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RESPONSES TO THE FIVE QUESTIONS

Norman Abrams†

1. TEN YEARS AFTER 9/11, WHAT IS THE MOST SIGNIFICANT LEGACY LEFT BY THE TERRORIST ATTACKS? ARE WE SAFER?

Ten years after 9/11, the most significant legacy(ies) of those terrorist attacks fall under three headings: (a) the public's ever-present awareness that we continue to be vulnerable to terrorism, even a catastrophic terrorist attack; (b) the significant security apparatus and enforcement measures that have been implemented since 9/11; and (c) the fact that national security became, and continues to be, a central political issue and governmental concern.

I. The public's awareness of the risk of a terrorism attack and its implications.

Generally, in the ten years since 9/11, the public has displayed a remarkable degree of cooperativeness and willingness to undergo inconvenience in connection with security measures that impact directly on them (e.g., airport security). Occasionally, of course, impatience surfaces when the security measures seem to be unreasonable ways of preventing terrorism.

An important concern is that, as the period lengthens in which a successful major terrorist attack has not occurred, it becomes harder to maintain the needed, ever-present vigilance. Our ability to continue to apply the necessary degree of care in security steps weakens. The need to fight apathy and to try to keep our guard up against the risk of terrorism is also part of the legacy of 9/11.

Another feature of this legacy of 9/11 is the general public's seeming tolerance of governmental measures that do not directly impact most people and that are perceived as necessary actions to prevent terrorism. In the court of public opinion, unlike civil libertarians, the general public has not seemed especially upset

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when the government has taken somewhat draconian steps in the name of national security. For example, the public may be unaware or simply unconcerned about moves that some members of Congress have made to shift the custody and prosecution of more persons accused of terrorism into military jurisdiction.

II. The significant security apparatus that has been created and the enforcement measures that have been implemented.

Other features of the post-9/11 legacy include the following: (1) large numbers of federal and state personnel that are now devoted to anti-terrorist investigatory and prosecutorial activities (e.g., in the FBI and the Department of Justice); (2) new legal measures, processes, and procedures that have been developed to deal with terrorist-related matters, some pre-dating 9/11; and (3) increased attention that has been devoted to practical security measures—guarding infrastructure, public and private buildings, nuclear facilities, airports, dams, reservoirs, factories, etc. Training in security, and courses in security and security-related professions and disciplines have become new cottage industries.

III. National security as a political concern and political issue.

Another byproduct of 9/11 is that, even ten years later, national security is, and will continue to be, near the top of the list of political issues addressed by candidates for public office and an important concern in Congress. This is not a bad thing. The problem is that in regard to police/security-type issues, it is politically risky to allow oneself to be out-flanked by opponents on the right. As a result, political figures, especially on the national scene, tend to drift rightward in their views on national security issues. One finds few officeholders or candidates who espouse strong civil liberties perspectives. This is not a new phenomenon, but, arguably, it has become more pronounced since 9/11.

IV. Are we safer?

Safer—what is safer? At best it is a relative term. Safer than we would have been without the measures that have been taken? I would say "yes." If not, then all that has been done in the name of national security in the decade since 9/11 would seem to have gone for naught. Of course, while on one level the country is somewhat better protected than it was in 2001, it can also be argued that we

have antagonized people in other countries and some foreign governments by some of the measures that have been taken. As a consequence, we have created additional antagonists and, possibly, enemies, a fact that ultimately may affect our safety.

In fact, it is impossible to answer this question in a meaningful way except by highlighting the obvious factors that should enter into an assessment of our relative safety since 9/11. If the implication of the question is that perhaps it was wasteful or counterproductive to undertake the various security steps that have been taken in the wake of 9/11, since on one scale or another we are still at risk, I would strongly disagree with that implication. First, these measures—e.g., the apprehension and prosecution of individuals who have been plotting or preparing for terrorist acts and the various security measures that have been implemented—have had an effect on our safety, even if it is impossible to measure. Second, a government must respond to the felt needs of the people and circumstances and must also appear to be doing so if it is to continue to receive the support of the populace.

Of course, questions can be raised about whether all of the steps that have been taken were the right ones. But that suggestion raises a different and quite complicated set of issues that go beyond the confines of this paper. While there have been some mistakes, for the most part the government has acted in a reasonable fashion, though sometimes the process by which decisions were made, particularly in the immediate aftermath of 9/11, was skewed.

2. WHAT IMPACT WILL THE "ARAB SPRING" HAVE ON AMERICAN NATIONAL SECURITY?

"Arab Spring" means the changes in governments that have occurred, and may yet still occur, as a result of massive protests by the populace in countries such as Tunisia, Egypt, Libya, Yemen, and Syria. Because these events are still occurring and the resulting changes in government are still very uncertain, at best, predictions about the impact on U.S. national security must be very speculative.

The direction of changes resulting from the Arab Spring protests has been toward trying to hold fair democratic elections that would lead to new governments replacing the essentially autocratic/dictatorial government systems previously in place. Of course, democratic elections may produce new governments that are not particularly friendly to the United States; elections may also

result in governments that are religiously-based; and finally, they can lead to governments, which, once elected and in power, may not maintain the commitment to democratic elections in the future. Democracy may be the best system, but its essential characteristic is that, in fair elections, no one can control outcomes.

The Obama Administration has generally supported the Arab Spring changes despite all U.S. administrations having previously had close relationships with governments such as the Mubarak rule in Egypt. Of course, our support of the Arab Spring movements may have in part reflected a desire to be on the right side of popular uprisings that could not be stopped anyway. We can try to influence developments and continue previous friendly relationships and alignments with the new Arab governments through the careful use of the traditional tools of foreign policy. These include, for example, the provision of substantial foreign aid, military assistance, and economic help to the countries at issue, as well as maintenance of pre-existing relationships with key individuals, some of whom may have been educated or received training in the United States. But despite our best diplomatic efforts, we may find the new governments aligning themselves with our adversaries (e.g., Iran) or replacing former close association with the United States with a policy of non-alignment.

Will any such changes directly affect American national security? Ultimately, the Middle East is a key geographic and political area for our national security. The general political significance of this area, combined with the fact that it is a major source of oil for the United States, Europe, and other important parts of the world, and the fact that one dangerous Middle East nation may soon become a nuclear power, make these unpredictable changes in alignments and relationships with other nations a matter of national security concern.

A period of uncertainty regarding the results of the Arab Spring lies ahead of us. No one can tell today whether it will impact national security in any significant or negative way and, if so, to what extent. But the potential is there for major changes. At a minimum, it behooves the United States to maintain a nimble foreign policy in the Middle East, guided by a careful, nuanced assessment as to what U.S. actions or inactions will best serve vital U.S. interests.

3. WHAT LESSONS CAN BE LEARNED FROM THE OBAMA ADMINISTRATION'S HANDLING OF THE AHMED WARSAME CASE?

A number of significant issues are posed by the Obama Administration's handling of the Warsame case.[1] The focus here will be only on the issues arising out of Warsame's detention for more than two months in military custody on shipboard and being interrogated there, and his subsequent transfer to civilian custody, and further interrogation by FBI agents after being given *Miranda* warnings.

Detaining Warsame on shipboard during the first period of interrogation was the administration's way of holding him in military custody for a period of time without sending him to Guantanamo or a military facility on the mainland. Because the administration is trying to close the Guantanamo detention facility, it avoids sending any new detainees there. Meanwhile, Congress has acted to prevent sending any new detainees to any military detention facility in the United States.[2]

The shipboard option worked well in the case of Warsame because, at the end of the two months or so of interrogation, the government decided to shift him to civilian custody and prosecute him in federal court. Suppose, however, that rather than prosecuting him, the government had decided to keep him in military detention as long as the war against al Qaeda continued because there was not enough admissible evidence to convict him. In such a circumstance, unless the impasse between the administration and Congress regarding what to do with detainees can be resolved, where would the government indefinitely detain

1. Ahmed Warsame was a Somali seized from a fishing boat sailing between Somalia and Yemen in April 2011. He was treated as a military prisoner and accused of aiding al Qaeda's branch in Yemen and al Shabaab, a Somali militant group. He was taken to a U.S. navy ship and interrogated there for two months by a special team of interrogators from several agencies. After a break of several days, during which he was allowed to see a Red Cross representative, the questioning was resumed by FBI agents, and he was given *Miranda* warnings. *See* Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somali Suspect*, N.Y. TIMES (July 6, 2011), http://www.nytimes.com/2011/07/07/world/africa/07detain.html?_r =1.

2. *See* National Defense Authorization Act for 2012, H.R. Res. 1540, 112th Cong. §§ 1026–27 (1st Sess. 2012) (enacted) (prohibiting the use of funds for the transfer of prisoners from Guantanamo or for the construction or modification of prison facilities in the United States to house prisoners transferred from Guantanamo). These provisions repeat similar provisions contained in the NDAA for the previous year.

him? On shipboard? It is a disturbing idea with bad associations, calling to mind the notorious British prison ships from the period of the American Revolution.

By treating Warsame as a military detainee for a period of months, the government was able to gain the advantage of a period of very extended interrogation that likely would not have been available if he had originally been treated as a civilian arrested on criminal charges. In the latter circumstance, the normally applicable rules would have required that prior to any interrogation he be given the *Miranda* warnings, and, unless he waived his *Miranda* rights, the interrogation would not have taken place; he would have been brought before a magistrate "without unnecessary delay,"[3] at which time he would have an opportunity to consult with counsel. The tactical gain arising out of the way the government handled the case is considerable: the possibility of a very time-limited period of interrogation versus a time frame of two months or more.

Ahmed Warsame is not the first person held in military detention for an extended period and subsequently shifted to civilian custody and prosecuted in federal court. Other examples include Jose Padilla and Ali Saleh Kahlah al-Marri, both of whom were detained for a period of years, interrogated during the period of extended detention, and then shifted to the civilian legal system for prosecution. What arguably differentiates the Warsame case is the fact that, unlike Padilla and al-Marri, where the government appeared to have backed into the sequence of military detention followed by civilian prosecution, for Warsame, it seems to have been a calculated progression. Even if not the case, the lesson that the government will take away from this handling of the case—if it passes muster in the courts—undoubtedly will be that this is an advantageous way to proceed.

It may be contended, however, that the advantage to the government is strategic (the purpose of the initial, lengthy period of questioning was to obtain intelligence useful for preventing terrorist actions), not tactical (i.e., not for the purpose of obtaining evidence to prosecute the individual). Whether that distinction carries the day may turn on the weight given to a statement in the plurality opinion of the Supreme Court in *Missouri v. Siebert*:[4]

3. FED. R. CRIM. P. 5.
4. 542 U.S. 600 (2004).

"Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent . . . ."[5]

Whether the Warsame approach ultimately is upheld by the courts will depend on how well that approach fits within the overall guidelines set by the *Siebert* decision. That case also involved a two-step strategy, but the earlier stage, of course, was not a period of military detention. *Siebert* suggests that the issue will depend on how effective a separation the government achieves between the two periods of interrogation. Because the principal opinion in *Siebert* commanded the views of only a four-justice plurality, Justice Kennedy's opinion, concurring in the judgment, has usually been cited as decisive since it represented views on which five justices could agree:

> When an interrogator uses [a] deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps. . . . Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.[6]

The government in the Warsame situation took the *Siebert* approach to heart and applied significant "curative measures." Warsame was first interrogated by the recently created High Value Interrogation Group, made up of FBI, CIA, and Defense Department personnel, over a period of more than two months on almost a daily basis. Prior to, and during this period, he was not given *Miranda* warnings.[7] Subsequently there was a break of several days; during this break, Warsame was permitted to meet with a Red

5. *Id.* at 613 (Souter, J., concurring).

6. *Id.* at 621–22.

7. Note that Section 1040 of the National Defense Authorization Act of 2010 prohibited the giving of *Miranda* warnings to a foreign national detained outside the United States as an enemy belligerent in the custody of the Department of Defense and being interrogated by military or components of the intelligence community. H.R. 2647, 111th Cong. § 1040 (1st Sess. 2009).

Cross representative. When the interrogation resumed, it was conducted by FBI agents (i.e., a different group of interrogators), and he was given *Miranda* warnings.[8]

The government is betting that the combination of a break of several days, a different set of interrogators, a different purpose for the interrogation, and the opportunity meanwhile to meet with an outside person are sufficiently curative to make admissible any statements Warsame made during the post-*Miranda*-warnings interrogation by FBI agents.

To be compared with the Warsame interrogation approach is that contemplated under the recently adopted FBI guidelines regarding interrogation of terrorist suspects arrested in the United States;[9] in and because of exigent circumstances, *Miranda* warnings are not required. When the interrogation reaches a point where the interrogators are no longer seeking intelligence in exigent circumstances, it may nevertheless be continued if deemed useful, on the assumption that the statements obtained from that point forward will not be admissible in a criminal prosecution of that suspect. Under the Warsame two-step protocol, which was applied to persons captured outside of the United States, the government apparently assumes that statements from the first interrogation relating to intelligence gathering would not be admissible in the criminal prosecution of the suspect in federal court. Under the somewhat different two-step process contemplated by the FBI guidelines, statements from the first portion of the interrogation justified by exigent circumstances would be admissible in the criminal prosecution, but statements obtained from the latter portion of the interrogation, post-exigency, again are assumed to be inadmissible. The two approaches may be viewed as complementary, each usable in the appropriate circumstance.

Another potential challenge to the legal success of the Warsame two-step protocol arises out of the fact that, reportedly, the interrogators in the first stage of the interrogation used only

8. *See* Press Release, U.S. Attorney's Office, Accused al Shabaab Leader Charged with Providing Material Support to al Shabaab and al Qaeda in the Arabian Peninsula (July 5, 2011), *available at* http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictmentpr.pdf.

9. Internal Memorandum, U.S. Department of Justice, Federal Bureau of Investigation, Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Arrested Inside the United States (Oct. 21, 2010), *in F.B.I. Memorandum*, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/25/us/25miranda-text.html.

techniques approved under the Army Field Manual (AFM). The AFM bars the use of extreme and harsh methods of interrogation, but some methods authorized under the AFM may be deemed coercive under relevant Supreme Court case law. As noted, the two-step protocol assumes that statements obtained in the first interrogation stage would not be offered into evidence in the criminal trial of the suspect, so even if unlawful "coercion" was used in obtaining them, their admissibility is not at issue. The question can be posed, however, that if coercive methods were used in the first-stage interrogation, might these affect the admissibility of statements obtained in the second-stage interrogation? The government's likely response would invoke the same general type of curative-measures approach used to address the failure to give *Miranda* warnings in the first-stage interrogation. The Supreme Court addressed a somewhat similar issue in *Lyons v. Oklahoma*[10]:

> Here improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances.[11]

The Warsame case could turn out to be a watershed precedent on how the government will handle the detention, interrogation, and prosecution of terrorists captured abroad. Whether the precedent might be usable for alleged terrorists apprehended in the United States is an issue fraught with even more controversy than the questions addressed here. If the government wins its bet and courts uphold the Warsame manner of proceeding, it will have in hand a two-step interrogation protocol usable in any terrorism case where there are adequate grounds for treating suspects, at least at the outset, as military detainees. Arguably, it could function as an end-run around the strictures and consequences of the *Miranda* warnings and the requirement of prompt first appearance before a magistrate, as well as a way of repairing the legal damage

10. 322 U.S. 596 (1944).
11. *Id.* at 602.

done by the use of mildly coercive interrogation methods in a first-stage interrogation.

4. OF ALL THE THREATS TO NATIONAL SECURITY, WHICH TYPE IS THE UNITED STATES LEAST PREPARED TO HANDLE? WHERE IS THE UNITED STATES MOST VULNERABLE TO ATTACK?

This may be a very unwise question to ask. Why should a country or its terrorism experts advertise our weaknesses and spots where we are most vulnerable to attack? No matter—the expertise which we possess on this issue does not go much beyond what a reasonably intelligent person could derive from newspapers and other media sources. Terrorists certainly read, too.

The threat of most concern is from persons living in the United States for a long time, possibly citizens, who become radicalized and operational members of a terrorist network or dangerous lone wolves. It is a big country, and we are not really equipped to keep track of even the small portion of our population who might pose such a risk since we may not know who fits into that category.

Other vulnerabilities include crucial elements of our infrastructure—e.g., electronic communications, nuclear facilities, factories, dams and reservoirs, ports, and incoming shipments by land, sea, and air. Clearly, we have moved in the direction of hardening and protecting these targets, but the task is difficult, and we are not as far along as we would like to be.

5. WHAT FACTORS WILL HELP DETERMINE WHETHER AL QAEDA HAS BEEN DEFEATED?

Al Qaeda is a nonstate actor, a terrorist organization that, today, is a set of subgroups, loosely affiliated and operating in different countries and, probably, not under a significant degree of hierarchical control from its "leadership." We have killed its supreme leader, Osama Bin Laden, who was its principal ideological and strategic thinker, as well as other lesser members of its leadership group. But the organization continues to operate under other leadership.

How does one determine that a nonstate actor terrorist organization has been defeated? There is no prospect—as there is when fighting a war with a state-actor enemy—of a formal surrender, an overrunning of the territory of the enemy, or

conquering and even killing all or even most of the membership of the organization. The organization is too spread out in its loosely affiliated subgroups to lend itself to those kinds of defeats.

At best, the hope is to continue to apprehend or kill members of this terrorist organization and its leaders—to defeat al Qaeda by attrition; to weaken it to the point where it is no longer an effective terrorist force and no longer poses a significant risk to U.S. interests; where in a best case scenario, it simply fades away. But that is unlikely to be a defined point in time. We may, however, reach a point where the government feels comfortable "declaring victory." Or we may not. The "war" could conceivably continue indefinitely at a low level.

An implicit premise of the question may be that if al Qaeda is defeated, the end of our "war" on terror will be at hand—therefore determining whether and when that eventuality occurs would be an important milestone. But if the threat to the United States is perceived as linked to international terrorism, of which al Qaeda is only one, albeit currently, the most dangerous manifestation, the better question may be: "[W]hen will international terrorism be defeated?" But that question carries with it its own answer. The threat to the United States from international terrorism, even more than the threat from al Qaeda, is not likely to end in the foreseeable future.

Recently, an effort was made in Congress to broaden the scope of the legal basis for our actions against al Qaeda by passing the Authorization to Use Military Force (AUMF), a joint resolution passed by Congress on September 18, 2001.[12] The AUMF authorizes the President "to use all necessary and appropriate force *against those nations, organizations, or persons he determines planned, authorized, committed, or aided*" the 9/11 terrorist attacks.[13] A provision passed by the House of Representatives in Summer 2011 for inclusion in the National Defense Authorization Bill for 2012 would have redefined the scope of the current armed conflict to include "*nations, organizations and persons who—are part of, or are substantially supporting the al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.*"[14] The Obama Administration strongly objected to this

12. Pub. L. No. 107-40, 50 U.S.C. § 1541, 115 Stat. 224.

13. *Id.* Sec. 2(a) (emphasis added).

14. H.R. 1540, 112th Cong. § 1034 (1st Sess. 2012) (enacted) (emphasis added).

recharacterization of the conflict on the ground that it "would risk creating confusion regarding applicable standards. At a minimum, this is an issue that merits more extensive consideration before possible inclusion."[15] The final version of the NDAA for 2012, which was signed by the President on December 31, 2011, contained essentially the same language, not as a redefinition of the conflict but rather as the definition of "covered persons" who under the AUMF may be detained pending disposition under the law of war.[16]

The recounting of this recent legislative back and forth is notable for what was not at issue. The legislation deals with the legal authority of the government to capture and detain individuals with specified links to al Qaeda—those who had been, or would be, apprehended in the future while the struggle against al Qaeda continues. The resulting legislation clarifies and, arguably, broadens that authority. The immediate significance of the new language may be its effect on habeas corpus litigation involving detainees. Depending on the meaning given to the phrase "associated forces," terrorists can be apprehended and detained if they substantially support or are at least part of "forces" "associated" with al Qaeda or the Taliban and engaged in hostilities against the United States or its coalition partners. What was not at issue in Congress was whether the government has the authority to engage international terrorism that threatens U.S. interests wherever it can be found, even if it has no connection at all to al Qaeda or the Taliban. In this age of nuclear, biological, and chemical weaponry, a new international terrorist organization could spring up and, conceivably, pose a threat of catastrophic danger to the United States. Such a development suggests questions about the adequacy of the existing foundation for the government's exercise of legal authority to act abroad and in a military mode against terrorists. This authority is currently linked to al Qaeda and its associates. A difficult challenge would be posed in such a post-al Qaeda period if a specific named new "enemy" has not been identified. The AUMF, which was the rough equivalent of a declaration of war, while nontraditional in not naming a nation

15. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY ON HR 1540 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012 2 (May 24, 2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf.

16. *See* H.R. 1540, 112th Cong. § 1021 (1st Sess. 2012).

state as the enemy, at least focused the target by relating the scope of the authorization to those who had been involved in the 9/11 attacks.

Without the naming of a specific adversary or some other method for narrowing the scope of this type of authorization, is it legally feasible to issue a declaration like the AUMF? Would it be wise to give the executive branch a roving commission to attack terrorist enemies of the United States wherever they are found and are deemed to be sufficiently threatening to U.S. interests? Such a declaration would be objectionable since it would amount to giving a blank check authority to the executive branch to act abroad in a military mode.

Arguments can nevertheless be made for why it is desirable to give an administration some flexible tools to deal with new significant international terrorist threats whenever they arise. The challenge is how to accomplish that result without raising serious concerns about the risks of giving the executive an unfettered authority to commit U.S. military resources abroad. For the present, it may be best to defer such questions on the ground that we have enough on our plate; there will be time enough to address such issues if and when we reach a point where it can fairly be said that al Qaeda has been defeated. We are not yet there.