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Legal Authorities in the Long War

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What legal structures can keep America safe against terrorist attacks? On one hand, this is a very timely issue, as we are currently in the midst of a heated debate about the appropriate means for defending our country against international terrorists. On the other hand, this is a timeless issue, one that we will continue to confront as we go through what will likely be a very long-term conflict with the forces of international terrorism.

In order to understand the state of our legal structures and how we got to this juncture, we need to go back to 9/11 and to the fundamental course correction that that day brought about. In the aftermath of the 9/11 attacks, we saw a dizzying array of changes to our national counterterrorism program. These changes were the result of several things.

First, they were a direct result of that day's death and destruction, which demonstrated in brutal relief just how vulnerable we really were to attack by a determined adversary.

Second, they grew out of the recognition that we were now dealing with a different adversary than we had faced in the past. These terrorists did not constitute a formal army with the trappings of an organized state military, the type of entity for which the rules of war were designed. Nor did they pose the type of threat that is readily addressed by the criminal justice system—a system that focuses on judging and punishing wrongdoers for completed crimes and not on preventing crimes from occurring in the first place, which of course is the preventive mission of counterterrorism.

Talking Points

- Congress needs to work with the President to craft an enduring legal structure for detaining terrorist suspects in the asymmetrical conflict against international terrorism.
- The three counterterrorism authorities that are scheduled to sunset this year have proven to be invaluable tools in our counterterrorism efforts. They are subject to careful oversight, and they should be made permanent.
- Congress needs to be involved in deciding how to prosecute detainees who are currently housed in Guantanamo as well as those who will be brought into custody.
- Though sometimes cumbersome and often frustrating for officials who are subject to it, oversight often makes the difference between passage and non-passage of national security legislation and is therefore a relatively small price to pay for an effective counterterrorism authority.

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In short, these terrorists posed a threat that was somewhere between the war paradigm and the criminal paradigm—a threat that caused us to question our preconceived notions of how justice should be administered in the context of international terrorism.

Finally, the post-9/11 reforms grew out of a recognition that our counterterrorism apparatus was ill equipped to meet today's threat from al-Qaeda-like terrorist organizations. We awoke the morning of 9/11 with a counterterrorism apparatus that was limited in size, scope, and authority; that lacked sufficient coordination among its key players; and that was designed in large part to be reactive rather than proactive and preventive.

This was not the fault of any one agency or any one Administration. To the contrary, the reality is that, until 9/11, there simply was not sufficient public and political will to force the difficult and fundamental changes that were necessary to build an effective terrorism-prevention capacity. It was only after the clarion call of 9/11 that the national will existed to fundamentally reorient the government's efforts toward terrorism prevention.

For all these reasons, the need for prompt legislative and executive action was manifest in the aftermath of the attacks, and we launched into an all-out effort to build our counterterrorism defenses. Reforms and initiatives were pursued at a furious rate, and significant pieces of legislation like the Patriot Act were signed into law in relatively short order.

A Sea Change in Counterterrorism

After a couple of years, once the immediate threat had subsided and we got through the frenetic building stage, we as a nation were then able to step back, take a hard look at all the new structural, legal, and operational innovations, and evaluate them with calm reflection.

In fact, we have been going through that evaluation process for some time now, at least as far back as the debate in 2005 and early 2006 leading up to the Patriot Act reauthorization—a debate that questioned whether the hastily passed authorities in the original Patriot Act had been drafted with sufficient safeguards and implemented with due respect for

privacy and civil liberties. That debate has morphed and been carried on through various iterations over the past few years.

In the past weeks, we have seen the most recent version of this debate on the national stage. This debate has been healthy in some ways, but I think it has had an unfortunate side-effect in that it has created a misimpression in the minds of some that the whole regime of counterterrorism prevention that was built after 9/11 is being called into question.

But, as you know, that is not the case. While a few policies have generated white-hot controversy, these policies constitute only a limited subset of the counterterrorism initiatives and reforms that have been instituted since 9/11, initiatives and reforms that include:

- Structural reorganizations, such as the stand-up of the Department of Homeland Security, the Office of the Director of National Intelligence, and the National Counterterrorism Center.
- The lowering of the legal wall that had separated our law enforcement and intelligence communities and badly handicapped our counterterrorism efforts before the Patriot Act.
- The development of new statutory and regulatory authorities, including the FISA Amendments Act, the Patriot Act and its reauthorization, and the recent rewrites of the Attorney General's guidelines for national security investigations and Executive Order 12333, which lays out authorities and limitations for our intelligence agencies.
- Fundamental reforms to agencies like the FBI, which has overhauled and reoriented its operations in an effort to take its historical facility for investigating completed crimes and apply it to the detection and prevention of terrorist threats.

This is just a sampling of the comprehensive reforms that have taken hold over the past eight years, and together they represent a sea change in the manner with which we pursue our counterterrorism mission.

What Must We Do Now?

The real debate today should be whether the executive and legislative branches will now

undertake to solidify and institutionalize the counterterrorism policies that make up that sea change. This is the challenge of the day, and it is a challenge that I am optimistic will be met under this Administration.

I am optimistic because I see a marked continuity between Administrations in relation to the vast majority of the policies and programs that have been implemented since 9/11. While there certainly are a few areas of serious disagreement, there are many more areas of agreement. When you think about it, that is really not that surprising:

1. Given the fact that the majority of these policies are simply not controversial in the eyes of most Americans;
2. Given the fact, which has been remarked upon in the press recently, that there really is not that much daylight between the national security perspective of this Administration and that which held sway in the last years of the Bush Administration;
3. Given the fact that we had a smooth presidential transition process that allowed for a meaningful sharing and mutual understanding about the origins and purposes of our national security policies; and
4. Given the fact that there historically have not been, and there should not be, wild swings in national security policies between Administrations. There is a need for policy stability—and, importantly, the *perception* of policy stability—especially when dealing in the international realm, and I believe that this Administration, like those in the past, is demonstrating an appreciation for that concern.

So, given that we have a level of continuity in the executive branch on most issues, what should happen at this point to institutionalize and solidify our nation's counterterrorism program?

In short, we need to identify those issues that are still not resolved, and then Congress needs to step up and take ownership of them. If we want to confer complete and lasting legitimacy on our counterterrorism policies, we need to bring the current debate into the legislative realm and hash it out in

the context of concrete proposals and legislative line-drawing.

I have been involved in two of those exercises over the past four years: the debate over the renewal of the Patriot Act and the extended deliberations over the amendment of the Foreign Intelligence Surveillance Act which resulted in the FISA Amendments Act of 2008. Though both were long and drawn out—and I felt like I was virtually living on Capitol Hill with all the hearings and briefings about the FISA legislation—they represented the democratic process at work with some of the most difficult issues of our time. Strong views were held and expressed, Members worked hard to develop a keen understanding of the relevant areas of law and operations, and virtually every facet of those two pieces of legislation was subject to rigorous scrutiny and debate. The result was strong legislation that provided the government the tools it needed along with sufficient safeguards to ensure that they would be used responsibly.

The upshot of this process was to put to rest the controversy that had previously swirled around each of those areas of law. The Patriot Act, which had been publicly demonized by many, became pretty much a non-issue with the passage of the Patriot Act reauthorization; and the issue of wiretapping overseas persons without a specific warrant, which had prompted the creation of the Terrorist Surveillance Program and triggered the ensuing controversy, was largely mooted by the FISA Amendments Act that laid out a workable framework for those operations and passed Congress with a broad bipartisan consensus.

The Challenge Before Us

I would like to see Congress undertake the same process with the issues we are currently facing.

First, Congress needs to address the detention issue. Just as Congress calmed the waters in the Patriot Act and electronic surveillance areas, Congress needs to work with the President to craft an enduring legal structure for detaining terrorist suspects in the asymmetrical conflict against international terrorism.

Second, Congress should act promptly to make permanent the three counterterrorism authorities that are scheduled to sunset this year. Those are:

- The authority to get roving wiretap authority in national security cases so that investigators can maintain electronic surveillance on a suspect as he switches between different phones or e-mails;
- The ability to get FISA surveillance authority against a foreign terrorist, even though he cannot be linked directly to a particular foreign power (the Lone Wolf Provision); and
- The business records provision of FISA that allows the government to procure a court order to obtain documents in a national security investigation.

These have all proven to be invaluable tools in our counterterrorism efforts. They are subject to careful oversight, and they should be made permanent.

Third, Congress needs to be involved in the decision on how to prosecute the detainees who are currently housed in Guantanamo as well as the detainees we will inevitably bring into custody as we continue to confront and capture terrorist suspects around the world.

One option is to establish a separate national security court that is designed to handle such cases with special rules that account for the specific challenges that arise from prosecuting cases that derive from intelligence and military operations—issues such as those relating to the protection of classified information and the application of the hearsay rule requirements to evidence collected in the field.

Another option is to bring those cases into the Article III courts, in which case Congress must consider whether and how our current rules and procedures could be adapted to meet the needs of these cases—for example, whether the Classified Information Procedures Act should be amended to provide greater protections for the highly sensitive information that is often implicated by these cases. These are tough issues, but there is no better time to address them than now, when both of the political branches are looking for a means of prosecuting these cases (or some number of them) in our criminal courts.

Meeting the Challenge

These are just some of the areas where the government needs new authorities and a legislative framework for prosecuting its counterterrorism efforts. Other needs are sure to arise as the terrorist threat morphs, as our adversaries adapt to our security measures, as technological change opens new opportunities for our enemies, and as intelligence tells us more about our potential vulnerabilities.

I would urge the new Administration to be forward-leaning in seeking new authorities to meet our operational needs. We have seen the consequences of waiting too long to seek the authorities that our operators need. We waited too long to dismantle the wall that handicapped coordination between our intelligence and law enforcement personnel, and we did not do so until after that handicap was laid bare in the unsuccessful effort to find the 9/11 hijackers in the days leading up to the attacks.

We also waited too long to address the problems that technological change caused in our FISA operations. Those problems were plaguing our operations before 9/11, and it was not until 2007 that we presented proposed legislation and not until the summer of 2008 before we got a final legislative fix.

If and when they identify operational needs, the new Administration should not wait and Congress should not balk at considering how to meet those needs. If the Administration can make the case that we need a particular authority and that it can be implemented in accordance with law and the Constitution, the question before Congress should not be *whether* to provide the authority but *how* to provide it with sufficient limitations and oversight to ensure its responsible use.

The executive branch learned in the course of the Patriot Act reauthorization and the FISA debate that we could live with oversight. In fact, the passage of the FISA Amendments Act was due in no small part to the executive branch's willingness to accept substantial congressional and judicial oversight in our FISA operations. Though sometimes cumbersome and often frustrating for the officials who are subject to it, that oversight—and the comfort it gives to Congress and the American people—is often what

makes the difference between passage and non-passage of national security legislation and is therefore often a relatively small price to pay for an effective counterterrorism authority.

Conclusion

So those are my wishes for the near future of counterterrorism law and policy:

- That we acknowledge the broad areas of consensus about our counterterrorism programs;
- That we develop possible solutions for those issues that remain unresolved; and
- That Congress takes them on and addresses them with a sound, deliberate legislative process.

If we do that, my hope and expectation is that the issues that seem so divisive today will go the way of the Patriot Act debate and the furor over warrantless surveillance and become the hot-button issues of the past.

—Kenneth L. Wainstein has served as Homeland Security Adviser and Assistant to the President for Homeland Security and Counterterrorism, and before that as the first Assistant Attorney General for National Security in the U.S. Department of Justice. These remarks were delivered at a May 28, 2009, conference on “Counterterrorism and the Obama Administration” sponsored by The Heritage Foundation and the Federalist Society.