three FBI cases the 9/11 Commission cited as failed opportunities to prevent the attacks were intelligence investigations. FBI agents in New York actually were prevented from pursuing criminal investigations against two of the hijackers because managers at FBI headquarters misunderstood intelligence-sharing regulations.[12] FBI managers, who denied Minneapolis agents their request to get a Foreign Intelligence Surveillance Act (FISA) warrant in the case of Zacarias Moussaoui, later admitted in testimony before the Senate Judiciary Committee that they did not even know the standard of proof necessary to obtain a FISA warrant.[13] The Phoenix memo was never even read prior to 9/11.[14] Bureaucratic inefficiency and managerial incompetence were the true causes of the breakdown, not a lack of intelligence and certainly not an over-reliance on criminal law enforcement.

In fact, proactive criminal investigations can be very effective in preventing terrorism, as my repeated success proves. That these cases are rare is not because the techniques are not effective, but because the FBI does not employ them effectively. A criminal law enforcement approach to terrorism has many inherent advantages that promote efficiency. By treating terrorists like criminals, we stigmatize them in their community, while simultaneously validating our own authority. Open and public trials allow the community to see the terrorist for the criminal he is, and successful prosecutions give them faith the government is protecting them. Judicial review ensures that the methods used are in accordance with the law, and juries enforce community standards of fairness. The adversarial process exposes improper or ineffective law enforcement techniques so they can be corrected. Checks and balances on government power and public accountability promote efficiency by ensuring that only the guilty are punished.

Finally, and this is perhaps counterintuitive, the exposure of proactive law enforcement techniques at trial is a force multiplier. Intelligence collectors focus on protecting sources and methods to ensure their continued availability, but this does not necessarily promote security as the three cases cited by the 9/11 Commission demonstrate. In each case, restrictions on intelligence-sharing caused the breakdown. If the presence of two al Qaeda terrorists in the United States was broadcast to state and local law enforcement, or if the Phoenix memo was distributed to flight schools around the country, perhaps the outcome would have been different. Protecting this intelligence did not protect national security.

When I was undercover, I was present during the planning of dozens of terrorist attacks. In almost every case, the one thing that stopped the terrorists from following through on their plans was the fear they had been compromised by an infiltrator. If a terrorist knows that every new recruit is a possible agent; if every old friend might have been turned; if communications over the phone, or over the radio, or over the internet are vulnerable to interception, his ability to operate effectively is greatly restricted. Certainly the terrorist will modify his behavior to try to avoid law enforcement detection, and this will require the government to constantly adapt and develop more effective techniques, but this is not a bad outcome.

Our security services do need to be improved. Congress needs to improve oversight and enact criminal laws to assist law enforcement in dealing with this threat, and some of the provisions in the Patriot Act and Intelligence Reform Bill are helpful. But overall, the reorganization and reform of the security services will fail because the real problems that led to 9/11 are not addressed, and bureaucratic inefficiency and managerial incompetence continue to hamper our counterterrorism efforts. After 3 years and 170 million dollars, the FBI still does not have a functioning computer system.

The worst part of these reforms, though, is that they increase the government's power to operate in secret, beyond judicial or congressional oversight, and beyond public accountability. After failing us once, the security services should be more accountable, not less.

We also need to better understand our enemy, and to do this, we need to use more efficiently the intelligence we already have. I spent over a year-and-a-half living undercover with right wing extremists, but despite my many requests, I was never operationally debriefed by the Domestic Terrorism Unit. I recorded hundreds of hours of conversations with real terrorists, selecting targets, planning attacks, and discussing motives and methods. These tapes were used as evidence in public trials, but they have never been analyzed for their intelligence value. If someone had bothered to listen to these tapes in the early 1990s, they would have heard right-wing extremists discuss the possibility of crashing a passenger air liner into a military installation to start the race war.

Contrary to popular opinion, from the terrorists' perspective, 9/11 was a political disaster for the jihadist movement. The scale of the attack was so horrible, the world united in solidarity with the United States to stop terrorism. Even many jihadi supporters could not accept that Muslims did something so terrible, and they dreamed up conspiracy theories suggesting Israel planned the attack to frame Muslims. In Tehran, the heart of the most anti-American Muslim state, there was a spontaneous candlelight vigil in sympathy for the victims. Other Muslim countries with a history of antagonism toward the United States, such as Pakistan and Syria, agreed to assist us. When diplomatic efforts failed to convince the Taliban to arrest and extradite al Qaeda criminals, the international community supported a military intervention to remove the Taliban from power and al Qaeda, "the base" of the jihadist movement, was destroyed. But when we departed from the rule of law, both our own Constitution and our obligations under international conventions, when we antagonized and alienated the international community, we undercut our success and handed a victory to the terrorists.

What we have to realize is that this is not a struggle of ideologies; it is not Islam against Christianity or fundamentalism versus secularism. This is a battle for legitimacy, and as such, it is one that we should easily win. As an open and free democracy regulated by the rule of law, we offer a future of

peace and prosperity that the jihadist movement does not. Its resort to terrorism is a sign of weakness, not of strength. We need to avoid the trap of demonizing our enemies, of dividing the world between "us" and "them" as the terrorist does. As former Weather Underground member Brian Flanagan said in a recent documentary, "if you think that you have the moral high-ground . . . you can do some really dreadful things."[15] That goes for both sides. Respect for the rule of law, international conventions, and treaty obligations will not make us weaker, it will engender international cooperation and good will that make it impossible for extremist movements to prosper. I have heard commentators suggest that we are losing the propaganda battle in the Middle East, but that misses the point entirely. The term "propaganda" connotes a fabrication or a spinning of facts to support one's position, and that is exactly what we must not do. In a battle for legitimacy, honesty and accountability are the most effective ammunition.

Terrorism will never go away, and free and open societies will always be especially vulnerable. But we do not win by becoming less free and less open. Ironically, al Qaeda does not have the power to destroy the United States of America. But we do.

By playing into a script written by terrorists we have indeed squared the error.

ENDNOTES-II

1. Sir Robert Thompson, "Squaring the Error," *Foreign Affairs*, No. 46, April 1968, p. 442-53.

2. Sun Tzu, *Art of War*, Chapter III, pt. 14, "Hence the saying: If you know the enemy and know yourself, you need not fear the result of a hundred battles." Translated from the Chinese with Introduction and Critical Notes by Lionel Giles, M.A., first published in 1910, available at *http://www.kimsoft.com/polwar.htm*.

3. See Camille Jackson, "Terror, American Style," Southern Poverty Law Center Intelligence Report, 2005, available at *http://www.splcenter.org/intel/intelreport/article.jsp?aid=378*.

4. See, for example, Rita Katz and Josh Devon, "The End of Al-Qaeda?," published in the *National Review Online*, March 21, 2003, available at *http://www.siteinstitute.org/bin/articles.cgi?ID=news8503&Category=news&Subcategory=0*.

5. Louis Beam, "Leaderless Resistance," *The Seditionist*, Issue 12, February 1992, available at *http://www.louisbeam.com/leaderless.htm*.

6. Ben Klassen, "RAHOWA: This Planet is Ours," published by the Church of the Creator, 1987.

7. Richard Clarke, "Review of What We Owe Iraq," publication of the New America Foundation, November 21, 2004, available at *http://www.newamerica.net/index.cfm?pg=DocRelated&DocID=2255*.

8. Carlos Marighella, "The Minimanual of the Urban Guerrilla," 1969, available at *http://www.latinamericanstudies.org/marighella.htm*.

9. *The Battle of Algiers*, directed by Gillo Pontecorvo, written by Gillo Pontecorvo and Franco Solinas, based on an original screenplay written by Yacef Saadi, 1967.

10. BBC News, "Networks row over Bin Laden tape," February 1, 2002, available at *http://news.bbc.co.uk/1/hi/world/middle_east/1795531.stm*.

11. *The 9/11 Commission Report: The Final Report of the National Commission on Terrorist Attacks Upon the United States*, W.W. Norton & Co. Inc., 2004, p. 423.

12. *The 9/11 Commission Report*, p. 271.

13. U.S. Congress, "Interim Report on FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures," Senator Patrick Leahy, Senator Charles Grassley, and Senator Arlen Specter, February 2003, available at *http://www.fas.org/irp/congress/2003_rpt/fisa.html*.

14. *The 9/11 Commission Report*, p. 272.

15. Brian Flannagan, as featured in the documentary film, *The Weather Underground: The Explosive Story of America's Most Notorious Revolutionaries*, directed by Sam Green and Bill Siegel, produced by the Free History Project, 2003.

III

PRESERVING THE RULE OF LAW IN A TIME OF TERROR: GERMANY'S RESPONSE TO TERRORISM

Shawn Boyne

Introduction.

Media coverage concerning the state of the U.S. partnership with Germany has focused primarily on Germany's opposition to the Iraq War. In fact, for some commentators, the litmus test of the state of German-American relations is whether or not Germany, at any point, will send military forces to Iraq. This narrow inquiry has overshadowed an equally, if not more, important difference of opinion between the two countries. While the United States elected to invoke both the metaphor and tools of war in response to the September 11, 2001 (9/11) attacks, Germany has chosen to frame its response within the strict bounds of both German and international law.

While both sides of the Atlantic share a common vision that terrorism must be prevented, the German response to terrorism has been strongly shaped by unique historical and cultural forces. With the caveat that the construction of history and culture is an ongoing process,[1] this essay will explore how Germany's prior experience with terrorism and war has helped to shape its current response to terrorism. The goal of this analysis is not to critique or evaluate Germany's response, but rather to appreciate some of the factors that have helped to define it. Toward that end, this chapter will review Germany's prior history in dealing with domestic terrorists, the country's post-9/11 legislative initiatives, and the recent debate about the role of torture that occurred within Germany.

Germany's Prior Response to Terrorism.

From a post-9/11 standpoint, Germany's prior experience with domestic terrorism offers an intriguing example of the inherent tensions in balancing security interests and civil liberties. Between the late 1960s and the early 1980s, a host of terrorist groups challenged the authority of the German government through a campaign of terror defined by the kidnapping and murder of prominent members of German society, as well as bombings and other violent criminal behavior.[2] Ironically, the decisive deployment of violent tactics by groups that included the Red Army Fraktion (RAF), the Revolutionary Cells (RZ), and the June 2nd Movement commenced as the energy behind Germany's student movement began to dissipate.

In contrast to the antiwar protest movement in the United States that occurred during the same period, the primary grievance articulated by German protestors in the late 1960s was the legislature's debate concerning amendments to the German Constitution or Basic Law which would enable the government to assume extraordinary powers in the case of an emergency. The protest movement, which included students, trade unionists, intellectuals, and other liberal groups, alleged that the governing Christian Democratic Union (CDU) planned to use the legislation to return Germany to a police state.[3] The election of Social Democratic Party (SDP) member Willy Brandt as Chancellor and the Soviet invasion of Czechoslovakia in 1968 triggered the decline of the student movement. Frustrated with the protest movement's direction and decline, individuals who sought to bring down the German government launched a campaign of terror that began with the bombing of the Springer publishing house.

For more than a decade after the Springer bombing, the German legislature seemed to respond to each highpoint of violence by enacting new legislation. Without a doubt, some Germans feared that the onslaught of terrorist activity would cause German history to replay itself. However, the decisive factor that shaped the legislative responses was not the actual threat that these groups posed to German security but rather the nature of the political struggle between Germany's political parties. In some cases, the politicized nature of this response led the government to unnecessarily restrict civil liberties. Some of the most egregious actions included using databases to profile not only terrorists but also left-leaning citizens, as well as subjecting millions of civil service applicants to loyalty screenings. In addition, new legislation that criminalized the act of forming a terrorist organization did not require law enforcement officials to possess reasonable suspicion before initiating an investigation.[4] German prosecutors subsequently used this legislation in some cases to broadly target government dissent. Another new provision banned "anti-constitutional" action, which was defined as any behavior likely to disturb the peace.[5]

After the highpoint of domestic terrorism passed in the autumn of 1977, there was increasing opposition among the public and the liberal media to further governmental restraints on civil liberties. Between 1978 and 1989 a group of SDP deputies, as well as members of the Free Democratic Party (FDP), began to oppose additional encroachments on the rule of law. Critically, German civic pride and confidence in the Basic Law grew throughout the 1970s. This development led to an uneven liberalization of Germany's internal security policy that included the repeal of the criminal code section that banned propagation of "anti-constitutional" action in 1981. Most importantly, by the mid-1980s, the German public had adopted a more tolerant attitude toward political protest and a more discriminating and suspicious attitude toward state action that intruded on civil liberties. The changed nature of German public opinion during this period was reflected in the fact that the Bundestag defeated additional security measures introduced by the CDU and modified the "loyalty oath" provisions governing civil service employment.[6]

The German Reaction to 9/11.

In the immediate aftermath of 9/11, the German government expressed its strong support for the United States. Germany's Minister of the Interior, Otto Shily, stated that it was not just America that was attacked, but democracy itself, as New York was "a symbol for the desire for freedom in this world."[7] At the same time, Germany did not view the attacks as a prelude to war. This sentiment mirrored the public opinion of many Germans who did not believe that it was feasible to "win a war" against terrorism by using military means.[8] From a policymaking perspective, this framing represented a choice by the German government to develop its response to terrorism within the existing framework of German and international law. This policy contrasted sharply with the decisions made by U.S. policymakers to push, if not cross, the legal envelope in developing strategies to combat terrorism.

Although the German legislature enacted two broad antiterrorism packages after 9/11, the primary focus of this legislation was not to create new laws, but to reform existing law and to increase the amount of resources devoted to identifying and prosecuting terrorists. A prime example of this was the changes made to Section 129 of the German Penal Code. Although this legislation was originally intended to punish Germany's domestic terrorist groups, after 9/11 the legislature enacted changes that extended the reach of the statute to terrorist organizations operating within any member state of the European Union (EU).[9] In cases where a personal or geographic connection to Germany exists, the reach of the statute extends to terrorist groups located outside of the EU.[10]

Enhancing the resources and information-gathering roles of Germany's key state security agencies was also a key focus of the legislative changes. As in the United States, German legislators recognized that there was an urgent need to improve the information flow between state agencies. Germany's

determination to frame its response strictly within its existing rule of law framework led legislators to limit attempts to expand law enforcement's investigatory powers. For example, the legislature refused to give German law enforcement agencies "initiatory investigative" power which would have allowed law enforcement to commence investigations to gather evidence to form an initial suspicion of a suspect. Moreover, the German government has resisted further attempts to increase the power of the Federal Crime Office(*Bundeskriminalamt*). As the result of the reorganization of German law enforcement and intelligence operations instituted after World War II, each of Germany's 16 *länder* (states) possesses its own police and intelligence agencies which are responsible for terrorist investigations within its own jurisdiction.[11] While Interior Minister Otto Shily has tried to centralize Germany's security operations in Berlin to investigate terrorists more effectively, Shily's plans have often been blocked by members of his own government. In addition, efforts to create a central database of Muslim fundamentalists have encountered strong resistance by both government officials and privacy groups.[12] Such attempts to relax of criminal procedure and constitutional standards have challenged Germany's commitment to the rule of law.

Although Germany contributed military forces to the International Security and Assistance Force in Afghanistan, Germans do not consider that deployment to be part of the U.S.-led global war against terrorism. In keeping with the peacekeeping and reconstruction-focused mission of the German forces, Germany has strongly resisted efforts to integrate the United Nations (UN) force with American military forces.[13] While many Germans supported the deployment of military forces to Afghanistan, they are less eager to support the use of those forces in combat operations.[14]

In sum, in designing responses to terrorism German policymakers are still haunted by the legacies of the government's abuse of power during World War II. In addition, memories of government overreaching in combating domestic terrorism in recent decades have caused the government to exercise caution in increasing the investigative powers of security agencies. Finally, the highly decentralized structure of German security operations, itself a legacy of the postwar period, has also hampered efforts to centralize security operations.

The Debate about Torture.

As the prior discussion demonstrated, the fact that Germany is committed to placing strict legal limits on its response to terrorism has not shielded the government from making difficult choices regarding the balance between security interests and civil liberties. Moreover, although the German media has criticized the war in Iraq as a violation of international law,[15] the German press also has investigated reports of human rights abuses allegedly committed by members of Germany's law enforcement community. Most notably, within the past 18 months, a vigorous debate has occurred within the German press and the government concerning the use of torture as an interrogation tactic in serious criminal cases.

Last fall, Frankfurt Deputy Police Chief Wolfgang Daschner stood trial on charges that he had ordered a subordinate to threaten to use force against a suspect in a child kidnapping case. Although Daschner issued the order hoping that the threat would allow him to save a child's life, the threat violated Germany's Basic Law (*Grundgesetz*) which states that "[p]ersons in custody must not be subjected to mental or physical mistreatment."[16] The issue of torture is taken very seriously in Germany not only for historical reasons, but also because Germany's most fundamental constitutional right is the right to human dignity. Article 1 of the *Grundgesetz* states that "the dignity of the human person is inviolable."[17] Law enforcement officials who violate the ban on torture face a potential 10-year prison sentence.

Despite the clarity of Germany's ban on the use of torture, the predicament facing the Deputy Police Chief generated sympathy from several prominent German officials. The President of the State of Hessen

went on record stating that the Deputy Police Chief's actions were "personally understandable."[18] The head of the German judges' federation, Geert Mackenroth, voiced support for Daschner, stating that "there are situations that cannot really be resolved by legal means, and in which legally protected rights have to be weighed."[19] These comments generated a substantial backlash from the media and other government officials. An editorial in the *Kölner Stadtanzeiger* pointed out that the German debate about torture did not involve the use of torture during wartime, but rather by a crime punishable under the penal code and went on to argue that:

> It is therefore all the more important we continue to press for the upholding of the ban on torture. This debate has shown how easily prepared we are to shed the principles of the rule of law . . . The protective film under which we keep human dignity safeguarded as a cherished possession has proven itself to be wafer thin.[20]

Germany's problems with the unlawful use of force have not been restricted to a single incident. Within the past 2 years there has been a series of allegations against members of the German military, the Border Protection Police, and law enforcement officials concerning the excessive use of force. These accounts include a report published by the Council of Europe charging members of the German Border Police with using unnecessary violence when deporting foreigners,[21] as well as allegations that German military officers tortured recruits during basic training by pretending to be Arab terrorists.[22] These allegations have been particularly disturbing for Germany given that the German press harshly criticized the U.S. treatment of prisoners at the Abu Ghraib prison in Iraq as a violation of the Geneva Conventions.[23]

Perhaps the lesson that democratic governments should take from the German experience is that governments must be vigilant in protecting human rights regardless of the particular tactics that they elect to fight terrorism. As the German example illustrates, the simple fact that Germany has chosen to respond to 9/11 by relying primarily on its existing criminal justice system has not prevented some public officers from committing human rights abuses.

Conclusion.

A key challenge for democracies today is how to preserve human rights while protecting their security interests. In the best of circumstances, the nature of how terrorists operate challenge governments that attempt to craft effective counterterrorism strategies that protect human rights and civil liberties. To preserve the rule of law in a time of terror, it has become increasingly important that governments ensure that systems are in place to discover, investigate, and prosecute human rights abuses. This requires an ongoing commitment at all levels of government, as well as an aggressive media that is unafraid to shine the light on government transgressions. Absent this level of commitment, democratic governments run the risk that the most important casualty of the war on terror will be their commitment to the rule of law itself.

ENDNOTES-III

1. Gary Fineman and Sherryl Kleinman. "Rethinking Subculture: An Interactionist Analysis," *American Journal of Sociology*, Vol. 85, July 1979, pp. 1-20.

2. See Hans Joseph Horchem, "The Terrorist Lobby in West Germany: Campaigns and Propaganda in Support of Terrorism," in Noemi Gal-Or, ed., *Tolerating Terrorism in the West: An International Survey*, New York: Routledge, 1991; and Klaus Wasmund, "The Political Socialization of West German Terrorists," in Peter H. Merkl, ed., *Political Violence and Terror: Motifs and Motivations*, Berkley: University of California Press, 1986.

3. Peter H. Merkl, "West German Left-Wing Terrorism," in Martha Crenshaw, ed., *Terrorism in Context*, University Park, PA: Pennsylvania State University Press, 1995, p. 174.

4. Sections 129 and 129a, German Penal Code (StGB).

5. Section 88a, *ibid*.

6. See Shawn Boyne, "Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation," *Cardozo Journal of International and Comparative Law,* Vol. 12, No. 1, Summer 2004. This report contains a detailed discussion of the legislative developments during this period.

7. Oliver Lepsius, "The Relationship Between Security and Civil Liberties in the Federal Republic of Germany After September 11 (2002)," *American Institute for Contemporary German Studies,* available at *http://www.aicgs.org/publications/PDF/lepsiusenglish.pdf*, quoting Ottto Schily in the German Bundestag, 14th electoral period, session number 209, *BT-Plenarprotokoll* 14/209, 20758 (B) (December 12, 2001, last accessed November 5, 2003.

8. Karin L. Johnston, "Clashing Worlds and Images: Media and Politics in the United States and Germany," *American Institute for Contemporary German Studies,* Issue Brief 01, August 2004, p. 5. available at *http://www.aicgs.org/Publications.PDF/issuebrief.pdf*, last accessed on April 3, 2005.

9. "New Law Designed to Step Up Fight Against International Terrorism, *Die Bundesregierung,* May 2, 2002, at *http://eng.bundesregierung.de/dokumente/Artikel/ix_7845_475.htm*, last accessed November 5, 2003.

10. *Die Bundesregierung* at *http://eng.bundesregierung.de/dokumente/Artikel/ix_7845_475.htm*.

11. "German In-Fighting Threatens EU Terror Initiatives," *Deutsche Welle,* November 5, 2004, available at *http://www.dw-world.de/dw/article/0,1564,1386282,00.html*, last accessed on April 3, 2005.

12. *Deutsche Welle,* November 5, 2004.

13. "Germany Opposes US Plan in Afghanistan," *Deutsche Welle*, October 13, 2004, available at *http://www.dw-world.de/dw/article/0,1564,1360150,00.html*, last accessed on April 3, 2005.

14. Roland Eggleston, "Germany: Support For Deployment High Despite Deteriorating Morale," *Radio Free Europe/Radio Liberty,* March 14, 2002, available at *http://www.rferl.org/features/2002/03/14032002102610.asp*, last accessed on April 3, 2005.

15. Johnston, p. 5.

16. Article 104(1) *Grundgesetz*.

17. Article 1 *Grundgesetz*.

18. John Hooper, "German Wrestle with Rights and Wrongs of Torture," *The Guardian*, February 27, 2003, available at *http://www.guardian.co.uk/print/0,3858,4624220-103532,00.html*.

19. *Ibid*.

20. "German Press Review: Wafer Thin Film of Human Dignity," *Deutsche Welle*, July 29, 2003, available at *http://www.dw-world.de/dw/article/0,1564,936115,00.html*, last accessed on April 3, 2005.

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23. Johnston, p. 5.

ABOUT THE CONTRIBUTORS

SHAWN BOYNE is a fellow at the Institute of Legal Studies at the University of Wisconsin Law School. She was a staff member of the *Southern California Law Review* and co-founder of the University of Southern California's *Review of Law and Women's Studies*. After practicing law as both a prosecutor and a defense attorney in New Mexico for nearly a decade, Ms. Boyne began pursuing a Ph.D. at the University of Wisconsin. Her current work focuses on the intersection of politics, law, and culture. Her recent publications include "The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States" (*Tulsa Journal of Comparative and International Law 111*, Vol. 11, 2003); "Law, Terrorism, and Social Movements: The Tension Between Politics and Security in Germany's Anti-Terrorism Legislation," (*Cardozo Journal of International and Comparative Law 41*, Vol. 12); and "The Tension Between Security and Justice: German Courts and the 9/11 Suspect Cases" (*Temple Political & Civil Rights Review*, Spring 2005). Ms. Boyne received her B.A. from Cornell University and J.D. from the University of Southern California.

MICHAEL GERMAN served as a Special Agent for the Federal Bureau of Investigation (FBI) from 1988 to 2004. He has taught counterterrorism at the FBI National Academy and worked as an undercover agent against white supremacist groups in Los Angeles, California, and militia groups in Seattle, Washington. He resigned from the FBI in June after protesting the handling of a terrorism case. Mr. German currently works as a writer and consultant for Hotei Consulting, LLC. He is the author of "Fighting Terrorism Takes Gavels as Well as Guns," published by *The Washington Post* on November 7, 2004. Mr. German received his B.A. in philosophy from Wake Forest University in 1985 and his J.D. from Northwestern University in 1988.

DALLAS D. OWENS joined the Strategic Studies Institute's Art of War Department in July 2003 after serving 27 years in the U.S. Army. His recent military assignments include U.S. Army Reserve Adviser for the U.S. Army War College; Mobilization Branch Chief, DCSOPS Army Operations Center; and Transportation Action Officer, Mobility Division, Logistics Directorate (J4), Joint Staff. His military education includes Infantry OCS and Basic Course, Transportation Basic Course, Quartermaster Advance Course, CAS3, U.S. Army Command and General Staff College, and the National Security Fellowship at Harvard University. Dr. Owens served as a Port Operator with a Transportation Terminal Unit during Operations DESERT SHIELD/DESERT STORM and as an Infantryman in Vietnam. He is the author of *AC/RC Integration: Today's Success and Transformation's Challenge* (Carlisle, PA: U.S. Army War College, Strategic Studies Institute, October 2001). Dr. Owens holds sociology degrees from the University of North Carolina (B.A.), Utah State University (M.S.), and the University of Tennessee (Ph. D.), and has served on the faculty of Clemson University, North Carolina State University, University of Virginia, and University of Colorado.

PAUL R. PILLAR was appointed National Intelligence Officer for the Near East and South Asia in October 2000 upon returning to the Intelligence Community from the Brookings Institution, where he was a Federal Executive Fellow. He joined the Central Intelligence Agency in 1977 and has served in a variety of analytical and managerial positions, including chief of analytic units covering portions of the Near East, the Persian Gulf, and South Asia. He previously served in the National Intelligence Council as one of the original members of its Analytic Group. Dr. Pillar has been Executive Assistant to the Central Intelligence Agency's Deputy Director for Intelligence and Executive Assistant to Director of Central Intelligence (DCI) William Webster. He headed the Assessments and Information Group of the DCI Counterterrorist Center, and from 1997 to 1999 was Deputy Chief of the Center. Dr. Pillar is a

retired officer in the U.S. Army Reserve. He served on active duty in 1971-73, including a tour of duty in Vietnam. He is the author of *Negotiating Peace* (Princeton, 1983) and *Terrorism and U.S. Foreign Policy* (Brookings, 2001; second edition, 2004). Dr. Pillar received an A.B. *summa cum laude* from Dartmouth College, a B.Phil. from Oxford University, and an M.A. and Ph.D. from Princeton University.