

LECTURE

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The Changing Nature of Terror: Law and Policies to Protect America

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Abstract

For the launch of its National Security Law Program, The Heritage Foundation invited Kenneth Wainstein, Assistant to the President for Homeland Security and Counterterrorism under George W. Bush, to address such national security issues as: Does the United States need a new statutory framework to meet the next wave of terrorist threats? Should the U.S. revise the Authorization for Use of Military Force? What should the U.S. policy be on terrorist detainees? On May 8, 2013, Wainstein spoke about how the laws and policies designed to protect Americans must adapt to the evolving terror threat.

I want to thank The Heritage Foundation and Senior Legal Fellow Cully Stimson for having me here today. I was thinking back as I was preparing for these remarks, and it occurred to me that this is the fourth time I've spoken about terrorism at a Heritage event over the past five years. It's been a pleasure to speak at Heritage on each of those occasions, but today it's a particular honor to be part of the inaugural meeting of Heritage's new National Security Law Program.

I've been involved in our nation's discussion about counterterrorism policy since 9/11. Over that time, I have always admired those who approach controversial counterterrorism issues in a measured and thoughtful way, and with an appreciation that the protection of our nation is a shared American value that should largely transcend politics—and, in fact, is one that largely does transcend politics, as evidenced by the marked continuity in our nation's

KEY POINTS

- In 1941, Americans found themselves completely unready for Pearl Harbor. We proceeded to build the war-making machine that ultimately defeated the Axis powers; then we recognized the new danger from the Soviet bloc and designed a governmental infrastructure and a foreign policy that successfully contained the threat of Soviet Communism.
- In the aftermath of the Cold War, we let our guard down again and did not recognize the threat of international terrorism.
- Since 9/11, the U.S. has made strong efforts to bring its counterterrorism readiness more in line with fighting non-traditional adversaries. Yet, these adversaries have shifted their tactics from grand-scale attacks carried out by squads of operatives, toward the use of individuals to commit attacks without extended support networks.
- As a nation, we must continually gauge our readiness to meet the evolving threats to our national security.

This paper, in its entirety, can be found at <http://report.heritage.org/hl1235>

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counterterrorism program between the past two Administrations.

That is just the type of constructive approach that Cully has followed during his time at Heritage, and under his leadership I expect the new program to play a significant role in fostering thoughtful dialogue about these important issues in the years to come.

So, my thanks to Cully and Heritage for the honor of speaking on this special occasion, and my congratulations for what promises to be a truly impactful initiative in the world of national security policy.

The Changing Nature of Terror

As a way of setting the table for upcoming policy discussions, Cully has asked that I reprise some of the points I made in recent testimony on the Hill and provide an overview of both the current terrorist threat—primarily the threat from al-Qaeda and its affiliates—as well as the authorities we need to meet that threat.

The title of today’s talk is “The Changing Nature of Terror: Law and Policies to Protect America”—which is particularly apt given the transition in the terror threat that we are witnessing at this moment. It is important that we recognize and understand that transition, and that we carefully assess whether we have the right counterterrorism strategy, organization, and authorities in place to meet this evolving threat.

As a nation, we must continually gauge our readiness to meet the threats to our national security. Our history since the outbreak of World War II illustrates both the importance and our mixed record of calibrating our readiness to confront the evolving foreign threat. In 1941, we found ourselves completely unready for the threat that struck us at Pearl Harbor. We proceeded to build the war-making machine that ultimately defeated the Axis powers, and after the war we recognized the new danger from the Soviet bloc and designed a governmental infrastructure and a foreign policy that successfully contained the threat of Soviet Communism.

In the aftermath of the Cold War, however, we let our guard down again. While we were enjoying the peace dividend, international terrorism was going through an evolution—from the relatively isolated operations of the Red Brigades, the Baader–Meinhof gang and the other violent groups of the 1970s into the more globally integrated organizations of the

1990s, a threat that emerged in its most virulent form in the network of violent extremists operating from its safe haven under Taliban rule in Afghanistan.

We underestimated the potency of that threat, and we continued to operate with an intelligence and military apparatus that was largely designed for the Cold War. As we had in the 1930s when the totalitarian storm was gathering overseas, we failed throughout the 1980s and 1990s to reorient our defenses against the looming threat of international terrorism.

Since 9/11, the Bush and Obama Administrations have made strong efforts to bring our counterterrorism readiness more in line with the post-9/11 threat. These efforts have included a fundamental restructuring of our government’s counterterrorism infrastructure, new and expanded investigative authorities for our intelligence and law enforcement personnel, and the reorientation of our military to fight an asymmetric war against a non-traditional adversary.

Thanks to the concerted efforts of both Administrations, the past seven Congresses, and countless committed public servants, we as a nation are significantly better prepared to meet the international terrorist threat than we were on the morning of 9/11. There is no better evidence of that fact than the number of top-echelon al-Qaeda leaders who have been removed from the battlefield and the list of terrorist threats that have been foiled over the past few years.

It has recently become clear, however, that the al-Qaeda threat that occupied our attention after 9/11 is no longer the threat that we will need to defend against in the future. The threat of 2001 emanated primarily from a centrally coordinated terrorist network operating out of Afghanistan and focusing on large-scale attacks against U.S. interests, such as the 1993 World Trade Center attack, the New York landmarks threat, the embassy bombings in 1998 and finally the attacks of 9/11.

The Threat from Smaller-Scale Attacks. This threat has changed since 9/11 in two primary ways. First, we have seen our adversaries shift their tactics away from the spectacular attacks carried out by squads of operatives and toward the use of individuals to commit attacks without extended support networks or sophisticated operational plans—the type of attack pattern that Israel has been dealing with for many years. We’ve seen that trend here over

the past few years—for example, with Umar Farouk Abdulmutallab, the foiled underwear bomber of Christmas 2009; with Faisal Shahzad, who attempted the bombing in Times Square in 2010; with Najibullah Zazi, who plotted an attack on the New York subway system in 2009; and potentially with Tamerlan Tsarnaev, the older of the two attackers in the Boston Marathon bombings.

There are several reasons why this strategy shift makes perfect sense for our terrorist adversaries. First, with our expanding intelligence network and capacity, a small-scale attack is much easier to pull off without being detected. It is becoming increasingly difficult to coordinate all the players and the logistics required for a large-scale attack without somebody hitting a trip wire that will expose the activities to U.S. authorities.

Second, this shift makes sense as it leverages the seemingly expanding group of Americans who are getting radicalized within our own society. While still a minutely small population, characters like Major Nidal Hasan, Shahzad, and the Tsarnaev brothers provide foreign terrorist groups with the perfect operative—an American who can fit in and fly below the radar as he orchestrates his attack plans.

Finally, this small-scale approach appeals to terrorist groups because they get a lot of bang for their buck. You can be sure that it has not escaped their notice that two flunkies with a couple of pressure cookers were able to shut down a major American city and monopolize the attention of the American people for the better part of two weeks.

The executive branch has adapted to focus on this threat in a number of ways. On a macro level, it has built up a counterterrorism apparatus that can better connect the relevant data points and alert us when such operatives are in our midst. On a micro level, the Intelligence Community has developed specific initiatives that focus on such individuals. One such initiative is the “pursuit teams,” implemented by the National Counterterrorism Center (NCTC) in the aftermath of the foiled underwear bombing in 2009. These teams of NCTC analysts focus on chasing leads among the snippets and fragments of information collected across the Intelligence Community in an effort to identify and neutralize terrorist operatives before they strike. Much of the after-the-fact analysis since the Boston Marathon bombings has centered on the effectiveness of these measures—a process that is very healthy, so long as it is undertaken

in a constructive manner and not in a “gotcha” kind of way.

The Decentralization of Al-Qaeda. The other major threat development has been the diffusion of operational authority and control within the al-Qaeda organization. Due largely to our counterterrorism efforts, the centralized leadership that had directed al-Qaeda operations from its sanctuaries in Afghanistan and Pakistan—known as Al-Qaeda Core—is now just a shadow of what it once was. While still somewhat relevant as an inspirational force, Zawahiri and his surviving lieutenants are reeling from our aerial strikes and no longer have the operational stability to manage an effective global terrorism campaign. The result has been a migration of operational authority and control from Al-Qaeda Core to its affiliates in other regions of the world, such as Al-Qaeda in the Arabian Peninsula, Al-Qaeda in Iraq, and Al-Qaeda in the Islamic Maghreb.

As Andy Liepman of the RAND Corporation cogently explained in a recent article, this development is subject to two different interpretations. While some commentators diagnose al-Qaeda as being in its final death throes, others see this franchising process as evidence that al-Qaeda is “coming back with a vengeance as the new jihadi hydra.”

As is often the case, the truth likely falls somewhere in between. Al-Qaeda Core is surely weakened, but its nodes around the world have picked up the terrorist mantle and continue to pose a threat to America and its allies—as tragically evidenced by the recent violent takeover of the gas facility in Algeria and the American deaths at the U.S. Mission in Benghazi last September. The threat from these affiliates has been significantly compounded by the terrorist opportunities created by the chaotic events following the Arab Spring.

The executive branch is adapting its policies and operations to address this development as well. It is working to develop stronger cooperative relationships with governments in countries like Yemen where the al-Qaeda franchises are operating. They are coordinating with other foreign partners—like the French in Mali and the African Union Mission in Somalia—who are actively working to suppress these new movements. And finally, they are building infrastructure—like the reported construction of a drone base in Niger—that will facilitate counterterrorism operations in the regions where these franchises operate.

Call for Congressional Action

While it is important that the Administration undergo this strategic reorientation, it is also important that Congress participate in that process. Over the past 12 years, Congress has made significant contributions to the post-9/11 reforms of our counterterrorism program. First, it has been instrumental in strengthening our counterterrorism capabilities. From the Authorization for Use of Military Force to the PATRIOT Act and its reauthorization to the critical 2008 amendments to the Foreign Intelligence Surveillance Act, Congress has repeatedly answered the government's call for strong but measured authorities to fight the terrorist adversary.

Second, congressional action has gone a long way toward institutionalizing measures that were hastily adopted after 9/11, and is creating a lasting framework for what will be a "long war" against international terrorism. Some argue against such legislative permanence, citing the hope that today's terrorists will go the way of the radical terrorists of the 1970s and largely fade from the scene over time. That, I'm afraid, is a pipe dream. The reality is that international terrorism will remain a potent force for years and possibly generations to come. Recognizing this reality, both Presidents Bush and Obama have made a concerted effort to look beyond the threats of the day and focus on regularizing and institutionalizing our counterterrorism measures for the future—as most recently evidenced by the Obama Administration's effort to develop lasting procedures and rules of engagement for the use of drone strikes.

Finally, congressional action has provided one other very important element to our counterterrorism initiatives—a measure of political legitimacy that could never be achieved through unilateral executive action. At several important junctures since 9/11, Congress has considered and passed legislation in sensitive areas of executive action, such as the authorization of the Military Commissions and the amendments to our Foreign Intelligence Surveillance Act. On each such occasion, Congress's action had the effect of calming public concerns and providing a level of political legitimacy to the executive branch's counterterrorism efforts. That legitimizing effect—and its continuation through meaningful oversight—is critical to maintaining the public's confidence in the counterterrorism means and methods that our government uses. It

also provides assurance to our foreign partners and thereby encourages them to engage in the operational cooperation that is so critical to the success of our combined efforts against international terrorism.

These post-9/11 examples speak to the value that congressional involvement can bring to the national dialogue and to the current reassessment of our counterterrorism strategies and policies. It is heartening to see Members of Congress starting to ratchet up their engagement in this area. For example, certain Members are expressing views about our existing targeting and detention authorities and whether they should be revised in light of the new threat picture. Some have asked whether Congress should pass legislation governing the executive branch's selection of targets for its drone program, with some suggesting that Congress establish a judicial process by which a court reviews and approves any plan for a lethal strike against a U.S. citizen. Others have proposed legislation more clearly directing the executive branch to hold terrorist suspects in military custody, as opposed to in the criminal justice system. While these ideas have varying strengths and weaknesses, they are a welcome sign that Congress is poised to become substantially engaged in counterterrorism matters once again.

The "Going Dark" Problem. I would propose that Congress undertake two specific efforts at this point. First, I would like to see Members fill a gap in investigative capabilities that has largely developed since Congress filled many of the pre-9/11 gaps with the PATRIOT Act and ensuing legislation. For several years now, FBI officials have been sounding the alarm about a problem they call "going dark," which refers to their increasing inability to get certain communications providers to conduct judicially approved electronic surveillance on their systems. The problem is a complex one, but, in short, it stems from the growth of different social networking and peer-to-peer communications services that do not—or cannot—provide the government with the assistance necessary to wiretap the communications running over their services. This situation is handicapping law enforcement and intelligence collection and raises the specter that the FBI will miss those communications that might tip them off to the next terrorist attack.

It has been reported by some media outlets—most recently in a Charlie Savage article in this morning's *New York Times*—that a government task

force is preparing draft legislation to compel communications companies like Facebook and Google to facilitate surveillance when so ordered by a court. I hope that a proposal is in the works, and I hope that Congress gives it serious consideration. As the FBI has publicly explained, going dark is a serious problem for them, and fixing it is their number one legislative priority.

Amending the Authorization for Use of Military Force. Another area that is ripe for legislative action relates to the Authorization for Use of Military Force (AUMF), passed by Congress on September 14, 2001. The AUMF authorized the executive branch to use military force against persons or groups who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,” which courts have interpreted to include al-Qaeda, the Taliban, and affiliates thereof. With the diffusion of power in the al-Qaeda network, the existing authorization may no longer be able to account for groups like Ansar al Sharia and Boko Haram, which pose a serious danger to the U.S. but have little direct connection to anyone who “planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.”

As Cully will be explaining in congressional testimony next week, there are a number of proposals for amending the AUMF to allow the use of military force against those non-al-Qaeda groups that pose a deadly threat to our country and our people. I hope that Congress will look carefully at these proposals, and consider how we should go about identifying those groups that are dangerous enough to warrant our using military force against them. That is a weighty issue, and it is one that the legislative branch is constitutionally positioned—and arguably constitutionally obligated—to consider and address.

Principles of National Security Legislation. In assessing these and other proposals for national security legislation, Congress should be guided by a pair of principles that their legislative efforts have largely followed over the past 12 years. First, it is important to remember the practical concern that time is of the essence in counterterrorism operations and that legal authorities must be crafted in a way that permits operators and decision-makers in the executive branch to react to circumstances without undue delay. That concern was not sufficiently appreciated prior to 9/11, and as a result, many of our counterterrorism tools were burdened

with unnecessary limitations and a stifling amount of process. In fact, the tools used by our national security investigators who were trying to prevent terrorist attacks were much less user-friendly than those available to law enforcement agents who were investigating completed criminal acts. The result was slowed investigations and an inability to develop real-time intelligence about terrorist threats, like the one that hit home on 9/11.

The PATRIOT Act and subsequent national security legislation helped to rectify that imbalance and to make our counterterrorism tools and investigations more nimble and effective, while at the same time providing sufficient safeguards and oversight to ensure that they are used in a responsible way, consistent with our respect for privacy and civil liberties. Any future legislation should follow that model. For instance, any scheme for regulating the use of targeted drone strikes—which may well raise myriad practical and constitutional issues beyond the concern with operational delay—should be designed with an appreciation for the need for quick decision-making and action in the context of war and targeting.

Second and more generally, Congress should maintain its record of largely resisting legislation that unduly restricts the government’s flexibility in the fight against international terrorism. For example, there have been occasional efforts to categorically limit the executive branch’s options in its detention and prosecution of terrorist suspects. While there may well be good principled arguments behind these efforts, pragmatism dictates that we should not start taking options off the table. We should instead maximize the range of available options and allow our counterterrorism professionals to select the mode of detention or prosecution that best serves our counterterrorism objectives with each particular suspect.

Flexibility should similarly be the watchword when approaching any effort to amend the Authorization for Use of Military Force. The diffusion of terrorist threats is bound to continue, and new groups will likely be forming and mounting a threat to the U.S. in the years to come. Any amended AUMF must be crafted with language that clearly defines the target of military force, but that also allows the government to use appropriate force against all such groups that pose a serious threat to our national security.

The Pattern Continues

So, that is my overview of the al-Qaeda threat of today, and my modest wish list of legislative initiatives. I mentioned at the outset that I recently reviewed my previous speeches at Heritage. It was an interesting exercise, because the topic of all those speeches was the same—the challenge of defending the nation against foreign terrorism—but the policy issues were different each time, demonstrating how new issues continually arise from the changing nature of the terrorist threat and our response. Today’s speech fits that same pattern, and that pattern is bound to continue for the foreseeable future as new issues constantly arise in what is clearly going to be a long war against the scourge of international terrorism.

It’s for that reason that we should all be grateful that The Heritage Foundation and Cully Stimson have set up the new program as a vehicle and a forum for thoughtful consideration and continuing dialogue about these important issues.

My thanks to you for your attention today, and my thanks to Heritage for allowing me to play a part in this special occasion. It’s been a pleasure to be here with you.

—Kenneth L. Wainstein is a partner with the law firm of Cadwalader, Wickersham, and Taft, LLP. The views expressed are those of the lecturer and not necessarily those of The Heritage Foundation or of the law firm.