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AICGS POLICY REPORT

FINDING SECURITY IN AN AGE OF
UNCERTAINTY: GERMAN AND
AMERICAN COUNTERTERRORISM
POLICIES

Frank Gadinger
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FOREWORD

New administrations took office in 2009 in both Germany and the United States, bringing with them renewed focus—and perspectives—on counterterrorism measures. Still, despite ever-increasing cooperation among allies, the German and American publics react differently to threats of terrorism. As part of AICGS's project on "Political, Cultural, and Economic Origins and Consequences of International Terrorism: American and European Answers," this Policy Report looks to increase German-American understanding of the issue and to offer policy solutions.

Much has been discussed about the causes of terrorism, be it homegrown or international, but to look beyond to strategies of and policies for counterterrorism will be fruitful for transatlantic cooperation. As federal states, Germany and the United States share similarities in their approaches to counterterrorism but can still benefit from greater cooperation among their allies. In this Policy Report, Frank Gadinger looks at German counterterrorism policies, explaining not only how the German government perceives of counterterrorism, but also how and why the German public reacts to counterinsurgency (COIN) and data retention policies as it does. Discussing the American approach to counterterrorism, Dorle Hellmuth looks at the response to terrorism following 9/11, the strategic culture in the U.S., and the remaining challenges for President Obama in light of his commitment to closing Guantanamo and sending additional troops to Afghanistan. Together, these essays show that much can be learned across the Atlantic as we strive to protect our societies from the global threats of terrorism.

AICGS is grateful to the Fritz Thyssen Stiftung for their generous support of this Policy Report and larger project. We are also grateful to Frank Gadinger and Dorle Hellmuth for sharing their insights. Furthermore, the Institute would like to thank Jessica Riester for her work on this publication.



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GERMAN COUNTERTERRORISM
RESPONSES AFTER 9/11

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IN SEARCH OF A SERIOUS DEBATE AND A CLEAR STRATEGY: GERMAN COUNTER-TERRORISM RESPONSES AFTER 9/11

FRANK GADINGER

1. Introduction¹

Since the 9/11 attacks, counterterrorism has shaped the domestic and foreign policy agendas in Germany more fundamentally than the scant political and public debate on this issue in the past years would suggest. With their official and public opposition to the military means the Bush administration used to fight its “war on terrorism,” Germans seem to have forgotten that their own military troops (Bundeswehr) have been in conflict with Taliban fighters and “insurgents” in Afghanistan for many years as well. The fact that German soldiers, until recently, are largely confined to the less violent north of the country, operating with what is officially a peace-enforcement mission and a soft mandate, has led to a common perception of engaging in counterterrorism with a clear conscience. But on 4 September 2009 a German commander called in an American air raid near Kunduz against Taliban insurgents who had hijacked a pair of fuel trucks. Scores were killed, not all of them Taliban. The incident provoked a critical debate and also reminded Germans of the uncomfortable reality that the boundary between a civilian mission and war is always a floating one. “Germany lost its innocence” and “*Krieg*” (war) were headlines in leading German newspapers. Chancellor Angela Merkel as well as new Minister of Defense Karl Theodor zu Guttenberg have since declared that German soldiers are confronted with “war-like situations” due to the nature of the threat. At first the widely criticized German commander, Colonel Georg Klein, was supported by Guttenberg, who defended Klein’s decision as “militarily appropriate.”

These current justifications constitute a breach of the code of conduct followed by former German politi-

cians, including former Minister of Defense Franz-Josef Jung who resigned from his new post as Minister of Labor and Social Affairs as soon as his disastrous information policy during the Kunduz incident came into public focus. He and many other politicians and officials have strictly avoided the term “war” in recent years and tried to portray the Afghan deployment not as a combat mission but as a humanitarian one. Surprisingly, the short public and political debate on the Bundeswehr’s involvement in Afghanistan following the Kunduz incident is nonetheless more a sensational than a serious debate. The public outcry, as in the case of Jung’s resignation or in the semantic choice of Guttenberg’s first reaction to the Kunduz incident (he has made an about-face in his assessment and calls it now “militarily inappropriate”), is primarily focused on questions of who did or said something wrong or something that could end another political or military career.

The heated political debate will be continued in a current parliamentary investigative commission, which will be used by the opposition parties to increase political pressure on the flagging start of the Merkel government. Despite the outsized scandal within the new governing coalition and the German public’s increasing opposition to the involvement in Afghanistan, Merkel and new foreign minister Guido Westerwelle have clearly decided to renew the mandate and will presumably send more troops, although not before the international Afghanistan conference scheduled end of January. Germany’s hesitancy after Obama’s decision to send 30,000 more U.S. troops and his demand to the NATO allies to support him can be explained by the unpopular war at home and the ongoing governmental crisis.

However, the silent topic of a German withdrawal in Afghanistan is still in need of explanation. For many years it has been marginalized in the political debate and only pushed by some intellectuals² and the Left Party in a polemical way. A basic debate on the mission in Afghanistan remains to be done and has possibly begun with the external shock of the Kunduz incident. The recent title of a German weekly news-magazine “When can Germans kill?” and the headline of one of the main newspapers “Kunduz: Is targeted killing allowed?” could be first signals for a more principled debate.³

The same is true for the public and political debate on domestic counterterrorism responses and the threat perception of Jihadist terrorism more generally. A long list of reforms have been adopted since 9/11, which have had a great impact on individual civil liberties and led to a more centralized security architecture in Germany. Additionally, there were thwarted terrorist attacks in 2006 and 2007 which illustrate the fact that Germany, as a member of the Afghanistan mission (with the third-largest contingent of troops), is also a target for Jihadist terrorism. The planned attacks by the plotters (“Sauerland cell”) on American and possibly Uzbek targets were only thwarted by German security services following a tip from their U.S. colleagues. In the ensuing criminal process the four accused plotters admitted their desire to kill as many American soldiers as possible.⁴ Nevertheless, Germany’s cultural self-perception seems to be immune to these developments and is still dominated by two elements: First, Germans feel relatively safe from the threat of terrorism because they see their country as a “good cop” in counterterrorism affairs, e.g., Germany’s opposition to the U.S.-led Iraq war and the general non-acceptance of the U.S. “war on terror” as a guiding policy paradigm. Germany’s own involvement in Afghanistan is downplayed and domestic security measures are perceived as pure law enforcement measures—in contrast to the U.S.’ “overreaction” of fighting a war on terrorism. Second, the current political culture in Germany is still shaped by the two core dimensions of the “Bonn Republic” before unification: multilateral cooperation and a culture of restraint.⁵ Critics refer to this practice as “checkbook diplomacy.” Such a political culture ignores the security challenges of armed international conflicts and the inevitable normalization of German

foreign policy as a medium-sized power dependent on alliance commitments. In a nutshell, Germany’s relatively robust domestic and foreign counterterrorism responses in regard to its special historical role are in conflict with its self-understanding of a peace-oriented culture of restraint. This dilemma explains its ambivalent and hesitant position in counterterrorism. The silent debate on counterterrorism at home and abroad can be interpreted as a consequence of this attitude and shows Germany’s predicament between new challenges in security policy and old traditions of political culture. The external critique by NATO allies—who demand more burden-sharing in Afghanistan—underscores the internal tensions of a changing political culture in Germany. These tensions are reflected in the political difficulties arising from the justification of the Afghanistan mission using traditional patterns of reasoning. The unavoidable reality of being in a situation of war and the sudden political debate reveal the lack of preparation of the German military leaders and troops and their government at home.

The following essay will be outlined in five steps. First, the domestic and foreign counterterrorism responses in Germany are discussed, focusing on the changes and effects of new regulations and security measures. Second, the character of the German counterterrorism approach is explained by considering the governmental structures and the origins of political culture. Such an analysis is necessary in order to understand the causes of the similarities and differences of the German approach in comparison to the U.S. strategy. From this follows that, third, comparable federal political systems and fragmented security architectures due to institutional checks and balances traditions put the United States and Germany in a place where they are well-positioned to, fourth, learn best practices from each other in questions of domestic counterterrorism in fields like intelligence cooperation. However, key legacies of the Bush administration, such as the future of the Guantanamo detainees, are likely to remain controversial (chapter 5). The Afghanistan mission could lead to a major disagreement because of the different perceptions and political cultures in Washington and Berlin, especially if Germany becomes more involved in the military conflict. The concluding policy recommendations in the final chapter stress that Germany first of all

needs a comprehensive counterterrorism strategy, one that is focused on long-term objectives and not an expression of daily crisis management. Such a strategic discussion primarily demands an honest debate about the future role of the Bundeswehr in Afghanistan. A “German McChrystal Report” would be a good start to develop its own strategic culture.

2. German Counterterrorism Responses After 9/11

In the United States counterterrorism was framed as a “war on terrorism” on the domestic and the foreign policy level during the Bush administration; the Obama administration has avoided using that term. Germany, too, eschews the idea of a “war on terrorism” and instead views the fight against terrorism primarily in criminal terms and as an act of law enforcement. The framing of this war—especially in its global scope that includes rogue states such as Iraq—was not widely accepted in Germany. Due to this understanding of the perceived threat, extreme military counterterrorism measures such as the creation of unlegislated areas like Guantanamo and military tribunals were not implemented. Simply stated, Germany has never considered itself in a state of war. Yet, the terrorist attacks of 9/11 have also led to a long list of reforms on the domestic level, which follow the same logic as in the United States: security-driven counterterrorism legislation with a focus on preventive action. The implementation of these security regulations has transformed the fragmented national security architecture into a more centralized system that facilitates coordination, law enforcement, and information-sharing. Aside from Germany’s minimal participation in “Operation Enduring Freedom” (OEF) operations in the Horn of Africa, foreign counterterrorism is primarily focused on the war in Afghanistan, which has been strongly supported by German governments from both sides of the political spectrum since 2001 but unpopular in the public. Thus, in the first case of invoking Article 5 for collective defense in the history of NATO, Germany was trapped in its multilateral commitments without clearly reflecting what foreign counterterrorism could and should mean for German troops. Foreign counterterrorism in Afghanistan is synonymous with the current process of self-discovery in German foreign and security policy.

2.1. DOMESTIC COUNTERTERRORISM RESPONSES: FOLLOWING THE PREVENTIVE LOGIC

Soon after 9/11 there was no doubt in the public and among political circles in Germany that a new security concept was needed, triggered by the fact that the attacks had at least partly been planned and prepared by a terror cell in Hamburg. In this climate, the former government of Chancellor Gerhard Schröder and interior minister Otto Schily rushed through counterterrorism legislation supported by the view that the existing legal framework contained considerable security problems and deficiencies. The immediate results were two legislative initiatives, termed “security packages” which were adopted by the Bundestag in the immediate aftermath of the 9/11 attacks.⁶

The first security package contained urgent measures addressing perceived security threats, such as closing legal loopholes in existing statutes. A good example is the addition of section 129b to the Criminal Code that facilitates sanctions on the creation of terrorist organizations, which in its prior form was only applicable to organizations that were represented within Germany and not abroad. Now the membership and support of foreign terrorist organizations is punishable as well. The “second security package” or “anti-terrorism law” amends a number of existing laws and changes of the Asylum Act, the Alien Act, and the Criminal Code. The main purpose of these new regulations was to increase the powers of the security authorities and to broaden and facilitate the range of activities between the Federal Intelligence Services (*Bundesnachrichtendienst*, or BND), the Federal Criminal Police Office (*Bundeskriminalamt*, or BKA), the Federal Office of the Protection of the Constitution (*Bundeamt für Verfassungsschutz*, or BfV), and the Military Counterespionage Service (*Militärischer Abschirmdienst*, or MAD). While the first security package was focused on repression, the anti-terrorism law stresses the preventive action and the early detection of terrorist activities by the security authorities.

Hence, the new Joint Counterterrorism Center (*Gemeinsames Terrorabwehrzentrum*, or GTAZ) was established, the BKA Act was reformed to enlarge the

authority of the BKA in December 2008, and the newly created Joint-Anti-Terror Database bundles the information of thirty-eight intelligence and law enforcement agencies in Germany. Above all the position of the BKA was strengthened by extending its competencies and instruments, which were usually explicitly in the hands of the less authoritative BND. All these measures reflect a general tendency in Germany to centralize domestic counterterrorism, thereby marking a shift in the national security architecture. The effects of these new legal rules and the new security concept are multifaceted, among others: improved measures to secure identities with Visa procedures and border controls; the possibility of deployment of armed air marshals from the Federal Border Guard on German flights; intensified security checks on personnel in defense and other institutions; inclusion of biometric features on identity cards; resign of the existing grid search from historical experiences with the German terrorist organization "Red Army Fraction" (RAF) in the 1970s; and instituting a controversial data policy to retain telecommunications, email, and internet data for a period of six months up to two years and make it accessible by law enforcement agencies.

This incomplete catalogue of reforms stresses the new emphasis on preventive action in questions of threat and security in Germany as well. Thus, the U.S. focus on preventive security practices is also apparent in the German development and in its wider institutional context of the European Union. At the center of the EU's counterterrorism approach is the Framework Decision on Combating Terrorism of June 2002 which provides a legal framework and sets out measures "to prevent terrorist acts from their earlier stages" (Art. 2-4).⁷ It is important to note that some measures of the EU Data Retention Directive⁸ go beyond current U.S. policy. The European Council Strategy for Combating Radicalization and Recruitment to Terrorism⁹ (especially Art. 9) even strengthened the preventive logic of the European Security Strategy of 2003 which states that "[...] we should be ready to act before a crisis occurs." And further: "Conflict prevention and threat prevention cannot start too early."¹⁰ The recent report on the implementation of the European Security Strategy in December 2008 reproduces the demand to act preventively in security affairs.¹¹ Thus, the change of

the traditional security concept of self-defense toward security politics of precaution and preventive risk-management is hardly an exclusively American development. The main problem of such a new understanding of risks, possible threats, and preventive security practice is that the legal framework has to fulfill a precautionary function that enables the pursuit and punishment of terrorist suspects who have not engaged in any criminal act but may do so in the future.¹²

What also becomes clear and has been widely criticized in legal circles in Germany is that the permanently fragile balancing act between liberty and security in democracies has tipped toward the latter.¹³ Most problematic is that security is no longer defined on a normative level; rather, it is defined negatively as the pure absence of threats on an always uncertain factual basis. The difficulty in the specification of the threat cannot be solved when terrorists operate in diffuse and fluid networks like al Qaeda and not in clearly identifiable groups and persons like the RAF or other regional groups. Hence, such an understanding of security as an objective value on a higher level finally legitimates basic rights infringements, especially in the position of the individual as an autonomous liberal being. The individual person is first of all a potential risk in dangerous circumstances and no longer a principally law-abiding citizen. Yet, it remains to be said that the new counterterrorism legislation with its focus on security builds upon the legislation in the 1970s during the RAF period and further initiatives in the 1990s. In this way the attacks of 9/11 served as a trigger and provided an opportunity to complement a security legislation which previously had lacked political support.

In sum, Germany should be cautious in criticizing the U.S. approach as overreaction. The German counterterrorism approach demonstrates an adoption of the U.S. security paradigm of prevention in its own (and EU) way. It goes without saying "collective security interests" in case of doubt dominate individual civil liberties. The previous satisfied reactions of the Counter Terrorism Committee, established by the UN Security Council after 9/11 to monitor all national counterterrorism measures, toward Germany for fulfilling its core obligations is another hint for a not so soft counterterrorism approach. Furthermore, the

redesigns of the ineffective grid search or of the controversial data retention are even examples of overreacted security practices. Finally, a critical political reflection on this problematic process seems not be prevalent. Some of the legal rules of the anti-terrorism law are temporally determinable, allowing an evaluation of their effectiveness after a distinct period. The fact that the evaluation procedure followed criteria which were developed by the Ministry of the Interior, entirely without external advice, is neither a sign of reflecting the fragile balancing act nor does it encourage the public's trust in its security authorities.¹⁴ Apparently Germans neither feel genuinely threatened by terrorism at home nor do they loudly complain about the new balancing between liberty and security. The public outcry on restricted liberty rights is narrowly linked to an elitist political discourse around the former Minister of Interior Gerhart Baum (FDP) and related intellectual figures.¹⁵ Baum and some of his colleagues were successful with a number of constitutional complaints concerning the emphasis on civil rights in prominent cases such as the electronic eavesdropping operation (2004), the air space security law (the controversial military attack of an airplane with civil passengers in an emergency situation) in 2006, and the online search of computers in 2008. The judgment of the Constitutional Court on the recent complaint in the case of data retention is not yet delivered. In contrast to political intentions of strengthening security legislation, the Federal Constitutional Court is much more skeptical of changing the constitutional law at the expense of civil rights. The Court often fulfills in Germany the political function of a corrective in political debates.

2.2. INTERNATIONAL COUNTERTERRORISM RESPONSES: SLIDING INTO THE WAR IN AFGHANISTAN

Germany's contribution in international counterterrorism affairs is focused on the war in Afghanistan based on a civilian ISAF mandate. Whereas in Afghanistan Germany represents the third-largest contingent of NATO troops (4,410 soldiers), its involvement in the U.S.-led "Operation Enduring Freedom" is only marginal, providing a small contingent of currently 260 soldiers at the Horn of Africa.¹⁶ Yet it is fair to say that German foreign counterterrorism in Afghanistan and elsewhere is not the result

of an active grand strategy, but rather a consequence of multilateral commitments in the context of NATO. Immediately after 9/11 former Chancellor Schröder declared Germany's "unconditional solidarity" with the United States—possibly without knowing what these words really meant, considering that he recently advocated for a direct withdrawal in Afghanistan. His former pledge could be read as a general German acceptance of 9/11 as a case of collective defense (Art. 5 NATO treaty) with political consequences until now. What is sometimes overlooked, because of the fundamental transatlantic crisis in the tumult of the Iraq War in 2003, is that from the beginning Germany agreed to send troops to Afghanistan despite a criticism from the German population. At that time, the decision of the Schröder government (including the former foreign minister Joschka Fischer) was taken against opposition from within the governing coalition. This can be interpreted as the second step of a "normalizing" process of German military involvement on foreign soil after Operation Allied Force in the Kosovo War in 1999, which marked a fundamental shift of Germany's special pacifist foreign policy tradition, including without a UN mandate. It is important to remember that, until 1994, Germany was constitutionally barred from deploying its armed forces abroad.

The German deployment in the safer northern region seems to be a non-altruistic compromise for the government taking into consideration Alliance solidarity and the special (historical) German role at the same time. However, when the Taliban gained strength in 2006, Germans were still reluctant to send troops into combat in the south and southeast despite allies' calls for burden-sharing. The complaints of the U.S., Britain, Canada, and the Netherlands about insufficient German solidarity within NATO illustrated the upcoming dilemma of the Germans as a "multilateral trap."¹⁷ With Obama's decision to focus on Afghanistan and Pakistan (or "AfPak") as the "right battlefield" in the fight against terrorism and a bloody year in 2009, Germany's explicit emphasis on the peace-enforcement character of ISAF became more precarious. A core element of Obama's new strategy for Afghanistan and Pakistan, which he declared in March 2009, was a strengthening of the civilian component in the Afghanistan mission. Germans applauded loudly and argued, as former foreign

minister Frank-Walter Steinmeier said, that the new U.S. strategy with its stronger commitment to civilian reconstruction efforts came closer to the longer existing European and German objectives.¹⁸ The often-heard German critique of the U.S. fighting a war on terrorism too focused on military objectives has also been demonstrated in a successive German reduction of the OEF contingent and a parallel increase of the ISAF contingent. Of course, the mandate of ISAF is politically easier to sell to the German public than the “war on terror” roots of OEF, yet the U.S. change of strategy will lead the German government into a new predicament. Their forces will be increasingly committed despite their lack of preparation for the new situation.

Dealing with a “war-like situation” in northern Afghanistan

Hence, such a civil-oriented position neglects that the German troops are confronted with a different situation in the north of Afghanistan than they originally expected in 2002. As it is written in its mandate, the ISAF forces should assist the Afghan government in the establishment of a secure and stable environment. To this end, ISAF forces are carrying out security and stability operations throughout the country together with the Afghan National Security Forces, which are directly involved through mentoring, training, and equipping. The objectives are clear: through Provincial Reconstruction Teams (PRTS) ISAF is supporting reconstruction and development and is helping Afghan authorities to strengthen the institutions required to fully establish good governance and the rule of law.¹⁹ Yet, the current reality in Afghanistan, thus also for German ISAF troops in the north, is different from the situation as described in the mandate. The main problem is that Taliban fighters and insurgents do not distinguish between PRTs with an ISAF mandate and OEF troops who are allowed to engage insurgents in offensive operations. The ISAF forces, created to secure the peace enforcement mission, the government, and international aides, are hardly perceived as necessary forces to support the peace-building process, but rather as being equivalent to war troops. Thus ISAF forces become themselves military targets for insurgents. Instead of being accepted as humanitarian assistants, the forces are confronted with snipers and suicide attacks in daily

threat situations. Since the beginning of this year more than seventy assaults and attacks on German forces have occurred.²⁰ It is not a new insight that longer lasting peace operations can fail when the civilian forces increasingly slide into armed conflicts and the integration into a clear strategy of reconstruction does not succeed. To put it simply, Germany’s demand for a strict separation between the ISAF and OEF structure of command in the Afghanistan mission is an artificial one and far from reality. German soldiers already know that their mission and daily tasks are in contradiction with their mandate. They are trapped in the predicament of being in a war zone but not being allowed to act as soldiers.²¹ Guttenberg’s use of the “*K-Wort*” (“war”) was a direct attempt to illustrate the common sense in the Bundeswehr of being at war without the right mandate and an unclear legal status. Therefore, the Kunduz incident was not only a wake-up call for Germans to rethink their “friendly disinterest” as German Federal President Horst Köhler rightly described the relationship of the German public toward the Bundeswehr.²²

The Kunduz incident: a symbol for the ambivalent German political position in Afghanistan

Using the example of Kunduz, the fundamental contradiction between German political intentions and bitter reality at the Hindu Kush can be illustrated. The narrow debate around German commander Colonel Klein, and the extent to which he violated various ISAF procedures before and after the bombing, overlooks some ambivalent matters in that tragic situation: First, Klein was compelled to call in the U.S. air raid because of the missing German mandate to act on one’s own behalf. The critical reaction of the U.S. by General Stanley McChrystal can also be understood as a critique on the ambivalent German position to backtrack on the ISAF mandate and to avoid offensive operations. Second, Klein saw no alternatives apart from the air raid because of the fact that German forces are insufficiently equipped. Two of the four infantry companies were involved in encounters in the north. It is rarely a secret that the German military forces are the least equipped armed forces among the NATO forces. There is a chronic lack of adequate deployment and military supplies for offensive operations which is obviously reasoned by

political intentions. For the purpose of air support, the German "Tornado" fighter-bombers would be useful, but they are only deployed for recon missions due to mandate constraints. Helicopters are not deployed at all.²³ Third, Klein was under considerable strain to destroy the two fuel trucks because of Afghan intelligence information concerning planned attacks with fuel trucks by Taliban leaders. Furthermore, four of the identified Taliban leaders were perceived as responsible for deadly attacks on own forces in recent months.²⁴

In sum, the question of what was the main objective for Klein to decide in such offensive way is not yet clearly answered. The assumption seems plausible that the German commander simply felt in a situation of war. The inconsistencies in the present reconstruction refer to the thesis that Klein possibly wanted the air raid in a definitive sense, and thus the killing of the Taliban leaders.²⁵ The thesis is supported by recent documents which reveal that the German Special Forces "KSK" were involved in the Kunduz attack with the main objective of killing the Taliban leaders.²⁶ The violation of ISAF command procedures are considerable: Klein reported that own troops were under attack ("Troops in Contact") to get air support. He concluded that there were no civilians near to the target. He called in the air raid although this is only allowed in extremely urgent situations. Finally, according to the Com-ISAF report the two involved U.S. pilots doubtfully asked the German commander five times before they dropped the bombs.²⁷

The Kunduz incident demonstrates that the German forces have already tried to deal with the difficult arrangement of an unrealistic mandate in a daily situation of war. An offensive operation like the Kunduz incident was definitely not backed by the mandate of the German parliament. The consequences of an inadequate mandate are military overreactions like in the Kunduz incident and confused German soldiers who operate with an unclear legal status under permanent threat. The reformulated pocket cards for German forces in summer 2009 additionally stress the political reassessment of the Afghanistan mission.²⁸ These cards express the rules of engagement and the legal status in short form. It is fair to say the reformulation can be interpreted as a shift from a

pure defensive action to the ability of preventive action, which is similarly a break with special national caveats in the ISAF mandate. Germany entered caveats in the NATO command structure for rules of engagement in offensive operations, especially for the scope of action of their Quick Reaction Forces.²⁹ Finally, the fact that KSK forces, whose official engagement in OEF was finished in 2008, were involved in the Kunduz attack strengthens the assessment that the official strict refusal of the offensive OEF mandate by the German government is first of all a rhetorical one which leaves a bitter taste.

The German debate on the Kunduz incident

The attack claimed the lives of about 140 people, including many civilians. Because Jung, defense minister at the time, steadfastly claimed that only insurgents had been killed despite reports otherwise, he was forced to resign. In addition to Jung, Germany's top military officer, General Wolfgang Schneiderhahn, and one of the top deputies in the ministry, State Secretary Peter Wichert, were forced to step down after the widely-read German newspaper *BILD* reported that information about civilian casualties had been withheld from the Bundestag and from prosecutors.³⁰ The ensuing debate, which is focused on finding scapegoats, struggles with the same contradiction. The attempt of Guttenberg to pursue a strategy of transparency and to push a strategic debate, unlike his predecessor Jung, could possibly fail because of the almost unsolvable task of dealing with the described contradiction between intentions and reality. First, Guttenberg's special usage of the "*K-Wort*" ("war") is remarkable. He said that, due to the threat, he could understand why German troops perceive their engagement as a war and spoke himself of "war-like situations" in Afghanistan. German military officials as well as German pacifists welcomed the new rhetoric strategy. However, another sentence by Guttenberg, which was mostly overlooked in the heated debate, was of much greater importance. He described the mission in Afghanistan as a "non-international armed conflict." The complicated use of words is not coincidentally chosen. The term stresses the shift from a law enforcement police intervention (his predecessor Jung always spoke from a "robust engagement of stabilization") to combat operations.³¹

The general avoidance of the war term by intervention forces in Afghanistan is partly caused by the three UN resolutions formulated after 9/11. The reason is simple: The term “war” is not mentioned, instead of war the resolutions call “on all States to work together urgently to bring to justice the perpetrators, organizers, and sponsors of these terrorist attacks.”³² A clear justification for a military counter-attack cannot be found in the documents.³³ Such a shift in the interpretation of the mission leads also to legal consequences, especially for Colonel Klein whose case will be examined by Federal High Court of Justice. The federal prosecutor must now decide if the original political problem—whether the Afghanistan conflict is an armed conflict in the meaning of International Criminal Law—could be true for the Kunduz case. The tentative declaration indicates that there was no criminal action by German soldiers.³⁴

From this legal vagueness follows the general problem for politicians to legitimate the Afghanistan mission. Are combat operations in Afghanistan in 2009 still elements of a collective defense operation or a defensive military support of the Afghan government in a domestic conflict? How long does the right of self-defense last? The current mixture between the OEF and the ISAF mandate is an expression of this interpretive conflict of meaning. The different political justifications of the mission from vital security interests to human rights arguments as a moral commitment to stabilize democracy in Afghanistan show the same problem. Whereas the former German defense minister Struck said that “German security interests are also defended at the Hindu Kush,” a sentence now legendary, the subsequent German politicians and officials balance between the security and the human rights argument. It is more than symbolic that just when Guttenberg used the war-term, Westerwelle re-emphasized that “German foreign policy is peace policy, oriented on interests and values.”³⁵

It is this domestic situation that makes a decision to send more troops to Afghanistan so difficult for Merkel. According to a survey conducted for the public broadcasting company ARD in December 2009, some 69 percent of German citizens are in favor of withdrawing German forces from Afghanistan as quickly as possible. Only 27 percent of Germans

believe that Bundeswehr troops should remain stationed in Afghanistan, a drop of 10 percent since the last survey in September.³⁶ Beside the lack of public support, the investigative commission starting in mid-December will increase pressure on the government coalition. This could also mean that pressure on the popular Guttenberg increases, too, when more details of the Kunduz incident come into public focus, especially when the two dismissed key figures in the Kunduz affair (Schneiderhan and Wichert) supply new material against the government. Both men no longer have a reason to keep silent. The paradox for Guttenberg is to balance between condemnation of the attack and standing by Klein. Due to the sense of solidarity within the armed forces a public denunciation of Klein would be interpreted as a betrayal within the army.

Finally, this complex domestic situation is the reason for Merkel's and Westerwelle's hesitancy in promising Obama more German troops, but at the end of November Guttenberg already hinted that “Germany will rethink and adjust, maybe even strengthen its military commitment to make Afghanistan a success.”³⁷ Although recent signals point to estimated 2,000-2,500 additional German troops in Afghanistan to fulfill the NATO pledge of 7,000 additional forces, the government coalition will officially not review the level of forces until after an international Afghanistan conference at the end of January.³⁸ It is understandable that the German delay of the critical issue on the domestic front is not welcomed in the U.S., as the harsh critique by Richard Holbrooke illustrates.³⁹ Merkel does not want another transatlantic rift. Yet it is a difficult balancing act for the chancellor and her team in the coming months, considering that three-fourths of Germans distrust the information policy of the government according to the above-mentioned survey.

The opposition parties, especially the Social Democrats (SPD) and their leader, former foreign minister Steinmeier, have likewise supported the Afghanistan mission and voted for a renewal of the ISAF mandate in the recent parliamentary decision. The Kunduz incident and the investigative commission serve as a first chance for the opposition parties to regain public support through a clear commitment to the German “peace tradition.” An intensified battle in

Afghanistan for Germans (“another Kunduz”) as well as new insights by the upcoming investigative commission could tighten the beginning crisis of legitimacy of the government coalition. Furthermore, it will be exciting to see how the SPD leadership will react when the government decides about an increased troop contingent at the end of January. The refusal of the SPD to vote for the already reduced OEF mandate in the Bundestag could be a first sign of a more confrontational opposition, released from the years of a grand coalition. It remains to hope that the current investigative commission in the Bundestag is not exclusively used for domestic campaigning. Rather an honest and strategic debate on the mission of the Bundeswehr and on the main objectives of international counterterrorism is urgently necessary in order to clarify the confusing discussion around the Kunduz attack. German politicians must push a strategic debate, which provides orientation for the public as well as for the German forces abroad.

3. Explaining the German Counterterrorism Approach

The German position in counterterrorism is primarily shaped by two factors closely linked to each other: the system of federal government and the political culture more generally. Following the previous argument, the national security architecture as well as the political culture are in a process of change. Whereas the historically-reasoned federal system of checks and balances has changed due to tough security legislation and a politically-intentioned centralized security architecture, the process of change in questions of national identity and political culture has begun since unification and the first deployments of the Bundeswehr abroad in the 1990s. The crucial question of what future role Germany, as a leading nation in Europe, wants to play on the global level is not yet adequately answered by politicians. The debate on German engagement in Afghanistan, initially triggered by the Kunduz attack, could be a critical point in Germany’s understanding of itself, still blurred between an understanding as a traditionally hesitant and multilateral partner and as a self-assured and “normal” medium-sized power demanding new challenges. The ambivalent and indecisive position on counterterrorism is an expression of this unfinished process of political change.

3.1. THE IMPACT OF THE FEDERAL SYSTEM ON THE POLITICAL SCOPE OF ACTION IN COUNTERTERRORISM

The federal government system with its checks and balances and basis in the German Basic Law (*Grundgesetz*) are results of historical experiences and, consequently, the Allied Powers’ intentions after World War II to avoid a future war of aggression by Germany. This set-up as a federal system is the main reason why security authorities in counterterrorism are widely split across local, state, and federal levels of government. The German states (*Länder*) exercise veto powers on domestic security issues through the upper chamber of the German parliament (Bundesrat) and generally try to oppose federal centralization plans, which were at the top of the political agenda after 9/11.⁴⁰ The permanent struggle between the state and the federal level for the arrangement of power competencies, which is also fought on other domestic issues, can be well observed in the centralizing process of domestic counterterrorism as well. The *Länder’s* concerns of losing competencies and veto power explains why the national security architecture is left relatively intact despite other federal plans. However, the long list of adopted domestic security reforms to centralize counterterrorism coordination demonstrates that the *Länder* had an impact on all federal reform proposals, despite being unable to completely block the federal centralization plans. Considering the strengthening of the BKA authorities in counterterrorism efforts (the BKA act) and the new Joint Counterterrorism Center, it is fair to say that national security architecture shifted from an extremely fragmented structure toward a more national system. This also means that the strict separation between intelligence and policing powers originating from the Basic Law is softened to some degree. Originally, the Basic Law (Art. 73, Sec. 10 and Art. 87, Sec. 2) determined that the federal government has the authority only to regulate cooperation between the federal and the state levels in the areas of criminal police and protection of the constitution.

This form of legislation (*Trennungsgebot*) is meant to prevent the authorities responsible for the protection of the constitution from holding police powers.⁴¹ On the one hand, this shift of centralizing security author-

ities to improve counterterrorism coordination can be interpreted as a necessary normalization of the national security architecture as a result of the transnational threat by Jihadist terrorism. On the one hand, it is legitimate to ask what functions the intelligence service agencies on the federal and state (*Länder*) levels fulfill when the Federal Criminal Police Office (BKA) assumes their tasks and successively becomes a policy agency with intelligence services authorities, similar to the FBI in the U.S.⁴² On the other hand, the trend to a more centralized security architecture, always reasoned by security interests and necessary preventive action, is criticized as a dangerous relativization of the separation between intelligence and policing services. It is argued that this separation is not only reasoned by the moral imperative from German history, but also because of the different specialization, and democratic control, of the different security authorities.⁴³

Although the concerns are legitimate to stress the potential risks from softening the separation between intelligence and policing services, in the face of the threat of Jihadist terrorism it seems necessary to facilitate cooperation between the security authorities, e.g., in the Joint Anti-Terror Database. Moreover, the judgments of the Federal Constitutional Court in recent years show that this powerful institution still serves as a political corrective to avoid overreactions in security legislation and to ensure protection of civil liberties. Judges on the Federal Constitutional Court are traditionally very skeptical of changing the Basic Law. The tendency of political hysteria in counterterrorism was harshly criticized by one of the judges as "intellectual lust for the anticipated emergency state."⁴⁴ This distinct position of protecting the Basic Law from political interests is deeply rooted in the historical experiences of the Third Reich. The fact that until 1994 Germany was constitutionally barred from deploying its armed forces on foreign soil and that the German Bundestag must decide each year whether the mandate for the mission in Afghanistan will be renewed are signs of a pacifist-oriented national political culture. The imperative for peace is formulated in Article 26 of the Basic Law, which forbids the preparation and participation in wars of aggression for the German military forces. Yet, as the discussion on the German engagement in Afghanistan illustrated (see section 2.2), the question of what the mission means

for German forces in Afghanistan is not easy to answer. It seems that the deep roots of Germany's pacifist political culture are in conflict with foreign operations, such as in Afghanistan, where troops are stuck between civilian nation-building and offensive operations. Germany's more hesitant position in counterterrorism, in comparison to the United States, is caused by the government system and the (changing) political culture.

3.2 THE CULTURE OF RESTRAINT STILL SHAPES THE SCOPE OF ACTION IN FOREIGN COUNTERTERRORISM

Germany's engagement in the Kosovo War in 1999 questioned the principal orientation of Germany's political culture of pacifism and a culture of restraint. Despite the political justification that the engagement in Kosovo (without UN mandate) would be the absolute exception, the case showed that after unification the German commitment to an instinctive multilateralism also led to stronger expectations by friends and allies in international engagements. Additionally, the representation and interpretation of the new German role as a leading nation in Europe with ambitions on the global level, especially by the Schröder government, reinforced the politically intentioned perception of Germany as a "normal," "self-assured," (Schröder) and "proud" medium-sized power.⁴⁵ Principal orientations like the commitment to multilateral cooperation were not discarded, but redefined to some degree in a much more instrumental fashion.⁴⁶ However, the new self-assured governmental rhetoric and the new security challenges concerning international engagements have neither led to a reflective process of thinking about the strategic culture nor to an adjustment of traditional procedures in security policy. Again, the current Afghanistan mission demonstrates the underdeveloped strategic culture of the Bundeswehr and the political failure to clarify the objectives for German military forces on foreign soil. Up to now, there was no official evaluation of the previous foreign operations of the Bundeswehr (e.g., the engagement in the Congo) and the mission in Afghanistan. Where is a German "McChrystal Report" to outline the strategy for German forces in Afghanistan?⁴⁷ There seems to be a gap between the new self-perception as an exporter of security and a reactive, defensive, and short-term strategy of

political action, which is oriented on traditional security practices of the “Bonn Republic.” In retrospect the clear role as a consumer of security and object in the Cold War was apparently easier to handle; it is possible that the transfer-period to a “normal” security actor happened too quickly. Practical problems for German forces began with the classification of a peace-enforcement operation as “robust,” which always symbolizes the grey area of civilian mandates.

The recently published official security documents do not solve this fundamental strategy deficit. The White Paper from 2006, which was originally written to deal with the new security challenges and to conceptualize the future of the Bundeswehr, does not fulfill needs and expectations. Of course, the list of functions for the Bundeswehr as the core instrument of German security policy is long: *inter alia*, international conflict prevention and crisis management (including the fight against international terrorism); support of allies; protection of German territory and its citizens; and partnership and cooperation.⁴⁸ The main problem is that the prevention of international conflicts and the fight against terrorism are identified as the most likely tasks of German armed forces, without saying how to develop the ability to participate in multinational operations anywhere in the world. One of the key concepts of the current strategy for Afghanistan, “Transfer in Responsibility,” is the concept of networked security (*vernetzte Sicherheit*) which expresses a complex understanding of security and state-building measures. After reading the strategy for Afghanistan, one understands why the German government still struggles with the justification of the mission to the public. Whereas the introduction still argues that besides national security interests, the main justification for the mission emphasizes the moral commitment to protect the Afghan people from the Taliban, who oppress the Afghan population, especially women rights, and violate human rights in general. A lack of perspectives, underdevelopment, and the destabilization of the region would be the consequences of another Taliban regime.⁴⁹

The problem is not that the described consequences are false; much more important is that such forms of political justifications are new in the German security discourse. In U.S. security debates it has always been a common security practice to argue with moral argu-

ments and to justify foreign engagements with human rights concerns. For Germans, such arguments mark a fundamental shift in the culture of restraint and the tradition of anti-militarism. The political justification for the engagement in Kosovo was primarily focused on the argument that Germany could not allow “another Auschwitz” in Europe (former Minister of Foreign Affairs Fischer) and less with general human rights. Yet, whereas the previous justification that German security interests are defended at the Hindu Kush (former Minister of Defense Struck) was already difficult to sell to the public, the new argumentative variant with its emphasis on human rights is even more difficult to sell. It requires Germans to accept that German soldiers die in Afghanistan for security interests and for human rights. What the debate on equal burden-sharing within NATO neglects is that certainly the death of forty German soldiers in Afghanistan is marginal in comparison to casualties of U.S. forces, yet it is completely new for Germans to grieve for their own casualties. The German debate in 2008 on how to refer to the casualties in Afghanistan in rhetorical terms stresses the uncertainty of a not so self-assured political culture.⁵⁰

Furthermore, a related problem is that Germans have a different image and understanding of wars due to their history. According to images of World War II, wars are linked to devastated cities and understood as the worst political scenario one can imagine.⁵¹ There is no established cultural practice in Germany for dealing with returning soldiers from Afghanistan, as an American journalist observed in a train station in Berlin: he described a heavy-packed German soldier waiting for the train as a sad, lone figure who was separated from the crowd by the uniform he wears. “No one would stop to thank him for his service or to ask whether he had been deployed to Afghanistan.”⁵² Indeed, what German Federal President Köhler described as “friendly disinterest” in the public is a polite formulation; one can also speak of a home front. There is neither a sense of appreciation for or pride in the troops who risk their lives in Afghanistan, nor is there any understanding of or interest in why they do this. The lack of public interest is, thus, a problem for German soldiers who do not receive any recognition. The U.S. common practice of “Support our troops” in daily life is not imaginable in Germany at all. Hence, the challenge for German

politicians is primarily to establish an understanding for the mission in the public and to explain the reasons for the own engagement. The Canadian engagement and the recent political decision of a definite withdrawal in Afghanistan until 2011 is caused by the failure of the government to explain the engagement and has led to an increasing domestic opposition. In Germany the governing coalition did not set an exit date for the Afghanistan mission, yet the German and Canadian cases show parallel developments.

4. Best Practices

One of the transatlantic success stories in counterterrorism is improved intelligence cooperation since 9/11. The domestic counterterrorism reforms in both countries have facilitated the coordination in intelligence and data sharing. A good example for successful cooperation is the case of the “Sauerland cell” in which the U.S. intelligence services gave crucial tips to their German colleagues to thwart the planned attack on American and possibly Uzbek targets. The Sauerland plot showed that German security authorities are still dependent on the cooperation of the U.S. Both governments in Germany and the U.S. have tried to centralize their national security architecture, yet in both countries the federal system restrains the concentration of powers. Thus, both countries can profit from each other in questions of how to structure an effective centralization of counterterrorism, which is conformable with the federal system. The German initiative to establish the Joint Counterterrorism Center (GTAZ) as a loose, informal arrangement to integrate the security services of the states into its information-sharing and joint analysis as well as judicial and foreign law enforcement representatives could possibly better serve as an exemplified approach for sensible counterterrorism than the often-cited domestic counterterrorism organization in Great Britain.⁵³

It is clear that the U.S. has indeed learned from the critical German position on military counterterrorism, as observed in the change of rhetoric on the “war on terror.” Whereas the Bush administration developed the narrative of a war on terror using military terms of victory and defeat, Obama understood early on that such military objectives are not helpful in the fight against terrorism. Terrorism is first of all a method and

tactic in asymmetric conflicts. The recognition of al Qaeda as a military enemy with superpower status is exactly the trap in which Osama Bin Laden wanted the U.S. to step. Thus, the foreign policy objective to defeat terrorism in a final sense is doomed to failure and reinforces the radicalization of Jihadist terrorism. The strengthening of the civilian component of nation-building in Obama’s new strategy for Afghanistan and Pakistan, as well as his rational and pragmatic arguments, should make it easier to agree on common objectives for the Afghanistan mission at the January 2010 conference. Obama’s promise to clear the Bush legacies in the war on terror is another positive signal to find a common understanding in counterterrorism. The intention of closing Guantanamo within a year and the strict forbiddance of torture in counterterrorism measures reflect that President Obama understands that a fight against terrorism only leads to the desired results if one’s own moral position is credible.

5. Remaining Challenges and Controversies in Transatlantic Counterterrorism

Three main issues remain as controversies between the U.S. and Germany. First, the Afghanistan engagement and the question of equal burden-sharing within the NATO could lead to a major disagreement in the transatlantic relationship. It is necessary that the NATO partners agree at least on common objectives in the Afghanistan mission. While the new U.S. emphasis on civil measures and the restrained rhetoric of military victory in counterterrorism should facilitate transatlantic cooperation, the main objectives between the U.S. and Germany still differ due to their different political cultures and threat perceptions. To promise a final defeat of the Taliban and al Qaeda in a military sense, as Obama did at the beginning of his presidency,⁵⁴ is unrealistic in counterterrorism and not easy for Europeans—and especially Germans who less believe less in the success of military hard power—to understand. The recent statement by Guttenberg that “Afghanistan will not be won by military means” illustrates the German position.⁵⁵ Nevertheless, Washington can expect from the German government a strategic position in the Afghanistan mission besides empty phrases. Obama knows that Merkel struggles with domestic opposi-

tion, yet the recent vague political argument of the governing coalition claiming that it is not able to promise more troops until the Afghanistan conference in January is not suitable if Germany wants to improve the relationship. Meanwhile, the previous ambitious U.S. objectives of a stable democracy, good governance, secure environment, and the defeat of terrorism in Afghanistan are pragmatically revised in light of the so-called democratic elections in 2009. Maybe the common pragmatic objectives to establish a functioning democracy-oriented political system and to guarantee a secure environment for the Afghan public are more helpful for the Afghanistan mission than permanent disappointments and redefinitions of former objectives. The fight against corruption among the powerful elite in Kabul should be the top priority to regain lost trust among the Afghan population after the election debacle.

Second, some problems from the Bush administration remain. The closing of Guantanamo is the top priority for the Obama administration and has led to problems of how to deal with detainees. The German government did not seize the chance to support Obama in a symbolic issue—hardly understandable considering the previous harsh German critique on Guantanamo by Merkel and the low costs of such a political concession. The U.S. demand to offer asylum to Uyghur detainees, members of an oppressed minority in China, was refused by then-Minister of Interior Schäuble in June 2009 due to domestic security concerns.⁵⁶ Apparently the German government did not want to annoy the Chinese government, which was displeased about the official meeting of Merkel with the Dalai Lama. Another problematic case was the illegal method of “extraordinary renditions.” Although the security services by and large cooperate reasonably well, it is absolutely important for restoration of mutual trust that such extreme practices of war are stopped. The case of the German citizen Khalid al-Masri, who was kidnapped by the CIA in late 2003 because of an erroneous terrorist suspicion, and similar cases have led to political tensions as well as to a legitimate outcry in the public. If such a case should reoccur, the German government would be well advised to distance itself from such methods more clearly than in the case of al-Masri. Furthermore, Obama did not break with all security measures—or rather war practices—of the Bush administration. The

controversial military commissions for some terror suspects are still in use, and less infamous detention centers, like the one in Bagram (Afghanistan), where about 600 prisoners (three times as many as Guantanamo) are held without charge, do still exist without critical debate.⁵⁷ Such fundamental differences in tolerating extreme security measures on the brink of the rule of law could still lead to disagreements. Again, German politicians should not be too cautious about criticizing these overreactions of the days of the war on terror, as they did in the case of Guantanamo.

Third, the debate on data privacy will remain a problematic issue in transatlantic counterterrorism efforts, as the critical discussion around the data-sharing agreement between the EU and the U.S. has clearly demonstrated. Recently, European Union countries have agreed on a deal that would allow the U.S. continued access to European citizens’ financial transaction data for counterterrorism investigations. American intelligence services have been monitoring European bank transactions since 2001. When the EU found out about it in 2006, initially they were outraged. The SWIFT (Society for Worldwide Interbank Financial Telecommunications) agreement finishes this debate and allows the continued covert data transfer for nine months, with plans to draw up a longer-term agreement when it expires. The problem for U.S. services has been that SWIFT is transferring much of its data business to servers located in the Netherlands and Switzerland, where the U.S. would no longer be able to consult the data. Within the EU, Germany and Austria were most critical and worried about the possibility of personal information possibly being passed on from the U.S. to third parties. Despite abstentions by Germany, Austria, Greece, and Hungary, these states still allowed the controversial agreement to pass. While German justice minister Sabine Leutheusser-Schnarrenberger stated that “this decision makes millions of citizens in Europe less secure,” the EU counterterrorism coordinator, Gilles de Kerchove, argued that SWIFT helped to prevent plots in Europe.⁵⁸ With the use of financial transaction data a terrorist network in Britain was broken up as well as the arrest of four plotters of the “Sauerland Cell” in Germany. In sum, the debate on the one hand illustrates that Germans are more concerned in data privacy,

than their U.S. counterpart. One the other hand, as the positions of Leutheusser-Schnarrenberger and de Kerchove show, the question of how to balance between security measures and civil liberty rights must be newly posed in each political field.

6. Policy Recommendations/Looking Ahead

The current debate on the Afghanistan mission demonstrates that German politicians waited too long in developing a comprehensive counterterrorism strategy, which is not guided by daily crisis-management. The task to develop a counterterrorism strategy that would be effective in the short term and de-escalating in the long term is difficult, yet it remains to be done. The threat of Jihadist terrorism is still real and at the top of the security agenda. After the heated discussions on the Kunduz incident, which illustrate the change of national political culture, it would be a good point in time for Germans to lead a more basic debate on domestic and foreign counterterrorism. This report and the following policy recommendations should be understood as possible starting points for such a necessary discussion.

■ German politicians need to lead an overdue substantial debate on the Afghanistan mission that moves beyond general justifications of multilateral ally commitments and argumentative mixtures of vague security interests and pledges for human rights. Create a collective narrative, explain what counterterrorism means for Germans, and name the reasons why the Bundeswehr is involved in Afghanistan.

■ The German government should be cautious if justifying the Afghanistan mission with moral arguments of human rights. Such arguments are in conflict with the national political culture and the underdeveloped strategic culture against the background of the pacifist tradition after World War II. To focus on security interests due to the threat of Jihadist terrorism, as former defense minister Struck argued, is more credible and better to sell to the German public than arguments of democracy stabilization. Trying to transport an image of a “clean war” is definitely the wrong way to establish a sense-making narrative in counterterrorism.

■ Avoid reformulating counterterrorism strategy that focuses on security measures over civil rights. Such measures are perceived as overreactions in counterterrorism in some cases, like the rediscovered grid search or data retention. In the case of data retention, the recent complaints of one of the judges of the German Federal Court that no political decision-maker from the legislative branch can be found who justifies and defends the controversial data retention policy illustrates that the Federal Court still functions as political corrective. Furthermore, the political behavior is not suitable for strengthening public trust in the political decision-making process.

■ The ignorance of basic human rights in counterterrorism (Abu Ghraib, Guantanamo) leads to a fundamental problem of credibility as well as to a reinforcement of radicalization in Jihadist terrorism. The German government should reduce security cooperation with authoritarian regimes like Uzbekistan, which ignore human rights. The public perception of a common complicity between German security services and authoritarian regimes is one of the main causes of terrorist attacks and can provoke further ones. The thwarted attack of the “Sauerland cell,” whose members were in a small Uzbek group called Islamic Jihad Union, can be interpreted as an example for such a fatal feedback loop.

■ The search of causes for homegrown terrorism should not be oversimplified. The previous U.S. argument, that failed integration in Europe leads to homegrown terrorists in European cities, is often misleading. The phenomenon of transnational terrorism is primarily an expression of modern globalization and refers to the identity search of young, overstrained, and mostly intellectual people in a globalizing world. Additionally, the causes of terrorist activities in Europe are in many cases to be found in regional conflicts that are transferred from their native countries, e.g., the Algerian conflict in France, the Pakistani conflict in Britain, or the Kurds minority problem in Germany.

■ Finally, strengthen the German Federal Security Council (*Bundessicherheitsrat*). The committee, originally founded in 1955, is guided by the German chancellor and includes the leader of the Federal Chancellery, and the ministers of the main agencies

that deal with national security concerns. Yet the committee was previously used to authorize sending military forces abroad. A newly-created position, similar to the U.S. National Security Advisor, could revitalize the Bundessicherheitsrat as a control center to coordinate the issues of domestic, foreign, and security policy.

NOTES

- 1 I am especially appreciative of the research assistance I received from Jonas Brüseken and Natalie Schmidthäussler. I would thank Dirk Peters, Wolfgang Wagner, and Taylan Yildiz for helpful comments as well as the AICGS team, especially Jessica Riester and Kirsten Verclas, for comments and editorial work.
- 2 "Für einen Abzug," *Der Freitag*, 8 September 2009, <<http://www.freitag.de/wochenthema/0937-aufruf-abzug-afghanistan-freitag>>.
- 3 See title cover: Wann dürfen Deutsche töten?, *Der Spiegel*, 30 November 2009 and the headline "Kundus: Gezieltes Töten erlaubt?," *Frankfurter Allgemeine Zeitung*, 13 December 2009.
- 4 "Angeklagte wollten viele US-Soldaten töten," tagesschau.de, 10 August 2009, <<http://www.tagesschau.de/inland/sauerlandprozess128.html>>.
- 5 On this point, see: John S. Duffield, "Political Culture and State Behavior. Why Germany Confounds Neorealism," *International Organization* 53/4 (1999): 765-803 and also: Franz-Josef Meiers, *Crossing the Red Lines? The Grand Coalition and the Paradox of German Foreign Policy*, AICGS Policy Report 32 (Washington, D.C.: American Institute for Contemporary German Studies, 2008).
- 6 On this debate and the following critical points, see: Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany," *German Law Journal* 5/5 (2004): 435-460 and Verena Zöller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights," *German Law Journal* 5/5 (2004): 469-494.
- 7 Council Framework Decision of 13 June 2002 on combating terrorism: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0475:EN:NOT>>.
- 8 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:en:NOT>>.
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- 10 A Secure Europe in a Better World – The European Security Strategy, 7 <<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>>.
- 11 See for the report on the Implementation of the European Security Strategy – Providing Security in a Changing World, <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/eports/104630.pdf> (especially p. 4)
- 12 On this point, see: Marieke de Goede, "The Politics of Preemption and the War on Terror in Europe," *European Journal of International Relations* 14/1 (2008): 161-185, especially 168.
- 13 On this argument, see: Oliver Lepsius, "Liberty, Security, and Terrorism: The Legal Position in Germany," *German Law Journal* 5/5 (2004): 435-460; and Verena Zöller, "Liberty Dies by Inches: German Counter-Terrorism Measures and Human Rights," *German Law Journal* 5/5 (2004): 469-494.
- 14 See Ulrich Schneekener "Warum lässt sich Terrorismus nicht 'besiegen'?" in *Vom Rechtsstaat zum Präventivstaat*, eds. Stefan Huster/Karsten Rudolph (Frankfurt am Main: Suhrkamp, 2008), 44.
- 15 See also the controversial manifest of Gerhart Baum, *Rettet die Grundrechte? Bürgerfreiheit contra Sicherheitswahn* (Köln: Kiepenheuer & Witsch).
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THE BUSH COUNTERTERRORISM
LEGACY AND REMAINING
CHALLENGES FOR OBAMA

TAKING STOCK OF TERRORISM: THE BUSH COUNTERTERRORISM LEGACY AND REMAINING CHALLENGES FOR OBAMA

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Barack Obama took over White House reins almost twelve months ago, warranting the question whether anything has changed about the way terrorism is handled on the western side of the Atlantic. If so, what are the implications for the transatlantic partnership? The Bush legacy in the counterterrorism (CT) arena was not only enormous, due to its eight year tenure and unprecedented expansion of executive powers, but also controversial, due to the formulation of principles and practices that went beyond established U.S. and international law. After the initial military response in Afghanistan the U.S. launched a second invasion in Iraq in 2003, putting further strains on transatlantic relations.

Despite these tensions and controversies the counterterrorism partnership is alive and well—most of the European allies came along for part or much of the ride, if only grudgingly. A review of U.S. counterterrorism measures since 2001, most striking for its focus on military power and externalization, illustrates the underlying rationale and threat perceptions that have shaped U.S. counterterrorism policy. These are unlikely to change under President Obama as they are an inherent part of U.S. strategic culture, informed by history, political culture, and government structures.¹ However, the emphasis has noticeably shifted. Obama's take on Guantanamo, detainee interrogation practices, and the war in Afghanistan signals a departure from Bush policies. What are the central counterterrorism challenges the United States faces more than eight years after 9/11, and how are these best tackled?

Counterterrorism Responses after 9/11

Without question, the 9/11 attacks represented a global watershed event. The nature of the attacks—the use of commercial airliners as human missiles—was unprecedented. The perpetrators—quickly identified as members of the al Qaeda terrorist network whose leaders advocate violence to advance their radical Jihadist interpretation of Islamic principles—demonstrated a new willingness to produce mass casualties.

The attacks catapulted transnational Jihadi terrorism to the forefront of the U.S. security agenda, generating a series of foreign and domestic policy responses in the U.S. While the former had the most visible impact on the transatlantic relationship, especially after military operations in Iraq were launched, domestic responses intended to secure the American homeland also did not leave Europe unaffected, and soon caused significant transatlantic reverberations. For example, Europe's cooperation was needed, and in some instances demanded, by the U.S. for the implementation of the new border security regime. Viewed as the most capable partner for implementing costly counterterrorism measures, Europe was also increasingly considered a staging ground for terrorist attacks in the U.S. Investigations into the attacks showed that the 9/11 hijackers had taken advantage of Europe's liberal laws and societies while plotting their strikes. The 2004 Madrid and 2005 London attacks also suggested that Europe's large Muslim communities were not immune to the Jihadi virus, but oftentimes enjoyed travel privileges that granted them visa-free entry to the United States.

MILITARY RESPONSES: INVADING AFGHANISTAN AND IRAQ

On the evening of 11 September 2001, President George W. Bush declared a war on terrorism, later explaining that the attacks “were on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”² Consistent with the war approach, Congress passed the first of two war resolutions, the Authorization for the Use of Military Force (AUMF), in October 2001. The AUMF paved the way for the U.S. invasion in Afghanistan (in addition to a series of other CT programs). Dubbed Operation Enduring Freedom, the effort was designed to hunt down al Qaeda leaders responsible for the 9/11 attacks, as well as senior Taliban allies who had been harboring and supporting al Qaeda. By December 2001 the Taliban had been driven from power by a combination of U.S. Special Forces, U.S. airpower, and Afghan Northern Alliance troops. Operation Enduring Freedom continued as U.S. forces stayed behind to chase down those al Qaeda and Taliban leaders that had escaped. Initially limited to Kabul, the mission of the UN-mandated International Security Assistance Force (ISAF) established in December 2001, was expanded across the country between 2003 and 2006. This mandate coincided with NATO officially taking over the ISAF command. Having turned down NATO support in fall 2001 to avoid burdensome multilateral coordination, burden-sharing became more appealing in the face of mounting nation-building challenges in Afghanistan and an increasingly insurgency-torn Iraq.

Less than eighteen months after staging Operation Enduring Freedom, the Bush administration launched a second military invasion in Iraq, justified as a last minute effort to prevent Saddam Hussein’s regime from producing nuclear weapons and handing them over to al Qaeda. Similar to the Afghanistan invasion, public support for the war was widespread. Use of military force in Iraq was further authorized by a second joint congressional resolution adopted in fall 2002, demonstrating strong bipartisan support. As is well known, the war was not as well received by a number of key European allies—with France and Germany being among the most outspoken critics of the war—resulting in one of the fiercest transatlantic rows since the end of the Cold War.

A NEW DETENTION AND INTERROGATION REGIME

The al Qaeda operatives and Taliban fighters that were apprehended in Afghanistan (and later in Iraq and elsewhere around the world) were detained in accordance with a newly formulated detention regime and categorized as so-called unlawful enemy combatants. The Military Order “about the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” signed by President Bush in November 2001 authorized indefinite detention without charge (or access to lawyer), and established so-called military commissions that would eventually be used to prosecute the detainees.³ As the military commissions were designed to facilitate convictions, they favored the prosecution and significantly lowered the standards of evidence required for conviction. In creating these new detention procedures, the Bush administration ended up not only suspending habeas corpus rights but also the Geneva Conventions—arguing that the international laws of war only apply to wars between or within nation states—thus denying enemy combatants any prisoner of war status and rights.

Some of the most senior al Qaeda and Taliban figures were transferred to a U.S. military base in Guantanamo Bay, Cuba, a name that quickly became the international symbol for the extremely contentious detention regime. Enemy combatants were also detained in Afghanistan and Iraq, or, as transpired later on, sent to CIA-led secret prisons in eastern Europe and elsewhere. Further details regarding the treatment of the detainees surfaced, increasing the domestic and international debate and political fallout over new controversial counterterrorism practices. For example, high-ranking detainees were subjected to interrogation techniques such as water-boarding, a practice that simulates drowning. While the method had been outlawed as torture, it was resurrected by the Bush administration to obtain information needed for the prevention of future catastrophic attacks.

A NEW DOMESTIC COUNTERTERRORISM ARSENAL: INTELLIGENCE AND LAW ENFORCEMENT REFORMS

The list of domestic CT reforms initiated after the 9/11 attacks is long. The immediate focus was on

finding remedies to the perceived intelligence failures leading to the 9/11 attacks. In addition, reforms illustrated an attempt to centralize and streamline coordination, coupled with the need to ensure that the “dots could be connected.” As a result, institutional CT reforms mostly centered on strengthening information-sharing and increasing coordination among security services. Beyond that, security agencies received a series of new instruments, ranging from new surveillance measures, investigative tools, and greater access to public and private data. On the judicial side, new terrorism offences were adopted to facilitate terrorism prosecution.

Among the new institutions created were the Homeland Security Office/Advisor inside the White House in 2001, the Terrorist Threat Integration Center (that would later be renamed National Counterterrorism Center, NCTC), and the Terrorist Screening Center; the latter two were both set up in 2003. What was common to all three institutions was their flat organizational structure and networked design, bringing together different agencies, analytical skills, intelligence, and watch list data. The recommendations of the 9/11 commission, which issued its final report on the investigation of the facts and circumstances related to the terrorist attacks in summer 2004, triggered additional institutional reforms. Most prominently, the position of the Director of National Intelligence (DNI, whose office would also house the aforementioned NCTC) was established in 2004. Designed to strengthen the coordination of the sixteen member strong intelligence community, the DNI replaced the previous Director of Central Intelligence (a dual-hatted position filled by the CIA director) as both chief coordinator and intelligence advisor. Illustrating the largest reorganization effort since 1947, the Department of Homeland Security consolidated twenty-two separate agencies and offices and instantaneously became the third largest U.S. government agency. Far from being flat designs, the Office of the DNI and DHS represented more hierarchical and hence bureaucratic approaches to fixing the perceived interagency coordination problems. Following the need to strengthen its domestic intelligence facilities, the FBI merged its three intelligence and CT-related units in an internal reshuffle and formed the National Security Branch in 2005.

Challenges related to organizational cultures required a more long-term approach as they involved major paradigm shifts. Most notably, the intelligence community had to learn how to shift gears from a “need to know” to a “need to share” *modus operandi*, in an effort to facilitate information sharing across agencies. Similarly, the FBI has attempted to embrace a more “preventive paradigm” and collect evidence that will help uncover the next plot, rather than close the next criminal case.

The 2001 Patriot Act and 2004 Intelligence Reform and Terrorism Prevention Act, in addition to provisions adopted as part of other Acts over the years, introduced new and also expanded existing surveillance measures. Some of the more controversial tools included and/or lowered the hurdles for so-called administrative subpoenas (issued by FBI officers and without court approval) for the collection of “transactional data,” “sneak and peak” search warrants for businesses and homes with delayed notice, “roving wiretaps” (that apply to all communication devices of terror suspects), and access to tangible items (including documents, books, records, and papers) “in connection with” a terror investigation. The hurdles for foreign intelligence-related wiretap and search warrants were considerably lowered to facilitate domestic surveillance operations—the 4th amendment prohibits spying on Americans and requires either a criminal probable cause hurdle or proof of a foreign intelligence or national security threat (and in both cases individual warrants). Because these reforms still did not go far enough, at least from the perspective of the Bush administration, a secret National Security Agency (NSA)-led surveillance program was launched, which bypassed traditional warrant application procedures. Thereby, so it was argued, the program provided security services with the necessary speed and flexibility to uncover terrorist scheming. While the full details of the classified program remain unknown, it is clear that its scope was vast: it targeted all those international phone and internet communications of people inside the United States with suspected terrorists abroad, and further wiretapped communications of anyone connected to those people.

To help in this preventive effort, the criminal justice system was also strengthened. Specifically, the

Patriot Act introduced new terrorism offenses to facilitate the prosecution of terrorist-related crimes. Most remarkable were amendments to the “material support” clause (which since 1996 had been used to try those accused of aiding terrorists by means of material support or resources, personnel, and training) to include “expert advice and assistance.” The Intelligence Reform Act further specified these definitions to ensure terrorist camp visits would be considered training. Last but not least, it created a new legal basis for the prosecution of “lone wolf terrorists” not connected to a foreign nation or terrorist organization.

A SYSTEM OF LAYERED BORDER SECURITY

Apart from the military operations in Afghanistan and Iraq, and the new domestic counterterrorism arsenal, a main focus after 9/11 has been on border security. Specifically, U.S. border security policy has been guided by a two-pronged approach that aims to identify and intercept dangerous people and goods before they reach the U.S. homeland to cause havoc.

The central measures designed to keep the bad guys out included a new watch list regime; a revised U.S.-VISIT (Visitor and Immigrant Status Indicator Technology) program that stores biometric data of people entering the country and has been supplemented by the recently established ESTA (Electronic System for Travel Authorization); and the SEVIS (Student and Exchange Visitor Information) system, which keeps tabs on all foreign nationals who enter the U.S. on student visas processed by U.S. consulates overseas and links DHS border and immigration authorities with American universities.

In the context of the new watch list regime, U.S. authorities began requesting and compiling passenger name records from all international flights arriving in the United States and checking them against government watch lists. In addition to the more high-profile no-fly list run by DHS, other watch lists include, but are not limited to, the FBI-run NCIC (National Crime Information Center) list, the State Department CLASS (Consular Lookout and Support System) list, and the DHS-led IBIS (Interagency Border Inspection System) list. These lists are compiled by their respective government agency, but

consolidated by the aforementioned Terrorist Screening Center (TSC), intended as a sort of “service center” for any watch list-related inquiries by law enforcement personnel.

The second major element of the U.S. border security regime aims to secure dangerous materials destined for the United States, especially those shipped in containers, while ensuring the uninhibited flow of legitimate trade. The Container Security Initiative (CSI), started in early 2002, represents the centerpiece of this effort. As part of the initiative, U.S. authorities work with some sixty foreign ports to identify and screen any high-risk containers before they are shipped to the United States.

In an effort to strike a balance between security and the global supply chain, and minimize the impact on legitimate trade, the CSI was supplemented with the Customs-Trade Partnership Against Terror (C-TPAT). In the context of this public-private partnership, importers can apply for a C-TPAT certificate, provided they submit their security profile, identify security gaps, and implement additional security measures. In exchange, trusted companies receive preferential treatment, which translates into reduced customs inspections and border delays.

Both approaches taken together represent a “layered approach” to border security: various “interdependent, overlapping, and reinforcing” measures were designed to deter, prevent, or interdict any terrorist-related border crossings of people or cargo, as well as terrorist attacks.⁴

Explaining CT Responses: U.S. Rationale and Strategic Culture

THE PRIMACY OF MILITARY FORCE

While the Bush administration pledged to use every instrument of national power in the prosecution of the 9/11 terrorists—including diplomatic, economic, law enforcement, financial, information, intelligence, and military means—the latter arguably played the most prominent role in the ensuing war on terror. As a nation at war, the United States reserved the right to not only act unilaterally but also preemptively, while exercising its “inherent right of self-defense.”

Even though this approach marks a departure from general CT practices in the 1990s—neither the Khobar Towers attacks in Saudi Arabia in 1996 nor the 2000 attack against the USS Cole in Yemen triggered military responses or reprisal strikes, but a series of criminal investigations and indictments—the justification for the 1998 U.S. cruise missile strikes in Sudan and Afghanistan shows some striking parallels to the response after 9/11.

The strikes, authorized by President Bill Clinton in retaliation for the U.S. embassy bombings in Kenya and Tanzania, were the notable exception to the law-and-order CT approach in the 1990s. The case is remarkable because Clinton administration officials at the time not only described U.S. military retaliation as an act of self defense needed to preempt other, more lethal and imminent attacks against the U.S., but also noted this would mark the beginning of a “real war against terrorism”⁵—reminiscent of the arguments and language used by the Bush administration after 9/11. The 1998 case also uniquely highlights U.S. rationale: Because al Qaeda had successfully launched simultaneous attacks against U.S. targets in two African countries, and thereby shown global reach, the United States had to flex its muscle and demonstrate “infinite reach” by striking on two continents at the same time. Clearly, the capacity to project military power on a global scale is viewed an invaluable instrument to showcase American resolve and strength, but serves as much to protect U.S. superpower status and interests around the world.

However, any sort of sustained campaign needed for a “real war against terrorism” requires a broad public consensus, which is difficult to come by and was evidently missing in the aftermath of the cruise missile strikes. In fact, the timing (President Clinton was in the midst of the Lewinsky scandal), highly secretive decision-making process (limited to a select group of senior cabinet members), target selection (according to then-CIA director George Tenet, the evidence linking Sudanese targets to al Qaeda “could be drawn only indirectly and by inference”),⁶ and overall usefulness (al Qaeda leaders escaped unharmed) of the attacks were strongly questioned and criticized by many, including senior government officials, lawmakers, the American media, as well as the international community.

The shock of the 9/11 attacks and mass casualties inflicted by al Qaeda eliminated any of the domestic doubts and reservations that existed in the aftermath of the 1998 bombings. From an American perspective—and consistent with the line of argumentation put forth by Clinton officials in 1998—the 9/11 attacks constituted an act of war by an international terrorist organization with global reach, which required a global response and war on terrorism. The war declaration demonstrated resolve, implied that victory was not only imperative but feasible, and carried the battle back to the enemy, away from the U.S. shore.

Apart from the fact that the United States has the capacity to respond with overwhelming military force, American strategic culture—which may be best thought of as a set of shared beliefs, perceptions, and assumptions, informed by historic experiences, political culture, and system of government—holds an important key to explaining U.S. threat perceptions and responses to the 9/11 attacks.⁷ U.S. relations and conduct in the international system have been strongly influenced by the concept of American exceptionalism—a term coined by Alexis de Tocqueville in the nineteenth century—which gave rise to the notion that the U.S. holds a special place in the world due to its unique historic evolution, location, liberal democratic values, and moral principles. Accordingly, these attributes have furnished the U.S. with a unique moral authority and leadership role in the world. Moral principles (defined as what is considered right or wrong by American standards) have guided U.S. foreign policy conduct since the early days of the republic. Translated into foreign policy terms, this means that the United States has at times chosen to lead by example, and at other times endorsed the use of military might to correct wrongdoing or spread democratic principles in the world, as evinced by the recent Bush administration.

As the world is being cast in good versus evil terms, friends, enemies, and threats are more easily conceived of in absolute terms, e.g., an “evil empire” (used by President Ronald Reagan to describe the Soviet Union), “axis of evil” (used by President Bush to label rogue regimes of North Korea, Iran, and Iraq during the 2002 State of the Union address), or “old Europe versus new Europe” (used to distinguish

between those European allies who opposed and supported the 2003 Iraq War). In a similar vein, the threat posed by al Qaeda was categorized as “new terrorism”—new in the sense that the primary objective of causing mass casualties appeared to overwhelm any political objectives that had been pursued by “old terrorism,” and required those old, more traditional groups to exercise some restraint due to their dependence on popular support. In stark contrast to these traditional terrorist groups, new terrorism, as represented by al Qaeda Jihadi terrorists, was characterized by a new willingness to sacrifice one’s own life for the cause.

Taking this logic a step further, this also meant that weapons of mass destruction (WMD) were the ultimate prize for any Jihadi-style suicide attack, rendering Cold War deterrence concepts obsolete. Even before 9/11, U.S. CT policy was shaped by the perceived triad linkage between weapons of mass destruction, terrorism, and enemy rogue states. Illustrative of the rogue-terrorist connection are the State Department lists of state sponsors of terrorism, featuring Syria, Cuba, Iran, and Sudan, in addition to the (much longer) list of non-state foreign terrorist organizations. Various government commissions in the years and months before 9/11 focused on the rising terrorist threat, as well as the growing dangers of a terrorist attack on U.S. soil involving WMD.⁸ Because nuclear weapons are extremely difficult to manufacture, it is assumed that terrorists will acquire the necessary materials and technology from a nuclear state. The aforementioned Container Security Initiative directly addresses the nuclear threat scenario: CSI was launched with the intention of protecting U.S. ports and local communities from a nuclear or dirty bomb entering a port in an undetected container and being set off on the U.S. homeland.

When considering these factors, it came as little surprise when in the immediate aftermath of the 9/11 attacks President Bush promised that the U.S. “will make no distinction between those who committed these acts and those who harbor them.”⁹ Arguments used to justify the Iraq invasion focused on Saddam’s alleged ability to produce WMDs and the high likelihood that he would give away some of his nuclear weapons to al Qaeda, making Iraq the “central front” in the war on terrorism. The two U.S. Counter-

terrorism Strategies that were published in 2002 and 2006 also highlight the aforementioned elements of U.S. strategic culture, as well as the evolution of Bush counterterrorism policies. Apart from the prevention of terrorist attacks (to be accomplished by targeting and ultimately eliminating the terrorists and their ability to connect and communicate, recruit members, raise funds, and spread propaganda), a second major objective was to deny terrorists the support, sponsorship, and sanctuary of rogue states, specifically Iran and Syria, in addition to any failed states. Needless to say, U.S. interests and targets had to be protected both at home and abroad. These CT objectives continued to be a central part of what was referred to as the “short-term approach” in the 2006 version of the Strategy on Combating Terrorism. Clearly written after the 2003 Iraq invasion, the revised strategy added new emphasis to deterring and preventing access to WMDs to rogue states and their terrorist allies. As part of the new “long-term” approach to terrorism, the 2006 Strategy called for the “advancing of effective democracy” around the world.

EXTERNALIZATION STRATEGY: PUSHING THE BORDER AND LINE OF DEFENSE OUTWARD

While the prevention of terrorist attacks became the overarching CT objective, this was to be achieved by attacking and battling the terrorists abroad. This externalization strategy served the twin objectives of keeping al Qaeda tied up on battlefields far away from the U.S. homeland and deterring them from coming here.¹⁰ Following the same logic, senior al Qaeda and Taliban leaders apprehended on the battlefield were locked up in Guantanamo, a location that was precisely chosen because it was surrounded by ocean, safely tucked away from local communities and U.S. court jurisdiction (the latter assumption proved to be short-lived, as the Supreme Court ruled in 2003 that the U.S. court system did indeed have the authority to determine the status of foreign detainees held in Cuba).¹¹ Similarly, all other military detention centers and secret prisons are located offshore.

Consistent with the externalization approach, the U.S. has further focused on detecting and defusing threats before they reach U.S. borders. This is not only done

to protect the U.S. homeland and restore the sense of pre-9/11 invulnerability, but also tied to the experience that the U.S. homeland had been spared, with few exceptions, from wars and indigenous terrorist attacks. The U.S. surely was never subjected to a sustained terrorist campaign like Great Britain, Spain, or Germany. Hence, terrorism has been viewed as an outside threat, which can be kept offshore. The 9/11 hijackers also came from abroad. Not only did the planning of the 9/11 plot occur outside the U.S., but the nineteen hijackers spent a considerable amount of time in western Europe. The 2004 Madrid attacks and the 2005 London attacks further heightened concerns about homegrown terrorism in Europe, and possible repercussions for the U.S. Allied countries like Great Britain, Spain, and Germany have increasingly been the target of terrorists who were either born and raised in these countries, or have become naturalized citizens carrying EU passports that allow them to travel in and out of the U.S. by means of the visa waiver program.

Ergo, the overarching objective of denying terrorists and their weapons entry to the U.S. is to be accomplished by pushing the border and line of defense outward.¹² Cargo and people screening processes—such as the CSI and ESTA—are moved offshore, to allied countries, airports, or harbors. Additional counter-proliferation operations are staged on the high seas. As part of the Proliferation Security Initiative (PSI), some sixty participating states seek to interdict sea or air shipments of WMD-related materials and technology to or by states of “proliferation concern.” Borders are further reinforced by the aforementioned layered security approach of watch lists, electronic arrival monitoring, biometric identification, and the building of actual fences at the border, symbolizing the ultimate fortification of the homeland.

PRESIDENTIAL POWERS AND THE WAR ON TERROR: “WHAT’S IN A WORD?”

U.S. responses after 9/11 were further shaped and made possible by the U.S. separation of powers system. As discussed elsewhere in this essay, the Bush administration responded to the 9/11 attacks by launching a global war on terror. The war terminology was a well known tool to mobilize the American public and demonstrate strong leadership in the face of a

new threat. Wars have been declared against drugs, poverty, crime, and even cancer. More recently, Clinton administration officials advocated a war on terror in response to the embassy attacks in Africa in 1998. But the proclamation has served as more than just a powerful rhetorical instrument. It entailed significant legal implications and triggered presidential war powers. As Commander in Chief, the President is responsible for the safety of the nation in times of crisis—a responsibility that has been used by presidents as justification for a broad interpretation of presidential powers in the past. Even though wars and crises have always favored the executive, fears of an “imbalance of power” were more pronounced after 9/11 because the attacks represented an unprecedented convergence of foreign and domestic policy realms. In the face of a transnational security threat, foreign policy and national security interests became more conflated, offering a unique opportunity to apply more expansive foreign affairs powers on the domestic front. What’s more, senior members of the Bush administration, above all Vice President Richard Cheney, saw a unique opportunity to correct what they had for a long time considered the creeping “erosion of (presidential) power” and “congressional overreaching” in foreign affairs.¹³

In times of war Congress also tends to fade into the background to facilitate quick and decisive decision-making. By implication, lawmakers are more tolerant of presidential unilateral tools, including executive orders and presidential directives, and attempts to withhold information from Congress by means of executive privilege. The AUMF passed in October 2001 represented exactly that; it effectively delegated far-reaching war powers to the President, and consequently was decried as an abdication of congressional checks on presidential powers by the critics.¹⁴ At the end of the day—with or without explicit statutory or constitutional authorization—President Bush claimed that his inherent executive powers as Commander in Chief served as legal justification to go to war in Afghanistan and authorize various other CT programs, including the NSA warrantless surveillance program.

Admittedly, it was not a war that could be defined or would be governed by traditional principles and rules. There was no distinct battlefield, no viable end in the

form of a ceasefire, let alone a political settlement, and not even a tangible enemy, but an amorphous loose terrorist network. The unprecedented threats posed by the new terrorism required a new flexibility, unprecedented approaches, and fresh solutions, so the logic continued, to not only apprehend the bad guys, but also quickly gain access to any kind of information that might help prevent future mass casualty attacks. These included, in addition to the aforementioned NSA surveillance program, the creation of a new detention and interrogation regime in Guantanamo. Suffice it to say, critics have questioned the effectiveness of what they deem “standard operating procedures” in response to an unconventional national security threat: The U.S. has been waging a conventional war against an asymmetric, non-state actor. While transnational terrorism blurs external and internal security, and the al Qaeda organization has evolved into as much of a social movement and ideology as an operational network, the U.S. remains focused on an external threat in the form of al Qaeda operatives crossing the U.S. border.

SUCCESS STORIES AND BEST PRACTICES

There have not been any attacks since 9/11 in the United States, which is undoubtedly the biggest success story of all. American interests and citizens surely have been targeted abroad, most notably in Afghanistan and Iraq, but the notion of the homeland sanctuary has been somewhat restored over the past eight years. It is important to note, however, that there has been no shortage of domestic terror plots.¹⁵ While most of these plots were disrupted early on, giving rise to criticism that they did not really constitute terrorism cases, many of the terror suspects were successfully prosecuted and sent to jail with the help of the aforementioned material support clause. All in all, at least 195 individuals have been convicted of terrorism-related charges in U.S. courts since the 9/11 attacks, generally considered a strong indication that the judicial system is up to the job (and, consequently, would be capable of prosecuting even tough Guantanamo cases).¹⁶

Why have there been no attacks since 9/11? It is impossible to say, of course, but the absence of attacks is likely the result of a combination of factors. Bush administration supporters will readily point to all

those counterterrorism strategies, doctrines, policies, and principles—numerous are presented and discussed on the preceding and following pages—that were formulated and implemented in the days, months, and years following the shock of 9/11. As a result of these, so these optimists argue, al Qaeda has been deterred from an attack, severely weakened overall, and pushed back into hiding in their caves in the Afghan-Pakistan border region. More pessimistic cynical voices would retort that al Qaeda succeeded in drawing the U.S. into two costly wars, has been slowly draining U.S. resources and attention, while using the two war zones as new training, recruitment, and breeding grounds for terrorism. Arguably, al Qaeda has had an easier time attacking Americans in Iraq or Afghanistan than inside the U.S. Also, al Qaeda may be merely biding its time, plotting and strategizing for a new attack.¹⁷

On the transatlantic front—despite the political fallout over Iraq and Guantanamo policies—counterterrorism cooperation is said to be alive and well. At least two high profile terrorist plots (that we know of) have been prevented in Europe with the help of U.S. intelligence. U.S. and British officials joined forces during the now well-known Operation Overt in 2006, a security investigation involving a plot to smuggle liquid explosives on board twelve U.S.-bound airliners to be exploded in midair. Also in 2006, U.S. intelligence helped detect and disrupt the so-called Sauerland cell from staging attacks against a series of U.S. targets in Germany. Intelligence and law enforcement agencies hailing from France, Germany, Great Britain, the United States, Canada, and Australia work together on a daily basis as part of the international counterterrorism center Alliance Base in Paris. Notwithstanding these success stories, the list of challenges remains long. A sound transatlantic counterterrorism partnership needs to go beyond effective intelligence sharing and requires collaboration in many other areas as well.

Remaining Controversies and Challenges for Obama

CT AND COIN IN AFGHANISTAN: BETWEEN A ROCK AND A HARD PLACE

Military CT operations will continue to play a role under the Obama administration. Clearly, over the course of the past eleven months, Operation Enduring Freedom in Afghanistan has been catapulted back to the forefront of the U.S. foreign policy/national security agenda. Echoing Bush administration argumentation, Obama has stressed that an unattended Afghanistan will likely serve as a launching pad for another 9/11 attack, possibly on a larger scale and involving nuclear weapons. Obama's decision to authorize a troop surge of 30,000 in Afghanistan, on top of the 40,000 troops that have been deployed there since January, emphasizes the importance of Afghanistan for the first time since December 2001. Even though Afghanistan was to be the first battleground in the GWOT proclaimed by President Bush, CT operations and nation-building efforts were in practice moved to the backburner as early as 2002, when key intelligence, Special Forces, and aviation assets were withdrawn from Afghanistan in preparation for the invasion in Iraq. The general security situation began to crumble in 2003, as the central government proved unable to protect the rural population from violence, and spiraled into a full-blown insurgency within only a few years. Neither military strategy nor troop levels were adjusted to meet the new realities on the ground. Attacks on ISAF and U.S. forces continued to mount, especially in southern and eastern Afghanistan, where the Taliban resurgence has been the strongest.

The current U.S. approach therefore goes beyond mere CT designed to hunt down al Qaeda, answering the question of whether Afghanistan's terrorism problem can be effectively contained without addressing the ongoing insurgency with a clear "no," at least over the next eighteen months. By sending additional troops, Obama has decided to embrace a more complex counterinsurgency (COIN) strategy. While this strategy places emphasis on kinetic force needed to "break the Taliban's momentum" and secure the local population, it recognizes that the ultimate challenge remains far larger than this, and is

civilian in nature: The creation of a legitimate, corruption-free government with the capacity to reach into the provinces, in addition to sustainable economic development (and agricultural alternatives to poppy seeds used to make opium and heroin).

A question to consider is whether the troop surge can have much lasting impact while governance problems have not been adequately addressed and remain far from resolved. After the Taliban were driven from power in late 2001, the Bonn agreement foreshadowed the immense challenges of reconstructing a war-torn Afghanistan: the country was in need of a new government and constitution; free and fair elections; national armed and police forces; and, last but not least, economic development. The constitutional structure was decided in favor of a presidential system, which gave rise to an ineffective and corrupt central government that lacks a popular mandate and the capacity to provide basic services (including security) to the rural population (especially in the South). The latter has closed ranks (often involuntarily) with Taliban and Hekmatyar's insurgent forces, while ISAF and U.S. forces are viewed as protectors of President Hamid Karzai's puppet regime. In view of the evident lack of allegiance to the central government, there may be a need for greater power sharing arrangements to account for ethnic and tribal diversity. Possible future scenarios include devolving power to local (tribal and ethnic) leaders, to create a more federal system that will be carried by popular support.

However, the Afghan version of the troop surge model first used in Iraq a few years ago may resemble more of a "COIN-lite" than a heavy military footprint. Troop numbers are not enough to secure the highly dispersed rural population in Afghanistan, and can only focus on key population centers. In addition, Obama faces logistic problems in the sense that the troop surge might actually be carried out in increments—due to Afghanistan's landlocked position and poor infrastructure. Troops will trickle in to Afghanistan over a period of some eight months, if not more, and might jeopardize the overall surge effect. Most importantly, however, Obama decided to impose an eighteen month deadline on U.S. troop presence in Afghanistan. At the end of the day, it appears that Obama is trying to do it all: execute a

troop surge while also promising the American and Afghan publics that there is light at the end of the tunnel after more than eight years of war and foreign occupation.

The deadline might therefore help prevent the troop surge from being counterproductive, help avoid alienating the local population, and stem popular support for the insurgents. A large military footprint certainly feeds into Taliban propaganda about foreign forces representing a “threat to Afghan culture” and needs to be countered by U.S. narratives in the “war of ideas.” While the end goal can only be to strengthen Afghans to govern themselves, and find Afghan solutions to Afghan problems, this surely cannot be accomplished in only eighteen months. It may, however, offer a much needed incentive for the Afghans to get to work. Furthermore, it is important to note that the deadline is conditional—at the end of the eighteen month surge, U.S. forces will surely not pull out at once.

Despite Obama’s commitment to a concerted counterinsurgency campaign, questions and uncertainties abound. From a pessimist view, the deadline sends a message about U.S.’ waning commitment—not only to the Afghan people and NATO allies, but also to the Taliban and al Qaeda. As Obama is seeking an additional 5,000 troops from its NATO partners, this will be hard to come by. With few exceptions, military support for a “war” on terror has always been lukewarm, and especially since the U.S.-led invasion in Iraq in 2003. This is not to say that the European allies have generally opposed military CT operations. Following the 9/11 terrorist attacks against the United States, NATO member states did not only pledge their sympathy, but also invoked Article 5 of the Washington Treaty for the first time, less than twenty-four hours after the attacks. Apart from diplomatic and political fallout over Iraq incurred by the Bush administration, NATO allies have more limited military capacities and publics that are generally more critical of foreign military engagements. While the war in Afghanistan has become increasingly unpopular and difficult to justify to the various European publics, Obama’s popularity remains at record levels on the opposite side of the Atlantic, and could still translate into additional troop contingents.

IRAQ: BEWARE OF FORGOTTEN WARS

CT operations will also continue to play a role in Iraq, despite the fact that Obama has announced the withdrawal of combat troops by the end of August 2010 (the Status of Forces Agreement has a target deadline of December 2011). Signifying an important first step in this direction, earlier this year U.S. combat forces pulled out of Iraq’s cities. The fourteen month troop surge during 2007 and 2008, drawn up and overseen by General David Petraeus, catapulted an additional 24,000 troops into Iraq, leaving a total force of 140,000 troops. While the surge is widely considered a success—a central reason for why the approach is currently being replicated in Afghanistan under President Obama—the nation-building process remains a work in progress. While surely committed to the troop withdrawal (Obama has always made his opposition to the Iraq war very clear), the President is not only well advised to wait for the outcome of the elections scheduled for January, but to not repeat the Bush administration’s mistake of neglecting a still fragile country. Over the past year Iraq has noticeably fallen off the (media) radar screen—the Iraq war may not be Obama’s war, but it ought not to become the forgotten war. The troops that will remain in Iraq will continue their counterterrorism mission against al Qaeda forces and insurgent groups, as well as advise and train Iraqi security forces—all of these are likely to be more successful in the absence of a resurgent insurgency.

DETENTION AND GUANTANAMO: MORE TROUBLE AHEAD

Obama’s detention policies have marked the most dramatic break with Bush administration policies, as evidenced by the recent announcement that key 9/11 suspects will be tried in a federal court room in New York City. Conservative circles were especially critical of the decision, arguing that those who committed an act of war against U.S. citizens should not be afforded the rights and protection of a civilian court (or even military courts marital with similar standards). Accordingly, under the Bush administration these same unlawful enemy combatants did not warrant criminal court or habeas corpus protection, and were scheduled to be tried by presidential military commissions.

It should also be pointed out, however, that the Obama administration has decided to use the disputed military commissions for some terror suspects. The decision is indicative of the fear that some of these cases would fail in federal courts or standard military courts martial also used to try prisoners of war. Admittedly, the commission regime has been further reformed since Obama took office. Pursuant to these modifications, statements gained through torture or through cruel, inhuman, or degrading treatment are no longer admissible but coerced statements and hearsay evidence may still be used. Defendants now have the right to be present during their entire trial, as well as during the presentation of classified evidence, and may further examine all other evidence presented against them, cross-examine hostile witnesses, and even call their own witnesses. Among other things, detainees may be prosecuted for conspiracy and under the material support clause.¹⁸ If and how the revised system will hold up will soon be seen; Obama has designated five other suspects, including a high-ranking al Qaeda member implicated in the 2000 USS Cole bombing, for trial by military commission.

Obama administration officials have also acknowledged that long term detention without a trial remains an option and is not off the table.¹⁹ Despite the fact that the Guantanamo Bay detention facility is set to be closed at some point next year, other detentions centers, like the one in Bagram, Afghanistan, will not go away and continue to hold detainees. This is consistent with the Bush administration's interpretation of a Supreme Court landmark case, according to which the highest court confirmed the power of the government to detain unlawful combatants for the length of hostilities in e.g., Afghanistan and Iraq.²⁰ At the end of the day, many detention questions remain still unresolved.

Consecutive court rulings have challenged the new legal regime of the Bush administration on other grounds, however, e.g., ruling that the White House does not have a "blank check" to indefinitely deny legal accesses to U.S. citizen detainees,²¹ and also lacks the power to unilaterally create military commissions ("whose structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949").²² Most

notably, the Supreme Court in 2008 extended habeas corpus rights in criminal courts to all enemy combatants.²³ Ultimately, though, the highest court refrained from ordering any of them released, and also left the decision of where they should be tried to the executive branch.

While U.S. Attorney General Eric Holder's decision was heralded as a much needed and critical departure from Bush detention policies, there are concerns that the case might not hold up in a regular court, especially since some of the evidence had been obtained by means of controversial torture practices, e.g., some 200 episodes of water-boarding. As one of his first acts in office Obama banned the use of water-boarding and other interrogation techniques, and also ordered CIA-led secret detention centers closed where these techniques were practiced. However, he did retain the practice of extraordinary renditions. Dubbed "torture by proxy," the practice involves the "snatching" and transferring of terror suspects to third countries like Egypt, where they can be subjected to harsh interrogation techniques. Obama has announced that his administration will seek additional assurances from foreign governments that individuals subjected to renditions would not be tortured—as did the Bush administration before him.

Holder's announcement also does not solve the problem of the ca. 200 remaining detainees held at Guantanamo. These include some fifty prisoners that were cleared for release under Bush, but cannot be returned to their home countries, such as Egypt, Libya, Algeria, and Uzbekistan, for fear they could be tortured there. Their numbers will likely increase: Since the start of the habeas corpus proceedings, federal judges have ordered additional releases. Obama has had some success in convincing other countries to take some of them in, including European allies such as Ireland, France, Belgium, Finland, Hungary, Italy, Portugal, and Spain. While European countries are right to argue that Guantanamo is first and foremost an American responsibility, it is also important to point out that Europeans were significantly involved in facilitating rendition kidnappings and flights, transfers to and from detention centers, and the outsourcing of torture. Various European allies, including Germany and Great Britain, allegedly conducted interrogations with "their" citizen detainees

in Guantanamo and at detention centers in Pakistan and Syria, and have used intelligence obtained from interrogations and renditions.²⁴

The unresolved status of the remaining prisoners makes it difficult to meet self-imposed deadlines and campaign promises. President Obama initially ordered the Guantanamo Bay facility closed by January 2010, but in November acknowledged that he would not be able to meet the deadline. The key challenge remains to convince lawmakers of the necessity to also imprison detainees on the American homeland. This, of course, represents a major shift in argumentation as its remote geographic location served as a key justification for the selection of Guantanamo. In fact, Congress even adopted legislation prohibiting the transfer of Guantanamo detainees to the U.S., unless lawmakers have had sixty days to review White House policy on how the closure will be implemented. After Congress temporarily also blocked all funding for any transfers, these were subsequently authorized for the sole purpose of their prosecution.

WATCH LISTING AND DATA PRIVACY STANDARDS: IS MORE DATA BETTER?

Transatlantic differences regarding data privacy have played a large role in the context of U.S. border security measures, particularly the storage of airline passenger data. The 9/11 attacks led to a concerted effort in the U.S. to collect personal data and establish watch lists. These watch listing procedures did not only affect U.S. citizens but also foreign nationals, including EU citizens.

A short review of US data watch listing procedures appears in order: All terrorism data with foreign connections is stored in the TIDE (which stands for Terrorist Identities Datamart Environment) database run by the NCTC. TSC analysts comb through this data, as well as additional data supplied by the FBI (responsible for all domestic terrorism leads) in an effort to put together the various government watch lists. Since 9/11, these databases and watch lists, with the no-fly list being the most famous example, have grown exponentially. In fact, the sheer data volume has become so massive that the TIDE director felt compelled to express concerns regarding long-

term quality control.²⁵ Concerns about privacy, errors, and secrecy abound, including questions about who is on which list, how the information is compiled, verified, and corrected, how is it being used and by whom, and how long it is stored. The no-fly list has made headlines mostly because of its inability to confirm or rule out the identities of innocent people (so-called false positives that have included e.g., pilots, air marshals, armed forces personnel, and babies) whose names match those on the list. Designed to facilitate screening processes and improve redress mechanisms, the newly introduced Secure Flight system has delegated identity checks from the airlines to the government (namely the Transportation Security Administration).

Following 9/11, the U.S. government demanded that European airlines submit data on passengers flying to the United States. While the transfer of some thirty pieces of data began within a few months of 9/11, negotiations between the U.S. and the European Union over the Passenger Name Record (PNR) Agreement lasted more than five years. Consultations were first interrupted by an internal EU battle (over the question of which EU organ had authority to actually make such an agreement), subsequently settled by a European Court of Justice ruling, and thereafter stalled by EU concerns over data privacy and protection. EU representatives were mostly concerned with the kind and amount of data to be stored and over which timeframe; the accessibility of the data; and lacking redress mechanisms. In the end, it remains unclear in how far EU citizens will be able to challenge U.S. government decisions (such as including them on the no-fly list) or data privacy rules as they are not afforded the same rights as American citizens—suggesting that there will be more data privacy-related tensions in the future. Interestingly enough, the data exchange continued all throughout the negotiation marathon, despite the drawn out power struggles and EU resistance.

In November 2009, the United States achieved yet another major victory in the struggle for long-term access to European data. In this particular case, the Department of Homeland Security and the EU closed an agreement which allows U.S. law enforcement and counterterrorism agencies continued access to EU financial transaction data through the SWIFT (Society

for Worldwide Interbank Financial Telecommunications) network, which includes some 8,000 financial institutions in more than 200 countries. SWIFT admitted in 2006 that its server in the U.S. had been providing information to U.S. authorities since 2001, but without knowledge of European authorities—contributing to transatlantic strains over U.S. surveillance of EU citizens. Also in November, after more than three years of deliberations, the U.S. and EU reached a milestone agreement on new common data protection standards and data sharing, likely to further add to and expand U.S. private data collections.

CONTAINER SECURITY: IS 100 PERCENT SCREENING VIABLE?

The 9/11 Commission Act passed in 2007 expanded the screening of air and sea cargo. Most notably, the bill sets a five year goal of scanning all container ships for nuclear devices before they leave foreign ports. In other words, the act requires scanning of 100 percent of all cargo containers headed to the United States by July 2012—in fiscal year 2008, a total of 9.8 million containers were shipped to the United States from 611 different seaports.²⁶

While the 9/11 Commission Act does not specify who will bear the costs of implementing 100 percent scanning—DHS has yet to conduct a cost-benefit analysis of the 100 percent scanning requirement and its alternatives—the technological and logistical challenges are immense and have yet to be overcome. In addition, it remains questionable whether the right scanning technology is yet available; for example, radiation detection devices currently deployed at U.S. harbors are unable to identify nuclear weapons or shielded nuclear materials or devices, including highly enriched uranium as well as radiation dispersal devices (aka dirty bombs).²⁷ Also, the U.S. will to a considerable degree have to rely on the support and agreement of host nations and foreign seaports, as well as their equipment and procedures, in addition to the private industry (CSI remains an honor system that relies on “known shippers” and truthful information provided by shippers and ocean carriers). A recent government study noted that DHS had made limited progress, “leaving the feasibility of 100 percent screening largely unproven.”²⁸

In the meantime, a series of other border security programs have been left unattended and remain unfinished. While arrival information, including biometric data, is obtained from each person upon every visit to the United States, departures of foreign visitors, students, businessmen, and others are still not recorded in real time, meaning there is no electronic exit monitoring system in place. The paper-based VISIT program and its counterpart online ESTA version, both of which require airline passengers to enter the same data, have run parallel even though ESTA became mandatory almost a year ago. Passengers still fill out a paper form when on board the airplane on route to the U.S., even though they submitted the same information online before their departure to the United States. This surely cannot be considered an efficient or cost-effective approach to border security.

THE THREAT OF U.S. HOMEGROWN TERRORISM

The 2004 and 2005 terrorist attacks in Madrid and London were remarkably different from the 9/11 attacks in the sense that they were carried out by immigrants who had spent significant time in Spain, or, in the British case, by British citizens who had been born and raised in the United Kingdom. In the aftermath of the attacks, U.S. government officials like then-Secretary of Homeland Security Michael Chertoff sounded the alarm about the “possibility of Europe becoming a platform for a threat against the United States.”²⁹ Proponents of this school of thought argue that the more disenfranchised and marginalized Muslims of Europe are more likely to resort to terrorism, whereas the more integrated, economically successful U.S. Muslims are less likely to bomb their homeland, as they are mainly occupied with their quest for the American dream and true to the manifestation of the melting pot.³⁰ In addition, U.S. Muslim immigrant communities tend to be less concentrated and much smaller overall.

As noted above, this rationale has served as a central justification for stricter border security initiatives—sealing off U.S. borders to keep out al Qaeda operatives and compiling massive data collections on transatlantic travelers (as citizens from thirty European countries are privileged by the visa waiver program which allows them to enter the U.S. on a ninety day

tourist visa).³¹ However, European and U.S. counterterrorism authorities and scholars have found it impossible to profile terrorists. They come from all backgrounds, some poor, others rich, some uneducated, others decorated with graduate and doctoral degrees. In a related, ongoing debate, it is not clear what makes a terrorist: ideologies, socio-economic/political surroundings, or are they born?³² Yet another debate deals with the question of whether Jihadists loathe U.S. foreign policy, the Western presence in Muslim countries and support for the near enemy (secular Middle Eastern governments), or are generally hateful of all Western culture, principles, and values?

Depending on how these questions are answered, CT objectives and strategies differ. When taking a closer look at al Qaeda's evolution since 2001, the validity of the externalization strategy—based on the assumption that any terrorist threat comes from outside the U.S. and that U.S. Muslims are immune to radical ideologies—comes under strain. Since 9/11, the threat from al Qaeda has grown more diffuse and comes in many shades and forms. In addition to the central al Qaeda leadership, there are al Qaeda franchisees and affiliate groups, and, most importantly, those inspired by al Qaeda's Jihadi ideology. As long as the causes of Jihadi terrorism are unclear, it is imperative to consider the possibility of homegrown terrorist threat in the United States. A series of U.S. citizens and permanent residents have been involved in a number of domestic terrorist plots, even if all of these have been foiled in the early stages, and have more recently followed calls to join the Jihad in Somalia.³³ The symptoms are there, but cannot be treated by a policy that is based on countering Jihadi radicalization everywhere else but at home.³⁴

Looking Ahead: Policy Recommendations

■ GET EUROPEAN SUPPORT FOR AFGHANISTAN AND GUANTANAMO

President Obama needs to continue using his popularity to get European support for his most unpopular and yet most critical decisions and policies. Europe's support is crucial for burden-sharing purposes, but it will also confer and increase legitimacy on U.S. policies. Remind Europeans that it is not only U.S.

national security that is at stake, but also the security of the European countries.

It remains to be seen if the U.S. can beat the odds in Afghanistan—the graveyard of empires—and regain the trust of the Afghan population. At the end of the day, Obama might be trying the impossible in a country that has been at war for most of the past thirty years. It might also prove to be too late to undo the mistakes of the past seven years. It will surely not be due to a lack of commitment, as U.S. troop levels will have increased by more than 200 percent under Obama. Irrespective of the massive civilian and development challenges that lie ahead, nation-building can only flourish in a secure environment.

The Guantanamo dilemma will have to be resolved over the next twelve months, and the remaining detainees, those freed of charges and even those who are not, need to find new home countries. In order to gain support from Europe, Obama will have to convince fellow Democrats (who at least until December 2010 hold the majority in both Houses of Congress) of the need to transfer Guantanamo detainees to high-security prisons in the United States and remind lawmakers that federal prisons already house 216 international terrorists, in addition to some 140 American terrorists, including Zacarias Moussaoui, Richard Reid, the Unabomber, and Terry Nichols.³⁵

U.S. foreign policy may be rooted in national interest, but as the sole superpower the U.S. has assumed critical global responsibilities. Some of these also benefit the transatlantic allies, and have been welcomed whenever they coincide with European interests (such as the U.S. nuclear umbrella, securing loose nukes from the Soviet WMD arsenal, and military interventions in Bosnia and Kosovo). The current campaign against terrorism benefits Europe and is in Europe's interest, as an unstable Afghanistan will also pose a threat to European security. This is not the time to practice buck-passing but to engage in burden-sharing.

■ STRENGTHEN NON-MILITARY ELEMENTS OF CT

Washington should expand social, political, and economic programs needed to address the under-

lying causes of terrorism. To this day, the European Union carries the most weight in the area of international aid and development. U.S. engagement will help improve U.S. standing in the world and rebuild a tarnished U.S. image. Remember that soft power translates into hard power. Focus on building contacts and developing relations with the Muslim world, both at home and abroad. Build trust and respect between law enforcement and Muslim communities.

■ WAR OF IDEAS: DEVELOP A CT NARRATIVE

Closely related to the previous two points, the U.S.—with the help of its European allies—needs to tell the stories of the fallen Muslims.³⁶ These have suffered the most from al Qaeda’s indiscriminate violence and *takfiri* practices (declaring fellow Muslims apostate), which remains a subject of contention even among senior al Qaeda leaders. In a similar vein, take advantage of ideological or doctrinal disputes among Jihadists.

■ PROVIDE INCENTIVES FOR INFORMATION-SHARING

Efforts to facilitate information-sharing across agencies, jurisdictions, and borders have thus far focused on introducing more net-centric organizational structures, in addition to legal reforms intended to break down the “wall” between law enforcement and intelligence. Encourage cultural paradigm shifts by developing an incentive-based reward system for information-sharing. Continue to forge human relationships by bringing different agencies and cultures together in one location, similar to the NCTC or the international Alliance Base.

■ STRENGTHEN TRANSATLANTIC CT COOPERATION THROUGH CONTINUOUS DIALOGUE AND LIAISONS

The United States and its European allies should establish a permanent transatlantic CT conference or committee, and encourage the dispatch of foreign CT liaisons to the U.S. and vice versa. Draw attention to common interests, similarities between approaches, and the analysis of best practices.

■ BEWARE OF “FEEL GOOD SECURITY”

There is no perfect security, the threat scenarios are endless, and U.S. CT resources are not unlimited. The massive accumulation of counterterrorism-related data, excessive watch listing, and the envisioned screening of 10 million U.S.-bound containers per year, represent futile attempts to achieve 100 percent security. Concentrate on risk-based security and data collection.

NOTES

* In writing this report, I have benefited from countless discussions with my students at American University.

1 On the importance and concept of strategic cultures, see Wyn Rees and Richard J. Aldrich, "Contending Cultures of Counterterrorism: Transatlantic Divergence or Convergence?" *International Affairs* (2005). On the significance of government structures and political cultures, see also Dorle Hellmuth, "German and U.S. Domestic Counterterrorism Responses: Only Half A World Apart," *AICGS Transatlantic Perspectives*, June 2009.

2 George W. Bush, Military Order - Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, available at <<http://www.presidency.ucsb.edu/ws/index.php?pid=63124>>.

3 Ibid.

4 For a definition of layered border security, see William Robinson, Jennifer Lake, and Lisa Seghetti, "Border Transportation Security: Possible New Directions and Policy Options," *CRS Report for Congress* (29 March 2005), 7.

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13 Dick Cheney, "Congressional Overreaching in Foreign Policy," in *Foreign Policy and the Constitution*, eds. Robert A. Goldwin and Robert A. Licht (Washington, D.C.: American Enterprise Institute, 1990), 101-122.

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