

Terrorist Violence in the New Millennium

New Legal Solutions for an Old Nemesis

By JAMES P. TERRY

In addressing the postconflict terrorist threat in Iraq, and the earlier terrorist attacks directed from al Qaeda in September 2001, President George W. Bush was addressing not a new phenomenon, but certainly a level of violence unusual to that genre. In fact, the crisis in Afghanistan and the earlier hostage-taking in Iran in 1979–1980 provided cogent lessons. Nor were those the first. During his Presidency, for instance, James Monroe established the right to enter the territory of another state where the host is unable or unwilling to quell a continuing terrorist threat. The Seminole Indians in Spanish Florida had demanded “arms, ammunition and provi-

sions or the possession of the garrison at Fort Marks.”¹ President Monroe directed General Andrew Jackson to proceed against the Seminoles, with the explanation that the Spanish “were bound by treaty to keep their Indians at peace, but were incompetent to do so.”²

During the Canadian insurrection of 1837, the standard for justifiable anticipatory self-defense that could legally be exercised by the Commander in Chief during terrorist threats was more clearly established.³ Anti-

British sympathizers gathered near Buffalo, New York. A large number of Americans and Canadians were similarly encamped on the Canadian side of the border, with the apparent intention of aiding these rebels. The *Caroline*, an American vessel the rebels used for supplies and communications, was boarded in an American port at midnight by an armed group acting under orders of a British officer, who set the vessel on fire and let it drift over Niagara Falls. The United States protested the

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Cave complex housing munitions destroyed in Afghanistan, Operation Snipe, 2002

incident, which claimed the lives of at least two American citizens. The British government replied that the threat posed by the *Caroline* was established, that American laws were not being enforced along the border, and that the destruction was an act of necessary self-defense to terrorist violence.

In the controversy that followed, the United States did not deny that circumstances were conceivable that would justify this action, and Great Britain admitted the necessity of showing circumstances of extreme urgency. The two countries differed only on the question of whether the facts brought the case within the exceptional principle. Charles Cheney Hyde summed up the incident by saying that “the British force did that which the United States itself would have done, had it possessed the means and disposition to perform its duties.”²⁴ Secretary of State Daniel Webster, in formulating an oft-cited principle of self-defense, said that there must be a demonstrated “necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment of deliberation.”²⁵ It is clear, however, that the Webster formulation was *not* applied by the British in the decision to destroy the *Caroline*, at least with respect to the element requiring “no moment of deliberation.” The U.S. Department of State has properly criticized Secretary Webster’s formulation as follows: “This definition is obviously drawn from consideration of the right of self-defense in domestic law: the cases are rare

organization after an attack on U.S. citizens in West Germany. This military action against Qadhafi followed precisely the articulation of Presidential prerogatives set forth earlier by President Reagan in National Security Decision Directive (NSDD) 138. While President Bill Clinton took no direct action after attacks on two American Embassies and on the USS *Cole*, he did reorganize our internal policymaking bodies responsible for counterterrorism.

In responding forcefully and effectively to the 2001 al Qaeda attacks on the World Trade Center and the Pentagon, President Bush properly viewed the attacks not as terrorist violence per se, but as military attacks on America that demanded the full weight of a U.S. response. It has been his careful articulation of a new policy toward the threat of terrorism in the two National Security Strategies issued at the beginning of his first and second terms, respectively, that will provide the roadmap for future response to terrorist violence.

Iranian Hostage Crisis

President Carter faced an administration-altering terrorist incident in the waning days of his tenure in office. On November 4, 1979, approximately 300 militant demonstrators overran the U.S. Embassy compound in Tehran and took 52 U.S. citizens hostage for 444 days. The attacks took place only 1 week after the Shah entered the United States for medical treatment.

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indeed in which it would fit an international situation.”²⁶ Today, when terrorists and their sponsors possess weapons with rapid delivery capabilities, any requirement that a nation may not respond until faced with a situation providing no moment of deliberation is unrealistic.

In the modern era, four Presidents have faced major incidents of terrorist violence that have impacted the vital national interests of the United States. The November 1979 seizure of U.S. diplomats by Iranian militants protected by the Iranian government, and the administration’s ineffective response, was likely responsible for President Jimmy Carter’s defeat by Ronald Reagan in the 1980 election. In 1986, President Reagan’s second administration acted forcefully to address the threat by Muammar Qadhafi’s Libyan terrorist

As in most developing countries, there were few internal constraints in Iran—whether from opposition parties, a critical press, or an enlightened public—to pressure Ayatollah Ruhollah Khomeini, the Iranian leader, to uphold the law. In the atmosphere of fervent nationalism that accompanied Khomeini’s sweep to power, forces for moderation were depicted as tools of foreign interests. In such an atmosphere, the militant supporters of the clerical leadership fomented domestic pressure to violate other recognized norms as well—in areas such as property ownership, religious freedom, and judicial protection. This combination of revolution and nationalism yielded explosive results—a reordering of both Iranian domestic society and Iran’s approach to foreign affairs.

It was President Carter’s lack of resolve in addressing the crisis that proved costliest to his administration, however. While the United Nations Security Council, at the behest of the United States, unanimously adopted Resolution 457 on December 4, 1979, calling on the government of Iran “to release immediately the personnel of the Embassy of the United States of America being held in Tehran, to provide them protection and allow them to leave the country,”²⁷ there was no accompanying threat of imminent military action on the part of the United States. Resolution 457 also requested that the Secretary General lend his good offices to the immediate implementation of the resolution and that he take all appropriate measures to that end.

While the United States, through Secretary of State Cyrus Vance, was able to secure repeated Security Council measures requiring Iran to comply with its international obligations, there were no sanctions included, as a result of a Soviet veto. In the subsequent U.S. application to the International Court of Justice,⁸ the court on December 15, 1979, unanimously ruled that Iran should release the hostages and restore seized premises to exclusive American control.⁹ Iran ignored this ruling.

When diplomatic efforts at securing the hostages’ freedom via diplomacy failed in the United Nations and through legal means in the International Court of Justice, President Carter banned U.S. purchases of Iranian oil under the Trade Expansion Act.¹⁰ His intent was to make clear that the United States would not be blackmailed because of oil requirements.¹¹ The United States then learned that Iran planned to withdraw all assets held in American banking institutions. The removal of funds would have jeopardized billions of dollars in American claims against those assets—debts owed to both government and private enterprise. The ripple effect of a mass withdrawal would have threatened the entire international financial system.

The President acted quickly to protect the interests of American creditors by blocking the removal of the Iranian funds, invoking the International Emergency Powers Act of 1977,¹² which permits the freezing of foreign assets when there exists “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”¹³ The Secretary of the Treasury implemented the President’s Executive order on November 14, 1979, with a series of measures called the Iranian Assets Control Regulations.¹⁴

A month later, the United States informed the Iranian chargé d’affaires in Washington that

personnel assigned to the Iranian Embassy and consular posts in the United States would be limited to 15 at the Embassy and 5 per consulate.¹⁵ From January to March 1980, the United States exercised restraint in generating additional pressure to allow the initiatives of Secretary General Kurt Waldheim to work along with those of intermediaries. Factional disputes prevented President Abolhassan Banisadr and other Iranian authorities from honoring their pledges regarding the authority of the United Nations Commission in Iran and this in turn stifled Waldheim's diplomatic initiatives.

President Carter then moved to impose unilateral sanctions on Iran, and in April 1980, all financial dealings and exports to Iran except food and medicine were prohibited.¹⁶ On April 17, 1980, the Carter administration imposed additional prohibitions on imports, travel, and financial transfers related to Iran.¹⁷ This Executive order also restricted travel under the Immigration and Nationality Act.¹⁸ Finally, in April 1980, the United States broke diplomatic relations and ordered the Iranian embassy in Washington closed.

While these unilateral measures were being implemented, American allies in Europe, along with Japan and Canada, were imposing economic and diplomatic sanctions against Iran in an effort to maintain a common front. At the April 21, 1980, meeting of the leaders of the European Community, nine allied nations reaffirmed their support for severe sanctions against Iran and stated that they would seek legislation enabling them to join the effort to isolate Iran internationally in the event the hostage crisis had not been resolved by May 17, 1980.¹⁹ When no progress had been made by that date, these allies moved to accommodate the U.S. request that no new contracts be entered into with Iran and that all contracts negotiated between these nations and Iran after November 4, 1979, be disavowed.

Unfortunately, several European states, Great Britain included, were unable to gain parliamentary support for the entire package of sanctions promised. Thus the impact, while significant, failed to isolate Iran completely from a vital source of imports—Europe. The Soviet Union compounded the problem of incomplete support when it announced that if Iranian ports were blockaded or primary commodities became unavailable from the West, the Soviet Union would neutralize the impact of such measures by providing all necessary assistance. Specifically, the Soviet Union offered its roads and railway system to move

goods if Iran's harbors should be blocked.²⁰ It also promised to supply Iran with primary foodstuffs if these became unavailable from customary sources.²¹

The economic measures adopted by the Western nations, while psychologically satisfying, proved singularly ineffective. In fact, the only noticeable impact was a rallying of Iranians behind Khomeini and the diversion of Iranian attention from internal difficulties to the foreign challenge. These measures tended to fragment international support for the United States while making it politically difficult for the Iranians to back down. In short, economic pressures, although perhaps politically expedient as a means to demonstrate Presidential resolution, had the counterproductive effect of unifying Iranian opposition without coercing cooperation.

Concurrently with its judicial, diplomatic, and economic initiatives, in November 1979 the United States began planning a military operation to rescue the hostages. Citing the same legal justification claimed by Israel in

mately 90 American Servicemembers departed the aircraft carrier *Nimitz* by helicopter for a remote, deserted airstrip in southern Iran, approximately 300 miles from Tehran. There they rendezvoused with a C-130 transport aircraft for refueling. The plan then called for a flight from this rendezvous to Tehran.²³ However, when three of the eight RH-53 helicopters were disabled by mechanical failures resulting from sand intake,²⁴ the mission was aborted and the remaining aircraft departed Iran, but not before a helicopter and transport collided and exploded.²⁵

With respect to the Americans held, the 1961 Vienna Convention on Diplomatic Relations²⁶ obligated Iran to treat each American diplomat with "due respect," to take "all appropriate steps to prevent any attack on his person, freedom, or dignity," and to ensure that diplomatic personnel were not subjected to "any form of arrest or detention." Article 37 extends these same privileges and immunities to members of the administrative and technical staffs as well as their families. These protections

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rescuing its citizens from terrorists at Entebbe, Uganda, and by West Germany in a similar successful rescue at Mogadishu, Somalia, in 1977,²² the United States entered Iran during the night of April 24, 1980. A team of approxi-

embody "the oldest established and the most fundamental rule of diplomatic law,"²⁷ a point repeatedly emphasized by the International Court of Justice in its December 15, 1979, order discussing provisional measures with



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respect to the American hostages.²⁸ In addition to its obligation to protect diplomatic personnel, Iran also had a duty to bring the attacking militants to justice. Its failure to take either step laid the groundwork for subsequent American claims for reparations.

In retrospect, certain implications of the 444-day Iranian hostage crisis are now clear. The continued vitality of mutual world values depends on much more than a search for national catharsis. The American public's penchant for gestures such as candlelight vigils and yellow ribbons was matched by the Carter administration's tendency to confuse symbol with substance and to adopt pose in the name of policy. Time was perceived as being on the side of the Iranians. It appeared that the crisis controlled Carter rather than Carter the crisis.

In the longer term, President Carter's attempt to embrace all options other than the direct use of military force resulted in a settlement favorable to Iran. A country that confuses catharsis with defense of its interests is a nation uncertain of its values, and Carter's effort to eschew the military instrument in favor of all others proved to be counterproductive. Reagan's pledge during the 1980 campaign of "swift and effective retribution" in case of further threats to Americans abroad was clearly meant

to deter future attacks as well as reassure a concerned nation. It also assured his election.

Upon his inauguration and the release of the hostages, President Reagan found himself bound by the terms of the Carter administration's negotiated settlement, terms that the Supreme Court upheld as legal, if not wise.²⁹ Some of the terms, such as the requirement to return unencumbered Iranian financial assets, did no more than honor a preexisting obligation. Other commitments that pertained directly to the official relationship between the United States and Iran, such as the formation of a joint U.S.-Iranian claims tribunal, were also honored as positive contributions to community values.

Some parts of the agreement, however, were legally unenforceable. One such provision was the requirement that the United States would order all persons within U.S. jurisdiction to report to the U.S. Treasury within 30 days for transmission to Iran of all information known to them as of November 3, 1979, with respect to the property and assets of the former Shah. Violation of the requirement would be subject to civil and criminal penalties described by U.S. law.³⁰ No such order was ever issued, but had it been, it could not have been enforced.

The Case of Libya

One of President Reagan's strongest attributes was his direct approach in responding to threats to the American people. When he took office, he engaged scholars at the war colleges to begin a review of available options to address the increased incidence of terrorist violence worldwide. Early in 1984, the President issued the seminal "preemption" doctrine addressing response to terrorist violence. In the words of former Defense Department official Noel Koch, President Reagan's NSDD 138, issued April 3, 1984,³¹ "represent[ed] a quantum leap in countering terrorism, from the reactive mode to recognition that pro-active steps [were] needed."³² Although NSDD 138 remains classified to this day, National Security Advisor Robert C. McFarlane suggested at the Defense Strategy Forum on March 25, 1985, that it included the following key elements: the practice of terrorism under all circumstances is a threat to the national security of the United States; the practice of international terrorism must be resisted by all legal means; the United States has the responsibility to take protective measures whenever there is evidence that terrorism is about to be committed; and the threat of terrorism constitutes a form of aggression and justifies acts in self-defense.³³

It is the linkage between the terrorist and the sponsoring state that is crucial to providing the United States, or any nation, with the justification for response against a violating state. Covert intelligence operatives are necessary for identifying and targeting terrorist training camps and bases and for providing an effective warning of impending attacks. Unfortunately, as noted by former Secretary of State George Shultz in 1984, "we may never have the kind of evidence that can stand up in an American court of law."³⁴

Although no U.S. administration official has been able to define adequately "how much evidence is enough," the demand for probative, or court-sustainable, evidence affirming the complicity of a specific sponsoring state is an impractical standard that contributed to the impression—prior to the articulation of NSDD 138—that the United States was inhibited from responding meaningfully to terrorist outrages. This view was certainly reinforced in 1979, as addressed above, when the U.S. Government allowed American citizens to remain hostage to Iranian militants. Hugh Tovar has correctly noted that "there is a very real danger that the pursuit of more and better intelligence may become an excuse for nonaction, which in itself might do more harm than action based on plausible though incomplete intelligence."³⁵

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True to his commitment under NSDD 138, and consistent with his 1980 campaign pledge to effect "swift and effective retribution" in case of further threats to Americans abroad, President Reagan directed military force against Libyan terrorists on April 15, 1986. On that date, the United States launched defensive strikes on military targets in Tripoli and Benghazi, Libya. The use of force was preceded by conclusive evidence of Libyan responsibility for prior acts of terrorism against the United States, with clear evidence that more were planned. The final provocation occurred in West Berlin on April 5, when 2 U.S. citizens were killed and 78 were injured by an explosive device in a discotheque.

Eleven days earlier, on March 25, a cable from Tripoli directed the Libyan People's

Navy pilots prepare for retaliatory strikes against Libya during Operation El Dorado, 1986



U.S. Navy (David Lee)

Bureau in East Berlin to target U.S. personnel and interests. On April 4, a return message was intercepted that informed Colonel Qadhafi's headquarters that a terrorist attack would take place the next day. On April 5, the same People's Bureau reported to Colonel Qadhafi that the attack was a success and "could not be traced to the Libyan people."³⁶ The next day, Tripoli exhorted other People's Bureaus to follow East Berlin's example.³⁷

The April 1986 response used F-111 bombers from an American airbase in Great Britain and A-6 fighter-bombers from two aircraft carriers in the Mediterranean to strike five Libyan bases. The United States responded only after it was determined that the Libyan leader was clearly responsible for the April 5 bombing, that he would continue such attacks, and, after an assessment that the economic and political sanctions imposed after the Rome and Vienna airport bombings had been unsuccessful, that Washington's West European allies were unwilling to take stronger joint steps against Qadhafi. A clear linkage existed between the threat perceived and the response directed against Libyan military targets.

President Reagan summed up the U.S. view of Qadhafi's complicity in supporting international terrorism when he spoke to the Nation immediately following the April 15, 1986, defensive response by U.S. warplanes:

*Colonel [Qadhafi] is not only an enemy of the United States. His record of subversion and aggression against the neighboring states in Africa is well documented and well known. He has ordered the murder of fellow Libyans in countless countries. He has sanctioned acts of terror in Africa, Europe and the Middle East as well as the Western Hemisphere.*³⁸

The United States directed its response to continuing Libyan violence at military targets only. The objective was to strike at the military "nerve center" of Qadhafi's terrorist operations and limit his ability to use his military power to shield terrorist activities, thereby "raising the costs" of terrorism in the Libyan leader's eyes and "detering" him from future terrorist acts.³⁹ Press Secretary Larry Speakes advised that the American raids on Libya "were justified on grounds of 'self-defense' to preempt further Libyan attacks."⁴⁰

In an August 21, 1986, meeting in Luxembourg, the foreign ministers of 12 European states reflected the profound effect the defensive raid had on inspiring allied efforts to resist ter-

rorism. The ministers approved a package of diplomatic sanctions aimed at limiting Libya's ability to sponsor terrorist attacks, which had been rejected only a week earlier.⁴¹ These sanctions were endorsed and refined during the Tokyo Economic Summit in May 1986, when President Reagan met with the leaders of Britain, Canada, France, Italy, Japan, and West Germany, as well as other representatives of the European Community. It is noteworthy that the United States essentially had to act alone against Libya, following Qadhafi's implication in the 1985 Vienna and Rome airport bombings. In April 1986, however, the U.S. use of force suddenly spurred more active support among the allies.

termination of the offending course of conduct. In the first sense of proportionality, the U.S. actions in 1986 sought only to neutralize the broad effort to overthrow the power balance in the Mediterranean region through terrorist violence. The American response did not seek to create a new alignment of that balance in North Africa. In the second sense of proportionality, the defensive strikes were restricted to military installations behind which Qadhafi's terrorist infrastructure was concealed.

Response to terrorism, like response to other forms of armed conflict, has as its principal purpose termination of hostilities under favorable conditions. Having forcefully dem-

President Clinton speaks at memorial service for Sailors killed in attack on USS *Cole* in Yemen



U.S. Navy (Joshua Trechowell)

This allied support, even though offered only after the fact, suggested that the allies viewed the April 15, 1986, U.S. actions to be proportional to the perceived threat. Proportionality in the Libyan case could be assessed from a dual perspective. First, this element of self-defense required that U.S. claims, in the

onstrated that the United States would respond to weaken Libya's military support for terrorist violence, President Reagan's follow-on moves were clearly appropriate. The President, through his support for coordinated diplomatic and economic sanctions at the April 21, 1986, European Community ministerial session, and his plea

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nature of counterterrorist goals, be reasonably related to the existing terrorist threat to U.S. national interests. Second, proportionality mandated that the United States and other offended states use only such means in addressing terrorist violence as were required to induce

for concerted action at the follow-on Economic Summit in Tokyo, emphasized that nonmilitary coercive measures against a pariah state are only effective if all the major free nations participate. If the blow against Libya was to do more than reestablish the credibility of U.S. forces, an

integration of strategies involving those nations trading with Libya was imperative.

The Libyan incident does not suggest the lack of international law restraints on the determination of necessity for preemptive action. Rather, it affirms that a self-defense claim must be appraised in the total context in which it occurs. One aspect of this contextual appraisal of necessity, especially as it relates to responding after the fact to terrorist violence, concerns the issue of whether force can be considered necessary if peaceful measures are available to lessen the threat. To require a state to tolerate terrorist violence without resistance, on the grounds that peaceful means have not been exhausted, is absurd. Once a terrorist attack has occurred, the failure to consider a military response would play into the hands of aggressors who deny the relevance of law in their actions. The legal criteria for the proportionate use of force are established once a state-supported terrorist act has taken place. No state

is obliged to ignore an attack as irrelevant, and the imminent threat to the lives of one's nationals requires consideration of a response.

Nairobi, Dar es Salaam, and the USS Cole

Although the United States under the Clinton administration suffered three significant attacks against U.S. facilities abroad—the Embassies in Nairobi and Dar es Salaam in 1998 and the attack in Yemeni waters against the USS *Cole* in 2000—President Clinton never responded directly to these attacks. His administration did, however, do much to address the terrorist threat through development of a comprehensive counterterrorism structure. When he signed Executive Order (EO) 13010 on July 15, 1996, President Clinton established the Commission on Critical Infrastructure Protection (CCIP). The President declared that certain designated “national infrastructures are so vital that their incapacity or destruction . . . would have a debilitating impact on the defense

or economic security of the United States.”⁴² The eight categories of critical infrastructure designated in the EO as requiring the development of a national strategy for protection included:

- continuity of government
- telecommunications
- transportation
- electric power systems
- banking and finance
- water supply systems
- gas and oil storage and transportation
- emergency services (medical, police, fire, and rescue).

Initially chaired by Robert T. Marsh, a retired Air Force general, the CCIP was tasked with developing a comprehensive national strategy for protecting critical infrastructure from electronic and physical threats. On October 13, 1997, the CCIP issued the unclassified version of its report entitled “Critical Foundations: Protecting America’s Infrastructure.” In addition to recognizing the challenge of adapting to a changing world, the report found that the existing legal framework was inadequate to deal with threats to critical infrastructure. Although the report itself provided few specifics, on May 22, 1998, the Clinton administration issued Presidential Decision Directives (PDDs) 62 and 63 in implementation of its policy framework.

President Clinton did much to address the terrorist threat through development of a comprehensive counterterrorism structure

PDD 62, *Combating Terrorism*, was the successor to NSDD 138, which determined that the threat of terrorism constitutes a form of aggression and justifies acts in self-defense.⁴³ PDD 62 was more expansive in its coverage than NSDD 138 and addressed a broad range of unconventional threats, to include attacks on critical infrastructure, terrorist acts, and the threat of the use of weapons of mass destruction. The aim of the PDD was to establish a more pragmatic and systems-based approach to protection of critical infrastructure and counterterrorism, with preparedness the key to effective consequence management. PDD 62 created the new position of National Coordina-

Pentagon after attack on 9/11



214th Mobile Public Affairs Detachment (John Valceanu)

tor for Security, Infrastructure Protection, and Counterterrorism, which would coordinate program management through the Office of the National Security Advisor.

PDD 63, *Critical Infrastructure Protection*, mandated that the National Coordinator, established in PDD 62, initiate immediate action between the public and private sectors to assure the continuity and viability of political infrastructures. The goal established within PDD 63 was to significantly increase security for government systems and a reliable, interconnected, and secure information system. A National Plan Coordination Staff integrated the plans developed by the various departments of government, which served as lead agencies within their respective areas of responsibility into a comprehensive National Infrastructure Assurance Plan, which is overseen by the National Infrastructure Assurance Council. The council includes representation from both the public and private sectors. Under the PDD, the Federal Bureau of Investigation's National Infrastructure Protection Center, established in February 1998, would continue to provide a control and crisis management point for gathering information on threats to critical infrastructure and for coordinating the Federal Government's response.⁴⁴ Together, these measures and the structure created, if implemented, would be invaluable in addressing current threats to the United States. Unfortunately, when two U.S. Embassies were attacked in the summer of 1998, and the USS *Cole* was the target of terrorist violence in the fall of 2000, implementation by the Clinton administration was totally lacking.

The al Qaeda Attacks

The 9/11 attacks presented new challenges to the Presidency and the effective exercise of Commander in Chief powers. Following the attacks, the rapid U.S. response by the Bush administration was only possible because of the clear linkage established between Osama bin Laden's organization and the assault on U.S. personnel and property. The thrust of the U.S. strategy by President Bush, outlined in NSDD 138 and reflected in Operation *Enduring Freedom* in Afghanistan, was to reclaim the initiative lost when the United States under President Clinton pursued a reactive policy toward unconventional threats and attacks, as represented by inaction in response to the attacks on its Embassies in Nairobi and Dar es Salaam and on the USS *Cole*.

To counter the worldwide al Qaeda threat, President Bush implemented the proactive policies later incorporated in the critically important 2006 National Security Strategy.⁴⁵ When President Bush released the National Security Strategy for his second term on March 16, 2006, his administration continued the emphasis on preemption articulated in his 2003 speech at West Point and included the points made earlier in the National Security Strategy announced for his first term in 2002.⁴⁶

was updated in 2006 for the second term. The language in the current version clearly relates the doctrine to events in Iraq and elsewhere that are creating current threats. For example, one section is entitled "Prevent attacks by terrorist networks before they occur."⁴⁸ Another section claims, "We are committed to keeping the world's most dangerous weapons out of the hands of the world's most dangerous people."⁴⁹ A further section states, "We do not rule out the use of force before attack occurs, even if

When President Bush released the National Security Strategy for his second term, his administration continued the emphasis on preemption

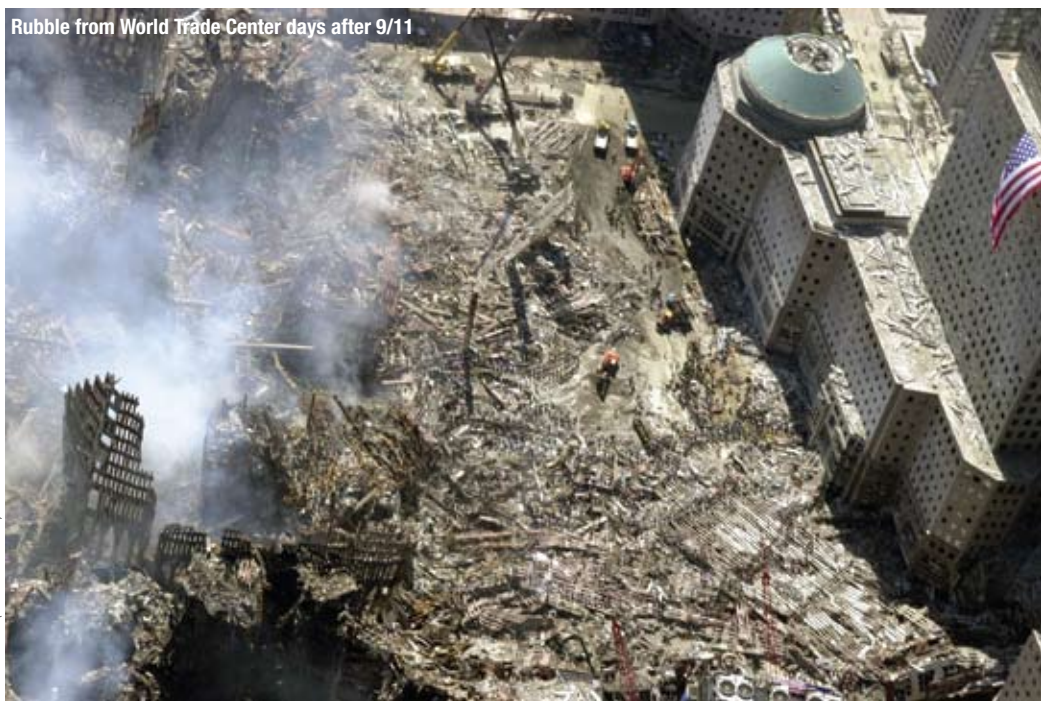
In the *Washington Post's* review of the 2006 Strategy, Peter Baker, like other writers around the country, suggested that:

*The strategy expands on the original security framework developed by the Bush Administration in September 2002, before our invasion of Iraq. That strategy shifted U.S. foreign policy away from decades of deterrence and containment toward a more aggressive stance of attacking enemies before they attack the United States.*⁴⁷

The doctrine of preemption was certainly put in context for the current terrorism threat in the 2002 National Security Strategy, just as it

uncertainty remains as to the time and place of the enemy's attack.⁵⁰ The doctrine of preemption, or anticipatory self-defense as it is otherwise known, was clarified in terms of its use by the Bush administration, just as it had been by the Reagan Presidency, which was the first to formally adopt this venerable legal principle as an administration policy.

These policies required that we make the fullest use of all the weapons in our arsenal. These include not only those defensive and protective measures that reduce U.S. systems vulnerability, but also new legal tools and agreements on international sanctions, as well as the collaboration of other concerned governments. While we should use our military



U.S. Air Force (Michelle Leonard)

power only as a last resort and where lesser means are not available, there will be instances where the use of force is the only alternative to eliminate the threat to critical civil or military infrastructure. The response to al Qaeda posed such a requirement.

The Road Ahead

The thrust of the roadmap articulated in the 2002 and 2006 National Security Strategies, if it is to be effective, has to reclaim the initiative lost while the United States pursued a reactive policy to incidents of unconventional warfare under the prior Presidency, which neither deterred terrorists nor engaged in effective response. The key to an effective, coordinated policy to address the threat posed by those willing to target our critical infrastructure in New York and at the Pentagon is the commitment to hold those accountable responsible under the Law of Armed Conflict.

Full implementation of the Bush National Security Strategy, as in that articulated by President Reagan, should lead to increased planning for protective and defensive measures to address this challenge to our national security and, where deterrence fails, to respond in a manner that eliminates the threat—rather than, as prior to the articulation of National Security Decision Directive 138 by President Reagan, treating each incident after the fact as a singular crisis provoked by international criminals. By treating terrorists and others attempting to destroy America's critical infrastructure as participants in international coercion where clear linkage can be tied to a state actor, the right of self-defense against their sponsor is triggered, and responding coercion (political, economic, or military) may be the only proportional legal response to the threat. **JFQ**

NOTES

¹ John Bassett Moore, *Digest of International Law*, vol. 2 (Washington, DC: U.S. Government Printing Office, 1906), 404.

² *Ibid.*

³ *Ibid.*, 409–414.

⁴ Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 2^d ed. (Boston: Little, Brown, 1945), 240.

⁵ Moore, 412.

⁶ *Participation in the North Atlantic Treaty of States Not Members of the United Nations*, Hearings before the Senate Committee on Foreign Relations on the North Atlantic Treaty, 81st Cong., 1st Sess., 1949, 101–102.

⁷ United Nations Security Council Resolution 457, December 4, 1979.

⁸ The arguments made on behalf of the United States for interim measures are reported verbatim in U.S. Department of State, *Selected Documents*, no. 15 (1979), 2.

⁹ Order of December 15, 1979, *United States v. Iran*, Provisional Measures, International Court of Justice (1979), 16–17.

¹⁰ “President Imposes Oil Ban,” *The Washington Post*, November 13, 1979, A1.

¹¹ *Ibid.*, A1, A16.

¹² Executive Order No. 12,170, 3 Code of Federal Regulations (CFR) 457 (1979).

¹³ International Emergency Economic Powers Act, 50 U.S. Code 1702 (Supp. III 1979).

¹⁴ U.S. Department of State, Bureau of Public Affairs, “U.S. Measures to Isolate Iran,” *Current Policy*, no. 179 (May 8, 1980), 2.

¹⁵ “Iran’s Embassy Staff Cut,” *The Washington Post*, December 13, 1979, A1.

¹⁶ Executive Order No. 12,205, 3 CFR 248 (1980).

¹⁷ Executive Order No. 12,211, 3 CFR 253 (1980).

¹⁸ *Ibid.*

¹⁹ U.S. Department of State, “U.S. Measures to Isolate Iran,” 2.

²⁰ “Russia Supports Iran,” *The Washington Post*, April 15, 1980, A1. For a contrary interpretation of the importance of this Soviet announcement, see Department of State, *Current Policy*, no. 165, 2, wherein President Carter is quoted as discounting the Soviet promise of assistance to Iran. Carter stated that the Soviet transportation routes were insufficient to offset the impact of a blockade or boycott.

²¹ “Russia Supports Iran,” A1.

²² See Richard Lillich, “Forcible Self Help by States to Protect Human Rights,” *Iowa Law Review*, vol. 53 (1967), 325, for the argument that neither customary international law nor Article 51 of the Charter prohibits such acts of intervention. Interestingly, the International Court of Justice largely ignored the American rescue attempt of April 1980, finding it irrelevant to the determination of whether Iran’s conduct in seizing the diplomatic hostages and entering the diplomatic premises violated international law. *United States v. Iran*, International Court of Justice (1980), 40–41.

²³ See U.S. Department of State, Bureau of Public Affairs, “President Carter, Secretary Brown: Hostage Rescue Attempt in Iran,” *Current Policy*, no. 170 (April 25, 1980), 2–4, for a full explanation of the purpose and plan of the rescue mission, including the thinking that went into the decision to abort.

²⁴ *Ibid.*, 3. Secretary of Defense Harold Brown later claimed that it had been predetermined that fewer than six RH–53 helicopters would make the mission impossible.

²⁵ *Ibid.*

²⁶ Vienna Convention on Diplomatic Relations of 1961, 500 United Nations Treaty Series 95. Article 29 of the convention provides: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving

state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

²⁷ See Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry, NY: Oceana, 1976), 135.

²⁸ Order of December 15, 1979, 19.

²⁹ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

³⁰ *The Washington Star*, January 29, 1981, A12.

³¹ National Security Decision Directive 138, April 3, 1984.

³² Quoted in “Preemptive Anti-Terrorism Raids Allowed,” *The Washington Post*, April 16, 1984, A19.

³³ Robert C. McFarlane, “Terrorism and the Future of Free Society,” speech at the National Strategic Information Center, Defense Strategy Forum, Washington, DC, March 25, 1985.

³⁴ George P. Shultz, “Terrorism and the Modern World,” speech at Park Avenue Synagogue, New York, NY, October 25, 1984, 23.

³⁵ Hugh Tovar, “Low Intensity Conflict: Active Responses in an Open Society,” paper prepared for the Conference on Terrorism and Other “Low Intensity” Operations: International Linkages, Fletcher School of Law and Diplomacy, Tufts University, Medford, MA, April 1985, 24.

³⁶ See Norman Kempster, “Cables Cited as Proof of Libyan Terror Role,” *Los Angeles Times*, April 15, 1986, 5.

³⁷ Mark Whitaker, “Targeting a Mad Dog,” *Newsweek*, April 21, 1986, 25.

³⁸ “Transcript of Address by Reagan on Libya,” *The New York Times*, April 15, 1986, A10.

³⁹ “Libyans Accused of Worldwide Plots,” *The New York Times*, April 15, 1986, A11.

⁴⁰ *Ibid.*

⁴¹ See Richard Bernstein, “European Community Agrees on Libya Curbs,” *The New York Times*, April 22, 1986, A8.

⁴² Executive Order No. 13010, 61 Federal Register 37347.

⁴³ McFarlane.

⁴⁴ Presidential Decision Directive 63, *Critical Infrastructure Protection*, May 22, 1998. See W. Gary Sharp, Sr., *Cyberspace and the Use of Force* (Falls Church, VA: Aegis, 1999), 201–204, for a comprehensive review of the major elements of this directive and the requirements imposed on the various departments of government and the private sector under it.

⁴⁵ George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, March 2006).

⁴⁶ George W. Bush, *The National Security Strategy of the United States of America* (Washington, DC: The White House, February 2002).

⁴⁷ Peter Baker, “Bush to Restate Terror Strategy: 2002 Doctrine of Preemptive War to be Reaffirmed,” *The Washington Post*, March 16, 2006, A1.

⁴⁸ *National Security Strategy* (2006), 12.

⁴⁹ *Ibid.*, 19.

⁵⁰ *Ibid.*, 23.