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Are We Safer From Terrorism?
(No — But We Can Be)

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A veil of secrecy shrouds intelligence work, making it difficult to assess whether Americans actually are safer owing to the reforms implemented since September 11, 2001. The fact that no successful acts of terrorism against civilians have occurred on American soil since 9/11¹ suggests we might indeed be safer, perhaps owing in part to the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA). Director of National Intelligence (DNI) Admiral Dennis C. Blair took credit for the Intelligence Community (IC) in a recent editorial marking the fifth anniversary of the passage of the IRTPA, asserting that “many successes must remain classified.”² Intelligence professionals, Blair claimed, “are already collaborative between and across agencies to an extent that was unheard of five years ago,”³ although he acknowledged that the work of “integrating the capabilities, cultures and information technologies of 16 diverse intelligence agencies is massive, and it is incomplete.”⁴

The primary objective of the IRTPA, as Blair’s comments indicate, was to better integrate the IC. The Act was born directly out of the recommendations of the 9/11 Commission, which investigated the events leading up to the devastating terrorist attack

¹ Two separate shooting incidents in this period can be considered terrorism., although the victims in both incidents were military personnel. Major Nidal Hasan killed 13 people and wounded 30 others in a shooting at Fort Hood, Texas. See Robert McFaddon, “Army Doctor Held in Fort Hood Rampage,” New York Times, November 5, 2009 <http://www.nytimes.com/2009/11/06/us/06forthood.html>. Abdul Hakim Mujahid Muhammad shot two soldiers outside a recruiting station in Little Rock, Arkansas, killing one and wounding the other. See Steve Barnes and James Dao, “Gunman Kills Soldier Outside Recruiting Station,” New York Times, June 1, 2009, at <http://www.nytimes.com/2009/06/02/us/02recruit.html>.

² Dennis C. Blair, *Strengthening Our Nation’s Front Line of Defense*, WASH. POST, Dec. 18, 2009, at A31. One publicly known success was the plot to blow up cross Atlantic planes, which was foiled by British intelligence; Bob Sherwood and Steven Fidler, *M15 Tracked Group for a Year*, FINANCIAL TIMES, Aug. 10, 2006, available at http://www.ft.com/cms/s/0/cbed2e12-28b5-11db-a2c1-0000779e2340.html?ncllick_check=1.

³ *Id.*

⁴ *Id.*

on the World Trade Center and the Pentagon. The Commission found that in summer 2001 the IC had plentiful advance indications of an imminent attack by al Qaeda operatives (including information about possible airplane hijackings) and several missed opportunities to derail the attack. But the critical information was spread among dispersed individuals within the IC, separated by institutional barriers, who did not share the information they had—hence no intelligence analyst or department put all the clues together. The IRPTA aimed rectify this by creating the Office of the Director of National Intelligence to collect, coordinate, and communicate information across the entire intelligence community.

The very title of the IRPTA declares what it purports to do: reform intelligence in ways that will prevent future terrorist attacks. Five years on, it is appropriate to ask whether the Act has succeeded. The answer, I will argue in this essay, is not only that the effort to integrate the IC has fallen far short, but more importantly, that no amount of intelligence reform can make Americans safer from terrorist attacks when the ranks of terrorists keep swelling with new recruits. That is the situation we now face.

Part I will lay out the jarring juxtaposition between rosy assessments of improvements in the IC that have been issued contemporaneously with urgent warnings of the spread of Islamic radicalization. The IC failures leading up to 9/11 will be described in Part II, and Part III will detail the assessment of intelligence specialists that, while a few improvements have been made, the IRPTA reforms have not resolved the fundamental flaws in the IC. Even the best intelligence system, as Part IV elaborates, cannot prevent all terrorist attacks. Hence the most important component of the IRPTA are the provisions directed at dampening the supply of terrorists; as Part V shows,

however, this aspect of the Act is inadequate, amounting to nil. The way forward, Part VI suggests, begins with genuinely appreciating why Islamic terrorists are so determined to attack us.

I. Current Evaluations, or False Praise

Like Blair, previous Directors of National Intelligence have offered positive assessments of IC reforms pursuant to the IRPTA. In November 2006, three months prior to his surprise resignation from his position as the country's first DNI, John Negroponte said: "Yes, we are better prepared, and in that sense we're safer."⁵ The final report to Congress issued under Negroponte's tenure concluded:

[W]e have done much to make Americans safer against the very real threats that menace our fellow Americans....The Intelligence Community and the ODNI [Office of the Director of National Intelligence] have embraced the reforms of the past two years and are implementing them, resulting in improvements to all aspects of the IC.⁶

DNI Michael McConnell, Negroponte's successor, also gave an upbeat report to Congress: "The Intelligence Community has made significant strides in addressing the underlying deficiencies exposed by the attacks of 9/11."⁷ McConnell cited multiple examples of growing collaboration: the establishment of the National Counterterrorism Center (NCTC) with rotating personnel from all intelligence agencies; the formation of an executive committee to advise the Director, comprised of heads of the major

⁵ *Q & A: John Negroponte*, U.S. NEWS & WORLD REPORT, Nov. 3, 2006, available at http://www.usnews.com/usnews/stories/061103/3qanegroponte_print.htm.

⁶ OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, PROGRESS ON INTELLIGENCE REFORM 7 (2007) [SC: Please check what type of source is this for *Bluebooking* purposes.]

⁷ *Confronting the Terrorist Threat to the Homeland: Six Years After 9/11: Hearing before the Senate Comm. on Homeland Security and Governmental Affairs*, 110th Cong. #-# (2007) (statement for the Record of J. Michael McConnell, Director of National Intelligence)[hereinafter McConnell Statement to Congress].[SC: Please check what type of source is this for *Bluebooking* purposes]

intelligence agencies; the creation of an IC-wide searchable database of intelligence research and the development of an Wikipedia-style information resource with access limited to intelligence personnel. “[W]e have come a long way over the past years in developing a more integrated, more collaborative intelligence enterprise,” McConnell said.⁸

Grounds to discount these optimistic accounts of intelligence reform efforts will be presented shortly. First, however, consider assessments of the terrorism threat issued during this same period. The April 2006 National Intelligence Estimate (a premier IC product) is sobering:

We also assess that the global jihadist movement—which includes [al-Qaeda], affiliated and independent terrorist groups, and emerging networks and cells—is spreading and adapting to counterterrorism efforts. Although we cannot measure the extent of the spread with precision, a large body of all-source reporting indicates that activists identifying themselves as jihadists...are increasing in both number and geographic dispersion.⁹

Consider also Director McConnell’s 2007 report to Congress:

[W]e judge that [al-Qaeda] will intensify its efforts to put operatives here. . . . We assess that the spread of radical—especially Salafi—Internet sites, increasingly aggressive anti-US rhetoric and actions, and the growing number of radical, self-generating cells in Western countries indicate that the radical and violent segment of the West’s Muslim population is expanding, including in the United States.¹⁰

⁸ *Id.*

⁹ Declassified Key Judgments of the National Intelligence Estimate “Trends in Global Terrorism: Implications for the United States” dated April 2006, available at http://www.dni.gov/press_releases/Declassified_NIE_Key_Judgments.pdf. National Intelligence Estimates are highly regarded products that represent the collective best judgment of the intelligence community.

¹⁰ McConnell Statement to Congress, *supra* note 8, at #. “Salafis” advocate strict adherence to traditional Islamic values; although this sect in general is not violent, salafi jihadis groups do promote violence on behalf of their version of Islam. See Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global*, 2nd ed. (New York: Cambridge University Press 2009) 131-33.

And a leading terrorism expert at the Rand Corporation, Brian Jenkins, testified before Congress in late 2009 that “the number and geographic range of al-Qaeda-inspired attacks has been growing each year;” the cumulative tally of terrorists plots with U.S. ties “puts the level of activity in 2009 much higher than that of previous years.”¹¹

If the number of committed terrorists is indeed multiplying, then Americans cannot be “safer” in an absolute sense. Metastasizing terrorist cells can elude the efforts of even the best intelligence system.

II. Intelligence Operations Before 9/11

To evaluate intelligence reform, it is essential to review what went wrong in the period leading up to 9/11. In July 2000, the CIA conducted surveillance of a high-level al-Qaeda meeting in Kuala Lumpur. Within days, the CIA identified one attendee, Khalid al-Mihdhar, and learned that he had a U.S. visa. The NSA had information about Nawaf al-Hazmi, another attendee holding a U.S. visa, but the CIA had not communicated with other intelligence agencies about the meeting.¹² Following the meeting, al-Mihdhar and al-Hazmi entered the U.S., where they lived openly under their real names in California; both were on the plane that hit the Pentagon, and al-Hazmi is thought to have been the second in command of the entire 9/11 operation.¹³ Al-Mihdhar and al-Hazmi had numerous contacts with an FBI informant in San Diego, but FBI officials were not informed by the CIA that they were suspected terrorists until nineteen days before the

¹¹ Going Jihad: The Fort Hood Slayings and Home-Grown Terrorism, Hearing before Senate Homeland Security and Governmental Affairs Committee, 109th Cong. (2009) (statement of Brian Michael Jenkins, , available at <http://www.rand.org/pubs/testimonies/CT336/>.

¹² AMY ZEGART, *SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11* 101-03 (Princeton Univ. Press 2007).

¹³ *Id.* at 105.

attack.¹⁴ On August 24th, both were placed on a watchlist and a single FBI agent was tasked with a “routine” assignment (with a 30 day time table) to search for Al-Mihdhar, which proved unsuccessful.¹⁵ Had the CIA communicated earlier with the State Department, the NSA, and the FBI, al-Mihdhar and al-Hazmi might have been prevented from entering the country (al-Mihdhar left for a time and returned a few months before the attack¹⁶), or brought in for questioning, or kept under surveillance.¹⁷

The FBI has had its own share of failures. After discovering that a number of Islamic extremists had enrolled in flight training schools in Arizona, an agent in the Phoenix office sent a memo to FBI headquarters on July 15, 2001, warning of the “possibility of a coordinated effort by [Osama bin Laden] to send students to the United States to attend civil aviation schools.”¹⁸ The agent recommended that the Bureau examine flight schools around the country and that other intelligence agencies be informed. The memo was ignored at FBI headquarters and was not forwarded to other intelligence agencies. On August 15, 2001, a flight school in Minneapolis notified the local FBI office that a student without the usual qualifications paid cash to practice on a Boeing 747 flight simulator. An FBI agent interviewed the student, Zacarias Moussaoui, and discovered that he had jihadist beliefs, that he could not explain \$32,000 in his bank account, and that he had traveled to Pakistan.¹⁹ Strongly suspecting that Moussaoui might be involved in a terrorist plot involving airplanes, the agent took the preventative

¹⁴ *Id.* at 105-06.

¹⁵ 9/11 Commission Report *supra* # at 271-72.

¹⁶ 9/11 Commission Report *supra* # at 237-40, 267.

¹⁷ *Id.* 272,

¹⁸ FBI electronic communication, Phoenix memo, July 10, 2001, quoted in 9/11 Commission Report, at 272.

¹⁹ *Id.* 273.

measure of arresting him on immigration charges for overstaying his visa.²⁰ The agent at FBI headquarters, however, thought this was an overly alarmist concern, lacking support, and he did not advise other agencies of the field agents' suspicion. The Minneapolis field supervisor heatedly argued with the headquarters agent, to no avail, stating (eerily, in hindsight) that he was "trying to keep someone from taking a plane and crashing into the World Trade Center."²¹ George Tenet, the Director of the CIA, was informed about Moussaoui's arrest, but he did not see any connection with al Qaeda and he considered it an FBI matter involving visa overstay; the Director of the FBI and the Director of Counterterrorism were not briefed on his case.²² Moussaoui was later convicted on terrorism charges in connection with 9/11.

Moussaoui's arrest came about a week after President George W. Bush was presented with the now infamous "6 August 2001 President's Daily Brief," entitled "Bin Laden Determined to Strike in US." The memo warned that bin Laden had repeatedly expressed the desire to "mount a terrorist strike" in the United States.²³ "[Al-Qaeda] members—including some who are US citizens—have resided in or traveled to the US for years, and the group apparently maintains a support structure that could aid attacks. . . . FBI information . . . indicates patterns of suspicious activities in this country consistent with preparations for hijackings or other types of attacks, including recent surveillance of federal buildings in New York."²⁴

There were other warnings and breakdowns in communication leading up to 9/11. In June and July multiple reports issued from intelligence agencies warning of imminent

²⁰ *Id.* at 273-76.

²¹ *Id.* 275

²² *Id.* 275.

²³ President's Daily Brief, reprinted in 9/11 Commission Report *supra* note #, 261-62.

²⁴ *Id.* at 261-262.

“spectacular” terrorist attacks against U.S. and Israeli interests.²⁵ “Director [George] Tenet told the 9/11 Commission that by late July ‘the system was blinking red’ and that it could not ‘get any worse,’ but the system was unable to make sense of the pieces of information it had.”²⁶

III. The Limited Achievements of Intelligence Reform

Reviewing these events, the 9/11 Commission laid substantial responsibility for the disaster on the lack of information sharing and integration across the intelligence community.²⁷ Three of the Commission’s five major recommendations were about “unifying” the intelligence effort: unifying intelligence and planning across the foreign-domestic divide; unifying the intelligence community under a new National Intelligence Director; and unifying the counterterrorism intelligence effort with a network-based information sharing system that spans government agencies.²⁸ With the Commission enjoying enormous public support, Congress hastily enacted the IRTPA in 2004 to carry out the Commission’s recommendations a mere four and a half months after its report was issued. The Act created the Office of the Director of National Intelligence (ODNI) to oversee the sixteen intelligence agencies, to pull together, collate, share, and coordinate information across the IC, and to bring overarching coherence to the intelligence community.

Since the IRPTA’s enactment, however, intelligence experts have consistently rendered negative assessments of the reform efforts. The House subcommittee evaluating

²⁵ 9/11 Commission Report, *supra* note # at 256-57.

²⁶ ZEGART, *supra* note 13, at 112; 9/11 Commission Report, *supra* note # , at 259.

²⁷ 9/11 Commission Report, *supra* note#, at 266-77, 340-60, and 399-419.

²⁸ *Id.* at 399.

implementation of the IRTPA in July 2006 found that “limited” progress had been achieved on information sharing and on integrating the agencies through joint-duty arrangements.²⁹ Also in July 2006, the Markle Task Force on National Security issued a dismal report, concluding that “almost five years since the terrorist attacks of September 11, systematic, trusted, information sharing remains more of an aspiration than a reality.”³⁰ The government had “lost its sense of the broader mission” to facilitate information sharing, and had instead become “bogged down by gaps in leadership, policy articulation, turf wars, and struggles over competing—and frequently incompatible—technologies.”³¹ A 2007 book by Amy Zegart on 9/11 and intelligence failures, drawing upon interviews with seventy-five former and current intelligence officials, concluded that “nearly six years after 9/11, the Intelligence Community’s most serious deficiencies remain.”³² “Information sharing and analysis, two critical shortcomings raised in the wake of 9/11,” Zegart wrote, “have not improved much, and in some cases have gotten worse.”³³

A damning internal report was issued in November 2008 by the Inspector General of the ODNI following extensive interviews with intelligence personnel. The Inspector General found that a majority of IC employees could not articulate the roles and responsibilities of the ODNI or what the Office was doing to implement its goals. IC employees complained about a lack of information and communication, confusing lines

²⁹ SUBCOMMITTEE ON OVERSIGHT, HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, INITIAL ASSESSMENT ON THE IMPLEMENTATION OF THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004, 35-38 (2006) [SC: Is this an official committee report? Does it have a report number?]

³⁰ ZOE BAIRD & JAMES BARKSDALE, MARKLE FOUNDATION TASK FORCE, MOBILIZING INFORMATION TO PREVENT TERRORISM: ACCELERATING DEVELOPMENT OF A TRUSTED INFORMATION SHARING ENVIRONMENT 1 (2006).

³¹ *Id.*

³² ZEGART *supra* note #, at 167.

³³ *Id.* at 186.

of authority, conflicting messages, and duplicative or overlapping tasks, “thereby undermining ODNI’s credibility and fueling assertions that the ODNI is just an ‘additional layer of bureaucracy.’”³⁴ According to the Inspector General, “IC elements do not consistently and effectively collaborate and integrate their program efforts.”³⁵ Turf battles and “stove-piping” (sending information to higher-ups without communicating it broadly) continue as before. Agencies still tightly control their own information and restrict access to others.³⁶

This negative assessment was reiterated in an evaluation of IC reforms issued by The Brookings Institute in September 2009, also based on interviews with current and former intelligence officials. Notwithstanding the implementation of a number of measures designed to better integrate the IC, the report concluded:

[I]nformation sharing remains a very nettlesome issue in the IC, and the system remains overall heavily skewed toward protecting narrow analytical silos. There are multiple reinforcing factors that contribute to this outcome: analysts’ and collectors’ desire to closely protect their most secret sources, budgeting processes, career patterns, and the general culture of the community.³⁷

These problems persist despite multiple initiatives.³⁸ Early in his tenure as DNI, John Negroponte promulgated a guiding strategy directive, “Transformation through Integration and Innovation,” in October 2005. Director McConnell issued a “100 Day Plan for Integration and Collaboration” in summer 2007, and a “500 Day Plan for Integration and Collaboration” in fall 2007. He followed these up in February 2008 with

³⁴ EDWARD MAGUIRE, OFFICE OF THE DIRECTION OF NATIONAL INTELLIGENCE, CRITICAL INTELLIGENCE COMMUNITY MANAGEMENT CHALLENGES 3 (2008)

³⁵ *Id.* at 6.

³⁶ *Id.* at 4-5.

³⁷ KENNETH LIEBERTHAL, BROOKINGS INSTITUTION, THE U.S INTELLIGENCE COMMUNITY AND FOREIGN POLICY: GETTING ANALYSIS RIGHT 28 (2009).

³⁸ The documents cited are available at the website of the Office of the Director of National Intelligence, at <http://www.odni.gov/index.html>. [SC: In order to determine the proper citation format, please determine the types of documents these are.]

an extensive “Information Sharing Strategy,” and then again in January 2009 with Intelligence Community Directive 501, designed to “[f]oster an enduring culture of responsible sharing and collaboration within an integrated IC.” The very repetitive nature of these efforts bespeaks their failure.³⁹

A charitable explanation for the evident lack of progress is that insufficient time has lapsed for the desired changes to take hold. But this is not persuasive. The House subcommittee recognized in 2006 that it was premature to measure ultimate success: “Former senior leaders of the Community have told the Subcommittee and staff that it will take five years to fully implement the Act.”⁴⁰ The fifth anniversary of the Act, however, has now past and integration still has not been achieved.

The failures of the IRTPA to achieve substantive change is not unique to the Act. Decades of law and society research repeatedly have drawn the lesson that efforts to use law to implement reform often fall short or produce unanticipated consequences.⁴¹ Existing institutions, structures, roles, norms, attitudes, habits, incentives, and inertia, often conspire to entrench and reinforce the status quo. A host of such problems has been identified in the IC and in the design and implementation of the IRTPA. A major problem that has hampered intelligence gathering on terrorism from the outset is that the IC was constructed to monitor Cold War state threats like Russia and China, relying heavily upon technical intelligence (satellites) and neglecting human intelligence on the

³⁹ The National Counterterrorism Center (created by presidential directive prior to IRTPA, though absorbed and renamed by the Act), staffed by personnel from across the IC, is generally regarded as the most successful reform, although it too suffers from barriers to information flow. See ZEGART, *supra* note #, at 186.

⁴⁰ Subcommittee on Oversight, Initial Assessment on the Implementation of The Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note #, at 35. [SC: See the previous query to determine proper citation format.]

⁴¹ See Brian Z. Tamanaha, *Law and Society*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY ## (Dennis Patterson ed., 2010)

ground. This reliance is reflected in the scarcity of agents fluent in languages spoken in Islamic countries.⁴²

A common criticism leveled by intelligence specialists is that the ODNI was crippled at its very inception by turf battles between various agencies and between the various congressional committees with oversight and budgetary power over these agencies.⁴³ The biggest blow was a major limit to ODNI's power. Facing stiff resistance from Secretary of Defense Donald Rumsfeld, the IRTPA did not grant the DNI effective authority over intelligence activities in the Defense Department, which controls more than eighty percent of the IC budget and personnel.⁴⁴ Another criticism is that intelligence activities fit poorly within the dominant law enforcement orientation of the FBI.⁴⁵ Apprehending criminals and building cases for successful prosecution entail different skills and priorities than intelligence gathering and analysis; the structuring of the FBI into separate regional field offices, which works for criminal investigations, inhibits coordinated intelligence. The traditional wall that limits the CIA to foreign intelligence activities, furthermore, creates a jurisdictional barrier that benefits terrorists who traverse this distinction. Adding to the communication barrier, the CIA and the FBI possess different internal cultures and harbor mutual distrust.⁴⁶ Information sharing across agencies grates against the very ethos and incentives operating with the IC,⁴⁷ which prizes secrecy (various agencies and their personnel hold different levels of

⁴² See JAMES LEWIS AND MARY DE ROSA, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, INTELLIGENCE, FIVE YEARS AFTER 9/11: AN ASSESSMENT OF AMERICA'S WAR AGAINST TERROR 28-29 (2006).

⁴³ Helen Fessenden, *The Limits of Intelligence Reform*, 84 Foreign Affairs 106, (2005).

⁴⁴ See ZEGART *supra* note #, at 178-88; 9/11 Commission Report 86.

⁴⁵ RICHARD POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 173-97(2005).

⁴⁶ 9/11 Commission Report 89.

⁴⁷ *Id.* 91.

clearance, blocking access and exchange) and in which ownership of information translates into influence and career advancement.⁴⁸ Finally, a few critics have pointed to the unwillingness or inability of successive DNIs, weakened by their brief tenures in office, to take real charge over the IC.⁴⁹

An often-echoed sentiment is that “the DNI has become what intelligence professionals fear[ed] it would: an unnecessary bureaucratic contraption with an amazingly large staff.”⁵⁰

IV. Intelligence Failures are Inevitable

There are limits to what even the best intelligence system can do to prevent acts of terrorism. Two irremovable constraints are profoundly inimical to the IRPTA’s objective: the paradoxical immensity and dearth of information, and the tactical advantages held by terrorists. The 9/11 Commission’s litany of intelligence blunders deceptively trades on the easy task of sifting through intelligence information with the benefit of hindsight.⁵¹ Beforehand, however, intelligence gathering and analysis suffer simultaneously from a lack of data (ignorance about the essentials of a forthcoming attack) and an excess of data (overflowing noise about possible risks). In the months leading up to 9/11, as the Commission observed, many intelligence officials “knew something terrible was planned,” but they were helpless because they had “few specifics regarding time, place, method, or target.”⁵²

⁴⁸ *Id.* at ##. Chapters 5.

⁴⁹ *See Id.* at 138-41; ZEGART, *supra* note #, at 183-86.

⁵⁰ Jack Devine, *An Intelligence Reform Reality Check* WASH. POST, Feb. 18, 2008 at #

⁵¹ 9/11 Commission Report, *supra* note# , at 266-77.

⁵² *Id.* at 262-63.

The vast trove of collected intelligence information is suffused with ambiguities and uncertainties that support various interpretations and predictions; not everything can receive equal attention; it is not evident what to prioritize; heightened sensitivity to risks taxes capacity and increases false alarms, which in turn reduces sensitivity.⁵³ As intelligence expert Richard Betts definitively elaborated three decades ago, these sources of failure “are inherent in the nature of intelligence and the dynamics of work. As such, they constitute severe constraints on the efficacy of structural reform.”⁵⁴ Tradeoffs are unavoidable: Decentralization makes coordination harder while unification encourages group-think and enhances the risk of that pressure from political leaders will shape the intelligence to meet policy goals; extensive information sharing compromises secrecy; increases in the volume of data creates a mountainous haystack that hides pivotal clues.

Terrorists, for their part, have tactical advantages that grow out of their stark power disadvantage. Incapable of defeating state opponents through direct military confrontation, they engage in violence against civilians for political ends—terrorizing the populace is the means by which they pressure government leaders to accede to demands.⁵⁵ Not limited to military targets or traditional fields of engagement, their attacks can take place literally anywhere. Targets are selected to sow maximum public outrage and fear—planes, buses, subways, trains, ships, bridges, tunnels, symbolic buildings (courts, churches, financial centers), public gatherings (parades, markets, celebrations, sporting events, restaurants), and high-profile individuals. Due to sheer volume alone, all potential targets cannot be protected from all forms of destruction all

⁵³ The classic article on the topic is Richard K. Betts, *Analysis, War, and Decision: Why Intelligence Failures are Inevitable*, 31 *WORLD POLITICS* 61, 62-72 (1978).

⁵⁴ *Id.* at 72.

⁵⁵ A superb study of terrorism is LOUISE RICHARDSON, *WHAT TERRORISTS WANT: UNDERSTANDING THE ENEMY, CONTAINING THE THREAT* (Random House 2006).

the time. Until they attack, terrorists are camouflaged in plain view as ordinary members of society. They continually adjust their tactics as well as the time and place of their attack in response to the changing likelihood of being discovered. Enhanced intelligence and greater military and police forces alone, therefore, cannot completely prevent or eradicate terrorism.⁵⁶

The coupling of the tactical advantages held by terrorists with the inevitability of intelligence failure was demonstrated anew in 2009's Christmas Day attempt by Nigerian citizen Abdul Farouk Abdulmutallab to destroy a plane while landing in Detroit. He was placed on the "watch" list after his father had advised U.S. officials that his son might have become radicalized in Yemen; the CIA prepared a biographical report on him; the NSA intercepted al-Qaeda conversations about a forthcoming attack by a Nigerian man; the NCTC received a cable about him from the U.S. embassy in Nigeria warning about possible terrorism; and the United Kingdom had rejected his request for a visa renewal.⁵⁷ Nevertheless, Abdulmutallab held a valid U.S. visa; he was allowed to board a flight to America without being questioned despite paying cash for a one-way ticket and not checking any baggage;⁵⁸ and he was able to conceal explosives in his underwear. U.S. intelligence agencies evidently failed to connect the various pieces of information they had about Abdulmutallab.⁵⁹

⁵⁶ See *Id.* at page# Chapter 7.

⁵⁷ See Mark Mazzetti & Eric Lipton, *Spy Agencies Failed to Collate Clues on Terror*, N.Y. TIMES, Dec. 30, 2009, available at http://www.nytimes.com/2009/12/31/us/31terror.html?_r=2&hp; [Insert Author], *Britain Rejected Visa Renewal for Suspect*, N.Y. TIMES, Dec. 28, 2009, available at http://www.nytimes.com/2009/12/29/world/europe/29london.html?_r=1&ref=todayspaper

⁵⁸ Mark Thompson, *Why Was the Accused Bomber Banned in Britain, Not the U.S.?*, TIME, December 28, 2009, Time., available at <http://www.time.com/time/nation/article/0,8599,1950280,00.html>

⁵⁹ See Mark Hosenball, Michael Isikoff, & Evan Thomas, *The Radicalization of Uman Farouk Abdulmutallab*, NEWSWEEK, Jan.11, 2010, at #.

Echoes of pre-9/11 missteps are manifest, although disaster luckily was avoided when the fuse failed to ignite properly and passengers subdued him. Critics were outraged at what they viewed as shoddy intelligence and security, heaping blame on the NCTC,⁶⁰ heretofore considered the most successful example of reform. What this reaction fails to sufficiently appreciate, however, is that his name was just one among a *half million others* on the watch list, one among an untold number of individuals who the IC has files on. The explosives and method of concealment were selected because they could not be detected through existing screening procedures, an example of tactics chosen specifically in response to intelligence strategies. (And in future attempts the terrorists will likely purchase their tickets in advance and go through the trouble of checking a bag.) A critical autopsy and additional changes in intelligence and security procedures will no doubt follow in the wake of this incident, but terrorists will evolve in sync to exploit other vulnerabilities.⁶¹

This incident is a reminder that the IRTPA will fall tragically short of its goal of making Americans safer from terrorism if the main focus in this effort is on intelligence reform. Reform is more of a partial palliative than a viable solution. As the Commission recognized, “even the most vigilant and expert agencies cannot always prevent determined, suicidal attackers from reaching a target.”⁶² The only long-term solution to terrorism, the only way to make Americans truly safer, is to reduce the supply of terrorists.

⁶⁰ Scott Shane, *Shadow of 9/11 Cast Again*, N.Y. TIMES, Dec. 30, 2009, available at http://www.nytimes.com/2009/12/31/us/31intel.html?_r=4&ref=politics

⁶¹ See Gordon Carera, *Failed Attack Shows How Air Security Can Be Subverted*, BBC NEWS, Dec. 27 2009, available at <http://news.bbc.co.uk/2/hi/americas/8432067.stm>

⁶² 9/11 Commission Report, *supra* note #, at 365.

V. The IRTPA and Reducing Anti-American Extremism

The 9/11 Commission recognized that the looming threat for America was less al-Qaeda, whose operational capacity had been weakened substantially, but the spread of radical extremism and anti-Americanism across the globe.⁶³ The Commission identified what it considered the roots of this growing radicalism:

Because the Muslim world has fallen behind the West politically, economically, and militarily for the past three centuries, and because few tolerant or secular Muslim democracies provide alternative models for the future, [bin Laden]’s message finds receptive ears. It has attracted active support from thousands of disaffected Muslims and resonates powerfully with a far larger number who do not actively support his methods.⁶⁴

The causes, according to the Commission, are internal to Muslim societies: “The United States finds itself caught up in a clash *within* a civilization. That clash arises from particular conditions in the Muslim world, conditions that spill over into expatriate Muslim communities in non-Muslim countries.”⁶⁵ The solutions, opined the Commission, are economic development, greater democracy and freedom, women’s rights, increased literacy, and establishing the rule of law.

The Commission correctly noted that many of these societies are underdeveloped economically, have suffered under authoritarian rulers, and are undergoing seething convulsions over the role religion should play in politics.⁶⁶ But none of this explains why America is so despised. Missing from its diagnosis was a serious examination of whether, or in what ways, U.S. actions might have contributed to negative attitudes towards

⁶³ 9/11 Commission Report, *supra* note #, at 363, 374-75.

⁶⁴ *Id.* at 362.

⁶⁵ *Id.* at 363.

⁶⁶ See AHMED RASHID, DESCENT INTO CHAOS: THE U.S. AND THE DISASTER IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA (Penguin 2008); FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL (Cambridge Univ. Press 2d ed. 2009).

America in particular. The Commission summarily dismissed polls showing that an overwhelming proportion of citizens in Muslim countries holds negative views of the United States: “Many of these views are at best uninformed about the United States and, at worst, informed by cartoonish stereotypes[.]”⁶⁷ The Commission neglected to add that opinions of the United States among Muslims plummeted in part owing to the Iraq war,⁶⁸ which was viewed around the world as unjustified.

The Report made only two oblique references to U.S. actions that might have generated enmity in the Muslim community. The first allusion was put in less than forthcoming terms: “One of the lessons of the long Cold War was that short-term gains in cooperating with the most repressive and brutal governments were too often outweighed by long-term setbacks for America’s stature and interests.”⁶⁹ A more frank statement of this point is that anti-American attitudes exist because America has long supported authoritarian regimes in the region. A Defense Department report bluntly acknowledged this, noting that “[t]he United States finds itself in the strategically awkward—and potentially dangerous—situation of being the longstanding prop and alliance partner of these authoritarian regimes [“the tyrannies of Egypt, Saudi Arabia, Pakistan, Jordan, and other Gulf states”].”⁷⁰ The second allusion was to our appalling treatment of Muslim prisoners: “Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will

⁶⁷ *Id.* at 375.

⁶⁸ See 2006 NIE (noting that Iraq War has increased radicalization); Peter Bergen & Paul Cruickshank, *The Iraq Effect: War Has Increased Terrorism Sevenfold World Wide*, MOTHER JONES, Mar. 1, 2007, at #.[SC: What type of source is the NIE? I think it is an official report.]

⁶⁹ 9/11 Commission Report, *supra* note #, at 376.

⁷⁰ WILLIAM SCHNEIDER, DBS, REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON STRATEGIC COMMUNICATION 35 (2004)

need.”⁷¹ Coming on the heels of public disclosure of abuses at Abu Ghraib prison and the Justice Department’s torture memo,⁷² this tepid prose provides no sense of the shattering impact and universal outrage this conduct generated against America.

The IRTPA adopted almost whole and without emendation the Commission’s recommendations for dampening Islamic radicalization, omitting only the proposals for better treatment of prisoners.⁷³ It is a program to win the hearts and minds of Muslims. The core mandate of the Act is that the U.S. must promote democracy, economic development, women’s rights, a free press, tolerance, and the rule of law in Muslim countries.⁷⁴ To combat anti-American views, the Act directs funds to help establish a media network,⁷⁵ and directs the Secretary of State to carry out a public diplomacy campaign to counter misinformation and propaganda against the United States.⁷⁶ It expands scholarship and exchange programs for Muslim youth to learn about American ideals and values,⁷⁷ and it creates a youth opportunity fund to reduce the illiteracy rate in the Middle East.⁷⁸ And the Act urges the creation of a Middle East Free Trade Area to facilitate economic development.

That is the sum of the provisions in IRTPA for reducing the spread of anti-American extremism in the Muslim world. The package comes to two propositions: If Muslim populations (especially young men and women) get to know America better, and

⁷¹ *Id.* at 379.

⁷² See Annie Lowrey, The Torture Timeline, FOREIGN POLICY, {date}, at {page}, available at http://www.foreignpolicy.com/story/cms.php?story_id=4891&page=0

⁷³ Guidelines for the treatment of prisoners, which the Commission recommended, were separately enacted a year later in the Detainee Treatment Act.

⁷⁴ See Title VII, Sections 7104, 7106, 7107

⁷⁵ Title VII, Section 7108.

⁷⁶ Title VII, Section 7109.

⁷⁷ Title VII, Sections 7112, and 7113.

⁷⁸ Title VII, Section 7114.

if Muslim countries become more like Western liberal democratic capitalist countries with greater freedom and economic opportunities, they will stop lining up to destroy us.

These propositions, however, square poorly with the facts. Many individuals who have planned or committed acts of terrorism, especially among the terrorist network leadership, are well-educated and did not suffer from impoverished backgrounds or a lack of economic opportunity.⁷⁹ Many known terrorists, including the 9/11 hijackers, lived for lengthy periods in America or in other Western countries with extensive exposure to our values and ideals.⁸⁰ The accused mastermind of 9/11, Khalid Sheikh Mohammed, has a degree in mechanical engineering from North Carolina Agricultural and Technical State University. Anwar al-Alwaki, considered a grave danger for his effective use of the Internet to spread radical messages to English speakers, with connections to the Fort Hood shooting and the failed Detroit airplane incident,⁸¹ was born and raised for a time in the United States and earned bachelor's and master's degrees from American universities. A number of terrorists were Western-raised converts to Islam. The recent rash of radicalized American citizens provides yet more evidence that a lack of familiarity with American values and ideals is not the problem.⁸²

Nor is it obvious that the majority of citizens within Muslim societies would embrace the full package of social and political transformations prescribed by the Commission, or that embracing such change would indeed lessen terrorism against the United States. But the most fundamental problem is that the radical make-over of

⁷⁹ Empirical doubts about the claimed connection are articulated in Alan B. Krueger & Jitka Maleckova, *Does Poverty Cause Terrorism?*, THE NEW REPUBLIC, Jun. 24, 2002 at #.

⁸⁰ See Olivier Roy, "Al Qaeda in the West as a Youth Movement: The Power of a Narrative," CEPS Policy Brief, No. 168, August 2008, <http://ssrn.com/abstract=1333550>

⁸¹ Alwaki also developed a "close relationship" with two 9/11 hijackers, Hazmi and Midhar. 9/11 Commission Report supra # at 221.

⁸² Scott Shane, *New Incidents Test Immunity to Terrorism on U.S. Soil*, N.Y. TIMES, Dec. 11, 2009, available at http://www.nytimes.com/2009/12/12/us/12assess.html?_r=2&pagewanted=1&hp

Muslim economies, polities, legal systems, and cultures envisioned by the IRPTA *cannot* be accomplished by any means at our disposal. That fact explains why the critical sections of Title VII are filled mostly with exhortations and precatory fluff, devoid of concrete proposals or programs. Versions of this transformative project—the spread of democracy, capitalism, rule of law, human rights—have been attempted around the world (including in Muslim countries) for decades, supported by billions of dollars from the World Bank, the UNDP, USAID, and other funding organizations—with meager results.⁸³ To propose an impossibly ambitious transformation of Muslim societies as the long-term solution to terrorism is tantamount to conceding that it will not be solved. Looking through the fluff, the only concrete measures created by the IRPTA are a few youth scholarship and exchange programs and setting up a media presence that likely will be viewed as an outlet for American propaganda.

Congress and the Commission offered these token gestures perhaps out of a sense of resignation that nothing can be done. America is fated to endure the plague of terrorism for decades, they apparently thought, so we had best improve intelligence coordination, ramp up security in public venues, tighten borders and immigration control, increase surveillance and data mining, hit hard at terrorists whenever and wherever they emerge, and hope America does not suffer a truly catastrophic disaster—the nightmare scenario of anthrax, a dirty bomb, or a nuclear device. Raise the walls higher and trim back on the privacy and liberty of everyone inside, with a few token gestures at improving the lot of Muslim countries. In concrete terms this is what IRTPA boils down to.

⁸³ See Brian Z. Tamanaha, “The Primacy of Society and the Failures of Law and Development.”

VI. What Can Be Done?

A gaping hole in the analysis of the 9/11 Commission and Congress was the absence of an effort to grasp why Muslims' attitudes toward the United States are so negative. Resentment at the country's global power or jealousy at its riches or way of life, frequently supplied as explanations, cannot account for the depth and breadth of the anger—the willingness to die to inflict harm against us—nor does it comport with what Muslims themselves are saying. The key to understanding what inspires Muslims around the world to volunteer in the fight against us lies in this oddity: The antagonists on both sides of this conflict sincerely see themselves as acting defensively, responding with force reluctantly only after being aggressively set upon by a vicious adversary.

On the evening of September 11, 2001, President Bush spoke to the stunned nation:

Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts....Thousands of lives were suddenly ended by evil, despicable acts of terror....A great people has been moved to defend a great nation. Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.⁸⁴

Although President Bush and Americans undoubtedly thought on that devastating day that we had been attacked without provocation or justification, in bin Laden's eyes the attacks were in self-defense. On February 23, 1998, Osama bin Laden and the World Islamic Front issued a *fatwa* ordering Muslims to kill all Americans (civilians and military) and their allies, explaining:

⁸⁴ George W. Bush, U.S. President, Presidential Address (Sep. 11, 2001) [hereinafter September 11th Speech]

All these crimes and sins committed by the Americans [listed earlier] are a clear declaration of war on Allah, his messenger, and Muslims. And ulema [religious scholars] have throughout Islamic history unanimously agreed that the jihad is an individual duty if the enemy destroys the Muslim countries....Nothing is more sacred than belief except repulsing an enemy who is attacking religion and life.⁸⁵

President Bush explained that “America was targeted for attack because we’re the brightest beacon for freedom and opportunity in the world. And no one will keep that light from shining.”⁸⁶ Bin Laden explained, “we fight you because we are free men who don’t sleep under oppression. We want to restore freedom to our Nation and just as you lay waste to our Nation, so shall we lay waste to yours.”⁸⁷ “We are fighting you and opposing you,” bin Laden said, in terms echoed by Bush, “because you attacked us and continue to attack us.”⁸⁸

A perfect reverse image knots this conflict Americans believe America was attacked *first* by Islamic terrorists—and remains under attack—while Muslims targeting the United States believe Muslims were attacked *first* by America, and remain under attack. Neither is the aggressor, in their own eyes, so neither has the ability to stand down from the fight.

Americans have little sense of why Muslims might be seized by what seems like an obviously warped view of the situation. American citizens tend to perceive their country as a benevolent world power. Yet, a 2004 Defense Department report found that “U.S. policies and actions are increasingly seen by the overwhelming majority of

⁸⁵ Osama Bin Laden, Jihad Against Jews and Crusaders, February 23, 1998, http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html

⁸⁶ September 11th Speech, *supra* note 68.

⁸⁷ Transcript of Osama bin Laden Video of Oct. 29, 2004, available at <http://abcnews.go.com/International/story?id=215913&page=1>

⁸⁸ Letter from Osama bin Laden’s to America (Nov. 24, 2002), available at <http://www.guardian.co.uk/world/2002/nov/24/theobserver>

Muslims as a threat to the survival of Islam itself. Three recent polls of Muslims show an overwhelming conviction that the U.S. seeks to “dominate” and “weaken” the Muslim World.”⁸⁹ Many Muslims “believe America’s war on terrorism is really an effort to control Mideast oil or to dominate the world.”⁹⁰

Talk by U.S. leaders of the desire to spread democracy in the Middle East might work with uninformed Americans, but it rings hypocritically hollow to a Muslim populace intimately familiar with the history of U.S. support for authoritarian allies in the region. And the United States is visibly less enthusiastic about democracy whenever it looks like popular Islamic parties might use the ballot box to win control of the government.⁹¹ Consider the frustration Muslims experience when the United States is quick to condemn Palestinian and Hezbollah terrorist actions against Israeli civilians but slow to criticize Israeli actions that injure Palestinian or Lebanese civilians. Imagine the anger in the Muslim world at knowing—as reported by UNICEF, the International Red Cross, and other organizations (although most Americans remain blissfully unaware)⁹²—that U.S.-led sanctions on Iraq after the first Gulf War resulted in the deaths of a half-million Iraqi children. Think of the sadness over the tens of thousands of Iraqi civilians who have perished during the Iraq War and the bitterness aroused by the many reports of innocent civilians killed accidentally by American and coalition troops in Iraq and Afghanistan, or by unmanned predator drones shooting rockets from the sky that kill whomever is in the blast zone. Imagine the anger at images of snapping dogs set upon

⁸⁹ Report of the Defense Science Board Task Force on Strategic Communication, *supra* p.35.

⁹⁰ “Global Public Opinion in the Bush Years (2001-2008), Pew Global Attitudes Project, 18 December 2008, p. 4.

⁹¹ See NATHAN J. BROWN, AMR HAMZAWY, & MARINA OTTAWAY, *ISLAMIC MOVEMENTS AND THE DEMOCRATIC PROCESS IN THE ARAB WORLD: EXPLORING THE GRAY ZONES #* (Carnegie Papers ed., 2006)

⁹² John Mueller and Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFFAIRS 43 (1999).

naked prisoners stacked into a pile at Abu Ghraib, at pictures of shackled prisoners at Guantánamo, and at repeated accounts of American infliction of torture in interrogation—making a mockery in Muslim eyes of U.S. rhetoric about human rights and the rule of law. Envision what it feels like to watch military forces from an alien culture and religion increase their presence in and encircle your country, stationing large numbers of troops in your holiest lands. Picture how a Muslim would interpret President Bush’s public statement a few days after 9/11—“This crusade, this war on terrorism, is going to take awhile”⁹³—knowing that “crusade” is the historic name of bloody invasions of Muslim lands by Christians during the Middle Ages.

These events and actions, seared into their consciousness, are what give bin Laden’s message resonance among Muslims. We may attempt to explain and protest our good intentions for each of our incursions, but the case against us taken as a whole is formidable. This is why the ranks are swelling with terrorists signing up to attack the United States, and it takes a modicum of empathetic imagination to realize that many Americans would do the same if the situations were reversed.

There is hope, though. Recent polls have shown a dramatic increase in unfavorable views of bin Laden and al-Qaeda across the Muslim world.⁹⁴ Although many continue to agree with the goals expressed by bin Laden, especially that America should remove its military presence from Muslim lands, large majorities in the Muslim countries polled believe that it is wrong and inconsistent with Islamic principles to attack civilians

⁹³ LOUSIE RICHARDSON, *supra* note #, at 194.

⁹⁴ See Pew Global Project Attitudes, “Pakistani Public Opinion, Growing Concerns About Extremism, Continuing Discontent with U.S.,” August 13, 2009; “Global Public Opinion in the Bush Years,” December 18, 2009; The Great Divide: How Westerners and Muslims View Each Other,” June 22, 2006.

in general and to attack civilians in the United States and Europe.⁹⁵ Fawaz Gerges, the author of a book about the rise of al-Qaeda, recently interviewed former Jihadis and Islamists, finding that, “[al-Qaeda]’s gruesome attacks on civilians, particularly in Muslim countries, coupled with the mayhem they have wrought, have rightly relegated [al-Qaeda] to the margins of Islamic society.”⁹⁶ Iraq and Pakistan have suffered large numbers of civilian casualties from bombings by extremists attempting to destabilize or intimidate the government or to whip up sectarian violence. Leading religious authorities and former Jihadis in Muslim countries have forcefully condemned the actions of al-Qaeda in recent years.⁹⁷

The remarkable parallelism between Bush’s and bin Laden’s characterizations of the nature of the conflict is now matched, ironically, by parallel negative ratings of the United States and of al-Qaeda in the eyes of the majority of Muslims. Both sides are now condemned. There is hope in this state of affairs because an essential step toward the decline of terrorism is to remove the base of community support that provides resources, refuge, and fresh recruits to terrorist organizations.⁹⁸ This can only be a partial step, it is important to recognize, because the growing backlash against terrorism by Muslims who have witnessed its awful consequences for their own communities is less felt by radicalized Muslims living in the West, the perpetrators of homegrown acts of terrorism, which appears to be on the rise.

⁹⁵ World Public Opinion, “Muslim Public Opinion on US Policy, Attacks on Civilians and al Qaeda, April 24, 2007; “Pakistani Public Opinion on Democracy, Islamist Militancy, and Relations with the US,” January 7, 2008.

⁹⁶ GERGES, *supra* note #, at #.

⁹⁷ *Id.* at ## [SC: Please locate chapters 5,6,7].

⁹⁸ LOUISE RICHARDSON, *supra* note #, at 215-24.

The long term threat of terrorism will not lessen until Americans understand that Muslims have real grievances, and the United States begins to change its policies and actions in the Muslim world to address these grievances. Foremost, we must eliminate the ultimate provocation that inflames Islamic terrorists to attack us—we must remove our troops from Muslim lands. Only then will we be safer from terrorists.