

FOREWORD

Jeh Charles Johnson*

I am pleased to provide this foreword to Volume 29, Issue 2, of the *Stanford Law & Policy Review*. In the post-9/11 era, homeland security, and all that it entails, has become an item of keen public and academic interest.

When I became Secretary of Homeland Security, the judge who administered the oath reminded me: “you just took an oath to support and defend the constitution, not the homeland.” We are, after all, a nation of laws. In matters of national security law, we must ensure that the law is applied honestly and faithfully to meet modern-day threats. In matters of national security policy, we must ensure that policy keeps pace with an ever-evolving post-9/11 threat picture. In all, we must ensure that policy conforms to law, and not the other way around.

When I became Secretary of Homeland Security in December 2013, I brought to the job a counterterrorism focus, given my four years of experience as General Counsel of the Department of Defense. I said publicly and repeatedly that counterterrorism must be the cornerstone of the Department of Homeland Security’s mission. I quickly realized that a building can have more than one cornerstone, and that for DHS, cybersecurity needed to be the other one.

The threat environment has changed significantly since 9/11, and it now encompasses, most notably, both counterterrorism *and* cybersecurity.

COUNTERTERRORISM

Like millions of other Americans, my world was rocked on September 11, 2001. I am a New Yorker, and was in Manhattan that day. September 11 also happens to be my birthday, so I have a vivid recollection of the day, both before and after 8:46 AM, when the first plane hit the World Trade Center. Just nine months earlier during the Clinton Administration, I had been in service at the Pentagon as General Counsel of the Air Force. Now out of the Pentagon and back to being a private citizen, I wandered the streets of New York bearing a sense of guilt and helplessness, asking myself “what can I do?”

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Seven and a half years later, I got my answer in service to President Barack Obama's administration, first as a lawyer (General Counsel of the Department of Defense), and then as a policymaker (Secretary of Homeland Security).

When the Department of Homeland Security was formed by an act of Congress in 2002, terrorism was something that our leaders worried would infiltrate our borders. The solution, then, was the merger into one Cabinet-level department of the protections against all the different ways a terrorist could enter our country—by land, sea, or air. Hence, DHS was the conglomeration of many different government missions that included border security, aviation security, maritime security and port security.

During the Bush presidency and the first term of the Obama administration, our government devoted most of our counterterrorism efforts to taking the fight to terrorist organizations overseas, where they hid, trained and recruited. Through the application of targeted lethal force, we took out a number of terrorist leaders, planners and operatives—most notably Osama bin Laden on May 1, 2011 and Anwar al-Aulaqi on September 30, 2011. These actions made our homeland safer, by seriously eroding terrorists' ability to launch another 9/11-style attack against us from abroad. Throughout, our principle challenge was to ensure we stayed true to the rule of law and applied traditional law-of-war principles in a non-conventional war against a non-state actor. In other words, to ensure that the policy conformed to the law, and not the other way around.

By 2014, my first year as Secretary of Homeland Security, the threat picture had changed dramatically.

The core of al-Qaeda had largely scattered, but a new terrorist organization, the so-called "Islamic State," had become the most notorious terrorist threat on the world stage.

The good news is that since 2014, our military and others have taken back almost all of the Islamic State's self-proclaimed caliphate in Iraq and Syria. The Islamic State's fighting force is a fraction of what it was in 2014. Through targeted lethal force, many of the leaders and external attack planners of the Islamic State have been killed. Here again, the homeland is safer as a result.

But today you can *kill* an enemy and not *defeat* that enemy.

The terrorist threat to our homeland has evolved to include not just terrorist-*directed* attacks, but also terrorist-*inspired* attacks—e.g., smaller-scale lethal attacks by a "lone wolf" actor who has never trained with, lived with, or accepted orders from a terrorist army, but who is inspired to commit an act of mass violence by terrorist-authored messages on the internet. For example, although Anwar al-Aulaqi has been dead for over six years, he lives on as an evil inspiration to others on the internet.

Recent examples of United States-based terrorist-inspired attacks are plenty. They include San Bernardino (2015), Chattanooga (2015), Orlando (2016), and—in New York City—West 23rd Street (2016), the West Side Highway vehicle attack (2017), and the attempted pipe-bomb detonation in the NYC subway (2017). This new threat environment presents new challenges,

and requires a new approach to our homeland security. Terrorist-inspired actors often radicalize alone and in secret. Their style of attacks are hard to detect, and hard to predict.

Aside from the traditional approaches, we must therefore prioritize three counterterrorism measures:

First, building bridges to communities in which terrorist organizations seek to recruit. While in office, I visited just about every major metropolitan area in this country with a significant American Muslim population, to encourage the leaders of these communities to work with us to counter extremism before it turned violent.

Second, continuing federal support for local homeland security and law enforcement efforts—through grants for surveillance, communications and other equipment, and for active-shooter training exercises. Given the nature of small-scale terrorist-inspired attacks, the cop on the beat is often the first to discover and respond to them.

Third, raising public awareness and vigilance. We are not a police state; in a free and open society, law enforcement cannot be on every street corner and metal detectors cannot be at the entry to every public place or event. Nor should they be. “If You See Something, Say Something” must be more than a slogan, and public awareness and vigilance does in fact make a difference in our homeland security efforts.

CYBERSECURITY

Cyberspace is the new battlespace, and cyberattacks are the new and most prevalent form of challenge to the homeland. Whether they are nation states, criminals, hacktivists, or perpetrators of ransomware, those on offense in cyberspace are increasingly ingenious and aggressive and have the upper hand now. Those of us on defense—in government or the private sector—have yet to turn the tide and struggle to keep up. The cyber threat to our nation will get worse before it gets better.

Nevertheless, there is room for optimism. In recent times we have made tangible improvements to our nation’s and our government’s cybersecurity. For example, the Department of Homeland Security established an automated information-sharing capability with the private sector, and deployed the Einstein 3A system, which prevents unwanted exfiltrations of data, across all federal civilian agencies. In October, 2016 the Director of National Intelligence and I issued a public statement formally accusing the Russian government of attempting to interfere in our 2016 election. In my final days in office, under my authority as Secretary of Homeland Security, I designated election infrastructure as critical infrastructure in the U.S., which requires the Department of Homeland Security to prioritize cybersecurity assistance to state and local election officials.

These cybersecurity efforts must continue at the national level. The President and Congress must be continually engaged in improving our

cybersecurity laws and policies. We should designate a national champion for cybersecurity that spearheads these reforms. Federal government systems must be modernized. Information-sharing with the private sector, and with our foreign allies, must continue and grow. And law and policy must keep pace with the evolving threats. While I was Secretary, Congress enacted the Cybersecurity Act of 2015, which bolstered the Department of Homeland Security's authorities for its cybersecurity mission. As I write, Congress seeks to wrestle with the relatively new and complex problems of encryption and cross-border data.

As cybersecurity is as much a private responsibility as it is a governmental one, there are things businesses and other private institutions can do—for starters, raising the awareness of those who use our systems about the evils of spearfishing. The reality is that the most devastating attacks by the most powerful actors often originate with a simple act of spearfishing. And, once the system user answers the door and lets the bad actor in, that actor can pose as almost anyone and walk out with the most valuable belongings in the house.

In the final analysis, homeland security means striking the right balance—a balance between our basic physical security and the civil liberties we cherish in a free and democratic society.

While in office, I frequently told audiences that we have it within our capability to build a perfectly safe city, but it would amount to a prison. We have it within our capability to construct a risk-free commercial air flight, but none of the passengers would be wearing any clothes, be allowed any carry-on or checked luggage, be served any food, or be allowed to unfasten their seatbelts and leave their seats. Likewise, I could offer you an email system insulated from cyberattack, but you would be limited in that system to about 10 other known people inside a firewall, with no access to the outside world.

Whether on land, at sea, in the air, or in cyberspace, Americans want security, but we also want to preserve our freedom to travel, our freedom to associate, and our privacy. The balance between these objectives is reflected in both law and policy, which, in turn, is the manifestation of our American values.