BOOK REVIEW

Careful Thinking About Counterterrorism Policy

TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR. By Philip B. Heymann. Cambridge: The MIT Press, 2003. Pp. xiii, 210. $24.95.

Reviewed by Robert M. Chesney*

> *Today we lack metrics to know if we are winning or losing the global war on terror. Are we capturing, killing or deterring and dissuading more terrorists every day than the madrassas and the radical clerics are recruiting, training, and deploying against us?*
>
> *Secretary of Defense Donald Rumsfeld*
> *Oct. 16, 2003*[1]

INTRODUCTION

On the afternoon of September 11, 2001, shortly after Air Force One touched down at Offutt Air Force Base, President Bush began a teleconference with senior national security officials by proclaiming, "We're at war."[2] The war, the President elaborated, would be "global in nature."[3] During a meeting of the National Security Council the next day, the principals labored to flesh out the parameters of the conflict.[4] In particular, they discussed a proposal to frame America's objective not merely as the destruction of al Qaeda but as the "'elimination of terrorism as a threat to our way of life,' an aim that would include pursuing other international terrorist organizations in the Middle East."[5]

---

* Assistant Professor of Law, Wake Forest University School of Law.

1. Memorandum from Donald Rumsfeld, Secretary of Defense, to Gen. Richard Myers et al. (Oct. 16, 2003), *available at* http://www.usatoday.com/news/washington/executive/rumsfeld-memo.htm.

2. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 326 (2004) [hereinafter 9/11 COMM'N REP.] (quoting from the transcript of an interview given by Condoleezza Rice to Bob Woodward on October 24, 2001).

3. *Id.* at 326 n.5 (quoting from the Rice-Woodward interview).

4. *Id.* at 330-331.

5. *Id.* at 331 (quoting from a paper considered at the meeting).

The fruits of these discussions became clear when President Bush addressed Congress on the night of September 20, 2001.[6] He described the 9/11 attacks as unlawful acts of belligerency, and he declared al Qaeda's responsibility for them.[7] But he emphasized that al Qaeda was "linked to many other organizations in different countries," forming a "radical network of terrorists" along with supporting entities such as the Taliban.[8] Thus, the President concluded, although the "war on terrorism begins with al Qaeda . . . [i]t will not end until every terrorist group of global reach has been found, stopped, and defeated."[9] The United States would, he added, use "every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war."[10]

Three years down the road, the "war on terrorism" has become a familiar rhetorical device, the default choice for supporters and critics alike when referring to the complex array of policies, actions, and laws that combine to form the current counterterrorism posture of the United States. Politicians on both sides of the aisle compete to be seen as best suited to pursue this war,[11] and in considerable contrast to the pre-9/11 atmosphere[12] the question of stewardship in the war on terrorism played a central role in the 2004 presidential election.[13] But is "war" an accurate label for current U.S. counterterrorism policy? And if so, is this the correct course for the nation to pursue? These much-contested questions[14] provide the organizing principle for the latest book by one of the nation's leading counterterrorism experts, Philip B. Heymann, formerly the Deputy Attorney General of the United

---

6. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *See, e.g.*, *The Presidential Debate; Kerry: "Better Plan"; Bush: "Tough Decisions,"* L.A. TIMES, Oct. 1, 2004, at A27 (quoting Senator Kerry, during the first 2004 presidential debate, proclaiming that "I will hunt down and kill the terrorists wherever they are"); *id.* (quoting President Bush, during the debate, stating that "the best way to protect this homeland is to stay on the offense").

12. *See* 9/11 COMM'N REP., *supra* note 2, at 341 ("As best we can determine, neither in 2000 nor in the first eight months of 2001 did any polling organization in the United States think the subject of terrorism sufficiently on the minds of the public to warrant asking a question about it in a major national survey.").

13. *See, e.g.*, James Harding, *U.S. Security Becomes Defining Theme*, FIN. TIMES, Sept. 11, 2004, at 8 (describing importance of security issues in the campaign).

14. According to one observer, "whether it is appropriate to declare a war on terrorism is a question that's been debated almost continually since September 11th, 2001." Tom Gjelten, *All Things Considered: Debate on the Best Way to Deal with Terrorism* (NPR radio broadcast, Sept. 10, 2004), *available at* 2004 WL 57380023. *But see* Lexington, *One Nation After All: A Surprisingly Tough Consensus About the Need to Go After Terrorists and Their Backers*, ECONOMIST, Sept. 11, 2004, at 32 (arguing that there is an emerging bipartisan consensus in support of the views that "America is engaged in a global war on terrorism" and that America should "project power abroad in order to win that war").

States and currently the James Barr Ames Professor of Law at Harvard. Heymann has spent decades grappling with and writing about the manner in which governments at home and abroad respond to systemic challenges to social order. He has focused in particular on the problem of terrorism, and the hallmark of his work in this area has been careful attention to nuance and a willingness to examine policy choices closely to assess not only their benefits but also their hidden and long-term costs. His new book, *Terrorism, Freedom, and Security: Winning Without War*,[15] builds on this long experience and is of a piece with this tradition.

The book proceeds in four stages. In Part I Heymann focuses on the problems of categorization generated by the war on terrorism, arguing that we have overemphasized the "war" paradigm in our conflict with al Qaeda and other terrorist organizations. Part II then begins to fill in the conceptual space carved out by this criticism of the war model, making a survey of the techniques available to fight terrorism. Having set forth a menu of policy options, in Part III Heymann aims to convince the reader that we can and should take account of the risk that certain antiterrorism policies will threaten civil liberties or incite international opposition to the United States. Finally, in Part IV Heymann concludes with a specific warning about the dangers of generating an "intelligence state" through efforts undertaken in the name of counterterrorism.

The book's subtitle, *Winning Without War*, foreshadows Heymann's ultimate conclusion that the war paradigm emphasized by the current administration is counterproductive and misplaced. But before we survey the arguments that lead him to this conclusion, some historical context is in order.

I. THE TWENTY YEARS' WAR

The phrase "war on terrorism" has become so ubiquitous since 9/11, so intimately associated with the policies of the Bush administration, that many seem to have forgotten that American presidents of both parties have been declaring "war on terrorism" with great frequency and earnestness for some twenty years now. Although some government officials pressed at various times prior to 9/11 to give literal meaning to these declarations, they met with little success. The arguments these attempts precipitated, however, foreshadowed many aspects of today's debate.

One of the earliest manifestations of the tendency of politicians to invoke the imagery of war to represent and reinforce their commitment to counterterrorism arose in the early 1980s in the wake of the Hezbollah and al Dawa bombings of U.S. embassies and military installations in Beirut and

15. PHILIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR (2003).

Kuwait.[16] These events generated sharp debate within the Reagan administration about the use of military or other lethal force against terrorist organizations and their state sponsors. Two cabinet members, Secretary of State George Shultz and Secretary of Defense Casper Weinberger, presented the opposing perspectives.[17] Secretary Shultz took the view that "terrorism was a form of warfare for which we were ill prepared,"[18] and he advocated the use of force for purposes of "active prevention, preemption, and retaliation."[19] As one observer reported, Shultz on one occasion "was actually shouting his insistence that we 'wake up' to terrorism as 'an international form of warfare . . . directed largely against us and our way of life.'"[20] Shultz was, in short, calling for the government to "use [its] power to fight the war against terrorism" as a war in the literal sense.[21]

Secretary Weinberger acted as a brake on Shultz's enthusiasm.[22] Sounding themes that had considerable resonance only ten years after the withdrawal of the United States from Vietnam, Weinberger frequently warned against the precipitate use of military force. In a summary of his views about the 1986 U.S. airstrike against Libya, for example, Weinberger noted that it "is tempting for many to exploit our renewed military strength," but that military force "should be used only when we have, and can achieve, a proper objective," and that it "should never be used except as a last resort, and when all else has failed. Military forces should certainly not be used on any occasion unless a matter of major national importance is involved."[23] According to then-National Security Adviser Robert McFarlane, Weinberger felt that these conditions simply were not met by the complex diplomatic, political, and military circumstances that existed when America confronted terrorism in the Middle East in the early 1980s.[24]

---

16. For brief narratives of the Beirut and Kuwait bombings, see GEORGE SHULTZ, TURMOIL & TRIUMPH 644 (1993), and THOMAS FRIEDMAN, FROM BEIRUT TO JERUSALEM 201-202 (1990).

17. *See* 9/11 COMM'N REP., *supra* note 2, at 94-95. For an engaging overview drawing explicit parallels between current debates and those of the Shultz-Weinberger era, see *Frontline: Target America* (PBS television broadcast, Oct. 4, 2001), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/target.

18. *See* SHULTZ, *supra* note 16, at 645.

19. *See* George Shultz, Remarks Before the Jewish Community Relations Council (Oct. 25, 1984), *reprinted in* TERRORISM: A DOCUMENTARY HISTORY 62, 63 (Bruce Maxwell ed., 2003).

20. Philip Geyelin, *Terrorism and Hypocrisy*, WASH. POST, Nov. 7, 1984, at A15.

21. *See id.*

22. The Shultz-Weinberger debate is described in an interview with former National Security Adviser Robert McFarlane conducted for *Frontline: Target America*, *supra* note 17, *available at* http://www.pbs.org/wgbh/pages/frontline/shows/target/interviews/mcfarlane.html; *see also* SHULTZ, *supra* note 16, at 650 (describing what Shultz took to be the "Defense Department's deep philosophical objection to using our military for counterterrorist operations").

23. CASPER WEINBERGER, FIGHTING FOR PEACE 200 (1990).

24. *See* McFarlane, *supra* note 22.

Significantly, this debate was not merely internal to the administration. Shultz's vigorous public statements followed a message to Congress from President Reagan describing a "war against terrorism,"[25] and both support and criticism from the media followed. *The Wall Street Journal*, for example, editorialized in favor of the Shultz view that this "war" should be fought with offensive force, writing that Shultz "was right to say again last week that the war against terrorism will begin only if the West has the will to fight this fire with fire."[26] Richard Cohen vigorously pressed the contrary view in *The Washington Post*, arguing that "even retaliation . . . would not substantially change matters," and that the "war on terrorism" rhetoric masked the reality that military force "either cannot be applied or dares not be applied."[27] Meg Greenfield, also of the *Post*, echoed Cohen, arguing that the phrase "'war' with terrorism" is an "especially unfortunate formulation," and that war is "exactly what we are not in."[28] Greenfield wrote that the effect of using such language in connection with terrorism "is to elevate these grubby criminal acts to a status they don't deserve; it is to cast, at least indirectly, all Americans as enemy civilians or belligerents and thus fair game; and it is to misdescribe the nature of the assault itself."[29]

Such criticisms did not dissuade President Reagan from continuing to deploy the language of a "war on terrorism" for rhetorical purposes in the following years.[30] During the same period, moreover, a number of books began to use the language of the "war on terrorism" in connection with analyses of the threat posed by terrorism and the nature of U.S.

---

25. Ronald W. Reagan, Message to Congress (Apr. 26, 1984) ("The legislation I am sending to the Congress is an important step in our war against terrorism."), *available at* http://www.reagan.utexas.edu/resource/speeches/1984/42684a.htm.

26. *Fighting Fire With Smoke*, WALL ST. J., Oct. 30, 1984, at 30 (noting widespread disagreement regarding Shultz's views).

27. Richard Cohen, *This Is Some War on Terrorism*, WASH. POST, Sept. 22, 1984, at A23.

28. Meg Greenfield, *Accepting the Unacceptable*, WASH. POST, June 24, 1985, at A13.

29. *Id.* Contrary to this argument, the use of the war paradigm to describe terrorist acts would not justify violence against civilians, since protecting civilians against direct attack is one of the primary objectives of the law of war.

30. *See, e.g.*, Ronald W. Reagan, Statement (May 7, 1986) ("The decent people of the world . . . are not just standing together in this war against terrorism. We're committed to winning the war and wiping this scourge from the face of the Earth."), *available at* http://www.reagan.utexas.edu/resource/speeches/1986/50786b.htm; Ronald W. Reagan, Press Conference (May 7, 1986) ("And in those discussions we discussed all the things that could be seen as possible tools or weapons in this war against terrorism, but we didn't feel that this was something that you put down in a plan."), *available at* http://www.reagan.utexas.edu/resource/speeches/1986/50786a.htm; Ronald W. Reagan, Speech to the U.N. General Assembly (Sept. 22, 1986) ("To that end, the United States believes that the understandings reached by the seven industrial democracies at the Tokyo summit last May made a good start toward international accord in the war on terrorism."), *available at* http://www.reagan.utexas.edu/resource/speeches/1986/092286a.htm. Interestingly, former President Richard Nixon in June 1985 called for "'an international declaration of war' on terrorism and said it should be the main topic of any summit meeting between President Reagan and Soviet leader Mikhail Gorbachev." *Hostage Crisis*, HOUS. CHRON., June 27, 1985, at 13.

counterterrorism policy.[31] But the reality of that policy did not quite live up to the martial rhetoric. As a practical matter, military force was used only sparingly in counterterrorism in those years.[32]

This pattern continued into the Clinton administration,[33] with the rhetoric of war surfacing frequently in connection with terrorism, while in practice counterterrorism remained firmly within the domain of the diplomats, the intelligence agencies, and the prosecutors.[34] In a May 1995 radio address not long after the Oklahoma City bombing, for example, President Clinton urged Congress to pass pending terrorism legislation, warning that "[w]e mustn't let our country fight the war against terrorism ill-armed or ill-prepared."[35] Likewise, in the aftermath of the bombing in Dharan, Saudi Arabia, State Department spokesman Nicholas Burns reminded reporters that "we believe we're in a war against terrorism, as the president said."[36]

The continued rhetorical invocation of a war paradigm in the 1990s raised questions. Did we now mean war in the literal sense of an increased reliance on military operations when dealing with terrorism, or was this just an organizing motif meant to lend oomph to the traditional blend of diplomatic, legal, and intelligence efforts? At least in the mid-1990s, the answer seemed to be that it was merely a rhetorical device akin to the "war on drugs."

---

31. *See, e.g.*, NEIL LIVINGSTONE, THE WAR AGAINST TERRORISM (1982) (reviewing terrorist activity around the globe and outlining various methods – most non-military, but including the use of elite commando units – to respond to the problem); FIGHTING BACK: WINNING THE WAR AGAINST TERRORISM (Neil C. Livingstone & Terrell E. Arnold eds., 1986) (collecting essays on various dimensions, many non-military, of U.S. counterterrorism policy); DAVID C. MARTIN & JOHN L. WALCOTT, BEST LAID PLANS: THE INSIDE STORY OF AMERICA'S WAR AGAINST TERRORISM 367 (1988) (concluding that "[t]errorism is a threat to law and order, not to national security," after reviewing U.S. responses to terrorist incidents in the 1980s); MICHAEL KRONENWETTER, ISSUES FOR THE NINETIES: WAR AGAINST TERRORISM 82 (1989) (observing that while "[s]ome people believe that the war against terrorism is best fought like any ordinary war . . . [o]thers disagree, arguing that military force is ineffective against the methods and tactics of the terrorists").

32. *See* 9/11 COMM'N REP., *supra* note 2, at 96-98. The most notable exception to the general reluctance to use military force in connection with terrorism arose when the U.S. carried out airstrikes against Libya in retaliation for its sponsorship of the bombing of the *La Belle* discotheque in Berlin in 1986. *See* SHULTZ, *supra* note 16, at 679-687.

33. *See* 9/11 COMM'N REP., *supra* note 2, at 98, 134-138, 188-189. During this period, a literature on "fourth-generation warfare" began to emerge among military professionals, emphasizing the danger posed by transnational, sub-state organizations capable of and willing to employ asymmetric methods not bound by any legal restraints. For a brief overview of this development, see Richard H. Shultz & Andreas Vogt, *It's War! Fighting Post-11 September Global Terrorism Through a Doctrine of Preemption*, 15 TERR. & POL. VIOLENCE 1, 5-7 (2003).

34. For a comprehensive survey of the distribution of counterterrorism responsibilities prior to the late 1990s, see 9/11 COMM'N REP., *supra* note 2, at 71-107.

35. William J. Clinton, Radio Address (May 20, 1995), *available at* 1995 WL 306814. Tellingly, the legislation at issue concerned prosecutorial and investigative tools; it ultimately resulted in the Antiterrorism and Effective Death Penalty Act of 1996. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. (forthcoming 2005) (exploring legislative history of AEDPA).

36. Press Conference (Aug. 5, 1996), *available at* 1996 WL 444435.

According to the Democratic Party platform upon which President Clinton successfully sought reelection in 1996, for example, the "war on terrorism" (also referred to in the platform as the "war on global terrorism") had "three front[s]." [37] None involved military force. Instead, the "war" was to be carried out "abroad, through greater cooperation with our allies; at home, by giving law enforcement the most powerful tools available to fight terrorism; and in our airports and on airplanes, through tough air travel security measures . . . ."[38]

After the al Qaeda truck bombings of our embassies in Nairobi and Dar es Salaam in 1998, however, it appeared for a time that the "war on terrorism" might begin to utilize military force on a more sustained basis. Initially, the Clinton administration was noncommittal. Thus, we find Colonel P.J. Crowley, the National Security Council's Senior Director for Public Affairs, refusing to let reporters pin him down on the topic:

> Q: Are we in a state of war – we have a war on drugs. Are we in a state of war against terrorism, or does that require a declaration in order for us to fight?
>
> A: I think we see terrorism as the emergent threat of the '90s. It will be the major threat that America faces globally into the next century.
>
> Q: Are we in a state of war against it so that we can fight these people if we can't apprehend them?
>
> A: I think we recognize the dangers and we're taking appropriate steps to address them.[39]

But the uncertainty seemed to lift later in the month after the United States launched cruise missiles against targets in Afghanistan and the Sudan in retaliation for the embassy bombings. A "senior Pentagon official" at that time warned that "this is not a one-shot deal here . . . . [W]e are engaged in a different – a real war against terrorism."[40]

---

37. Democratic Party Platform (1996), *available at* 1996 WL 490886.

38. *Id.*

39. Press Conference (Aug. 12, 1998), *available at* 1998 WL 468796).

40. Press Conference (Aug. 20, 1998), *available at* 1998 WL 513579; *see also* Rep. Lee Hamilton, Statement (Aug. 20, 1998) (commending the President for ordering the missile strikes, and stating that "we are in a protracted war against terrorism"), *available at* 1998 WL 513583. *But see Worldwide Threats Facing the U.S. and Potential U.S. Operational and Contingency Requirements: Hearing Before the Senate Armed Services Comm.*, 105th Cong. (1998) (testimony of Sec. of Defense William Cohen, stating that "Osama bin Laden has declared war against the United States," but that "we will follow the legal route as far as seeking the arrest and apprehension of those responsible – bringing them to justice"), *available at* 1998 WL 690667.

Unfortunately, it was in fact a "one-shot deal." We know now that efforts were made in the 1998-1999 period by many officials within the Clinton administration and the military – most notably Richard Clarke of the National Security Council, General Peter Schoomaker of Special Operations Command, and Thomas Kuster of the Office of the Assistant Secretary for Special Operations and Low-Intensity Conflict – who sought to go beyond the initial August missile strikes and to become more aggressive with the use of military force, in order to disrupt al Qaeda and to kill its leaders and operatives.[41] But despite their efforts, the missile strikes of August 1998 would be the last overt use of military force against terrorists until after 9/11.

A number of concerns combined to block further military action. Some have considerable force, even in retrospect, while others seem to reflect what proved to be a mistaken assessment of the magnitude of the threat posed by al Qaeda. Antiterrorism planning was affected by: (1) the lack of "actionable intelligence" regarding Osama bin Laden's location, (2) the reluctance to stimulate international hostility at a time when the United States was already engaged in military actions in Iraq and Kosovo, (3) uncertainty about the overflight and basing rights necessary for such critical activities as search-and-rescue operations, and (4) domestic political constraints arising both from "wag-the-dog" allegations linked to the Lewinsky scandal and from still-disputed claims about the accuracy of the intelligence upon which the 1998 strike was based.[42] Neither the subsequent bombing of the USS *Cole* in 2000 nor the discovery of al Qaeda plots to attack American targets in Los Angeles and Amman at or near the millennium resulted in a military response in the final days of the Clinton administration or the early days of the Bush administration.[43] In both instances difficult questions about attribution of responsibility for the attacks (and meta-questions about the standard of proof to be applied in answering that question) added to the factors cited above in preventing military responses to them. The use of military force in August 1998 thus represented an exception to the status quo rather than the emergence

---

41. *See* 9/11 COMM'N REP., *supra* note 2, at 119-121, 134-137, 143.

42. *See id.* at 115-143 (describing in detail the policy debates regarding the use of force in connection with our response to the 1998 bombings). In December 1998, DCI Tenet circulated a memorandum on bin Ladin to senior CIA officials declaring that "[w]e are at war," and that "no resources or people [should be] spared in this effort, either inside CIA or the Community." *Id.* at 357 & n.38 (quoting Memorandum from Director of Central Intelligence George Tenet on "Usama Bin Ladin" 2 (Dec. 4, 1998)). However, the directive "had little overall effect on mobilizing the CIA or the intelligence community." 9/11 COMM'N REP., *supra* note 2, at 357.

43. Both the Clinton and Bush administrations come off poorly in the 9/11 Commission Report with respect to the U.S. response – or lack thereof – to the *Cole* bombing. *See id.* at 193-197 (describing the outgoing Clinton administration's decision not to respond directly against al Qaeda for the *Cole* bombing in the absence of better proof of al Qaeda's responsibility), 201-202 (describing the incoming Bush administration's decision not to respond directly against al Qaeda for the *Cole* bombing due to a perception of inadequate strike options and a sense on the part of Secretary Rumsfeld that "too much time had passed" and of Deputy Secretary Wolfowitz "that the *Cole* attack was 'stale'").

of a true "war" on terrorism, much like the isolated use of airstrikes against Libya in 1986. The war rhetoric remained in circulation,[44] but it would not be realized through sustained action until after 9/11.

In summary, the concept of a "war on terrorism" has been a rhetorical device used repeatedly by government officials and commentators alike since at least the early 1980s. The phrase was little more than rhetoric prior to 9/11, however. Notwithstanding the efforts of individual proponents of more aggressive action, military force in this period played only a minor and episodic role in counterterrorism policy, while diplomacy, law enforcement, and intelligence gathering bore the main burden. The Bush administration's robust embrace of military mechanisms after 9/11 thus involved a continuity of rhetoric but a significant break with the status quo in practical terms. This brings us at last to the question addressed by Philip Heymann in *Terrorism, Freedom, and Security*: Are we better off for the change? His answer: a carefully qualified "no."

II. CRITICIZING THE WAR MODEL

Terrorism, Freedom, and Security is not Heymann's first book on the subject of counterterrorism. In his 1988 book *Terrorism and America: A Commonsense Strategy for a Democratic Society*, Heymann provided a thoughtful survey of the policy considerations involved in formulating counterterrorism policy.[45] *Terrorism, Freedom, and Security* is in many ways a post-9/11 coda to that earlier work. Heymann explains that he both acknowledges the changes wrought by 9/11 and recognizes that "some things have not changed."[46]

With respect to what has changed, Heymann begins by emphasizing American threat perceptions. In particular, he highlights the belated realization that al Qaeda is an organized, radical vanguard embedded within a "context of radical Islamism that may motivate millions," and that al Qaeda and perhaps other organizations desire to acquire weapons of mass destruction and are quite likely to use them or other mass casualty methods against the United States if possible.[47] Heymann observes that these factors suggest that we previously had underestimated the magnitude of harm terrorism might inflict and thus underestimated the degree of effort that ought to be devoted to its prevention.[48]

---

44. *See, e.g.*, Treasury Secretary Lawrence Summers, Address to the U.S. Customs Service (Dec. 20, 1999) (highlighting role of the Customs Service in the "war against terrorism"), *available at* 1999 WL 1214815.

45. *See* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY (1998).

46. *See* HEYMANN, *supra* note 15, at xi.

47. *See id.* at 7. For a brief discussion of the critical distinction between "Islamism" and "Islamic," see 9/11 COMM'N REP., *supra* note 2, at 362 n.3 and sources cited therein.

48. *See* HEYMANN, *supra* note 15, at 7.

Heymann also emphasizes that the 9/11 attacks prompted recognition of a "gap in [the] web of legal regimes for states, groups, and individuals that had been intended to deal comprehensively with war, crime, and the rights of non-citizens."[49] Al Qaeda operated within this gap. It committed acts that conflated crime and belligerency, raising difficult questions about the proper mode of response.[50]

The most pressing reason for resolving such questions after 9/11 was Afghanistan. Al Qaeda's Afghan haven had proven to be quite beyond the scope of the legal, diplomatic, economic, and covert measures employed by the Clinton and Bush administrations prior to 9/11.[51] As Heymann affirms, only military force held out the prospect for closing this "dangerous gap,"[52] and thus "the initial commitment to war in Afghanistan was plainly wise."[53] Operation Enduring Freedom was, after all, "far more analogous to what we had called 'wars' in the Middle East and South Asia than what we had labeled 'terrorism' in those areas."[54]

Whether a war paradigm is accurate or even desirable in contexts other than Afghanistan, however, is an entirely separate question. It is here that we find Heymann breaking ranks with the Bush administration's post-9/11 approach to terrorism. Heymann argues that giving primacy to the military in non-combat counterterrorism contexts around the world "might work in the

---

49. *Id.* at 9.

50. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L. J. 1029, 1032 (2004) ("Our legal tradition provides us with two fundamental concepts – war and crime – to deal with our present predicament. Neither fits."). For a selection of articles reflecting the diverse views among legal academics on what might be termed the categorization problem presented by terrorism, see *id.* at 1032-1037 (arguing that neither "war" nor "crime" provides an adequate framework); Symposium, *The Changing Laws of War: Do We Need a New Legal Regime After September 11?*, 79 NOTRE DAME L. REV. 1183 (2004) (collecting articles arguing for and against application of a war paradigm); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 310-313 (2003) (reviewing the definitional issues raised since 9/11); Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOB. STUD. L. REV. 135 (2004) (arguing for classifying terrorism as an international crime); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003) (arguing that a state of war exists between the U.S. and al Qaeda); Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Law of War*, 28 YALE J. INT'L L. 325 (2003) (arguing that the laws of war do not apply to non-insurgent, substate actors such as al Qaeda).

51. *See* 9/11 COMM'N REP., *supra* note 2, at 119-143, 205-214. As Heymann observes, "even extending the network of law enforcement cooperation would not create a system, in every state from which Al Qaeda might operate, sufficiently motivated and efficient to prevent attacks on us. A dangerous gap remained." HEYMANN, *supra* note 15, at 10.

52. *See* HEYMANN, *supra* note 15, at 10.

53. *Id.* at 15. In this important respect, Heymann's views are rooted in a pragmatic realism that contrasts sharply with the views of other scholars who suggest that the problem of terrorism can be dealt with through criminal law enforcement mechanisms, be they domestic or international in nature. *See, e.g.*, Sadat, *supra* note 50.

54. HEYMANN, *supra* note 15, at 16.

short term" but "has great weaknesses as a long-term strategy."[55] "Reliance on the military," he asserts, "is the wrong set of priority activities."[56]

What, then, should the priorities be? Anticipating the report of the 9/11 Commission, Heymann contends that "the organizational structure that is most needed is a greatly improved intelligence apparatus,"[57] one that benefits from the greatest possible extent of allied cooperation abroad and active support from key audiences – particularly the Muslim- and Arab-American communities – at home.[58] No reasonable person would dispute the importance of intelligence collection and analysis to counterterrorism, of course, and since 9/11 we have seen considerable efforts to enhance and improve these capacities (culminating in the bipartisan rush to participate in reform of the intelligence community in the wake of the 9/11 Commission's report). The question is whether these efforts have been unduly hampered by the primacy of the war model.

This brings us to the core of Heymann's argument. In his view, the Bush administration's extensive reliance on the "metaphor of war" interferes with the central task of assessing the full range of available policy choices in terms of their short and long term costs and benefits: "It tends to obscure the differences among the threats we face and to distract attention from a careful analysis of: what we can do; what the essential roles of other nations are; and what mixture of desired and undesired effects is likely for each of our choices."[59] War, Heymann finds, "misleads us as to the means that we will have to use" as the locus of counterterrorism activities shifts from the Afghan combat zone to other nations and, occasionally, to the United States itself.[60]

On the latter point – the role of the military within the United States – Heymann takes particular exception. The critical function of gathering intelligence about domestic threats has by tradition and law been the province of the FBI and the Secret Service, joined now by the Department of Homeland Security.[61] Adoption of the war model domestically, Heymann cautions, would bring with it an undesirable expansion of military intelligence into the domestic realm.[62]

---

55. *Id.* at 17.
56. *Id.*
57. *Id.*
58. *See id.* at 78, 100-101.
59. *Id.* at 87.
60. *Id.* at 19.
61. *See id.* at 32.
62. *See id.* at 32-33. In this context, consider the events of February 2004 at the University of Texas School of Law, when two agents of the U.S. Army Intelligence and Security Command (INSCOM) attempted to gather information about the attendees at a law school-sponsored event on Islamic law and sexism, during which a participant allegedly acted in a suspicious manner toward two Army lawyers who were present. INSCOM, to its credit, conducted a review of the incident, found that the agents had violated procedures, and instituted additional training in an attempt to prevent recurrences. *See* Janet Elliott, *Agents' Probe at Law School Criticized; Army's Review Sees Procedural Lapses*, HOUS. CHRON., Mar. 16, 2004, at 11. *See also* Robert Block & Gary Fields, *Is Military Creeping into Domestic Spying and*

There are situations outside the United States in addition to Afghanistan – the Northwest Frontier province of Pakistan comes to mind – where military primacy will be the desirable model. But in other contexts, in London, for example, or Paris, the use of military force will be unrealistic or counterproductive.[63] What is needed in such scenarios, Heymann concludes, is "a level of willing and competent cooperation abroad that we cannot effectively compel."[64] The military of course still has a significant role to play, even in those contexts; it is difficult to imagine, for example, how one might carry out an effectively integrated counterterrorism policy in Jordan without the intimate involvement of Central Command. But for Heymann the bottom line is that the emphasis on "war" in the "war on terrorism" causes more problems than it solves.

Heymann also objects that the war model encourages a one-size-fits-all approach to the "rich variety of terrorism" that we actually face.[65] That variety consists both in method (ranging from small-scale acts of violence designed to obtain publicity to sustained bombing campaigns to mass casualty "spectaculars")[66] and in source (ranging from al Qaeda to relatively unaffiliated actors emerging at random from the background noise of the radical Islamist movement).[67] As Heymann emphasizes, different threats call for different remedies and countermeasures, only some of which will be military in nature.[68]

What non-military measures does he have in mind? This is the subject of the next section of the book.

III. THE POLICY MENU

Much that was true of counterterrorism policy before 9/11 remains true today. One of the most notable consistencies, Heymann suggests, involves a

---

Enforcement?, WALL ST. J., Mar. 9, 2004, at B1 (describing various aspects of military involvement in domestic information-gathering).

63. *See* HEYMANN, *supra* note 15, at 29-31; *cf.* Sievert, *supra* note 50, at 314 (promoting the relative merits of military action over a law enforcement response in the event that an al Qaeda cell were discovered "in an apartment or farmhouse in England, France, or the United States").

64. HEYMANN, *supra* note 15, at 32.

65. *Id.* at 22.

66. *Id*.

67. *Id*. at 23-25; *cf.* 9/11 COMM'N REP., *supra* note 2, at 362 (commenting that "the enemy is not just 'terrorism,' some generic evil. . . . The catastrophic threat at this moment in history is more specific. It is the threat posed by *Islamist* terrorism – especially the al Qaeda network, its affiliates, and its ideology."), 363 ("Our enemy is twofold: al Qaeda . . . and a radical ideological movement in the Islamic world, inspired in part by al Qaeda, which has spawned terrorist groups and violence across the globe.").

68. *See* HEYMANN, *supra* note 15, at 26. Heymann cautions that he does not mean to suggest that the domestic criminal law enforcement system should be left to deal with al Qaeda. *See id.* at 22.

fundamental principle of sound policymaking:[69] decisionmakers must be willing constantly to assess – from both short and long-term perspectives – the full range of costs and benefits associated with particular policy choices. Exigent circumstances can, of course, require such assessments to be truncated, to proceed by necessity on the basis of incomplete information or analysis. With the passage of the exigency the obligation for thorough assessment reemerges, however, and may even require a change of course from that charted in the heat of the moment.

Heymann notes that in times of war we tend to depart, quite rightfully, from such nuanced approaches.[70] "But terrorism is different" from war, he warns, in the sense that the ongoing threat of terrorist violence does not preclude us from thorough cost-benefit analysis.[71] The threat is a continuing one; terrorism is a method that can and should be suppressed and discredited, but it cannot be permanently extinguished.[72] Even if the focus of the war on terrorism is made more specific so as to encompass only al Qaeda or perhaps also the broader radical Islamist movement, the opportunity for and obligation to perform careful policy analysis remains.

In an effort to inform such assessments, Heymann provides readers with a grid designed to clarify thinking about the utility of specific policy options.[73] Across one axis the grid lists at an abstract level the various inputs in the equation of a terrorist attack: recruiting and sustaining members; obtaining resources (including funds); training; acquiring tactical information about the target; accessing the target; escaping (in non-suicide operations); maintaining some form of haven; maintaining morale; and generating broader social support in some relevant community.[74] Along the other axis Heymann lists the several modes of prevention available to the government: reducing anti-American attitudes that facilitate hostilities against us; using deterrence (through military, legal, or economic measures) against individuals, groups, or states; hardening targets by restricting access to them (including access to the United States itself); restraining access to critical resources such as funding; collecting tactical and strategic intelligence (and analyzing and distributing such intelligence); and disrupting specific operations or organizations through prosecution, detention, or covert operations.[75] Notably, but perhaps not surprisingly given Heymann's general discomfort with the

---

69. *See id.*

70. *See id.* at xii.

71. *See id*.

72. *See* 9/11 COMM'N REP., *supra* note 2, at 362 ("But the enemy is not just 'terrorism,' some generic evil. This vagueness blurs the strategy."), 363 ("Terrorism is a tactic used by individuals and organizations to kill and destroy.").

73. *See* HEYMANN, *supra* note 15, at 40 (Figure 3.1). The cryptic column headings are described in greater detail in the text. *Id.* at 41-42.

74. *See id.*

75. *See id.*

military model, the grid does not address the overt use of lethal force (by the military or the CIA) to incapacitate targeted terrorists.[76]

In the pages that follow, Heymann surveys a wide range of policy options designed to flesh out the grid.[77] His recommendations are thoughtful and well-targeted, although they break little new conceptual ground and in some instances suffer from generality. His treatment of the war of ideas is illustrative. Terrorist organizations such as al Qaeda benefit from the growth of hostility to the United States, as this increases the pool of logistical and moral support available to them, sustains group morale and cohesion, and provides the conditions for additional recruits.[78] For all of these reasons, success in preventing future terrorist attacks over the long-term will depend in significant part on the success of our effort to delegitimize terrorism not so much at home (where few if any need convincing) as in the Islamic world. Heymann correctly and persuasively identifies these dynamics, and he is frank in discussing our limited options for changing them. He concedes, for example, that we face a somewhat intractable dilemma in attempting to advance an agenda of democracy in the Islamic world without fatally undermining our interests in Saudi Arabia, Egypt, and Pakistan, and he recognizes that the United States all too often is scapegoated by other governments – including nominal allies – to deflect domestic dissent.

What then can we do to improve our position in the war of ideas? Heymann has several suggestions. He emphasizes the use of diplomatic and other measures to urge Saudi Arabia and Pakistan in particular to crack down on incitement in the schools and in the media. He also suggests that we redouble our efforts to find credible outlets for our own messages.[79] These are smart policies, and Heymann does a service in establishing the link between them and the ultimate goal of prevention. For as the 9/11 Commission recently observed, "If the United States does not act aggressively to define itself in the Islamic world, the extremists will gladly do the job for us."[80] But Heymann unfortunately does not take on the more difficult task of identifying specific mechanisms for implementing these policies. By the same token, we learn little here about the pros and cons of existing Bush administration policies designed to address these same concerns.[81]

---

76. *See id.*

77. *See id.* at 42.

78. *See id.* at 42-43. On the decentralization of terrorist organizations, see Chesney, *supra* note 35.

79. *See* HEYMANN, *supra* note 15, at 46.

80. 9/11 COMM'N REP., *supra* note 2, at 377.

81. *See* Joseph S. Nye, Jr., Opinion, *Foreign Policy; Sell It Softly; Persuasively Promoting American Values and Culture Will Work Better Than Carrots or Threats to Influence the Middle East*, L.A. Times, Apr. 25, 2004, at M2 (arguing that the Bush administration's "establishment of Arabic language broadcasting units like Radio Sawa and satellite television channel Al Hurra, both of which intersperse news with popular programming, was a good first step for the U.S.," and that the next step is to "learn to work more effectively with Arab news media").

In this respect, Heymann's discussion of the war of ideas typifies the style of his book. *Terrorism, Freedom, and Security* is pitched at a level of abstraction that enables Heymann to address a wide array of topics in a meaningful way, but it may prove less useful for readers already thoroughly versed in the policy debates associated with counterterrorism. With this caveat noted, however, even experienced readers will benefit from the general themes developed in this book.

By the time one reads through Heymann's other policy discussions – touching on subjects ranging from ethnic and religious profiling, to assassination, to overseas intelligence gathering[82] – one theme in particular emerges. However tempting a given policy may appear at first blush, it very likely will have counterproductive side effects and unintended consequences. Heymann does not suggest that we therefore take no policy initiatives; on the contrary, he seems quite prepared to proceed with a variety of measures notwithstanding these risks. But he does insist on a complete assessment of the possible downsides of these measures, arguing that although "[n]o one is very good at such an assessment . . . only the foolhardy fail to recognize that the offset is there."[83]

IV. CIVIL LIBERTIES

Having spent dozens of pages describing the offsetting considerations associated with particular policy options, Heymann turns to the general issue of the impact of counterterrorism law and policy on civil liberties within the United States, or, as he puts it, on "the historic set of arrangements which have preserved our democratic liberties."[84] He organizes his thoughts on this topic around an appealing graphic – a Venn diagram composed of three circles representing: (A) actions that would reduce the threat of a terrorist attack, (B) actions that would threaten civil liberties or national unity of purpose, and (C) actions that would reduce public fear.[85] The visual impact of these partially overlapping circles nicely conveys the point that a given policy may interact in a number of ways with these three factors.

Heymann uses this device to draw attention to the fact that the most difficult policy choices will arise where a policy falls within the scope of the second circle (infringing liberties or undermining unity) but also might be useful for reducing terrorism or public fear.[86] He does not claim that categorical answers are available in these scenarios, but rather, that these are the situations where we must be most on guard with respect to our liberties, taking care not to discount their long-term value unnecessarily for the sake of

---

82. *See* HEYMANN, *supra* note 15, at 48-83.
83. *Id.* at 60.
84. *Id.* at 87.
85. *See id.* at 88-89 & Figure 5.1.
86. *See id.* at 89.

short-term gain (or the appearance thereof).[87] These are points well taken, if notoriously difficult ones to operationalize.[88]

Heymann applies the principles he advances to a series of specific policies. In some respects, he is quite critical of the current administration. He argues, for example, that military detention of U.S. citizens should not take place in the absence of a congressional authorization that is more specific than anything currently in place.[89] On the other hand, he describes policies that we may need to employ notwithstanding their impact on liberties, including most notably the use of data mining techniques to assist in culling useful bits from the vast digital ocean of available information, despite personal privacy concerns.[90] Heymann also raises the provocative question of whether an incitement law – properly confined in scope to the parameters set forth in *Brandenburg v. Ohio*[91] – would be desirable,[92] a topic that has arisen tangentially in recent months thanks to the unsuccessful prosecution of a computer programmer in connection with his operation of a Web site purveying a variety of violent jihadist messages[93] and, most recently, the indictment of a man in Virginia for his role in persuading a group of men to attempt to travel to Afghanistan to take up arms against U.S. forces.[94]

To his credit, Heymann carefully avoids the trap of assuming that steps taken in response to fear necessarily make for bad policy. Certainly fear may have a deleterious effect on sound policymaking,[95] but it need not always produce the wrong result.[96] Heymann reminds us instead that decisionmaking in a climate of fear requires careful consideration of a range of factors. Is the

---

87. *See id.* at 89-90.

88. A number of scholars have argued that during times of heightened national security concerns policymakers are most unlikely to give civil liberties the same value that they would during ordinary times. *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449 (1985).

89. *See* HEYMANN, *supra* note 15, at 91-93.

90. *See id.* at 103-104.

91. 395 U.S. 444 (1969) (holding state syndicalism statute unconstitutional as applied).

92. *See* HEYMANN, *supra* note 15, at 106-108.

93. *See* Harvey A. Silverglate, *Free Speech in an Age of Terror*, BOSTON GLOBE, June 28, 2004, at A11 (describing acquittal of Sami Omar Al-Hussayen, a Saudi student in Idaho charged with providing material support to terrorist organizations by establishing and operating Web sites that recruited members, solicited funds, and promoted militant Islamist views).

94. *See* United States v. Ali al-Timimi (indictment) (E.D. Va. Sept. 23, 2004) (charging, among other things, that al-Timimi persuaded others to levy war against the United States), *available at* http://www.usdoj.gov/usao/vae/ArchivePress/SeptemberPDFArchive/04/TimimiINDC092304.pdf.

95. *See, e.g.*, W. Kip Viscusi & Richard Zeckhauser, *Sacrificing Civil Liberties to Reduce Terrorism Risks*, 26 J. RISK & UNCERTAINTY 99, 100 (2003) (discussing possible impact of cognitive biases in this context); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011, 1038-1042 (2003) (discussing impact of cognitive bias on risk assessment).

96. *Cf.* Eric A. Posner & Adriane Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 630-631 (2003) (suggesting that in some circumstances fear can enhance rather than detract from sound policymaking, as when it stimulates policymakers to examine and take action with respect to a particular problem).

proposal well calculated to actually reduce the threat? Is it aimed at the right target? And lastly, does it take into account "the value Americans place on individual rights, decency, and liberty"?[97]

Heymann next identifies a series of considerations – "four pillars," he calls them [98] – that seem rooted in the seminal experience of the 1960s and 1970s with respect to the tension between national security and civil liberties. First, he emphasizes the importance of keeping "internal security functions out of the hands of the military and the CIA," both in order to maintain the Agency's freedom of action abroad and to prevent it from exercising similar freedom within the United States.[99] Second, and closely related, Heymann urges that we maintain the distinction between domestic and foreign intelligence gathering, and in particular that we identify and publicize the scope of the distinction between them.[100] Third, out of concern for the possibility of abuse by domestic intelligence agencies, Heymann supports the adoption of a statutory charter expressly defining the powers allocated to them.[101] Finally, Heymann attaches special importance to effective bipartisan oversight of domestic intelligence gathering functions by a body equipped with an appropriate staff, the strong will needed to play the oversight role, and a real capacity to act when necessary to correct or prevent abuses.[102]

In the wake of this discussion, Heymann concludes by returning to the issue with which the book begins: Does the rhetorical and practical emphasis on war in the latest chapter of the long-running war on terrorism undermine the sound policymaking principles identified throughout the book? Heymann thinks that it does. "Talk of 'war' as if that substitutes for a recognition of the complexity of the situation *and* the richness of our goals *and* the variety of our alternatives is simply folly," he warns.[103]

Reading this statement during the peak of the 2004 electoral cycle, one could not help but appreciate the spirit of Heymann's point. Not many politicians of either party were willing to run the risk of appearing weak on national security by discussing the limits of military force as a tool of counterterrorism policy.[104] But is this a fair description of the actual substance of the Bush administration's counterterrorism policies? That is a question not clearly answered by this book, although the underlying point Heymann makes – about the pernicious effect of overreliance on the military model for

---

97. HEYMANN, *supra* note 15, at 112.
98. *Id.* at 157.
99. *Id.* at 139.
100. *See id.* at 142-150.
101. *See id.* at 150-151.
102. *See id.* at 152-156.
103. *Id.* at 170 (emphasis in original).
104. Election campaigns do not tend to shed useful light on the nuances of the candidates' policy views, particularly in the national security context. *See* Gjelten, *supra* note 14 (observing that the differences between the presidential candidates' views "have been exaggerated," as Kerry "has never questioned whether there should be a war on terrorism" and Bush does "not describe the anti-terrorism effort solely in military terms").

responding to a problem that requires a complex array of military and non-military solutions – remains valid, even if one disagrees to some degree with his characterization of current policies.

CONCLUSION

Terrorism, Freedom, and Security, at a general level, is a plea for nuanced decisionmaking, for counterterrorism policies that balance short-term advantage against long-term consequences. It is hard to see how one could disagree. Over the long haul in the war on terrorism – and it will be a long haul – we will pay a significant price if we neglect this approach.

At a more specific level, the book claims that the Bush administration has overemphasized the military's role in the war on terrorism at the expense of the intelligence agencies, the diplomats, and other instruments of the government. But it is important not to read too much into this argument. Heymann readily accepts the propriety of using military force as the fundamental mode of response to terrorism in at least some contexts, such as in Afghanistan. He does not support a return to the pre-9/11 world, in which the "war on terrorism" was a mere rhetorical device on a par with the "war on poverty" or the "war on drugs." Heymann aims to convince readers of the importance of a contextualized, cost-benefit approach to decisionmaking in which the military option may or may not turn out to be the best one in a particular situation. He believes the Bush administration is coming to the wrong conclusions with respect to some such determinations – as in the use of military detention to hold citizens captured in the United States – but one need not accept or reject his assessment of the merits of any one issue in order to grasp the wisdom of his general approach.

In this respect, Heymann's recommendations coincide with the observations of the 9/11 Commission that "long term success" in the struggle against terrorism will require "the use of all elements of national power," including not only military force but also "diplomacy, intelligence, covert action, law enforcement, economic policy, foreign aid, public diplomacy, and homeland defense."[105] Discussions of counterterrorism policy, unfortunately, all too often portray the issue as a zero-sum game in which decisionmakers must view terrorists only through the lens of law enforcement or war, but never both. The reality is that good counterterrorism policy makes use of all the levers of national power, favoring one over another in various circumstances depending on a rigorous assessment of the balance of costs and benefits. In the final analysis, *Terrorism, Freedom, and Security* will succeed with readers from diverse perspectives because it encourages this kind of careful thinking.

---

105. 9/11 COMM'N REP., *supra* note 2, at 363-364. Both Heymann and the Commission also make the salutary point that this overarching strategy must be "as much, or more, political as it is military." *Id.* at 364.