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Opt Back In To the International System Part I: Counterterrorism

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Analytic Overview

By 2007, there is bipartisan as well as international recognition that U.S. leadership globally has been severely damaged by the Bush administration's counterterrorism policies. The rhetoric about the "global war on terror" coupled with the policies of extraordinary rendition away from justice, secret prisons, extralegal interrogation practices, indefinite detention as well as the stripping of the ancient writ of habeas corpus have led our closest allies as well as our enemies to conclude that the United States is a country that disregards its obligations under international human rights and humanitarian law. The practices adopted by the Bush administration have amounted to a new legal framework, adopted unilaterally and without public discussion or Congressional oversight. The practices have greatly harmed a principal source of U.S. soft power: our reputation as a generator of legal norms and practices.

The damage is most evident in the erosion of the "prohibition against torture and cruel, inhuman or degrading treatment or punishment." Through law, policy, and practice, this administration has called into question the absolute nature of the prohibition. In doing so, the current administration has put U.S. personnel serving overseas in danger of receiving similar treatment should they fall into the hands of the enemy. The erosion of the prohibition has also had the unintended consequence of alienating Muslim populations and increasing—not containing—extremism. In other words, these counterterrorism policy choices and practices have undermined more than the international consensus on human rights.

The radical departure from long-established international human rights and humanitarian laws has led to the dramatic reduction in the efficacy of U.S. smart power. In numerous interviews conducted in spring 2007, senior jurists and diplomats in Great Britain lamented the decline of U.S. influence in international jurisprudence, fearing that the impact will be long term and take many years to repair. The current administration, in contrast to every previous administration in modern U.S. history and to lessons learned from our closest ally with decades of bitter experience with terrorism, has viewed transparent justice and human rights as impediments to the measures needed to protect the physical wellbeing of the citizens of the United States. Drawing on declassified White House memos that attempted to rewrite the definition of torture, the American people, and indeed the world, can see the lengths to which the administration consciously departed from long standing security and human rights practices. Specifically, this departure (and in some cases, the derogation from law) has been met with a steady decline in trust of the U.S. commitment to justice.

Senior British counterterrorism officials warned that the paradigm of war rather than law enforcement will prove ineffective and urged instead a shift from methods such as indefinite detention and "deep interrogation" techniques that were abandoned in the 1980s in Northern Ireland. While the comparison of Northern Ireland and Al Qaeda are obviously not perfect,



multiple lessons from the British counterterrorism experience—both today and from the last two decades—are worthy of study for the next administration.

For example, British officials claim that only after the European Court of Human Rights forced the British to end the practice of “deep interrogation” did they begin to see progress in counterterrorism efforts. They also cited their focus on “root causes” and the “thousands of pounds that were poured into the health care and educational systems” that have created social services, in the words of one official, “second to none.” Their current approach to counterterrorism combines elements of law enforcement as well as counterinsurgency focusing as much on the communities that are at risk for harm as on the few that cause harm.

Terrorism experts warn repeatedly against complacency and many worry that Al Qaeda or a franchise of Al Qaeda will attempt a catastrophic strike in the months or weeks prior to the U.S. presidential election. What then should new counterterrorism policies and approaches look like? How then should the next administration best handle those who wish us devastating harm without damaging the very fabric of our legal and national security culture?

Recommendations

The next administration needs to adopt a dramatically different tone and policies on counterterrorism. Only a clear and comprehensive break with current policies will begin to repair the damage that has been done. A swift move toward the rule of law will begin the process. Recommendations fall in two categories: those that reverse specific counterterrorism policies taken by the Bush administration and those that are more conceptual in nature but affect the general climate in which new counterterrorism policies should be implemented.

New Counterterrorism Policies

On Guantanamo: The next administration has two choices: make the facility transparent and keep it open, or make the facility transparent as the administration works to close it. Should the president decide to close Guantanamo as quickly as possible, the plan must be put in place immediately after the election. At the same time, he or she should make Guantanamo completely transparent, end indefinite detention, open it to inspection, including by the UN Special Rapporteur on Torture. From a symbolic and political perspective, closing the facility would be favorable. From a pragmatic perspective, it will be difficult. Attempts by the next administration to get European allies to take some of those that have been held for five years does not appear likely, even with a new president in the White House. A senior British legal authority states that there are no legal issues in accepting such cases, but many Europeans consulted said that the reluctance stems from domestic political concerns. Therefore, should the next administration choose to close Guantanamo, the administration will be forced then to release those for whom there is no evidence. Those for whom there is evidence of terrorist activity must be brought to trial and if found guilty, held in maximum security prisons within the United States.



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Interrogation: The next administration should work with Congress to expand the McCain Amendment to bring all intelligence agencies under the same regulations governing interrogation that are applied to the military and law enforcement. The next president must work toward having one standard of interrogation, and it must be crystal clear to everyone. The interrogation techniques used by the CIA, the DOD and all government contractors must be compliant with international laws. These standards must prohibit not just torture but cruel, inhuman and degrading (CID) treatment.

Secret Prisons: The next administration should immediately close CIA-run prisons and provide CIA interrogators and contractors with the same standards and clear rules that we now insist must be used by military interrogators, following the adoption of the McCain Amendment. The use of secret detention has hurt us beyond measure in terms of world opinion and has endangered troops serving on the battlefield by making them vulnerable to standards and practices that are outside U.S. and international law. Instead, when terrorist cells are broken up and suspects come into custody, they should receive full legal treatment and be interrogated lawfully. The next president should work with Congress to establish a legal time for holding suspects (such as three months) before they must either be indicted and go to trial or released.

Rendition From Justice: The next administration should bar any rendition of suspected terrorists away from justice. The practice of outsourcing interrogation of potentially high value suspects to countries that have records of torture, such as Egypt and Syria, is bad policy; it does not provide good intelligence and has caused particular damage to our reputation internationally.

New Approaches to Counterterrorism

Change Rhetoric and Tone: The next administration needs to adopt a dramatically different tone and rhetoric concerning terrorism. This new approach should include a full recognition that so-called “tough” methods, e.g. what many consider torture, have unintended negative security consequences that far outweigh whatever short term intelligence benefits may or may not be achieved. British and European experts all urged that the next administration end the use of the term “the war on terror,” and particularly, the “global war on terror.” Instead, they advocated speaking of specific networks and highlighting what are often local grievances. The language of the “global” struggle only serves to elevate the terrorists’ cause and surround it with a misleading sense of unanimity. While senior U.S. security experts inside and outside government have called recently for a new international legal framework to address what are seen as “new” threats, numerous senior British legal and counterterrorism experts consulted argued that this move would be viewed as a continuation of what the Bush administration had done in unilaterally setting new precedence. Should the next administration wish to consider whether current international legal frameworks are adequate, it must be guided by senior diplomats and legal experts and proceed in concert with allies.

Risk Management: British officials speak of “risk management” while American officials have traditionally talked of eliminating *all* risk and *ending* terror. Great Britain was pounded by bombs during World War II, so British allies have no pretense of invulnerability. In fact, the



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United States lost this invulnerability with the catastrophic terrorism event of September 11. Politicians have to date been unwilling to address the concept of risk management of terrorism, and policy makers have been unwilling to plan accordingly. The next president should manage the problem, rather than promise to eliminate all risk. Even the unthinkable must be addressed, such as the use of a nuclear device in a major American city. Contingency planning is smart counterterrorism.

Counterinsurgency and Law Enforcement: The Bush administration has approached counterterrorism from a war paradigm. In contrast, British and other European allies use a law enforcement paradigm. The next administration should consider either the law enforcement paradigm or a modified version of the counterinsurgency approach laid out in the December 2006 U.S. Army Field Manual. This alternative paradigm updates the traditional conception of counterinsurgency beyond one nation's borders and shifts focus from the few who commit terrorist acts to the larger communities in which terrorists may be ignored, enabled, recruited, replenished, or idolized. It directs policy makers to understand and address local conditions and specific populations at risk for radicalization.

Shift Resources Internationally and Domestically: Accordingly, to address more comprehensively the threat of terrorism, the next administration should dramatically increase budgets for foreign assistance and diplomatic initiatives abroad. At home, local communities within the United States must have sufficient funds for preparation for response to a chemical, biological, or radiological device used in an urban area.

Message & Marketing

A growing number of retired senior military officers are now on record advocating that upholding rights must be an absolute pillar of stability and security. Public documents, such as General Petraeus' memo of 10 May 2007 to the troops in Iraq following the results of a 2006 survey suggesting tolerance of torture among uniformed members currently serving in Iraq, and the December 2006 Army Field Manual on Counterinsurgency can bolster the campaign's messages on these points.

Within the first one hundred days, the next president should appoint a Senior Ambassador, preferably a seasoned diplomat, on counterterrorism and send him or her on an extended trip through Europe, the Middle East, Asia and Africa to explain the shift in policy and consult counterparts.

Challenges exist. Experts warn of a terrorist attack in the election cycle. Shifting tone and rhetoric while in the midst of an attack would be difficult. The next administration would also face significant challenges from organizational cultures inside the intelligence agencies. The understanding that human rights abuses breed security consequences does not appear to be widely shared within the intelligence community. More generally, human rights are viewed in the policy world as a niche concept, the domain of special interests. The demand for a rule of law approach to counterterrorism will need to be mainstreamed in a robust manner into the

The opinions expressed in this essay are those of the author, and while they were used to inform the Commission's deliberations, they do not reflect the opinions and recommendations of the Commission.



policy community and to the general public. The policy memo on treaties addresses some ideas of how this might be advanced.