

Article

The Untold Story of al Qaeda's Administrative Law Dilemmas

Mariano-Florentino Cuéllar[†]

Introduction	1304
I. Peering Inside a Terrorist Network	1315
A. Context and Methods	1317
B. Themes Evident in Jihadi Strategic Studies	1321
1. Western Resolve and Imperial Overstretch ...	1321
2. Protecting Organizational Survival	1324
3. Crafting a Long-Term Plan to Achieve (Surprisingly Conventional) Strategic Goals ...	1327
4. Subtle Parallels Between Terrorist Networks and State Bureaucracies	1330
II. Learning from al Qaeda's Administrative Law Dilemmas	1337
A. Agency Problems and Information Gaps	1338
B. Centrality of Public Approval and Disapproval ..	1344
C. Al Qaeda's Drive to Solve Its Administrative Law Dilemmas	1350
III. Strategic Conflict as a Duel Among Competing Systems to Manage Administrative Problems	1354
Conclusion	1366

In the months and years following September 11, senior al Qaeda strategists and sympathizers disseminated a series of manuscripts revealing the terrorist network's aims and its in-

[†] Associate Professor and Deane F. Johnson Faculty Scholar, Stanford Law School; Faculty Affiliate, Stanford Center for International Security and Cooperation. I would like to thank Jake Shapiro, Barry Weingast, William McCants, Jarret Brachman, Robert Weisberg, Alan Morrison, and participants in the 2006 Minnesota Law Review Symposium, "9/11 Five Years On: A Look at the Global Response to Terrorism." I also appreciate excellent research assistance from Niki Carelli. Errors are mine. Copyright © 2007 by Mariano-Florentino Cuéllar.

ternal management dilemmas. This Article elucidates how we can better evaluate changes in our counter-terrorism laws and policies—from warrantless NSA surveillance to massive military operations abroad—by scrutinizing the goals and internal organizational problems of our adversaries. Conventional wisdom paints terrorist networks such as al Qaeda and state bureaucracies in advanced industrialized countries as starkly different. Al Qaeda and its allies are assumed to pose particularly severe dangers because they are flexible, adaptable, decentralized, and staffed by committed supporters with a common goal. By contrast, state bureaucracies in advanced industrialized nations are often described as suffering from plodding, rule-bound decision-making structures that hobble their response to our nimble adversary. But a closer look at al Qaeda's own strategic studies—read in light of social scientists' emerging analyses of terrorist organizations—reveals a more complex picture. In it, the distinction between terrorist networks and bureaucratic agencies is less pronounced than commonly supposed. Both entities face pervasive problems involving the harnessing of expertise, the resolution of conflict among politically important players, reconciliation of competing goals, restraints on overzealous action, building public legitimacy, and monitoring subordinate activity. By scrutinizing terrorist networks as collective entities with conflicting goals facing evasive administrative problems, we can better understand three things: (1) that, in fact, terrorist networks have repeatedly sought to develop administrative procedures and law-like hierarchical arrangements to manage their problems; (2) that the efficacy of counter-terrorism strategies depends crucially on the extent to which such strategies exacerbate (at a reasonable cost) these networks' administrative problems; and (3) that legal arrangements characteristic of U.S. public law—particularly those governing the administrative decisions of bureaucratic institutions—are valuable in part because they assuage the very problems that our terrorist adversaries are so desperately trying to solve.

* * *

“By the grace of God, the organized Islamic work is beginning to be managed on the highest administrative level . . . especially the jihadi organizations. However there still needs to be more mastery, general training, and advancement in order to encompass the greatest amount of the sectors of the Islamic movement,

*especially since we are approaching (by the permission of God) a stage in which our administrative needs will be expanded in what we have called the stage of the administration of savagery, where we will mix with hundreds of thousands of people and they will require the administration of regions from us as diminished governments. If we are not prepared to deal with that, we will face dangerous problems, to say nothing of the harm (that results from) random behavior or (from) a rigid management organization which stops action by its inflexibility and prevents development and advancement.”*¹

*“Bureaucracies rationalize the problems and processes with which they work, allowing them to develop systems That system does not consist simply of rules and regulations. Rather, the rules are accompanied by standards, practices, guidelines, prototypes, models, and informal procedures, all shaped to some extent by a general goal”*²

Americans lived through such a raft of changes in the half-decade after the September 11 attacks that evaluating those changes became a cottage industry in legal scholarship. Lawmakers entrusted the executive to manage sweeping new surveillance and war-fighting powers.³ When the executive doubted whether Congress would convey even more powers for surveillance, it implemented some tactics without congressional authorization.⁴ The American military engaged in complex missions in Afghanistan and Iraq.⁵ It deposed brutal regimes, but

1. ABU BAKR NAJI, *THE MANAGEMENT OF SAVAGERY* 23 (William McCants trans., Combating Terrorism Center, U.S. Mil. Acad., 2006) (discussing al Qaeda leadership).

2. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* 61–62 (1993).

3. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

4. See *infra* Part III (discussing the administration’s policy of using the National Security Agency for warrantless surveillance precluded by the Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, §§ 101–111, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.)).

5. See generally MARTIN EWANS, *CONFLICT IN AFGHANISTAN: STUDIES IN ASYMMETRIC WARFARE* 164–68 (2005) (discussing the U.S. invasion of Afghanistan); DAVID L. PHILLIPS, *LOSING IRAQ: INSIDE THE POSTWAR RECON-*

thousands of American soldiers—and many tens of thousands of foreign civilians—died in the process.⁶ U.S. intelligence organizations redoubled their efforts to track wire transfers and enemy operatives, and became embroiled in a now infamous tug-of-war with the White House about the justifications for war in Iraq.⁷ Some of the nation's most distinguished diplomats staked their reputation on the strength of that intelligence.⁸ U.S. personnel detained thousands,⁹ abusing and killing some of them in the course of interrogations,¹⁰ and rendering others to regimes with established track records of torture and human rights abuses.¹¹ Courts began sorting through fundamental questions—raised perhaps once in a generation—about the scope of executive power,¹² the role of international law in our legal system,¹³ and the constitutional guarantees afforded to detained individuals.¹⁴ Predictably, most of these developments inspired considerable public debate.

But they were far from the only changes. A bit further from the limelight, criminal justice bureaucracies achieved long-sought changes in criminal statutes and deployed their im-

STRUCTION FIASCO 7–11 (2005) (discussing U.S. difficulties associated with the invasion of and reconstruction of Iraq).

6. See, e.g., Erik Mink, *Grasping for Answers as Iraq Unravels*, ST. LOUIS POST-DISPATCH, Oct. 24, 2006, at D11 (discussing estimates of civilian and military deaths and casualties).

7. See generally COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 154–56 (2005) (criticizing the intelligence community's assessment of Iraqi programs allegedly involving weapons of mass destruction).

8. See, e.g., THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 90–94 (2006) (discussing the weaknesses in the case then-Secretary of State Colin Powell presented to the United Nations regarding the administration's case for attacking Iraq).

9. See generally Diane Marie Amann, *Abu Ghraib*, 153 U. PENN. L. REV. 2085, 2088–89 (2005) (indicating there were almost 700 detainees at Guantánamo and hundreds elsewhere).

10. See *id.* at 2092–93 (describing detainee abuse); Deaths of Detainees in the Custody of U.S. Forces in Iraq and Afghanistan from 2002 to 2005, <http://www.medscape.com/viewarticle/547787> (last visited Apr. 9, 2007) (accounting for detainee deaths while in custody and describing causes of death).

11. See David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123, 129 (2006).

12. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773–74 (2006) (balancing executive and congressional power over the armed forces).

13. *Id.* at 2786.

14. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 524–25 (2004).

mense breadth against alleged supporters of terrorism¹⁵ and other targets.¹⁶ Executive branch officials prioritized secrecy in response to Freedom of Information Act requests,¹⁷ environmental regulation,¹⁸ and immigration proceedings.¹⁹ Congress gave regulators complex new authority to control cross-border financial flows to disrupt money laundering and terrorist financing.²⁰ And working in tandem, legislators and the President undertook the most significant transformation of the federal bureaucracy in a half-century, forging a sprawling new Department of Homeland Security,²¹ a new intelligence oversight bureaucracy,²² and a new set of budget priorities reshaping the allocation of federal resources.²³ Together, these developments paint a startling picture, in which nearly a half-century of legal changes has been crammed into sixty months.

15. See Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (containing numerous substantive criminal law provisions); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1261, 1329 (2004) (“Although trumpeted as anti-terrorism legislation, it vastly expands police powers in terrorism and non-terrorism cases alike. As some members of Congress have admitted, they voted for the legislation without having read it entirely.”). For the Department of Justice’s perspective on terrorism-related prosecutions and investigations associated with the new Patriot Act passed in the wake of the attacks, see U.S. DEP’T OF JUSTICE, REPORT FROM THE FIELD: THE USA PATRIOT ACT AT WORK 2–5 (2004).

16. See Eric Lictblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at 1.

17. See Keith Anderson, Note, *Is There Still a “Sound Legal Basis?”: The Freedom of Information Act in the Post-9/11 World*, 64 OHIO ST. L.J. 1605, 1620–24 (2003).

18. See Rena Steinzor, *Democracies Die Behind Closed Doors: The Homeland Security Act and Corporate Accountability*, 12 KAN. J.L. & PUB. POL’Y 641, 660 (2003).

19. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 961 (2002); Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 373 (2006).

20. See Patriot Act, tit. III (outlining regulatory provisions governing money laundering and terrorist financing). For a discussion of the significance of these changes, see Mariano-Florentino Cuéllar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT’L L. 15, 37–39 (2004).

21. See Dara Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 696–700 (2006).

22. For an insightful analysis of this development, see Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1673–75 (2006).

23. See *id.* at 1667.

My purpose here is not to dwell directly on these developments.²⁴ Instead, this Article raises questions about how best to assess legal change by mining an underappreciated vein of knowledge about the organization of terrorist activity. In the process, the Article contributes to an applied scholarly literature on national security law in the administrative state, and to a more theoretical one concerned with the legal implications of social science research on complex organizations.

The argument begins by engaging a familiar trope. Conventional wisdom suggests that terrorist networks such as al Qaeda are quintessentially different from the complex national security and regulatory bureaucracies charged with countering the threat that terrorists pose.²⁵ Discussions of the aforemen-

24. Although it is tempting to do so, most of those developments have been the subject of substantial and often quite thoughtful commentary (including in some well-reasoned pieces appearing in this Symposium). On the other hand, certain occurrences—particularly the significance of bureaucratic changes, budget reforms, and criminal justice policies—have plainly received less reflection than they merit. *But see id.*; Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2669 (2005); David Zaring & Elena Baylis, *Sending the Bureaucracy to War*, 92 IOWA L. REV. (forthcoming May 2007) (manuscript at 11, on file with author).

25. *See, e.g.*, Scott Canon, *West Will Win War on Terror, Rumsfeld Assures University*, BOSTON GLOBE, Nov. 10, 2006, at A15.

[Rumsfeld, focusing on terrorism] described an effort that has battled against an elusive enemy and labored to overcome bureaucratic and political hurdles at home He said the military needs to transform to a more agile force capable of changing tactics to deal with terrorists “The enemy has a brain,” he said. “They do things, and they adjust.”

Id. Similar views are voiced by policy analysts outside government, as evidenced by the following statement from a well-placed observer of national security at a leading Washington, D.C. think-tank:

The threat we face from al Qaeda and other terrorist groups is one of agile, non-bureaucratic adversaries who have the great advantage of being on the offense—knowing where, when and how they will attack. . . . [T]errorist groups have always been nimble opponents that were difficult to stop No security threat to the United States matches this one. To fight this nontraditional threat, we must think outside [the] box and try to be as nimble as the opponent (a difficult task).

Protecting the Homeland: The President's Proposal for Reorganizing Our Homeland Defense Infrastructure, Before the Subcomm. on Technology, Terrorism, and Government Information of the S. Comm. on the Judiciary, available at http://judiciary.senate.gov/print_testimony.cfm?id=294&wit_id=667 (2002) (statement of Ivan Eland, Director, Defense Policy Studies, Cato Institute). As will emerge, reality is far more complicated. Although terrorists are adaptable, they face considerable organizational problems in adapting. And while they have partially decentralized (and some strategists would prefer even greater decentralization), terrorist networks such as al Qaeda also find crucial bene-

tioned changes are often clouded by seductive assumptions derived from that conventional wisdom: that our terrorist adversaries can be understood as nimble, endlessly adaptable actors simultaneously able to capture the advantages of decentralization while functioning as a unitary actor motivated by a single coherent goal.²⁶ This Article shows this assumption to be profoundly misleading. Terrorist organizations are complex entities. They are enveloped in a multitude of organizational problems that necessarily make principled discussions of legal responses to terrorism far more intricate than conventional wisdom might suggest.

fits from hierarchy. See *infra* Part I.B.4. This has kept such organizations partially hierarchical even in the midst of protracted crises. In addition, both before and during such crises, some theorists believe the most crucial characteristics terrorist networks should develop are essentially those sometimes considered to be outdated in some superficial observations of national bureaucracies, including law-like procedures, trained managers working as part of a hierarchy, and monitoring mechanisms to mitigate agency problems. See NAJI, *supra* note 1, at 23, 73–74; *infra* Part II.C. As used in this Article, the term “terrorist network” refers to organized nonstate entities whose leaders both desire and find it feasible to use a range of tactics including terrorist attacks.

26. For a sampling of presidential statements treating the terrorist threat as one posed by a unitary actor with a single, coherent ideology, see The President’s News Conference, 42 WEEKLY COMP. PRES. DOC. 1877, 1880 (Oct. 25, 2006) (“Afghanistan was a front in this war against the terrorists. Iraq is now the central front in the war against the terrorists. This war is more than just finding people and bringing them to justice; this war is an ideological conflict between a radical ideology that can’t stand freedom, and moderate, reasonable people that hope to live in a peaceful society.”). For an example of a scholarly paper modeling a terrorist organization as a unitary actor, see Paul R. Pillar, *Counterterrorism after al Qaeda*, 27 WASH. Q. 101, 102 (2004); Robert Powell, *Defending Against Terrorist Attacks with Limited Resources* (Aug. 2005) (unpublished manuscript), available at <http://www.wcfia.harvard.edu/seminars/pegroup/Powelldefendaug05.pdf> (providing an example of a scholarly paper modeling a terrorist group as a unitary actor). Pillar eloquently emphasizes the “threat of decentralization” trope:

The small, secretive nature of terrorist plots and the indeterminate nature of the target—likely to become an even greater problem as the Islamic terrorist threat further decentralizes—have always made terrorism a particularly difficult target subject. . . . The danger now lies in the fact that the looser the operational connections become and the less Islamist terrorism is instigated by a single figure, the harder it will be to uncover exploitable links and the more likely that the instigators of future terrorist attacks will escape the notice of U.S. intelligence. In a more decentralized network, these individuals will go unnoticed not because data on analysts’ screens are misinterpreted but because they will never appear on those screens in the first place.

Pillar, *supra*, at 102–04.

The alternative is not to forswear the instrumental analysis of counter-terrorism tactics. Instead, the key to any reasonable policy response lies in systematically examining the strategic dilemmas and organizational challenges confronting terrorist networks such as al Qaeda. Terrorists, like drug cartels and legislatures, are a “they,” not an “it,” best understood as organized entities facing some of the same institutional problems that conventional state bureaucracies face.²⁷ Though animated by different strategic imperatives, leaders of terrorist networks and managers of public agencies shoulder common burdens. Their power depends on mitigating principal-agent problems.²⁸ They must harness expert knowledge, and they yearn for a beguiling yet endlessly elusive synthesis of technocracy and political vision.²⁹ Their power depends in part on fostering favorable public perceptions³⁰ and adjudicating dis-

27. See *infra* Parts I, II.A. Although the focus of this case study is primarily on al Qaeda and its affiliates, other illicit nonstate actors (particularly those interested in using terrorist tactics) are likely to face substantially similar organizational problems. The analysis therefore holds broader implications.

28. For a discussion of principal-agent problems, see Mathew McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 171–73 (1984). For an insightful analysis of how principal-agent problems distort the operations of terrorist networks, see Jacob Shapiro, *The Greedy Terrorist: A Rational-Choice Perspective on Terrorist Organizations' Inefficiencies and Vulnerabilities*, 4 STRATEGIC INSIGHTS 1, 2 (2005); *infra* notes 156–57 and accompanying text (providing examples of how al Qaeda strategists face principal-agent problems).

29. See NAJI, *supra* note 1, at 23 (“The mastery of the art of administration saves a lot of time and blesses the effort exerted (to acquire it), especially since we are in a race against time and we need to undertake any effort in such a way that we get the best results.”). For a similarly effusive exaltation of technocratic ideals in the context of the American administrative state, see BREYER, *supra* note 2, at 61–62. For critiques discussing the simultaneous allure of technocracy along with the impossibility of using technocracy to resolve normative problems of administration, see generally Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (discussing the tension between administrative models founded on expertise and suggesting limits to agency actions); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (comparing administrative discretion with judicial controls on discretion).

30. See PETER BERGEN, *THE OSAMA BIN LADEN I KNOW* 392 (2006). Referring to top al Qaeda strategist Ayman al Zawahiri, Bergen notes, “Zawahiri complained in his 2001 biography, *Knights Under the Prophet's Banner*, that the masses have not embraced al-Qaeda ‘The jihad movement must come closer to the masses. We must win the people’s confidence, respect, and affection.’” *Id.* For discussions of the value of favorable public perceptions to administrative bureaucracies in advanced industrialized countries, see Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411,

putes.³¹ In short, both terrorist networks and conventional public agencies are burdened by some of the challenges routinely managed by U.S. administrative law. While scrutinizing the administrative problems of al Qaeda and analogous organizations is manifestly more challenging than merely restating common assumptions about nonstate actors,³² this scrutiny will reward scholars and policymakers with a host of valuable insights crucial to any defensible evaluation of post-September 11 legal changes.

My argument focuses on three insights in particular. First, although circumstances have forced terrorist networks to adopt a measure of decentralization, those networks have often sought to build administrative procedures and law-like hierarchical arrangements to strike a balance between flexibility and control and to mitigate the recurring organizational problems associated with managing painfully scarce resources. Second, policymakers should evaluate counter-terrorism policies on the basis of whether they exacerbate terrorist networks' ongoing organizational challenges—challenges such as fostering public approval and mitigating agency problems—at a reasonable cost. Third, administrative arrangements characteristic of how advanced industrialized democracies manage organizational problems are valuable in part because they tend to manage pervasive organizational problems more effectively than non-state terrorist actors manage such problems. In contrast, a less organization-focused evaluation of terrorist networks is likely to emphasize simple but misleading assumptions over complexity,³³ shorter-term tactical gains over gradual strategic pro-

495–97 (2005); *infra* note 134.

31. See LAWRENCE WRIGHT, *THE LOOMING TOWER* 134 (2006) (discussing the problems faced by al Qaeda at its early stages of development as a result of internal squabbles).

32. Compare The President's News Conference, *supra* note 26, at 1880 (“[T]his war is an ideological conflict between a radical ideology that can't stand freedom . . .”), with Martha Crenshaw, *The Causes of Terrorism*, 13 COMP. POL. 379, 385 (1981) (“As purposeful activity, terrorism is the result of an organization's decision that it is a politically useful means to oppose a government. . . . Terrorism serves a variety of goals, both revolutionary and subrevolutionary. Terrorists may be revolutionaries[,] . . . minority separatists combating indigenous regimes[,] . . . reformists[,] . . . anarchists or millenarians . . . or reactionaries acting to prevent change from the top.”).

33. See, e.g., Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1099 (2006). Posner and Vermeule assume that terrorist threats are best modeled as unexpected, exogenous shocks. *Id.* A focus on the internal dynamics of terrorist organizations, however, reveals the extent to which recruits and funding flow to such networks as a result of gov-

gress,³⁴ and worst-case scenarios about the threats posed by terrorist networks rather than the considerable organizational difficulties and trade-offs our terrorist adversaries face in carrying out their most lethal attacks.³⁵

Peering inside a terrorist network may seem like a nearly impossible task. After all, both experience (with the failures of our own intelligence bureaucracies) and intuition (about terrorist networks' incentives for secrecy) suggest that we can do little more than speculate about questions such as what al Qaeda's ultimate strategic objectives are and what organizational challenges it faces in achieving those objectives. Surprisingly, this turns out not to be the case. In the months and years following September 11, senior al Qaeda strategists and sympathizers disseminated documents divulging the terrorist network's aims and its internal management dilemmas.³⁶ Some of these documents have been posted on the Internet; others have

ernment policies. Hence, the assumption that terrorist shocks are entirely unpredictable and unrelated to domestic government policy, rather than endogenous to the settings where governments choose policies and terrorists solve organizational problems may be unwarranted. Depending on the nature of the security policy, it may actually help solve terrorists' problems (e.g., if the costs fall disproportionately on minorities from among which terrorist groups seek to recruit, or if the alleged security policy—such as the invasion of Iraq—makes it dramatically easier for the terrorist network to gain attention and resources).

34. *See id.* (stating that “[a]s the benefits of security increase due to exogenous threats such as terrorism, a well-functioning government will supply more security and less liberty, because the value gained from the increase in security will exceed the value lost from the decrease in liberty,” without considering whether governments have the knowledge or motivation to provide the right kind of “security” given the complexities of terrorist organizations).

35. *See* Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 *YALE L.J.* 2512, 2533 n.56 (2006). The authors assume that “terrorist groups like al Qaeda seek to acquire weapons of mass destruction, are more likely to use them, and—because they have no population or territory to defend—may be immune to ‘traditional concepts of deterrence’ that permeate the crisis bargaining model.” *Id.* Although the authors have reason to question whether bargaining dynamics would play out the same way with ordinary nation-states and terrorist networks, the discussion elides organizational complexities that force terrorist networks to contend with calibrating the intensity of their attacks, cultivating public support (and avoiding backlash), and trading off the investment of scarce resources in procuring or developing such a destructive weapon compared to other imperatives. *See generally* BERGEN, *supra* note 30 (describing factors important to the development of al Qaeda); *infra* note 109 (providing additional discussion of how the mass public tends to affect the incentives of terrorist networks).

36. *See infra* Part I.A.

been recently declassified.³⁷ When we examine these documents in the context of emerging political science literature on the organizational dilemmas associated with terrorist activity, these jihadi strategic studies (as some observers have christened them) provide a revealing portrait of al Qaeda's goals. Al Qaeda emerges as an organization that delegates power and money to regional affiliates who carry out recruiting, terrorist attacks, and political organizing.³⁸ Though it is decentralized, it appears still to have a coherent leadership structure and a cadre of strategic thinkers to chart its future course.³⁹ Both the leadership and the strategists are bent on turning the organization into a social movement with broad appeal in the Muslim world.⁴⁰ In this quest they are aided by U.S. policies that provoke outrage among rank and file Muslims,⁴¹ and they are frustrated by the fact that some supporters have competing goals, like getting rich.⁴²

These realities play out in illicit terrorist organizations that are unquestionably unique. Plainly, al Qaeda and its imitators differ in a host of ways from a bureaucratized nation-state, and even to some extent from previous insurgencies and other illicit organizations.⁴³ The irony is that scholars and poli-

37. See *infra* Part I.A.

38. See Lawrence Wright, *The Master Plan*, NEW YORKER, Sept. 11, 2006, at 48, 50–51 (discussing the jihadists' alleged decision to decentralize after the September 11 attacks).

39. See NAJI, *supra* note 1, at 25 (discussing al Qaeda leadership); *Al Qaeda's No. 2 Criticizes Bush and Pope in Video*, CHI. TRIB., Sept. 30, 2006, at 12, available at 2006 WLNR 16955181 (describing a recent video by al Qaeda leader Ayman al Zawahiri).

40. See COMBATING TERRORISM CTR., U.S. MILITARY ACAD., HARMONY AND DISHARMONY: EXPLOITING AL-QA'IDA'S ORGANIZATIONAL VULNERABILITIES 52–54 (2006) [hereinafter HARMONY AND DISHARMONY], available at <http://www.ctc.usma.edu/aq/Harmony%20and%20Disharmony%20--20CTC.pdf> (discussing al Qaeda's continuing attempts to become a "social movement"); Wright, *supra* note 38, at 51 (quoting Suri as declaring that "[a]l Qaeda is not an organization, it is not a group, nor do we want it to be . . . it is a call, a reference, a methodology").

41. See *infra* Part II.B.

42. See HARMONY AND DISHARMONY, *supra* note 40, at 11, 13 ("Preferences aren't always aligned. When they are not, the covert nature of terrorist groups necessarily implies that agents can take advantage of delegation to act as they prefer, not as their principals would like.")

43. See *infra* Part I.B.4 (describing the administrative law analogy). Al Qaeda's cavalier willingness to kill civilians is its most readily discernable distinction. Organizational polymorphism is a fact of life, affecting both the public agencies that enforce laws as well as the licit and illicit entities subject to such enforcement. The point here is not to deny that fact, but to focus on

cymakers can only fully grasp those distinctions, and their potentially subtle policy implications, after recognizing the extent to which terrorist networks face a class of dilemmas that reflect—and sometimes even mirror—those of the Defense Department, the Food and Drug Administration, the National Intelligence Director, and United Nations Peacekeeping Operations. Indeed, when the jihadi strategic studies are read in the context of political scientists' work on terrorist organizations, they reveal the extent to which terrorist networks confront problems that are analogous to those of our own administrative law.⁴⁴ Common predicaments include delegating executive and quasi-legislative powers to subordinate entities, harnessing expertise, solving problems associated with participation and legitimacy, and adjudicating disputes. Although al Qaeda strategists have been forced to manage their myriad of internal administrative dilemmas without the precise equivalent of administrative law, some strategists have occasionally identified the need to build the functional equivalent of bureaucratized, hierarchical, and even law-like structures to manage their administrative problems.⁴⁵ They have recognized the devilish trade-offs between the flexible, decentralized structure that allegedly makes the organization so dangerous and regularized procedures and more centralized hierarchy which offer substantial benefits.

It may be tempting to ignore these parallels, but it is also risky. In a world where conventional wisdom stresses the alleg-

common organizational problems that can provide a more realistic picture of terrorist networks as well as the public bureaucracies with which they interact. *Id.*; see also *infra* Part II.B (discussing differences between al Qaeda and other insurgencies).

44. For present purposes, the term “administrative law” is used both in the literal sense of a law-like system to solve administrative problems, which substantially overlaps with (though is obviously different from) using the term to describe the duties and functions of administrative law in the American system. Administrative law is used in a manner that encompasses procedural mechanisms not ordinarily considered part of administrative law but reflecting substantially similar goals of mitigating arbitrary action by organizations. FISA's judicial review provisions are an example of the latter category. See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993) (discussing the effect of convergence between law and social, economic, and political norms on the implementation of legal rules); *infra* Part III.

45. In some cases, al Qaeda's leaders have actually implemented law-like arrangements to legitimize internal control decisions. See BERGEN, *supra* note 30, at 124–25 (discussing al Qaeda's use of Sharian courts to legitimize the decision to execute the son of one of the organization's leaders after the son was discovered spying on the group).

edly unique flexibility and post-modern structure of al Qaeda-type terrorist organizations,⁴⁶ citizens and policymakers would do well to recognize some of the parallels between our own established institutions and these nascent ones. The more we begin to see al Qaeda and its counterparts as entities struggling to solve their internal administrative law-related dilemmas, the better we can understand how to disrupt their efforts.

And there may be a subtler, but no less important, implication. In the process of adopting a more nuanced perspective on the organization of terrorist networks, citizens and policymakers may also better appreciate how administrative arrangements help advanced industrialized nations forge reasoned responses to a wide variety of threats, whether they arise from food adulteration, environmental degradation, or terrorist attacks. Inasmuch as organizational success depends on managing agency problems, generating information, securing legitimacy and participation, and adjudicating disputes, citizens and policymakers should understand strategic conflicts in part as a contest between dueling systems of administrative law. The United States should evaluate counter-terrorism policies in part based on how they affect those systems. Hence, when Americans evaluate the implications of presidential decisions to sidestep the literal terms of the Foreign Intelligence Surveillance Act,⁴⁷ they would do well to focus on more than just the short-term tactical implications of the President's decision. They should also weigh the price of interfering with an institutional arrangement designed to mitigate the same type of internal management problem that terrorist networks are themselves struggling to overcome.

The argument unfolds in three parts. Part I seeks to peer inside a terrorist network by examining jihadi strategic studies, al Qaeda documents captured and recently declassified, and political science research on the organization of terrorist activity. It also identifies four recurring themes that emerge from these sources and that appear to epitomize the behavior of insurgent networks committed to using terrorist tactics. Part II explores

46. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 71 (2004) [hereinafter 9/11 COMMISSION REPORT] (describing a "new kind of terrorist organization"). *But see* Martha Crenshaw, *Counterterrorism in Retrospect: Chronicle of a War Foretold*, 84 FOREIGN AFFAIRS 187, 189, 193 (2005) (criticizing the idea that al Qaeda represents a "new" kind of terrorism).

47. FISA of 1978, Pub. L. No. 95-511, §§ 101-111, 92 Stat. 1783, 1801 (codified as amended in scattered sections of 50 U.S.C.).

the implications of the preceding analyses and the potential relevance of these implications for evaluating legal and policy responses to terrorism. Part III demonstrates that this exercise enables us to understand the extent to which strategic conflict is partly a contest among competing systems of administrative law (broadly defined), each seeking to solve internal agency, information, participation, and adjudication problems endemic to both complex nonstate actors and state bureaucracies.

I. PEERING INSIDE A TERRORIST NETWORK

No event in recent history so vigorously forced the machinery of the federal government into overdrive as the September 11 attacks. Within hours of the terrorist strikes, Washington was a flurry of activity.⁴⁸ Executive branch officials held countless emergency meetings, made spirited public statements, executed complex diplomatic maneuvers, and took part in urgent internal discussions about how to respond.⁴⁹ The same was true thousands of miles away in Afghanistan, where the Taliban regime had been sheltering al Qaeda for years. At the same time that congressional leaders and the Bush administration were gearing up for legal and policy changes in the United States, al Qaeda's Kabul storefront office was brimming with activity.⁵⁰ Operatives, recruits, and organizers braced for the American response. Anticipating the imminent reprisal attack, the organization put together a propaganda video entitled "The Big Job."⁵¹ Meanwhile, Osama bin Laden wrote a long email to Mullah Omar, the leader of the Taliban government hosting al Qaeda, seeking simultaneously to reassure the Taliban about what would come next and to strengthen their decision to tolerate it:

I would like to emphasize the major impact of your statements on the Islamic world. Nothing harms America more than receiving your strong response to its positions and statements. Thus it is very important that the Emirate respond to every threat or demand from America . . . with demands that America put an end to its support of Israel, and that U.S. forces withdraw from Saudi Arabia. Such responses nullify the effect of the American media on people's morale . . . Their threat to invade Afghanistan should be countered by a threat on your

48. See 9/11 COMMISSION REPORT, *supra* note 46, at 35–36.

49. *Id.*

50. See Alan Cullison, *Inside Al-Qaeda's Hard Drive*, ATLANTIC MONTHLY, Sept. 2004, at 55, 58, available at <http://www.theatlantic.com/doc/print/200409/cullison>.

51. See *id.* at 68.

part that America will not be able to dream of security until Muslims experience it as a reality in Palestine and Afghanistan Keep in mind that America is currently facing two contradictory problems: a) If it refrains from responding to *jihad* operations, its prestige will collapse, thus forcing it to withdraw its troops abroad and restrict itself to U.S. internal affairs. This will transform it from a major power to a third-rate power, similar to Russia. b) On the other hand, a campaign against Afghanistan will impose great long-term economic burdens, leading to further economic collapse, which will force America, God willing, to resort to the former Soviet Union's only option: withdrawal from Afghanistan⁵²

Mullah Omar was not the only one needing reassurance. Within al Qaeda, the response to the attack's success was mixed. Some al Qaeda members expressed deep concern for how the U.S. response would affect the jihadi movement. Abu Musab al Suri, a member of the terrorist organization's inner leadership and a theorist of jihad, had sparred with bin Laden before about the potential risks of high-profile operations. "I think our brother has caught the disease of screens, flashes, fans, and applause," he wrote in an email to bin Laden in 1999, complaining about the al Qaeda leader's penchant for prioritizing attacks generating high-profile publicity over the difficult work of running the training camps and smoothing over relations with the Taliban.⁵³ Now, Suri had reason to fear that the September 11 attacks would imperil the rule of the Taliban, and the Taliban's control of Afghanistan was central to the movement's future because it provided a place to organize and train new recruits.⁵⁴ By June 2002, even bin Laden's son Hamzah had posted messages on an al Qaeda website lamenting al Qaeda's post-September 11 situation.⁵⁵ In response to these challenges—furtively exchanging messages online and occasionally meeting in secluded corners of Central Asia—the organization's strategic thinkers set about recapturing the

52. *Id.* at 70.

53. Wright, *supra* note 38, at 48, 50.

54. *Id.* at 48.

55. *Id.* Bin Laden's son exclaimed: "Oh, Father! Where is the escape and when will we have a home? Oh, Father! I see spheres of danger everywhere I look. . . . Tell me, Father, something useful about what I see." *Id.* Bin Laden apparently replied: "Oh, son! Suffice to say that I am full of grief and sighs. . . . I can only see a very steep path ahead." *Id.* Then, trying to dissipate the link between the September 11 attacks and the organization's present challenges, Bin Laden laments that "[a] decade has gone by in vagrancy and travel, and here we are in our tragedy. Security has gone, but danger remains." *Id.*

group's momentum and renewing its institution-building project.⁵⁶

A. CONTEXT AND METHODS

The arguments unleashed within al Qaeda after the September 11 attacks richly emphasize the dangers of treating a terrorist network as a monolithic entity, impervious to organizational challenges, and enjoying a bountiful supply of members guided by a single purpose. With a more textured image of terrorist networks, key players shaping national security policy would find it harder to ignore the value of peering inside a terrorist network. Scholars and analysts would find it more difficult to dismiss the insights to be gleaned from closely observing al Qaeda's goals, its approach to weighing the costs and benefits of choosing between truck bombs or time bombs, its canonical texts and political debates, its internal compromises, and its plans for appealing to the public. Domestic political realities playing out within advanced industrialized countries sometimes discourage legislators and executive branch officials from fully appreciating the complexities of their terrorist adversaries.⁵⁷ But facing a complex adversary with competing goals and a range of subtle weaknesses and strengths, politicians are almost foolish to ignore what leaders and strategists of terrorist networks actually say, what social scientists have gradually come to understand about the internal strategies of nonstate actors, and what these statements and conclusions reveal about our adversary's internal organizational challenges and its strategies to address these challenges.⁵⁸

This is precisely the strategy that the nation's terrorist adversary has pursued. Its thinkers are hard at work scrutinizing

56. See Jarret M. Brachman & William F. McCants, *Stealing Al-Qaeda's Playbook*, 29 *STUDIES IN CONFLICT & TERRORISM* 309, 309–11 (2006); Cullison, *supra* note 50, at 64; Wright, *supra* note 38, at 50–51.

57. See Ethan Bueno de Mesquita, *Politics and the Suboptimal Provision of Counterterrorism*, 61 *INT'L ORG.* 9, 9–11 (2007) (discussing the potentially suboptimal provision of counter-terrorist policy); Cuéllar, *supra* note 20, at 44–48 (discussing the potentially diverging incentives of politicians and the public in the context of transnational security and law enforcement policy); Mark Schlesinger & Richard R. Lau, *The Meaning and Measure of Policy Metaphors*, 94 *AM. POL. SCI. REV.* 611, 611–14 (2000) (indicating how politicians have an incentive to simplify the discussion of complicated issues).

58. See BERGEN, *supra* note 30, at 392 (“One of the lessons of September 11 is that we should pay careful attention to what the jihadists are actually saying.”).

Western management texts and Paul Kennedy's *The Rise and Fall of the Great Powers*.⁵⁹ Regarding the importance of understanding Western administrative practices and political behavior, one strategist said this:

We urge that most of the leaders of the Islamic movement be military leaders or have the ability to fight in the ranks, at the very least. Likewise, we also urge that those leaders work to master political science just as they would work to master military science.⁶⁰ We can say that bargaining is a characteristic of the politics of the enemy because the substitute for successful bargains between them—even if they achieve some partial gains—is continuous war which might crush all of (their) interests.⁶¹

And while an important goal in studying Western practices closely is to understand the weaknesses of those practices, the terrorist networks' strategists also emphasize the value of leveraging technocratic Western ideas about how to solve administrative challenges—challenges that are likely to prove increasingly critical to al Qaeda.⁶²

Al Qaeda's thinkers have good reason to focus on understanding their adversaries. Al Qaeda's goals are ambitious and its resources are scarce. Its adversaries are complex and capable at times of tremendously nimble feats; yet, they also face substantial practical and political obstacles.⁶³ Some of the terrorist network's recurring internal challenges—involving agency problems, filling gaps in information, and adjudicating disputes—have analogues in advanced industrialized countries, and even turn out to be the province of an elaborate body of administrative law imposing non-arbitrariness re-

59. See Brachman & McCants, *supra* note 56, at 310.

60. NAJI, *supra* note 1, at 37–38.

61. *Id.* at 38.

62. *Id.* at 23 (“We must make use of books on the subject of administration, especially the management studies and theories which have been recently published, since they are consonant with the nature of modern societies. There is more than one site on the Internet in which one can obtain management books.”). The strategists betray little awareness of the complexities associated with how larger political, economic, legal, and social circumstances combine to both shape the production of the Western management practices they lionize, as well as shape the conditions potentially allowing such practices to be instrumentally effective. For an interesting discussion of how macro-level social forces and legal practices shape the administration of organizations in the Middle East, see Timur Kuran, *Why the Middle East is Economically Underdeveloped: The Historical Mechanisms of Institutional Stagnation*, 18 J. ECON. PERSP. 71, 82–83 (2004).

63. See *infra* Part I.B.

quirements and managing public participation.⁶⁴ Policymakers in advanced industrial democracies would be ill-advised to neglect a symmetrical opportunity to scrutinize terrorist networks' organizational life. Such neglect would almost certainly diminish policymakers' capacity to mitigate the dangers that some terrorist networks pose, while also limiting society's capacity to evaluate the strategies justified in the name of disrupting terrorism.

To counter the existing dearth of attention to organizational problems in prevailing evaluations of counter-terrorism strategies, the sections that follow scrutinize strategic documents and studies produced by al Qaeda strategists and sympathizers. This scrutiny sheds light on the organization's goals and its internal administrative dynamics. I focus particularly on Abu Bakr Naji's book-length study, entitled *The Management of Savagery*, because of the unparalleled volume of details it provides about jihadi terrorist networks' goals and challenges, and because it was published through *Sat al-Jihad*, the main organ of al Qaeda in Saudi Arabia.⁶⁵ I also draw from accounts of three other works described by some leading al Qaeda observers as authentic and influential jihadi strategic studies describing the thinking of al Qaeda affiliates. These include a long tract by Abu Musab al-Suri entitled *Call for Worldwide Islamic Resistance*;⁶⁶ Ayman al Zawahiri's *Knights Under the Prophet's Banner*;⁶⁷ and a book entitled *Al Zarqawi: The Second Generation of al Qaeda*, by radical Jordanian journalist Fouad Hussein, which is based on sympathetic interviews with individuals such as the late Abu Musab al Zarqawi (the former leader of al Qaeda in Mesopotamia) and al Qaeda security chief

64. See, e.g., Administrative Procedure Act § 4, 5 U.S.C. §§ 551–59 (2006) (providing, among other things, for notice and comment in the context of most regulatory rulemaking proceedings, and subjecting administrative action to review against arbitrariness).

65. See Wright, *supra* note 38, at 52, 56; Combating Terrorism Ctr., Abu Bakr Naji's THE MANAGEMENT OF SAVAGERY (2005) (unpublished document on file with author).

66. See *id.* at 50.

67. The translation of al Zawahiri's book-length analysis of al Qaeda's goals and strategies consulted here is included in LAURA MANSFIELD, HIS OWN WORDS: TRANSLATION AND ANALYSIS OF THE WRITINGS OF DR. AYMAN AL ZAWAHIRI (INCLUDES KNIGHTS UNDER THE PROPHET'S BANNER AND SELECTED POST SEPTEMBER 11, 2001 COMMUNIQUÉS AND MESSAGES) (2006). Al Zawahiri is "widely credited with being the brains behind the terror infrastructure of Al Qaeda." *Id.* at 13. Al Zawahiri's analysis was initially serialized in a Middle Eastern newspaper in December 2001. *Id.* at 13–14.

Saif al Adl.⁶⁸ To place these sources in context, I have also drawn from a growing cache of declassified al Qaeda documents translated and analyzed by the Combating Terrorism Center at the United States Military Academy,⁶⁹ and from political scientists' studies (which in turn reflect qualitative, game-theoretic, or quantitative analyses) of the organization of terrorist networks.⁷⁰

It is natural to question whether such studies genuinely reflect al Qaeda's position. Given the reality that al Qaeda is an organization subject to internal disagreement and political competition, it is more accurate to say that these sources are likely to reflect what some of the organization's key strategists are thinking.⁷¹ Al Qaeda factions jockey for support within the organization and for recruits outside it. In doing so, they are almost certainly drawn to articulating visions in written documents—much like political parties or government agencies in advanced industrial democracies develop written justifications for their own policies.⁷² In some cases, the materials have been posted in known al Qaeda websites by individuals long known to have authored previous works published by the terrorist network.⁷³ In other cases (as with some of the declassified sources), documents have been captured directly from al Qaeda operatives.⁷⁴ Sometimes the sources provide insight into internal dis-

68. See Wright, *supra* note 38, at 56–57; Souad Mekhennet & Michael Moss, *In Lebanon Camp, A New Face of Jihad Vows Attacks on U.S.*, N.Y. TIMES, Mar. 16, 2007, at A1.

69. See HARMONY AND DISHARMONY, *supra* note 40, at 2–3.

70. See *infra* notes 71–75 and accompanying text.

71. The claim is not that these studies are representative, in a statistical sense, of what a random member of al Qaeda's leadership would think. A large study of available al Qaeda-related documents could prove revealing in many ways, though making inferences from such an analysis might prove tricky given the selection problems affecting the documents presently available. Instead, my goal here is to focus on some of the works that experts consider to be indicative of the major strands of thinking among some of al Qaeda's key strategists, to place them in context by referring to a larger body of captured al Qaeda documents and political science research, and to use the process as an opportunity for gaining some insights (and generating theories) about the role of law-like administrative arrangements in strategic conflict.

72. Cf. Brachman & McCants, *supra* note 56, at 309 (“Jihadi leaders are surprisingly frank when discussing the vulnerabilities of their movement and their strategies for toppling local regimes and undermining the United States. Their candor is, in large part, a consequence of struggles for leadership within the movement . . .”).

73. See Wright, *supra* note 38, at 53, 56 (discussing the provenance of Abu Bakr Naji and his likely role as a leading al Qaeda strategist).

74. See HARMONY AND DISHARMONY, *supra* note 40, at 2.

agreements within al Qaeda in particular, and among supporters of the jihadi movement more generally. Some favor more regionally focused goals culminating in the control of territory in the Middle East, while others (particularly some of Hussein's sources) seek an eventual "clash of civilizations" with the West.⁷⁵ In other domains, however, there is considerable overlap—even remarkable agreement—among these sources, and the themes evident therein also prove remarkably consistent with the analyses in political scientists' accounts of the logic of terrorist organizations.⁷⁶

B. THEMES EVIDENT IN JIHADI STRATEGIC STUDIES

1. Western Resolve and Imperial Overstretch

Organizations nearly always claim to have a purpose.⁷⁷ For example, some public bureaucracies ostensibly aim to protect the environment through regulatory policies, while some clandestine insurgent groups claim responsibility for casting off the yoke of a brutal colonial occupation. To understand any collective entity which claims for itself the mission to accomplish particular goals, one should know something about its alleged objectives.⁷⁸

Jihadi strategists repeatedly place among their most important strategies to carefully manage public reactions in Western democracies. In particular, the strategists see opportunity in the risks to the United States and its Western allies of what could be termed imperial overstretch, where the burdens of commanding the affairs of distant lands begins to weaken the government and the economy. This trope bears some resemblance to the account Paul Kennedy provides in *The Rise and Fall of the Great Powers*, in which empires crumble because of the staggering financial, geostrategic, and logistical

75. See Wright, *supra* note 38, at 57–59 (discussing differences between the more nationalistic activists focused on securing control of Arab countries, and comparing their purpose to the dark utopian vision of conflict in Hussein's book).

76. See *supra* notes 71–75 and accompanying text.

77. See JAMES G. MARCH & HERBERT A. SIMON, ORGANIZATIONS 22 (2d ed. 1993) ("Roles in organizations, as contrasted with many of the other roles that individuals fill, tend to be highly elaborated, relatively stable, and defined to a considerable extent in explicit and even written terms.")

78. This is not the same as assuming those objectives fully explain what organizations actually seek to do. See generally Cohen et al., *supra* note 21, at 702–12.

burdens of maintaining their imperial capabilities.⁷⁹ A second and related theme is the goal of making Western republics sufficiently sensitive to these burdens to provoke a political demand for disengagement from the Muslim world. They find historical support for this possibility in the U.S. experience with Vietnam and Somalia, and Soviet Russia's debacles in Afghanistan. In one jihadi strategic tract, Abu Bakr Naji makes these points by quoting Paul Kennedy himself:

When a state submits—whatever the extent of its ability—to the illusion of the deceptive power and behaves on this basis, that is when its downfall begins. It is just as the American author Paul Kennedy says: “If America expands the use of its military power and strategically extends more than necessary, this will lead to its downfall.” This overwhelming power is also assisted by the cohesion [tamasuk] of the society in the central country and the cohesion of that society's institutions and sectors. The overwhelming military power (weapons, technology, fighters) has no value without the cohesion of society and the cohesion of (society's) institutions and sectors. But this overwhelming military power may become a curse to this great superpower if the cohesion of society [literally “the social entity”] collapses.⁸⁰

Bin Laden's aforementioned email to Mullah Omar immediately after the September 11 attacks voices similar hopes to

[a]ttempt to cause a rift between the American people and their government, by demonstrating the following to the Americans: That the U.S. government will lead them into further losses of money and lives. That the government is sacrificing the people to serve the interests of the rich That the government is leading them to the war front to protect Israel and its security. America should withdraw from the current battle between Muslims and Jews.⁸¹

While the strategists sometimes differ in the extent to which they believe imperial overstretch to be essentially inevitable, they often highlight the importance of undertaking violent resistance operations that will encourage Westerners to tire of involvement in the Middle East and the Muslim world.⁸² They also highlight an additional benefit of the controlled use of violence: it helps to puncture the myth that Western forces

79. See PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 100 (1987) (discussing the weaknesses of the French and Russian empires).

80. NAJI, *supra* note 1, at 7.

81. Cullison, *supra* note 50, at 70.

82. NAJI, *supra* note 1, at 38 (“As for [the Americans'] persistence in continuing war, that is only when they think that their opponent is weak and it is possible to crush his will. When there is violent resistance which leads to invasions that cost a great deal and are of little use, the factions of the coalition began to withdraw one after another preferring (their own) security or delaying the conflict until more suitable circumstances.”).

generally, and the United States in particular, are invincible.⁸³ Thus, in an argument that echoes game theorists' identification of prisoners' dilemma problems facing those who might resist authorities that have greater power,⁸⁴ Naji notes:

There is no doubt that the power which God gave to the two superpowers (America and Russia) was overwhelming in the estimation of humans. However, in reality and after careful reflection using pure, human reason, one comes to understand this power is not able to impose its authority from the country of the center—from America, for example, or Russia—upon lands in Egypt and Yemen, for example, unless these (latter) countries submit to those powers entirely of their own accord. It is correct that this power is overwhelming and that it seeks help from the power of local regimes controlled by proxies who rule the Islamic world. Yet all of that is not enough (to completely control the satellite states). Therefore, the two superpowers must resort to using a deceptive media halo which portrays these powers as non-coercive and world-encompassing, able to reach into every earth and heaven as if they possess the power of the Creator of creation.⁸⁵

Al Zawahiri sounds a similar theme in *Knights Under the Prophet's Banner*, noting the extent to which Western powers work through local allies inveigled by the appearance of power:

We need to admit that successful attempts have been made to infiltrate our ranks, that these attempts have attracted some of our prominent names, and our enemies have added them to the crowds that serve their purposes, including the writers of falsehoods, those who exploit principles for personal gain, and those who sell their fatwas (religious rulings) as commodities.⁸⁶

Because the Afghan experience punctured the myth of superpower invincibility, it was incredibly valuable to the jihadi movement.⁸⁷ Imperial overstretch, characterized by crumbling Western resolve and diminished perceptions of invincibility resulting from attacks in the Middle East, yields a toxic brew that strategists can use to undermine Western objectives and to acquire converts and territory. The organization must garner sufficient resources, supporters, and administrative capacities

83. *Id.* at 9.

84. *Cf.* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245 (1997) (modeling a “game theory approach to . . . political officials’ respect for political and economic rights of citizens”).

85. NAJI, *supra* note 1, at 7.

86. MANSFIELD, *supra* note 67, at 20.

87. *Id.* at 38 (“A further significant point was that the jihad battles in Afghanistan destroyed the myth of a superpower in the minds of the Muslim mujahideen young men. The USSR, a superpower with the largest land army in the world, was destroyed and the remnants of its troops fled Afghanistan before the eyes of the Muslim youths and as a result of their actions.”).

to calibrate its tactics and to survive long enough to reap the reward of the West's imperial overstretch, which brings us to the next theme.

2. Protecting Organizational Survival

Save in the rarest of circumstances, conflict over means, ends, or decision-rules is an inevitable byproduct of collective decision making.⁸⁸ Just as members of the Securities and Exchange Commission or the Federal Election Commission often disagree about the proper content of a regulatory rule, al Qaeda strategists do not agree on everything. For example, Suri differs from other writers because he believes the organization should largely eschew high-profile attacks against Western targets.⁸⁹ His concern is borne largely from a desire for the survival of the movement to which he is so profoundly devoted and from experiences where that movement faced collapse because of meager financial resources, captured leaders, relentless pressure at the hands of intelligence agencies, and the lack of territory from which to organize and recruit.⁹⁰

On the other hand, the disagreements are only partial. Although other strategists are somewhat more willing to contemplate attacks against Western targets (particularly if they have the appealing quality of fomenting exhaustion rather than outrage among the Western public), they tend to share Suri's concern for organizational survival. Despite Naji's relatively greater willingness to sacrifice secrecy for some of the benefits of a more hierarchical bureaucracy,⁹¹ he shares Suri's view about the need to focus on organizational survival by learning from the past:

In the beginning of the Afghani war in the [19]70s . . . the jihad went through critical periods in which a number of strikes were directed

88. See MARCH & SIMON, *supra* note 77, at 132–56; Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 758–65 (1984).

89. See Wright, *supra* note 38, at 51 (“Unlike most jihadi theorists, Suri acknowledges the setback caused by September 11. He laments the demise of the Taliban, which he and other Salafi jihadists considered the modern world's only true Islamic government.”).

90. See MANSFIELD, *supra* note 67, at 201 (“Victory by the armies cannot be achieved unless the infantry occupies the territory. Likewise, victory for the Islamic movements against the world alliance cannot be attained unless these movements possess an Islamic base in the heart of the Arab region.”); NAJI, *supra* note 1, at 61 (discussing the value of territory); Wright, *supra* note 38, at 50 (discussing how poorly the movement was doing in the early to mid 1990s).

91. See NAJI, *supra* note 1, at 63.

against the mujahids, until—according to some accounts—only thirty men remained. However, . . . after . . . a decade of confrontation with the regime . . . the jihad offered up one and a half million martyrs . . . Where did these numbers of people come from? The response is that it happened by means of leading the masses to the battle and turning them into an army, especially when we established regions that were secure from the chaos and savagery that resulted from fighting and the people emigrated to these regions. We can make these regions theaters for proselytizing, training, and education.⁹²

Naji's exhortation to turn adversity into opportunity is similarly reflected in the efforts made by al Zarqawi's organization in Iraq to learn from the mistakes of the al Tali'a movement in Syria.⁹³ Al Tali'a's experience in Syria, for example, taught the brash entrepreneur of terrorism that organizational survival depended in part on the existence of a media and political arm to complement war-fighting.⁹⁴

Suri, al Zarqawi, and Naji were not alone in seeking to protect the organizational viability of the jihadi movement by extracting lessons from previous failures. Zawahiri also dwells on the critical imperative of learning from past mistakes in order to protect organizational survival, focusing particularly on ostensible allies of the jihadi movement that instead "stabbed . . . [it] . . . in the back."⁹⁵ And echoing recent empirical work in political science emphasizing the importance of geography to the success of insurgencies, Zawahiri notes that:

The problem of finding a secure base for jihad activity in Egypt used to occupy me a lot, in view of the pursuits to which we were subjected by the security forces and because of Egypt's flat terrain which made government control easy, for the River Nile runs in its narrow valley between two deserts that have no vegetation or water. Such a terrain

92. *Id.* at 62.

93. *See* HARMONY AND DISHARMONY, *supra* note 40, at 37.

94. *See id.* Other jihadi strategists, including Naji, agree about the importance of political activity as being central to organizational survival. *See* NAJI, *supra* note 1, at 37 ("If we meditate on the factor common to the movements which have remained, we find that there is political action in addition to military action.").

95. MANSFIELD, *supra* note 67, at 46 ("The Islamic movement in Egypt, even though it made an effort against the enemies of Islam in the past, its general line was not against the ruling regime but against the external enemy. The movement's ideology and media continued to try to get close to the head of the ruling regime (the king) and to recognize him as the legitimate authority in the country. This arbitrary separation between the external enemies and their internal agents led to many disasters and setbacks because the movement's members faced their enemy with their chests but left their backs exposed to his ally. Thus, they were stabbed in the back on the orders of those whom they faced with their chests.").

made guerrilla warfare in Egypt impossible and, as a result, forced the inhabitants of this valley to submit to the central government and be exploited as workers and compelled them to be recruited in its army.⁹⁶

The September 11 attacks did nothing to diminish the imperative of organizational survival. The survival imperative was intensely apparent in the hectic days following the September 11 attacks, as operatives and leaders responded to American pressure and eventually decided to further decentralize the organization.⁹⁷ One should expect concerns about organizational survival to be both profound and stable. While al Qaeda has produced its share of suicidal violence, the conclusion that it is a suicidal *organization* is profoundly deceiving. Indeed, the organizations involved in recruiting, preparing, and fielding suicide bombers tend to exhibit a long-term, even quasi-rational, regard for their own survival which is essential to creating the elaborate infrastructure which supports suicide bombing campaigns.⁹⁸ More generally, players within organizations such as al Qaeda have both politically instrumental and more self-regarding reasons for their movement—and indeed, for their particular faction or organization—to survive. Whether they crave some measure of political power or whether they seek the satisfaction of seeing like-minded individuals affect the larger political environment, they are unlikely to want their investment in a particular organization to dissipate.⁹⁹ Moreover, their own well-being, including access to the necessities of life and support in eluding capture, depends to some extent on the organization in which they have invested.¹⁰⁰ Finally, as Bruce Hoffman observes, terrorist organizations are subject to a process of natural selection, which constantly weakens or even decimates those that do not focus on the importance of their own survival.¹⁰¹

96. *Id.* at 28.

97. See BERGEN, *supra* note 30, at 392 (discussing the pressures placed on the organization as a result of “the loss of Afghanistan as a base, and the U.S.-led campaign to detain members of jihadist movements around the world”).

98. See ROBERT PAPE, DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM 20–24 (2005) (describing the strategic, social and individual logic behind terrorist organizations).

99. See *infra* notes 129–35 and accompanying text.

100. See *supra* Part I.B (discussing the importance of public approval for the survival of al Qaeda).

101. See BRUCE HOFFMAN, INSIDE TERRORISM 157–84 (1998) (discussing organizational survival). Though it would be all but impossible to deny the importance of survival for his own organization, Abu Bakr Naji indulges his

3. Crafting a Long-Term Plan to Achieve (Surprisingly Conventional) Strategic Goals

Terrorist organizations have reason to take the long view. Even by their own admission, they must surmount staggering difficulties to achieve their political goals, and their tactics sometimes require feats of extraordinary complexity. They are marginalized from political power yet crave the authority to govern.¹⁰² Al Qaeda strategists are no exception: they too live for the future. They emphatically reject the notion that violent activity is a mere outlet for pent-up frustration.¹⁰³ Al Qaeda strategists envision a campaign that will take, at a minimum, decades.¹⁰⁴ Naji's vision, as summarized by Wright, takes the following shape:

[J]ihadis [should] continually attack the vital economic centers of [regimes in Muslim countries that cooperate with the West], such as tourist sites and oil refineries, in order to make the regimes concentrate their forces, leaving their peripheries unprotected. Sensing weakness, Naji predicts, the people will lose confidence in their governments, which will respond with increasingly ineffective acts of repression. Eventually, the governments will lose control. Savagery will naturally follow, offering Islamists the opportunity to capture the allegiance of a population that is desperate for order (Naji cites Afghanistan before the Taliban as an example.) Even though the jihadis will have caused the chaos, that fact will be forgotten as the fighters

evident sense of moral superiority when discussing how Westerners think about survival:

[W]hat fuels their action are material interests and the desire to *survive*. Thus, they strive to survive, but it is not just any survival; rather it is a survival which guarantees for them an unruffled life of comfort and luxury. As for their allies and those who support them, they continue and remain steadfast in their coalition with them as long as (their) interest is served by that alliance. Therefore, we must understand this very well.

NAJI, *supra* note 1, at 37 (emphasis added).

102. See NAJI, *supra* note 1, at 15–22 (discussing the goal of establishing a caliphate in the Middle East). As one observer notes:

[A]ll terrorists exist and function in hopes of [acquiring the power to govern]. For them, the future rather than the present defines their reality. Indeed, they can console themselves that it was only a decade ago that the British prime minister, Margaret Thatcher, said of the African National Congress, "Anyone who thinks it is going to run the government in South Africa is living in cloud-cuckoo land." Exactly ten years after that remark was uttered, Queen Elizabeth II greeted President Nelson Mandela on his first official state visit to London.

HOFFMAN, *supra* note 101, at 184.

103. See NAJI, *supra* note 1, at 72 (discussing the problem of "idiots").

104. See *id.* at 38.

impose security, provide food and medical treatment, and establish Islamic courts of justice.¹⁰⁵

Surpassing even Naji's ambition (though overlapping with his account on key points), Hussein details a twenty-year plan for al Qaeda beginning with the September 11 attacks. The details of Hussein's plan bear at least some resemblance to what the United States has experienced in the succeeding years.¹⁰⁶ In a stage that is to last until 2006, Iraq will become the focus of recruiting for foot-soldiers eager to attack the United States.¹⁰⁷ Subsequently, al Qaeda will turn attention to Syria and Turkey, while ratcheting up direct confrontation with Israel.¹⁰⁸ The organization, gradually transforming itself into a decentralized social movement, will then be in a position to undermine Arab governments, to bolster its capabilities to deploy electronic warfare, and to more openly confront the United States.¹⁰⁹

105. Wright, *supra* note 38, at 56.

106. *Id.* at 56–58.

107. *Id.* at 57–58.

108. *Id.*

109. *See id.* Suri also celebrated the potential to transform jihadi organizations into the backbone of a more deeply-rooted but decentralized social movement. *See* BERGEN, *supra* note 30, at 245 (discussing Suri's vision of decentralization). In achieving such a goal, Suri seems to have sought not only a means of enlisting untold numbers into his cause but also of solving (however imperfectly) the hierarchy-operational security trade-off otherwise pervasively affecting his movement. *Id.* "If a Muslim is in Britain he doesn't need to leave his job or university and go and fight jihad at the front. What he can do is call the press agency and tell them I'm from the global Islamic resistance and claim responsibility for whatever action is being done in the world." *Id.* But achieving this goal is easier said than done. The problem lies in a paradox Suri and his like-minded pro-decentralization strategists apparently fail to acknowledge. Building a movement requires broad public support, which in turn requires coordinated operations (particularly violent ones), a task that is nearly impossible without hierarchy. In principle, it is perhaps not impossible for al Qaeda and similar entities to innovate in the creation of postmodern organizational forms that combine attributes of hierarchy along with some of the benefits of decentralization (as when a central leadership sets broad goals that leave lower-level operatives a measure of flexibility but also constrain their priorities, and when resources can be spent independently by decentralized members but allocated centrally). Nonetheless, two observations are in order about such efforts. First, they are likely to require time, energy, and learning through mistakes (because of the technical complexities inherent in developing signaling systems, using technology, and otherwise harnessing the benefits of hierarchy when decentralization is the norm), thereby introducing large risks that must be weighed alongside other goals. Second, compelling theoretical rationales (supported by empirical observation) suggest that, even when organizations innovate in an attempt to achieve benefits of both centralization and hierarchy, certain inherent limits are likely to interfere with this process.

While the jihadi strategists differ about when to confront their political adversaries and how hierarchical to make terrorist organizations, their overarching goals are surprisingly similar. In particular, the terrorist networks appear to harbor not abstract ideological objectives but rather concrete strategic political and military goals. In some cases, these turn out to be surprisingly conventional goals relating to the accumulation of territory and control over commodities such as oil. For example, Naji writes:

[T]he military goals of our movement in the stage of “the power of vexation and exhaustion” [are] especially the goal of (making) the enemy withdraw its forces and the forces of its helpers among the apostates from specific targets and making them withdraw from places where they are present (especially the regions where the masses live so that we can begin in the stage of the management of savagery.) (Furthermore), in accordance with the principle of (self) interest which the enemy follows . . . we must crown that (effort) by targeting petroleum sectors since petroleum is the artery of life in the West. . . . America views [oil] as a primary and vital strategic commodity in war and a necessity in peace and a requisite for international influence. The success of targeting the economy of the enemy politically and militarily is historically well-established . . .¹¹⁰

Naji makes similar observations regarding the value of territorial control,¹¹¹ echoing Suri's emphasis on the importance of territory as a place to recruit, organize, train, and strategize.¹¹²

Admittedly, actors within terrorist networks differ in the extent of their ultimate aspirations. Some burn with a rage that will only assuage with vengeance,¹¹³ while other participants in the network are more readily motivated by money¹¹⁴ or

Hierarchy depends on formal organizational structures, division of responsibility, authority relationships, and predictable forms of interaction that are generally considered to be the antithesis of decentralization. It is more plausible to expect that terrorist networks will find a viable means for operational security to exist with somewhat hierarchical arrangements than to expect terrorist networks to discover some entirely unique means of having their cake and eating it too by simultaneously being centralized and decentralized.

110. NAJI, *supra* note 1, at 41.

111. *See id.* at 61 (discussing the value of territory).

112. *See* Wright, *supra* note 38, at 50–51.

113. *See id.* at 52 (“One line of thinking proposes that America’s tragedy on September 11 was born in the prisons of Egypt. Human rights advocates in Cairo argue that torture created an appetite for revenge, first in Sayyid Qutb and later in his acolytes, including Ayman al-Zawahiri.”).

114. *See* BERGEN, *supra* note 30, at 154–55 (quoting one of bin Laden’s most trusted lieutenants in the early al Qaeda organization in Sudan who stole \$110,000 from him); Shapiro, *supra* note 28 (discussing “greedy” terrorists).

abstract political and religious convictions.¹¹⁵ In the midst of these competing agendas, leaders with a strategic vision have articulated a range of goals that fit onto a continuum, from obtaining control of existing nation-states,¹¹⁶ fomenting broad regime change in the Middle East and creating a caliphate throughout the region or the Muslim world,¹¹⁷ to engagement in a long-term military and ideological struggle with the West.¹¹⁸ The most sophisticated analyses repeatedly bring the focus back to the concrete indicators of political and military success that one might expect from a more conventional nation-state adversary.¹¹⁹ Assumptions that terrorist networks seek as their primary objective to undermine Western values may distort our capacity to appreciate how they might respond to familiar costs and benefits relating to the achievement of conventional political and military goals.¹²⁰

4. Subtle Parallels Between Terrorist Networks and State Bureaucracies

If there is any image that epitomizes modern national security discourse, it is that of a faceless, lawless terrorist cabal—endlessly adaptable and antithetical to conventional rule-bound bureaucracies. Yet Lawrence Wright's exhaustive study of al Qaeda's origins again confounds such imagery. In its stead, Wright traces an image of an entity almost desperate for Weberian, rule-bound bureaucratic structure:

The leaders of al-Qaeda developed a constitution and by-laws, which described the utopian goals of the organization in clear terms: "To establish the truth, get rid of evil, and establish an Islamic nation." This would be accomplished through education and military training, as well as coordinating and supporting jihad movements around the world. The group would be led by a commander who was impartial, resolute, trustworthy, patient, and just; he should have at least seven years of jihad experience and preferably a college degree. Among his duties were appointing a council of advisors to meet each month, establishing a budget, and deciding on a yearly plan of action. One can appreciate the ambition of al-Qaeda by looking at its bureaucratic

115. See BERGEN, *supra* note 30, at 98–99 (interviewing a Libyan recruit about his ideological motivations for joining al Qaeda).

116. See *supra* Part I.B.

117. See NAJI, *supra* note 1, at 15–22.

118. See Wright, *supra* note 38, at 56.

119. See *id.* at 57–58.

120. See *supra* note 32 (comparing the Bush administration's assertions about the motivations of terrorist networks with a more scholarly historical analysis of terrorist groups).

structure, which included committees devoted to military affairs, politics, information, administration, security, and surveillance.¹²¹

This picture of an embryonic al Qaeda, steeped in legalisms and bureaucratic procedures, showcases the importance terrorist networks assign to institution-building. Time and again, terrorist leaders ponder how to simultaneously solve their most pressing short-term management problems, while instilling a sense of shared mission among members and forging procedures achieve their organizations' longer-term goals. Indeed, perhaps the most common recurring theme in the jihadi strategic studies concerns the central importance of creating a structure to solve organizational challenges. How should camps be run? Who should decide what operations are undertaken? Who makes decisions about how best to resolve disputes? How should work be delegated? How should differing opinions be harmonized? While a terrorist network's specific operational challenges are distinctive, its larger organizational dilemmas are not.

To see this, consider how the jihadi strategic studies emphasize the importance of service-delivery to the growing populations they expect to control.¹²² Some strategists recognize the need for effective administrative cadres to manage oversight responsibilities and particularly to ensure the delivery of services to civilian populations that come under the organization's control.¹²³ Not surprisingly, al Qaeda's vision of eventually administering the security, sustenance, and economic needs of a population would encompass the same burdens that a conventional public agency would encounter in providing services, including the need to recruit competent staff and to respond to the needs of the population being served. And crucial among these burdens is the need for managers. As Naji notes:

[We have a need for] a large number of elements who have administrative experience, especially in the first periods of the management of savagery. Of course, we have previous experience from managing our organized groups. However, when we settle in the regions, our administrative elements will not be sufficient with respect to numbers for managing these regions, whose large numbers of residents will take us by surprise. The regions of savagery should be managed by us and by the people who live in them.¹²⁴

121. WRIGHT, *supra* note 31, at 142.

122. See Wright, *supra* note 38, at 56.

123. NAJI, *supra* note 1, at 63.

124. *Id.* Note that Naji offers a somewhat more elaborate vision than al Zawahiri's, which hints at the ability of a terrorist network to take over a

Notwithstanding al Qaeda's ultimate and radically anti-Western goals, the basic insight ought to be familiar to anyone involved in planning for post-conflict reconstruction in Iraq or similar settings on behalf of the U.S. government.

Of course, the administrative cadres to which Naji refers are just one type of expert. In order to manage the period of "savagery" that Naji foresees and effectively provide services to civilians, the strategist readily anticipates the need for al Qaeda to deploy even more specialized expertise:

One of the brothers said to me . . . "This [territorial expansion] is not the way that will take us to our goals. Assuming that we get rid of the apostate regimes today, who will take over the ministry of agriculture, trade, economics, etc.?" . . . [I]t is not a prerequisite that the mujahid movement has to be prepared especially for agriculture, trade, and industry. *One even sees that the movements and the parties which come to power in the world govern on the basis of their political constituents.* They appoint ministers from within the party or the movement for managing the different ministries and for taking charge of general policy for each ministry in accordance with the general policy of the state. As for the one who manages the techniques in each ministry, he can be a paid employee who has no interest in policy and is not a member of the movement or the party. There are many examples of that . . .¹²⁵

Many examples, indeed: unfamiliar though his context may be to external observers, Naji might as well have been providing a theoretical account of representative politics and bureaucratic delegation that underlies the conventional administrative state.

Solving management problems is relevant not only when terrorist networks enter their hoped-for "management of savagery" phase. Taxing Western resolve, seeking organizational survival, and executing their long-term plan to create the preconditions for the management of savagery all require resources and recruits.¹²⁶ Achieving these objectives requires calibrating violence and navigating the devilishly difficult trade-

state's administrative apparatus essentially intact. *See supra* Part I.B.; cf. Andrew Rathmell, *Planning Post-Conflict Reconstruction in Iraq: What Can We Learn?*, 81 INT'L AFF. 1013, 1022 (2005) (discussing the problems that followed from U.S. planners' apparent assumption that they could take over the Iraqi government's administrative apparatus essentially intact). In contrast, Naji appears more willing to recognize service delivery and governance as a staggering challenge. NAJI, *supra* note 1, at 63.

125. NAJI, *supra* note 1, at 63 (emphasis added). As for the time it would take to explain, a semester's worth of administrative law would probably do the trick.

126. *Id.*

offs between operational security and innovation on the one hand and centralized control on the other. From an instrumental perspective, jihadist leaders would therefore view some of the challenges faced by public organizations and their leaders with considerable familiarity before the “management of savagery” phase.

Intricate contextual details unquestionably affect how any collective entity fashions an instrumental response to its organizational problems. Yet the underlying internal organizational problems have a common root, even in staggeringly different contexts. Public bureaucracies routinely face agency problems involving the alignment of goals between principals (political actors or agency managers) and agents.¹²⁷ Jihadi strategists foresee similar challenges, given the ambitious nature of their goals and the frequently demonstrated temptation of lower-level operatives to skim financial resources.¹²⁸ Both types of organizations must adjudicate disputes and explicitly turn to legal procedures to do so.¹²⁹ Like public bureaucracies, al Qaeda and its analogues also face the problem of restraining overzealous action. The language of some jihadi strategic studies even eerily parallels words in American judicial opinions recognizing the importance of administrative mechanisms to mitigate such overzealous behavior.¹³⁰ Commonalities emerge as well in how terrorist networks and public bureaucracies in the U.S. public law system—faced with the need to restrain overzealous action while harnessing expertise¹³¹—view management through

127. See KAREN M. HULT & CHARLES WALCOTT, *GOVERNING PUBLIC ORGANIZATIONS: POLITICS, STRUCTURES, AND INSTITUTIONAL DESIGN* 15–24 (1990) (describing characteristics of the different models of the organization as a political system).

128. See *supra* note 114 and accompanying text (discussing examples of “greedy” terrorists).

129. See, e.g., BERGEN, *supra* note 30, at 124–25 (discussing al Qaeda’s use of Sharian courts to legitimize its decisions); HULT & WALCOTT, *supra* note 127, at 44–45 (discussing prominent adjudicative structures within public organizations). Although both types of entities deploy formal legal rules, it is unsurprising that an illicit nonstate entity does so less frequently given the lack of a larger social, political, and bureaucratic context that would enable it to more fully acquire the attributes of a conventional nation-state.

130. See NAJI, *supra* note 1, at 61 (discussing the need to restrain certain groups from being excessively aggressive); Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 258–60 (2006) (discussing the role of judicial review in restraining overzealous action among public bureaucracies).

131. See, e.g., *Far E. Conference v. United States*, 342 U.S. 570, 574 (1952) (“[I]n cases raising issues of fact not within the conventional experience of

strict and hierarchically imposed rules. Terrorist networks face an even more difficult trade-off than public bureaucracies in contending with hierarchy. This is because formal bureaucratic hierarchies value carefully administering scarce resources, a practice which can lead to particularly pronounced security problems.¹³² But more striking than the distinctions in the intensity of the dilemma is the reality that such profoundly different types of organizations as public bureaucracies and terrorist networks nonetheless view hierarchy and formal rules as both a blessing and a curse.

Finally, although some strands of conventional wisdom regard terrorist organizations as entirely unconstrained by public reactions,¹³³ a closer examination reveals that both public agencies and terrorist networks seek to build public approval and gain legitimacy.¹³⁴ Terrorist networks can be constrained by their audiences in two crucial ways. First, leaders' tactical and egotistic political objectives depend on the internal support of participants, and that dependence requires leaders to employ strategies that engage and reward these constituents.¹³⁵ Second, the appeal of a terrorist network to the public (particularly in Middle Eastern countries) is pivotal because it cultivates greater organizational support and assuages opposition to the group's objectives.¹³⁶ This connection between public support

judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over."); NAJI, *supra* note 1, at 25 ("[I]n our plan we open the door of management wide to those who have mastered its art.").

132. See BERGEN, *supra* note 30, at 244–46 (discussing Suri's critique of hierarchy).

133. See Nzelibe & Yoo, *supra* note 35, at 2533 (contending that "terrorist organizations face . . . no political accountability for their foreign policy failures," and that therefore "they can afford to ignore their domestic audiences and take more aggressive stances in initiating international conflict").

134. Compare *Kallstrom v. Columbus*, 136 F.3d 1055, 1065 (6th Cir. 1998) (discussing the value of transparency and public accountability for both the judicial and executive branches), and DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* 366 (2001) (stating that much of the FDA's present power is derived from the public legitimacy and prestige that it gained early in its history as it "acted to stem vast consumer crises in adulterated medicines"), with NAJI, *supra* note 1, at 21 ("[T]he masses . . . will be our support in the future, provided that there is transparency in this plan and even an acknowledgement of error sometimes").

135. See Brachman & McCants, *supra* note 56, at 315 (discussing the internal power struggles within terrorist organizations).

136. See NAJI, *supra* note 1, at 63–64 (discussing the importance of popular support in establishing a successful Islamic revolution). Indeed, al Qaeda strategists recognize that the need for public support extends not only to what

and the mitigation of internal management problems may explain why some of the most contentious disagreements among terrorist leaders involve the question of how to cultivate broader public support.¹³⁷ It also explains why leaders temper their authoritarian impulses for tight control and security with an approach that values the legitimacy created by law-like administrative procedures.

Ignoring the terrorist networks' public constraints may distort counter-terrorism policy by downplaying the value of and potential for driving a wedge between terrorist leaders and their actual or potential supporters. Juxtaposing conventional public bureaucracies from advanced industrialized nation-states with nonstate actors deploying terrorist tactics is counterintuitive. Yet both share a tangle of common organizational problems that provide insights into the nature of strategic conflict which transcend the more superficial ideas about terrorist networks that prevail in much of the current political discourse.

As with any analogy, certain limits govern the comparison between problems confronting modern terrorist networks and those that bedevil conventional, rule-bound state bureaucracies. Illicit nonstate actors must sometimes adopt more costly organizational strategies than legitimate governmental agencies. For example, the risk of detection may force a terrorist leader to confer greater independence to subordinates than would otherwise be desirable.¹³⁸ Furthermore, illicit organizations must do without a formal legal system. With few exceptions, they lack the depth of expertise and bureaucratic capacity of a nation-state.¹³⁹ Public bureaucracies in advanced industrialized countries rarely face the range of constraints that terrorist networks do, leaving agency leaders with a broader range of options to solve their bureaus' management problems.

the jihadi movement would have to achieve during the "management of savagery" stage, but also to what the organization would need at a more embryonic stage in the development of a terrorist network. *See* BERGEN, *supra* note 30, at 392 (quoting al-Zawahiri's call to win over greater public support for al-Qaeda); *supra* note 124 and accompanying text.

137. *See, e.g.*, Wright, *supra* note 38, at 53.

138. *See* Jacob N. Shapiro & David A. Siegel, Underfunding in Terrorist Organizations (Nov. 3, 2006) (unpublished manuscript at 7, on file with author).

139. NAJI, *supra* note 1, at 63.

In the end, a more nuanced analysis reveals critical commonalities that are at least as important as the differences. Both terrorist networks and our own bureaucratized nation-state must strike a balance between hierarchy and expertise, simultaneously drawing on the strengths of each while trying to minimize their dependence on them.¹⁴⁰ Both must reconcile the potential disconnect between low-level players and their superiors.¹⁴¹ Both must deal with problems involving bounded rationality and tunnel vision.¹⁴² And both must encourage participation while maintaining critical operational attributes such as secrecy and restraint.¹⁴³ In light of these parallels, what makes terrorist strategists such as Naji particularly insightful is that they recognize that many of their movement's strategic goals—including the exploitation of imperial overstretch and the survival of organizational structures—all depend on the fate of the network's administrative capacity.¹⁴⁴

If one casts aside the more superficial descriptions of terrorist organizations, certain tentative implications begin to emerge. Jihadi terrorist networks simultaneously seek to achieve ambitious goals, such as provoking Western overstretch or competing with established governments in delivering services to civilian populations while facing complicated organizational realities. This combination of environment and aspiration gives rise to recurrent administrative law-type problems—

140. Compare HARMONY AND DISHARMONY, *supra* note 40, at 12–13 (noting that the balance between hierarchy and expertise must be struck as a consequence of security concerns), with HULT & WALCOTT, *supra* note 127, at 92–93 (explaining that bureaucracies exist to develop organizational expertise, but that hierarchy is often imposed as a means of enhancing accountability).

141. Compare HARMONY AND DISHARMONY, *supra* note 40, at 19–21 (discussing how terrorist groups deal with the problem of “preference divergence” within their membership), with MARCH & SIMON, *supra* note 77, at 13–14 (discussing the preference divergence problem more generally in the context of large legitimate organizations).

142. Compare NAJI, *supra* note 1, at 71 (complaining of operatives who cannot conceive of undertaking small missions instead of larger ones), with MARCH & SIMON, *supra* note 77, at 173–74 (discussing how departmentalization can lead to the emergence of subgoals which limit the overall rationality of agency actions).

143. See BERGEN, *supra* note 30, at 245–46 (outlining Suri's lecture on the importance of a decentralized cell structure as a mechanism for maintaining secrecy and security); NAJI, *supra* note 1, at 71 (“[T]he desire for large actions, especially battle, overcomes the minds of some . . . enthusiastic people However, one of its harmful effects is that it moves them to scorn actions that are not large.”).

144. NAJI, *supra* note 1, at 23.

problems borne from the amount and complexity of coordinated effort that leaders must expend to achieve their objectives in a complicated world,¹⁴⁵ and similar to those concerns existing at the core of domestic administrative law in a nation such as the United States. The problems involve delegation and oversight, expertise, participation, restraint of overzealous action, and adjudication of disputes.¹⁴⁶ Much like the managers of state bureaucracies in advanced industrialized countries, the nominal leaders of terrorist networks cannot assume the existence of optimal institutional conditions such as the alignment of the goals of low-level operatives with those of strategic decision makers. They must instead forge that alignment from the imperfect materials available to organizational entrepreneurs: raw recruits, imperfect monitoring strategies to oversee the work of low-level operatives, limited financial resources, and the ability to devise rules and standards that embody organizational goals.¹⁴⁷ A more nuanced view of institutional dynamics reveals the organizational complexity of illicit nonstate actors who aim simultaneously to exhaust Western resolve, to ensure organizational survival, and to execute an ambitious long-term plan for achieving territorial control. This complexity undermines the assumptions made by some scholarly observers of terrorism-related legal developments.¹⁴⁸ Just as it is dangerous to assume that public agencies routinely achieve their stated goals, policymakers should be wary of presumptions that terrorist networks have routinely solved their own organizational problems. We should instead turn our attention to learning from al Qaeda's administrative law dilemmas, so that we might better address our own.

II. LEARNING FROM AL QAEDA'S ADMINISTRATIVE LAW DILEMMAS

Having traced some of the themes that appear in the works of al Qaeda strategists, we can now use them to evaluate potential changes to our own law and policy. In particular, we can observe how the recurring themes emphasize certain features of terrorist networks that are sometimes overlooked when poli-

145. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 1 (Comm. Print 1960).

146. See MARCH & SIMON, *supra* note 77, at 2.

147. See *id.*

148. See, e.g., *supra* notes 33–35 and accompanying text.

ticians shape public perceptions. Since politicians' craft their statements and policy pronouncements to appeal to the public's prevailing views,¹⁴⁹ conventional assumptions about the uniform zeal of terrorist organizations, their time horizon, their interest in using weapons of mass destruction, and their aptitude for working in secrecy may confound our collective ability to manage terrorist risks at a reasonable cost. As an alternative to the more common, truncated depiction of terrorist networks in discussions about appropriate legal and policy responses, this Part discusses some of the implications that arise from dissecting al Qaeda's administrative law-related problems.

A. AGENCY PROBLEMS AND INFORMATION GAPS

One challenge permeating the administrative state involves gaps in information.¹⁵⁰ Political actors in the legislatures and the executive branches of such states face substantial uncertainty. How is the Food and Drug Administration using its regulatory powers? How reliable is the Department of Homeland Security's rationale for deciding not to process asylum applications from certain countries? What is the best way of changing the public's nutritional or highway safety practices? To manage these problems, the administrative state balances the benefits of discretion with those of review.¹⁵¹ It provides for deferential judicial review of executive branch decisions, forces Congress to delimit the bureaucracy's powers so courts can monitor agency activities,¹⁵² and grants private parties the limited right to learn about government policies through the Administrative Procedure Act and the Freedom of Information Act. These measures survive in the U.S. system because politicians think the measures can reduce agency problems and (to a lesser extent) because the public occasionally supports such policies.¹⁵³

149. Cf. Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1629 (2003) ("[P]oliticians' treaty-related rhetoric shapes public opinion, but that opinion in turn shapes what politicians choose to emphasize to please key constituencies.").

150. See, e.g., 9/11 COMMISSION REPORT, *supra* note 46, at 416–17.

151. See Frug, *supra* note 29, at 1301–02.

152. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (requiring Congress to make a clear textual commitment of authority to agencies whenever it "alter[s] the fundamental details of a regulatory scheme").

153. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180, 215 (1999) (arguing that Congress enacted the

For the leaders of terrorist networks, the information predicament is exacerbated by the rudimentary nature of their internal procedures and by the constraints of their security environment.¹⁵⁴ Nowhere is this more apparent than in the recurring problem of managing people and money to ensure action in accordance with the network's overall goals. Time and again, the strategists of terrorist organizations recognize that some members are motivated in part by the possibility of personal gain. For example, in 1999, leaders asked for an accounting from a Yemeni cell leader who had been provided with funds. In response to the report provided, he received the following email from Ayman al Zawahiri, already one of al Qaeda's major figures:

With all due respect, this is not an accounting. It's a summary accounting. For example, you didn't write any dates, and many of the items are vague. The analysis of the summary shows the following: 1-you received a total of \$22,301. Of course, you didn't mention the period over which this sum was received. Our activities only benefited from a negligible portion of the money. This means that you received and distributed the money as you please . . . 2-Salaries amounted to \$10,085—45 percent of the money. I had told you in my fax. . . . That we've been receiving only half salaries for five months. What is your reaction or response to this? 3-Loans amounted to \$2,190. Why did you give out loans? Didn't I give clear orders to Muhammad Saleh to . . . refer any loan requests to me? We have already had long discussions on this topic . . .¹⁵⁵

Such bickering over financial resources belies the stereotypical image of terrorist networks that are uniformly populated by cadres of operatives desperately eager to die for their cause. Instead, the picture that emerges from such exchanges is one of a network capable of raising considerable sums of money but uncertain about how, by whom, and to what degree of efficacy that money will be used. If the Yemeni leader had actually portrayed the stereotypical perception of a religious zealot whose only purpose is to serve a dark organizational master, then Zawahiri's exasperated email hinting at the misuse of funds would hardly have been necessary.¹⁵⁶ In other examples,

APA in order to control the actions of agency administrators who might be appointed by presidents of the other political party).

154. See HARMONY AND DISHARMONY, *supra* note 40, at 11; Shapiro & Siegel, *supra* note 138, at 6.

155. HARMONY AND DISHARMONY, *supra* note 40, at 42; Cullison, *supra* note 50, at 62, 64.

156. This is similar to a long-running federal case involving the financial mismanagement of Indian funds which features a federal judge displaying similar degrees of exasperation with federal officials. Cf. Richard J. Pierce, Jr.,

strategists almost seem to take pains to excuse their less-than-perfect supporters (while suggesting that the transgressions of those supporters should be kept secret), reinforcing the stereotype of the monolithic terrorist organization.¹⁵⁷

Ironically, even the early history of al Qaeda amply reveals its leadership's pragmatic bent. During the 1980s, when the organization's leadership was holed up near Khost, Afghanistan, bin Laden and his allies recognized that many potential recruits would seek something more than spiritual deliverance. In response they designed an employment program that provided for members' decidedly material needs:

Al Qaeda held its first recruitment meeting in the Farouk camp near Khost, Afghanistan. . . . New recruits filled out forms in triplicate, signed their oath of loyalty to bin Laden, and swore themselves to secrecy. In return, single members earned about \$1,000 a month in salary; married members received \$1,500. Everyone got a round-trip ticket home each year and a month of vacation. There was a health-care plan and—for those who changed their mind—a buyout option: They received \$2,400 and went on their way. From the beginning, al-Qaeda presented itself as an attractive employment opportunity for men whose education and careers had been curtailed¹⁵⁸

Al Qaeda's leadership certainly would welcome the opportunity to dispense with the monetary incentives. In the process, it could avoid depending on anyone other than individuals who are entirely committed to the organization's cause.¹⁵⁹ The terrorist leaders may even agree with James Landis's observation that "[t]he prime key to the improvement of the administrative process is the selection of qualified personnel. Good men can make poor laws workable; poor men will wreak havoc with good laws."¹⁶⁰

But those improvements are easier said than done. Most individuals harbor mixed motives for engaging in political activity.¹⁶¹ Once the religious rhetoric is privately put aside, some

Judge Lamberth's Reign of Terror at the Department of Interior, 56 ADMIN. L. REV. 235, 241 (2004) (describing a judge's discontent with the Treasury and Interior Departments, leading to multiple contempt proceedings).

157. NAJI, *supra* note 1, at 35 (warning leaders not to criticize the imperfections of their volunteers, and telling them to avoid publicizing errors).

158. WRIGHT, *supra* note 31, at 141–42.

159. HARMONY AND DISHARMONY, *supra* note 40, at 42–43 (advising against the removal of less committed operatives and strengthening the network as a result).

160. STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 66 (Comm. Print 1960).

161. See MARCH & SIMON, *supra* note 77, at 83–85.

supporters of jihadi movements are especially happy if the organization provides them with an opportunity for financial gain, but may become cautious or unreliable if they feel exposed to personal danger.¹⁶² Even if the world were filled with a large number of individuals who would be fanatically loyal al Qaeda members, it would not be obvious who they were. Almost any successful effort to identify them would require placing them in positions of intermediate responsibility and observing their performance.¹⁶³

Moreover, al Qaeda not only needs adherents, but also requires expertise and resources. The network must sift through pools of potential recruits to find collaborators who can raise, transfer, and administer financial resources; who can forge a communications strategy; and who can procure commodities such as explosives or weapons. Thus, the organization expands its recruitment circle beyond those who are most intensely committed to the organization.¹⁶⁴ Weapons and explosives traffickers, money launderers, communications specialists, individuals with valid documents or the ability to forge them, and those with experience living in Western countries are all likely to display a mix of loyalties, including those to their own material and personal well-being.¹⁶⁵ And the most radical and loyal adherents might be drawn into particularly sensitive or specialized roles, such as serving on suicide missions, that would preclude their generalized use throughout the network. For all these reasons, the organization confronts repeated and perva-

162. See Shapiro & Siegel, *supra* note 138, at 13 (“[T]he longer individuals remain in [a terrorist] organization, and the further they move up the management structure, the more likely they are to place a heavy weight on monetary rewards. . . . [T]he threshold level of risk acceptance and commitment required for participation in support activities is much lower than for participation in technical roles.”).

163. See MARCH & SIMON, *supra* note 77, at 59–61. *But see* HARMONY AND DISHARMONY, *supra* note 40, at 15.

164. See NAJI, *supra* note 1, at 63; Shapiro & Siegel, *supra* note 138, at 11–12.

165. These agency problems, moreover, make it easier to understand the jihadi strategic studies’ frequent focus on the importance of ideological indoctrination. *E.g.*, NAJI, *supra* note 1, at 59; Wright, *supra* note 38, at 48. However, even that strategy is unlikely to ensure organization-wide orthodoxy. See MARCH & SIMON, *supra* note 77, at 59–61 (noting that departmentalization leads to the creation of subgoals which may not further the overall organizational objectives).

sive problems arising from the divergence between the organization's goals and the goals of some of its operatives.¹⁶⁶

The tensions that arise from this disconnect are merely an example of a more general problem. Incomplete information limits the ability of the leaders of a terrorist network to assess the network's current tactical position. Those leaders have difficulty acquiring precise information about the potential effects of the group's attacks on the political and military environment, the progress made by adversaries in the pursuit of major leaders, and the activities and whereabouts of subordinates.¹⁶⁷ Information gaps hinder the organization's efforts to set strategic goals and work toward them. These gaps also create obstacles to resolving basic management problems such as those arising from the operation of training camps or in the planning of responses to potential enforcement operations. From a more parochial perspective, factions within the organization need information to better manage political competition.¹⁶⁸ These information needs are analogous to our own system, which is why so much of modern administrative law deals with creating institutional mechanisms that produce information that justifies particular regulatory decisions, and why information can have such strategic value for both military and political adversaries.¹⁶⁹

Much like agencies within the administrative state, a terrorist network seeks to counter its information problems in a

166. Cf. Cuéllar, *supra* note 130, at 261 (observing that while there are times when the good conscious of administration officials will sometimes contribute to action which is in line with institutional objectives, "such desirable circumstances do not always arise").

167. See HARMONY AND DISHARMONY, *supra* note 40, at 47; Shapiro & Siegel, *supra* note 138, at 6.

168. See MARCH & SIMON, *supra* note 77, at 150 (noting that in intra-organizational conflicts, problem solving requires an exaggerated emphasis on information assembly).

169. STEPHEN PETER ROSEN, WINNING THE NEXT WAR 253–55 (1991) (highlighting how uncertainty about the military capabilities of rival nations prompted the U.S. military to develop information through simulations); Erik Lichtenberg & David Zilberman, *Efficient Regulation of Environmental Health Risks*, 103 Q.J. ECON. 167, 167 (1988) (discussing environmental regulators' uncertainty as to the extent of the risks associated with environmental contaminants); Thomas W. Gilligan & Keith Krehbiel, *Collective Decision Making and Standing Committees: An Informational Rationale for Restrictive Amendment Procedures*, 3 J.L. ECON. & ORG. 287, 287–88 (1987) (discussing the impact of information gaps on the incentives of politicians to organize the legislature into committees, and to defer to the judgments of those committees).

variety of ways. It could seek to promote broader participation to obtain more information; however, this would create additional security problems. It could attempt to infiltrate its enemies.¹⁷⁰ But, given the scarcity of operatives able to live unobtrusively in the West,¹⁷¹ finding those capable of infiltrating Western security agencies would be very difficult. It could target individuals with special analytical capacities for recruitment. Ultimately, however, none of these approaches would entirely solve the problem: the environment is too complicated and even the most sophisticated organizations can only respond imperfectly to such uncertainty.¹⁷²

As a result, terrorist networks such as al Qaeda remain vulnerable to strategies designed to exploit their information gaps. Their burden is a consequence of simultaneous pressures to operate secretly while managing broader organizational problems that can be mitigated through hierarchy, expertise, and broader participation. In the course of walking this tight-rope, leaders of terrorist organizations almost inevitably create networks of people with heterogeneous motivations.¹⁷³ The presence of individuals who are motivated by greed or personal political ambition also belies the assumption that terrorist networks are monolithic institutions, driven uniformly by religion and ideology.¹⁷⁴ In fact, reality is more complicated. Terrorist leaders must shoulder the burdensome cost of identifying zealous recruits while dealing with the security problems associated with its dependence on essential, though less reliable, foot soldiers.

The prevalence of mixed motives among illicit organizations leaves policymakers with a chance to drive a wedge between participants in terrorist ventures. Policymakers should value counter-terrorism policies that leave less-reliable mem-

170. See NAJI, *supra* note 1, at 52 (calling on the movement to infiltrate all institutions associated with its enemies).

171. See Cullison, *supra* note 50, at 61.

172. See Shapiro, *supra* note 28, at 2 (indicating a trade-off between solving information problems and promoting security).

173. See HARMONY AND DISHARMONY, *supra* note 40, at 43. To avoid creating a pool of new recruits with heterogeneous motivations, leaders would have to incur two sets of costs: exceedingly elevated expenses screening potential participants, and high opportunity costs borne from excluding from participation eager individuals with expert knowledge, skills, personal contacts, or material resources that can be valuable to the leaders' vision of the organization.

174. Address to the Nation on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 597, 1598 (Sept. 11, 2006) ("[T]hey form a global network of extremists who are driven by . . . totalitarian ideology . . .").

bers of terrorist organization in place (particularly if the members can be monitored) instead of detaining them. Allowing such operatives to stay in the organization forces al Qaeda to contend with a rank-and-file membership that is not fanatically committed to the group.¹⁷⁵ Enforcement practices that fail to consider the implications of removing the less reliable elements in the al Qaeda network can unwittingly aid the organization by effectively assuming the burden of separating the wheat from the chaff. As long as less reliable operatives remain readily observable (and, if necessary, subject to interception), focused surveillance may be a better strategy than a policy of detention that alerts the organization to enforcement activity and helps it identify its most valuable members.¹⁷⁶ Another way to exploit terrorist networks' agency problems would be to credibly communicate to less devoted terrorists the rewards they might enjoy in exchange for betraying the group.¹⁷⁷

B. CENTRALITY OF PUBLIC APPROVAL AND DISAPPROVAL

Like administrative bureaucracies, terrorist networks depend on public approval to achieve both near-term goals of surviving, and longer-term instrumental goals of undermining pro-Western Middle Eastern regimes. Accordingly, popular support in the Muslim world is a critical asset to al Qaeda, its affiliates, and the broad social movement the organization wishes to spawn. Indeed, the desire of some al Qaeda strategists to found such a movement echoes the desire of some regulatory officials in advanced industrialized countries to achieve their policy goals by leveraging public support.¹⁷⁸

175. See Shapiro & Siegel, *supra* note 138, at 32–33.

176. HARMONY AND DISHARMONY, *supra* note 40, at 42. Cf. Neal K. Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1381 (2003) (calling for higher sentences on co-conspirators playing a minor role in a scheme to perpetrate illegal activity, without considering the extent to which such penalties align the incentives of the minor players and the ringleaders).

177. See *id.* at 43 (advocating providing an easier out for lower tier operatives than “indefinite detention or death”).

178. See DAVID KESSLER, A QUESTION OF INTENT 388–89 (2001) (providing an example of a regulatory official pursuing a strategy of fostering broad social support). Former FDA Commissioner David Kessler was considering potential policies for curbing tobacco use when he had the following insight:

I also began to think about the importance of removing the vestiges of social acceptability from tobacco in order to prevent future generations of children from becoming addicted to nicotine. I knew that changing priorities and attitudes, and ultimately creating new norms, is a far more complex task than achieving legislative victories, but in

It follows for some strategists that their plans are especially threatened by the prospect of successful U.S. government efforts to counter the network's plans to build public support. Suri notes that the American "war of ideas" has had at least limited success in spurring modification of textbooks in some Muslim countries.¹⁷⁹ This success greatly rankles him, and he emphatically calls on adherents to promote Salafi jihadism as a response.¹⁸⁰ More generally, public supporters provide nearly all resources on which the organization relies, from financial backing to foot soldiers to safe houses. At the same time, Western public opinion is also crucial. It may create pressure on Western governments to withdraw from the Muslim world, but is also a potentially vindictive force that strategists must not overly provoke.¹⁸¹ This tension forces al Qaeda and its sympathizers to conduct operations that generate enough publicity to spur recruitment and financial support without alienating the Middle Eastern general public; likewise they must provoke exhaustion rather than outrage among the public in the West.

Al Qaeda's leadership is not ignorant of these parameters. For example, Naji emphasizes the centrality of a "media plan" to any successful operation. This plan should

target[] and focus[] on two classes. The first class is the masses, in order to push a large number of them to join the jihad, offer positive support, and adopt a negative attitude toward those who do not join the ranks. The second class is the troops of the enemy who have lower salaries, in order to push them to join the ranks of the mujahids or at least to flee from the service of the enemy.¹⁸²

Avoiding wanton and excessive brutality is crucial to the success of this media strategy. Such brutality can provoke sympathy for al Qaeda's enemies or give rise to such intense outrage among Western audiences that "success" could imperil the

the end that is probably what it takes to reduce rates of smoking.

Id. at 388. A generation earlier, the Federal Narcotics Bureau, "faced with a non-supportive environment and a decreasing budgetary appropriation that threatened its survival, generated a moral crusade against marihuana use which resulted in the passage of the Marihuana Tax Act and the alteration of a societal value." Donald T. Dickson, *Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade*, 16 SOC. PROBS. 143, 143 (1968).

179. Wright, *supra* note 38, at 51.

180. *Id.*

181. See BERGEN, *supra* note 30, at 392 ("[W]hat [many jihadist strategists] are saying about September 11 is that the attacks may have been a tactical victory, but they were a strategic disaster because of the overwhelming response it provoked."); *supra* Part I.B.1 (discussing the strategy of provoking imperial overstretch).

182. NAJI, *supra* note 1, at 21.

organization.¹⁸³ Ayman al Zawahiri espouses this principle, evidenced by his warning to the late al Zarqawi to curtail his brutality.¹⁸⁴ In shaping American public opinion, their key goal is to promote fatigue among the population—to make the public question why the U.S. government is spending lives and money.¹⁸⁵

Carefully calibrating the amount of brutality is also crucial because too much violence can alienate the terrorist network's most important pool of potential support. Among Muslims in the Middle East—al Qaeda's primary audience—the terrorist network's leaders seek desperately to evoke sympathy and support. They endeavor to increase the flow of donations and recruits. They seek allies and sympathizers to smooth the organization's work and to promote efficient administration.¹⁸⁶ The thorniest predicament for the leaders therefore emerges anew in nearly every strategic decision: how to achieve sufficient public notoriety without unleashing the sort of backlash that followed the two American embassy bombings in Africa, the organization's earliest attacks against high-profile targets. As Lawrence notes:

Muslims all over the world greeted the bombings with horror and dismay. The deaths of so many people, most of them Africans, many of them Muslims, created a furor. Bin Laden said that the bombings gave the Americans a taste of the atrocities that Muslims had experienced. But to most of the world and even to some members of al-Qaeda, the attacks seemed pointless, a showy act of mass murder with no conceivable effect on American policy except to provoke a massive response.¹⁸⁷

The public support enjoyed by a terrorist organization has a direct impact on its ability to solve the nettlesome management problems that interfere with its ability to accomplish its goals. Having greater public support facilitates building exper-

183. Brachman & McCants, *supra* note 56, at 312–13.

184. Wright, *supra* note 38, at 53 (“Zawahiri advised Zarqawi to moderate his attacks on Iraqi Shiites and to stop beheading hostages. ‘We are in battle,’ Zawahiri reminded him. ‘And more than half of this battle is taking place in the battlefield of the media.’”).

185. Moreover, note how concern for public perceptions should naturally translate into a desire to develop bureaucratic and administrative mechanisms that both control operations and restrain excesses. See NAJI, *supra* note 1, at 9 (“If the number of Americans killed is one/tenth the number of Russians killed in Afghanistan and Chechnya, they will flee, heedless of all else [because] . . . [t]hey [have] reached a state of effeminacy which [makes] them unable to sustain battles for a long period of time . . .”).

186. See *supra* Part I.B.4.

187. WRIGHT, *supra* note 31, at 272.

tise within the network because a larger base of support is more likely to produce skilled and knowledgeable recruits who would otherwise have to be carefully trained or hired at rates calculated to ensure loyalty. Greater public support also fills the network's coffers, allowing it to fund new activities, to enlarge its circle of supporters by providing services and security, and to mitigate its internal management problems by occasionally using money to purchase valuable expertise or services.¹⁸⁸ Deeper and broader support can also mitigate internal dispute resolution problems by making individual members more fungible, particularly the low- and mid-level operatives on which any organization depends.¹⁸⁹ As the organization becomes less dependent on a smaller group of individuals, it no longer has to please members that would otherwise have been able to veto operations.¹⁹⁰

Certain policy implications follow from terrorist networks' thirst for public support. To further their long-term goal of dislodging U.S. influence in the Middle East, al Qaeda and its allies gain in the short-term by drawing U.S. forces into the region. Insurgents and terrorist networks can lure U.S. forces into using tactics, such as those inflicting collateral damage, that draw the ire of Arab and Muslim communities.¹⁹¹ Thus, U.S. policymakers should weigh the potential reaction of the Muslim public among other factors as they craft counterterrorism strategies.

The opposite point is unlikely to be lost on strategists for al Qaeda and its allies, whose unquestionably ruthless zeal for destruction must uneasily coexist with a desire to tire rather than enrage Western publics.¹⁹² Meanwhile, the concern with

188. *E.g.*, MANSFIELD, *supra* note 67, at 257–58, 313–14; *see also* Shapiro & Siegel, *supra* note 138, at 11–12.

189. *See* HARMONY AND DISHARMONY, *supra* note 40, at 15.

190. *Cf.* MARCH & SIMON, *supra* note 77, at 61 (observing how organizational leaders can manage some of their problems by recruiting members to whom work can be delegated).

191. *E.g.*, Kim Gamel, *Troops Kill 20 in Iraq Clash*, CHI. TRIB., Dec. 9, 2006, at A5; Jason Straziuso, *U.S. Night Raid Harms Afghans' Trust*, L.A. TIMES, Jan. 21, 2007, at A5 (providing examples of how American military responses to actual or perceived terrorist tactics have yielded civilian casualties); Press Release, U.S. Cent. Command, *Civilians Wounded by Anti-Iraqi Mortar Attacks* (Dec. 21, 2006) (on file with author); *see also* RICKS, *supra* note 8, at 332–35 (noting how insurgents were able to provoke the First Battle of Falujah and the ensuing collateral damage).

192. *See* HOFFMAN, *supra* note 101, at 155 (noting the danger, from the perspective of terrorist groups, that adverse publicity of severe terrorist at-

tiring rather than indefinitely infuriating American public opinion suggests greater nuance and complexity in potential terrorist motivations to use weapons of mass destruction.¹⁹³ Some strategists aim to engage in sufficient violence to attract public support among some sympathetic Muslim and Arab groups,¹⁹⁴ while avoiding the most punishing tactics that might risk creating sympathy for Westerners or even provoking a maximally brutal response imperiling the entire movement.¹⁹⁵ And just as leaders may be able to exploit divisions in the motives of individuals working within these organizations, policymakers may be able to confound terrorist drives for recruits and public support by choosing policies that contradict negative assumptions about the U.S. which are rampant in the Arab and Muslim world.¹⁹⁶

U.S. policymakers must contend with public opinion not only in the Middle East, but also among their own constituents. In the process, they must consider the possibility that, by seeking to dilute public resolve, terrorist networks accurately perceive an important feature of the interaction between the costs of using force and the constraints associated democratic institutions. Democracies are more likely to force their leaders to equilibrate the costs of a policy of military intervention with its perceived benefits.¹⁹⁷

Whether democracy can force policymakers to learn from terrorist networks' organizational vulnerabilities is a different

tacks "helps an outraged public to mobilize its vast resources and produces information that the public needs to pierce the veil of secrecy all terrorist groups require"); *supra* note 130 and accompanying text (discussing overzealous action and the need to restrain it among terrorist organizations).

193. These complexities are not routinely appreciated even by some commentators on national security. *See, e.g.*, John M. Burkhoff, *The Fourth Amendment and Terrorism*, 109 PENN. ST. L. REV. 911, 925 (2005) (claiming without support, not only that "terrorist individuals and organizations undoubtedly seek to obtain chemical, biological, and nuclear materials" but that they do so "to assist in their assaults"); *supra* note 35 and accompanying text (discussing the trade-offs terrorist organizations face in deciding whether to use nuclear, biological, or chemical weapons).

194. *See* NAJI, *supra* note 1, at 15 (discussing the importance of public support in the "path to the establishment of an Islamic state").

195. *See supra* note 130 and accompanying text (discussing overzealous action).

196. *See* ZACHARY SHORE, BREEDING BIN LADENS: AMERICA, ISLAM, AND THE FUTURE OF EUROPE 5 (2006) (citing polls and concluding that "America's appeal in the Muslim world has rarely been lower").

197. James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577, 577, 586-87 (1994).

question. Although policymakers have plenty of principled reasons to train attention on the organizational problems affecting terrorist networks' competition for public support, the last five years suggest that U.S. officials have not always taken these insights seriously.¹⁹⁸ It may take time, bureaucratic capacity, or additional political support to fully appreciate the implications of these insights. And political dynamics may distort even the most determined efforts to develop more effective counter-terrorist policies.¹⁹⁹

Ultimately we must await history's judgment on whether U.S. policymakers have sufficiently mined the organizational complexities of al Qaeda and its analogues. But three facts suggest that U.S. policymakers and the sprawling bureaucracies they supervise have yet to advance far enough on this path. First, much of their public rhetoric about al Qaeda in particular, and about terrorist groups in general, fits poorly with the insights arising from a close observation of al Qaeda's ongoing administrative law dilemmas.²⁰⁰ Second, some of the strategies the U.S. government has pursued play into the terrorist network's hands by dovetailing almost precisely with its explicitly avowed strategies.²⁰¹ Third, in order to apply some of the insights that can be gained from studying al Qaeda's organizational problems, we must ensure that our own bureaucracies are capable of assimilating such information and evaluating policies using new metrics sensitive to those insights. In keeping with such a focus, the September 11 Commission report called for greater capacity to analyze open sources.²⁰² Yet build-

198. See 9/11 COMMISSION REPORT, *supra* note 46, at 365–83 (stating that the “U.S. government must build the capacities to prevent a 9/11-scale plot from succeeding” and making a series of recommendations with respect to several countries with perceived terrorist threats); RON SUSKIND, *THE ONE PERCENT DOCTRINE* 342 (2006) (“It’s five years after 9/11 [and] the country still [is not able] to tell everybody what [it] know[s] about the strategic targeting doctrine of al Qaeda.”).

199. Cf. Bueno de Mesquita, *supra* note 57, at 29–30 (discussing politicians’ incentives to provide less stringent counter-terrorism policies that might be optimal under certain conditions); Cuéllar, *supra* note 20, at 44–48 (discussing politicians’ potential incentives to signal competence by undertaking visible and aggressive actions while neglecting activities with longer-term payoffs).

200. See *supra* notes 32–35 and accompanying text (discussing distinctions between political and scholarly discussions of terrorist motivations).

201. See Wright, *supra* note 38, at 59.

202. See 9/11 COMMISSION REPORT, *supra* note 46, at 407–19 (discussing the importance of developing analytical capabilities to analyze both open-source and covertly obtained information, and of integrating such information).

ing such capacity, and repairing what ails existing intelligence bureaucracies, is only the tip of the iceberg. Security bureaucracies would deliver greater social value if they eschewed their tendency to analyze the threat of terrorism in the abstract. Instead, analysts' focus should turn to the question of how specific legal and policy changes affect terrorists' organizational vulnerabilities, and whether the steps our society has taken reasonably advance its security or instead play precisely into the hands of terrorist networks. Such capacity seems, at best, embryonic.²⁰³

C. AL QAEDA'S DRIVE TO SOLVE ITS ADMINISTRATIVE LAW DILEMMAS

Even a brief observation of terrorist organizations demonstrates that these entities lack a fully functioning analogue to the familiar administrative law framework found in the United States and other advanced industrialized countries. As non-state actors, terrorist networks have a limited ability to fully appropriate the functional architecture of nation-states.²⁰⁴ Nonetheless, aligning the incentives of lower-level operatives and organizational leaders, restraining overzealous action endangering the organization's standing with the public, and maintaining operational confidentiality are all examples of organizational challenges that have encouraged some al Qaeda strategists to aspire to imitate the administrative structures of state bureaucracies in advanced industrialized countries.²⁰⁵

In some cases, strategists have begun to realize their ambition for law-like administrative procedures within the terrorist network. Al Qaeda's increasingly frenetic pace of operations displays evidence of occasional attempts not only to address internal administrative problems, but also to attempt to do so through the creation of a law-like system of adaptive procedures. Though embryonic as an administrative process, the components of these systems seem to rely on a flexible mix of

203. Witness, for example, the Justice Department's relative lack of detailed theoretical or empirical analysis when its officials made the case for renewal of portions of the Patriot Act that were subject to sunsets. *Cf.* DEPT OF JUSTICE, USA PATRIOT ACT: SUNSETS REPORT (2005) (identifying the expiring provisions of the Patriot Act and providing analysis and argument for their renewal).

204. It is worth noting, however, that their leaders repeatedly voice the aspiration to acquire such capacity. *See supra* Part I.B.4.

205. *See NAJI, supra* note 1, at 73.

hierarchy (whenever possible) and loose decentralization (whenever necessary),²⁰⁶ audits of lower-level officers,²⁰⁷ efforts to require specialization,²⁰⁸ dispute resolution bodies to administer Islamic law,²⁰⁹ and a decidedly Weberian effort to match individuals to tasks on the basis of skill.²¹⁰ Al Qaeda's leaders have embraced delegation—providing guidance and leaving logistical planning and financing to regional officials.²¹¹ An employment contract for potential recruits explains how the organization has developed administrative procedures for handling grievances and disputes that arise under Islamic law.²¹² Reviewing what al Qaeda has already accomplished, Naji emphasizes what the organization has learned regarding the value of sorting recruits by intellectual ability and competence,²¹³ the successful division of responsibilities within al Qaeda units,²¹⁴ and the creation of promotion systems to reward those who invest in acquiring administrative skills.²¹⁵ The organization's most exalted instrumental goals, he reiterates at every turn, depend on procedures that will build on these developments, providing the organization with the means to make the most effective and legitimate use of its scarce resources.

If administrative procedures are important for the internal management of terrorist networks, they are even more important for the provision of services to external constituencies. Perceptive strategists within terrorist networks recognize the value of bureaucratic administration and service delivery. They seek more than tentative steps toward a formal internal administrative process—particularly during or immediately following periods of intense violence—and recognize that these steps are among their most difficult, complex, and pressing challenges. In order to manage such challenges, al Qaeda's strategists seek

206. *See id.* at 23.

207. *See* Shapiro, *supra* note 28, at 2.

208. *See* NAJI, *supra* note 1, at 23.

209. *See* BERGEN, *supra* note 30, at 123–25 (discussing al Qaeda's use of Sharian courts).

210. *See* NAJI, *supra* note 1, at 23, 72.

211. *See* HARMONY AND DISHARMONY, *supra* note 40, at 8.

212. *Id.* at 69 (summarizing Harmony Document AFGP-2002-600045, an al Qaeda employment contract which, inter alia, lays out “[p]rocedures for handling grievances and disputes . . . in accordance with Islamic law”).

213. *See* NAJI, *supra* note 1, at 72.

214. *See id.* at 23.

215. *See id.*

to develop administrative cadres with special competence to manage organizational units.²¹⁶ They also seek experts to run the equivalent of cabinet-type ministries, and in some cases they openly advocate the study of Western management texts.²¹⁷ In contrast to some U.S. military planners, these strategists worry not only about the proverbial *day of*, but also about the *day after*.²¹⁸

Underlying this concern is the recognition that administrative capacity is essential both to overseeing the operations of the network itself (including, among other things, the planning of terrorist operations and the training of new recruits), as well as to providing services to civilians in order to maintain their allegiance. The process begins with brutality:

When savagery happens in several regions—whether we administer them or they are neighboring regions or further away—a spontaneous kind of polarization begins to happen among the people who live in the region of chaos. The people, seeking security, rally around the great personages of the country or a party organization or a jihadi organization or a military organization composed of the remainders of the army or the police of the regimes of apostasy.²¹⁹

But it culminates in al Qaeda's version of the administrative state, where success depends on

management of . . . needs with regard to the provision of food and medical treatment, preservation of security and justice among the people who live in the regions of savagery, securing the boarders [sic] by means of groups that deter anyone who tries to assault the regions of savagery, as well as setting up defensive fortifications. (The stage of) managing the people's needs with regard to food and medical treatment may advance to (the stage of) being responsible for offering services like education and so forth.²²⁰

While Naji's is perhaps the most elaborate and organizationally sophisticated vision associated with those who support the burgeoning movement that al Qaeda represents, it is worth noting that not every jihadi strategist is equally sensitive to the centrality of service delivery and administrative challenges. Take al Zawahiri's *Knights Under the Prophet's Banner*. The senior al Qaeda leader stresses the value of recruiting new adherents, publicizing the movement, and mobilizing supporters, using these goals as a strategic justification for massive terror-

216. *See id.* at 1, 63.

217. *See supra* note 62 and accompanying text (discussing the value of Western management texts to al Qaeda).

218. *Cf.* RICKS, *supra* note 8, at 184.

219. NAJI, *supra* note 1, at 47.

220. *Id.* at 11.

ist attacks directly against the West.²²¹ By contrast, he pays little attention to the challenge of administering security and service delivery in areas where existing state authority collapses. He assumes, instead, that the state will simply fall into the jihadists' hands after allegedly unpopular, pro-Western regimes begin to fail:

The jihad movement must adopt its plan on the basis of controlling a piece of land in the heart of the Islamic world on which it could establish and protect the state of Islam and launch its battle to restore the rational caliphate based on the traditions of the prophet.²²²

There is an uncanny similarity between this assumption and some U.S. war planners' assumptions about Iraq. Perhaps the canny aspiration of some al Qaeda strategists to forge greater internal administrative capacity, and particularly a greater capacity to provide services to civilians during and after violent conflict, should be cause for reflection among U.S. policymakers and citizens. Despite the importance of post-conflict reconstruction, the U.S. government and its allies have confronted major problems in forestalling civilians' descent into despair in Afghanistan and Iraq. To improve the nation's capacity to manage these challenges, U.S. policymakers may need to forge new bureaucratic structures and international coalitions better able to address the security and service delivery challenges that jihadi strategists have rightly underscored.

But despite the unquestionable need for some bureaucratic improvements in conventional nation-states' security and humanitarian capabilities, the most cogent implication to draw from terrorist networks' organizational problems may not be about the need to change our domestic administrative arrangements. The most important point may be a more subtle one; whatever their degree of apparent ideological commitment and political audacity, even terrorists must overcome vast organizational challenges to achieve their goals. As the next Part details, this ineluctable pervasiveness of organizational problems—problems that have motivated both advanced industrialized nation-states and terrorist networks to seek rule-like mechanisms for managing administrative burdens—suggests

221. See MANSFIELD, *supra* note 67, at 349–50.

222. *Id.* at 214. In contrast to Naji, al Zawahiri provides considerably less evidence when discussing the objective of territorial control of the complex service-delivery challenges that would confront the organization, particularly in the transitional period before security could be established. Nonetheless, al Zawahiri does recognize that the *organization* (as opposed to the state he hopes to create) faces administrative challenges.

that the tactical game of counter-terrorist law and policy is embedded within a longer-term, strategic struggle among competing systems to manage administrative problems.

III. STRATEGIC CONFLICT AS A DUEL AMONG COMPETING SYSTEMS TO MANAGE ADMINISTRATIVE PROBLEMS

Return to the now-familiar debates about specific legal changes in the wake of the September 11 attacks. These debates are familiar not only because of the significance of the legal changes in question, but also because the discussions tend to rely on three familiar approaches. One focuses on the potential tactical advantages that a new statute or constitutional interpretation would yield in the battle to detect potential terrorist activity,²²³ another on the new policy's effect on civil liberties,²²⁴ and a third on trying to weigh the tactical advantages against the intrusions.²²⁵ Though each of these approaches has something to offer,²²⁶ each also neglects a more institutionally sensitive approach to evaluating the appropriate legal response to national security risks—an approach that emerges more clearly from the following insight. Despite their staggering differences, state bureaucracies in advanced industrialized countries and terrorist networks such as al Qaeda have something in common. Administrative problems are endemic to both, and hierarchical, law-like arrangements have been appealing (in varying degrees) to both. Neither commonality should be surprising upon reflection—achieving ambitious goals is all but impossible except through organized action, and undertaking such action without a measure of hierarchy and process is profoundly difficult. It follows that strategic competition is partly about the performance of administrative systems, and in particular, about how well those systems manage organizational problems. Even when competition occurs between seemingly radically different adversaries, such as advanced industrialized countries and terrorist networks, in some respects the underlying conflict might resemble a duel among adminis-

223. See *supra* notes 33–34 and accompanying text.

224. See David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1759–60 (2004).

225. Cf. Posner & Vermeule, *supra* note 33, at 1110–14.

226. In fact, some of the preceding discussion falls squarely within the first trope. See *supra* Part II.B.

trative systems designed to lift an entity closer to achieving its goals while managing internal organizational problems.

To see how this insight applies in the continuing struggle against al Qaeda and similar groups, recall how time and again, problems that fall under the purview of administrative law in the American system prove central to terrorist networks' capacity to manage strategic conflicts.²²⁷ These problems include restraining overzealous action, managing disputes among political actors, harnessing expertise, and weighing the costs and benefits of organizational activity. These very problems also help determine our own government's ability to respond to the threats posed by terrorist networks. Managing them depends in part on the organization of military bureaucracies. Budgetary priorities also matter, as do specific regulatory strategies that can enhance the security of transportation infrastructures, chemical plants, and nuclear facilities.²²⁸

Legal arrangements are a critical ingredient allowing advanced industrialized countries to manage such administrative problems, and for good reason. Although adherence to legal procedures depends on a measure of symbiosis with political circumstances and social practices, the procedures themselves plainly aim to strike a balance between flexibility and hierarchy.²²⁹ They provide a framework for resolving disputes. They create procedural mechanisms to promote enhanced bureaucratic performance and restrain overzealous action. These advantages are not lost on some al Qaeda strategists; even when they lack the elaborate social arrangements and ability to operate openly that facilitates the implementation of legal rules as such, al Qaeda leaders have at various times aspired to create quasi-legal arrangements to better manage their endemic administrative burdens. Ironically, some government policies undermining existing legal arrangements in advanced industrialized countries may seem attractive only because of excessively simplistic depictions of terrorist networks. Policymakers and observers sometimes describe a ruthlessly efficient, entirely decentralized yet centrally coordinated, technologically

227. See *supra* Part I.B.4.

228. Cf. Eric A. Posner, *Fear and the Regulatory Model of Counterterrorism*, 25 HARV. J.L. & PUB. POL'Y 681, 689–90 (2002).

229. See *Leather Indus. of Am. v. Evtl. Prot. Agency*, 40 F.3d 392, 402 (D.C. Cir. 1994) (“An agency has discretion to design rules that can be broadly applied, sacrificing some measure of ‘fit’ for administerability.”); BREYER, *supra* note 2, at 77–78.

sophisticated terrorist entity staffed monolithically by equally committed, zealous operatives with a common vision.²³⁰ Instead, the reality of al Qaeda and similar networks exposes this description as a mirage—terrorist operatives manage to pose a threat not *because of*, but *despite*, their inability to fully address their pervasive administrative problems with hierarchical legal arrangements reminiscent of our own.

No entity with ambitious policy goals can avoid the recurring problem of how best to organize administrative activity to deliver services to members or external constituents. In some cases, severe problems in these domains persist for both al Qaeda and the United States, such as Iraq-style challenges of bureaucratic management in post-conflict situations where violence continues while services must be delivered. But the U.S. legal-bureaucratic system the post-conflict management problem is an exceptional one. Typically, the most pressing administrative challenges are gradually resolved in our own nation-state—perhaps not to perfection, but to a significant degree. The familiar administrative arrangements characteristic of modern regulatory policy not only reflect, but epitomize the qualities associated with advanced industrialized democratic states. U.S. law, for instance, reflects a broader trend among advanced industrialized nation-states to manage agency problems through some degree of legislative and judicial monitoring.²³¹ The U.S. regulatory state leverages organized interests' capabilities through bureaucratized notice and comment arrangements that permit participation and reshape those groups' relationships to the resulting regulation.²³²

Far from being orthogonal to the struggle against adversaries such as al Qaeda, these features of the bureaucratized nation-state can be critical ingredients for strategic success. Nation-states and terrorist networks face pervasive organizational dilemmas regarding how best to organize people, committees, and scarce resources to achieve complicated goals in an unpredictable world. In the American public law system, lawmakers facing political pressures and seeking to achieve their

230. See *supra* notes 33–35 and accompanying text.

231. See Cuéllar, *supra* note 130, at 249–50. For a discussion of the development of administrative arrangements in other advanced industrialized countries, see, e.g., Jeeyang Rhee Baum, *Presidents Have Problems Too: The Logic of Intra-branch Delegation in East Asian Democracies*, 37 BRIT. J. POL. SCI. (forthcoming Oct. 2007) (on file with author).

232. See McNollgast, *supra* note 153, at 213–15.

own goals have been largely responsible for creating the modern administrative law system. They have done so in response to organizational dilemmas making it difficult to monitor and restrain government agencies. Despite its occasional prescriptive limitations, the basic system of administrative law that politicians have forged (along with associated legal doctrines and bureaucratic practices) addresses some of the most nettlesome dilemmas a nation-state faces. These include resolving disputes that embroil political actors,²³³ allowing political actors to anticipate the public's reaction to administrative decisions,²³⁴ mitigating agency problems,²³⁵ allowing the executive branch to credibly signal its competence to a skeptical public,²³⁶ and administratively weighing the costs and benefits of particular actions.²³⁷ Because these administrative arrangements are capable of serving such crucial functions, they constitute a strategic resource of sorts. Diluting or dismantling these arrangements in order to achieve tactical goals can exacerbate problems that interfere with responses to a nation's adversaries.

Despite its politicized origins, the modern administrative law system has become a framework for crafting legal and policy decisions in a manner that mitigates some of the pervasive bureaucratic problems affecting politically controversial and factually complex decisions.²³⁸ Such complexity arises not only

233. See, e.g., *Raines v. Byrd*, 521 U.S. 811, 812–13 (1997) (adjudicating a dispute involving legislators' standing to challenge an executive branch administrative action).

234. See McNollgast, *supra* note 153, at 186 (“The positive political analysis of administrative law generates some ideas about the policy effects of administrative procedures.”).

235. See *id.*

236. Enhancing executive branch discretionary powers and limiting judicial review of national security actions may weaken the executive's ability to credibly signal competence and good faith. Cf. Matthew C. Stephenson, *Bureaucratic Decision Costs and Endogenous Agency Expertise* 3–5 (June 26, 2006) (unpublished manuscript), <http://www.law.uchicago.edu/files/stephenson.pdf>.

237. See Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993).

238. See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 170–71 (2002) (discussing how “[t]he new administrative state created a multitude of problems,” and explaining the procedural and legal reforms that mitigated the difficulties). It should be readily apparent that administrative law is neither entirely rational nor balanced. As a product of the political process, its tenets reflect the particular distribution of political strength and weakness channeled into the lawmaking process. And because they are enmeshed in that larger political process, legal provisions associated with admin-

in traditional regulatory contexts,²³⁹ but also in the field of national security.²⁴⁰ Because of this complexity, Professor Cass Sunstein underscores the practical relevance of the administrative law model—with its proscriptions on arbitrary decision making, its flexible logic of delegation and deference, and its increasing emphasis on cost-benefit analysis—for problems traditionally involving national security.²⁴¹ This approach is eminently sensible given the difficulties public bureaucracies face in resolving national security problems in light of the need for a measure of discretion in this domain.²⁴² Moreover, in principle modern national security law is concerned with limiting arbitrariness. The arbitrary exercise of national security power has the potential to waste resources, provide a false sense of se-

istrative law do not operate in a vacuum by themselves; they are instead acted upon in large measure because the existing political equilibrium makes it costly for various players to ignore the doctrine. Nonetheless, although legal arrangements do not function by themselves in the absence of norms and enforcement mechanisms, part of what makes advanced industrialized countries distinctive is that administrative law arrangements survived political efforts to address organizational problems that afflict public bureaucracies. The intense litigation, legislative conflict, executive branch interpretive disagreements, and scholarly debate concerning the definition of different legal provisions integral to administrative law is a testament to its importance in our system. Though it is plain that rules, by themselves, would not have the same impact within loose networks of illicit activity, the key point is that terrorist leaders have reason to seek the creation of law-like procedures to govern organized activity, regardless of whether such organizations have the necessary social and political context to make such procedures easy to impose. Indeed, such organizations tend to face precisely the circumstances that make following procedures difficult, including the need to operate in secrecy, the inability to recur to a formal legal system to enforce contractual arrangements, and the risk that seemingly loyal operatives will tend to have competing motives.

239. See Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 412–18 (2005) (discussing the complexity of regulatory policymaking).

240. See Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2663–64 (2005) (concluding that the United States should evaluate the authorization to use military force under administrative law).

241. *Id.* at 2672.

242. One may sensibly disagree with Sunstein's willingness to use this "administrative law at war" approach as a justification for expansive deference. Quite likely, some differences of opinion on this issue might be rooted in the extent of deference considered appropriate even within more traditional confines of administrative law. Compare Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2582–84 (2006) (exalting deference), with Cohen et al., *supra* note 21, at 743–45 (questioning rationales for deference in conventional administrative law), and Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227, 261–65 (2006) (detailing the risks associated with expansive discretion).

curity, provoke a backlash, or engender unnecessary restrictions on individual autonomy. These problems are no less serious merely because potential restraints on the arbitrary use of executive power can interfere with tactical operations.²⁴³

The National Security Agency (NSA) wiretapping controversy further illustrates the argument. Late in December of 2005, a newspaper revealed that President Bush had signed an order in 2002 directing the NSA to “monitor[] the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants,” in an effort to gather intelligence on al Qaeda.²⁴⁴ President Bush quickly expressed regret—not that he signed the order, but that news of it leaked.²⁴⁵ The newspaper article constituted a “shameful act,” he said, adding that “the fact that we’re discussing this program is helping the enemy.”²⁴⁶ That same day, Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, held a press briefing concerning the wiretapping program.²⁴⁷ Although refusing to confirm details of the story, Gonzales stressed the program complied with the Fourth Amendment reasonableness standard for warrants.²⁴⁸ Hayden explained that the judgment to warrant “targets” was “made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply—and it’s a two-person standard that

243. Even if one leaves aside the direct benefits of hierarchical bureaucracy and external promotion of bureaucratic capacity in the short-term, the question remains whether matching the relatively greater decentralization of terrorist networks would actually serve the advanced industrialized nations strategic goal of responding to terrorist attacks. Greater decentralization implies, by definition, less control over critical decisions such as the projection of coercive force. Given scarce resources, more decentralization runs the risk of excessively spreading those resources, which is precisely what some terrorist networks’ strategic studies emphasize as a crucial objective. *See supra* note 77 and accompanying text (discussing the goal of rendering Western powers less effective by spreading their resources).

244. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

245. Edward Epstein, *Bush Plays Hardball on Spying, Patriot Act*, S.F. CHRON., Dec. 20, 2005, at A1.

246. *Id.*

247. Press Release, White House, Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005) [hereinafter Press Release], available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

248. *Id.*

must be signed off by a shift supervisor.”²⁴⁹ Hayden later clarified that the judgments had “intense oversight by the NSA Inspector General, by the NSA General Counsel, and by officials of the Justice Department who routinely look into this process and verify that the standards set out by the President are being followed.”²⁵⁰

Critics have ardently questioned the administration’s legal basis for ordering the NSA to engage in wiretapping activities in contravention of the Foreign Intelligence Surveillance Act of 1978 (FISA).²⁵¹ Indeed, the administration has tacitly acknowledged that the wiretapping program violates FISA on its face, conceding that the Act “requires a court order before engaging in this kind of surveillance . . . unless there is somehow—there is—unless otherwise authorized by statute or by Congress.”²⁵² In FISA’s own terms, the statute is, together with the criminal wiretap statute, “the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.”²⁵³ The structure of FISA essentially creates an administrative review system for presidential decisions to use national security-related authorities to wiretap. To this end, FISA creates a Foreign Intelligence Surveillance Court (FISC) as the means for secretly reviewing and approving wiretap requests.²⁵⁴ These requests must show probable cause that the wiretapping target is “a foreign power or an agent of a foreign power,” and must be approved by the Attorney General and certified by a high-ranking defense official.²⁵⁵ Critics have questioned the administration’s asserted need to avoid FISC. FISA provides for retroactive warrant applications and FISC has rejected only a handful of applications since its inception.²⁵⁶ Some observers sympathetic to the administration’s rationale nonetheless emphasize how the court’s

249. *Id.*

250. *Id.*

251. FISA of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

252. Press Release, *supra* note 247.

253. 18 U.S.C. § 2511(2)(f) (2006).

254. See 50 U.S.C. § 1803(a) (Supp. III 2005).

255. Katherine Wong, Recent Development, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517, 518 (2000).

256. David Johnston & Neil A. Lewis, *Defending Spy Program, Administration Cites Law*, N.Y. TIMES, Dec. 23, 2005, at A20 (noting that of the 10,617 warrant applications the court received from 1995 to 2004, the court rejected only four).

“cumbersome submission requirements and insistence on strict adherence to the law” result in “the government regularly withdrawing or modifying applications when it appeared the judges might disapprove them.”²⁵⁷

Administration representatives emphatically maintained, however, that the wiretapping was rendered legal by a combination of the 2001 Authorization for Use of Military Force and the President’s inherent constitutional authority. “History,” its declarations contend, “conclusively demonstrates that warrantless communications intelligence targeted at the enemy in time of armed conflict is a traditional and fundamental incident of the use of military force authorized by the AUMF.”²⁵⁸ The administration’s preferred analogy is between detention and surveillance, emphasizing the Supreme Court’s holding in *Hamdi* that detention was authorized under the AUMF because it is an “inherent part of warfare.”²⁵⁹ The administration argues that because “signals intelligence is even more a fundamental incident of war,” surveillance is therefore implicitly authorized by the AUMF.²⁶⁰ From this perspective, the AUMF “does not lend itself to a narrow reading,” and represents an explicit endorsement by Congress of “the President’s use of his constitutional war powers.”²⁶¹ Thus, the administration argues that the AUMF transferred the war on terror from a “zone of twilight” to a situation in which the President is at the “zenith” of his powers.²⁶²

Second, the administration has argued that “[t]he NSA activities are supported by the President’s well-recognized inherent constitutional authority as Commander-in-Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States.”²⁶³ Under this view, the AUMF merely “confirm[s]” the President’s constitutional authority, as “intelligence gathering is at the heart of ex-

257. *Id.*

258. U.S. DEP’T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT 2 (2006) [hereinafter DOJ WHITE PAPER], available at <http://news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf>.

259. *Hamdi v. Rumsfeld*, 542 U.S. 507, 515 (2004).

260. Press Release, *supra* note 247.

261. DOJ WHITE PAPER, *supra* note 258, at 11.

262. *Id.*

263. *Id.* at 1.

ecutive functions.”²⁶⁴ Thus, authorization of the NSA wiretapping program is “primarily an exercise of the President’s authority as commander in chief during an armed conflict that Congress expressly has authorized the President to pursue.”²⁶⁵

Both of the administration’s claims are speculative at best. To the extent the enacting congressional coalition intended anything specific, it did not likely intend the AUMF to supersede FISA. Critics have argued that FISA is designed to regulate all NSA efforts to intercept transnational communications, and that there is no clear basis for believing that the legislature viewed the AUMF trumping such an explicit and well-established program.²⁶⁶ These critics have further noted that Congress amended FISA five times after 9/11, indicating congressional intent for the statute to continue to govern wiretaps.²⁶⁷ Additionally, the Congressional Research Service has argued that “[w]hile the collection of intelligence is also an important facet of fighting a battle, it is not clear that the collection of intelligence constitutes a use of force,” as authorized under the AUMF.²⁶⁸

Critics also dispute that the President has constitutional authority, under Article II, to permit warrantless wiretapping. They note that, given the number of Congress’s enumerated powers that touch on foreign affairs, “Congress under Article I plainly enjoys the power to decide what measures the government should take against its enemies within and abroad.”²⁶⁹ As the Congressional Research Service indicates, “The statutory language in FISA . . . and the legislative history of the bill that became FISA . . . reflect the Congress’s stated intention to circumscribe any claim of inherent presidential authority to conduct electronic surveillance . . . so that FISA would be the exclusive mechanism for the conduct of such electronic surveillance.”²⁷⁰

264. *Id.* at 2, 30.

265. *Id.* at 31.

266. John Cary Sims, *What NSA Is Doing . . . and Why It’s Illegal*, 33 HASTINGS CONST. L.Q. 105, 132 (2006).

267. *Id.*

268. ELIZABETH B. BAZAN & JENNIFER K. ELSEA, CONG. RESEARCH SERV., PRESIDENTIAL AUTHORITY TO CONDUCT WARRANTLESS ELECTRONIC SURVEILLANCE TO GATHER FOREIGN INTELLIGENCE INFORMATION 35 (2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

269. Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383, 1394 (2006).

270. BAZAN & ELSEA, *supra* note 268, at 27.

Three things stand out about the administration's justifications for the existing surveillance program. First, the administration's justifications focus relatively little on the marginal security benefit gained from circumventing FISA, rather than complying with its requirements. Second, it offers even less justification of how the strategy disrupts al Qaeda's strategic goals, internal structure, and budding administrative law.²⁷¹ Finally, it presents almost no discussion of how this action weakens a system that has been relatively successful at avoiding the profound organizational challenges now afflicting al Qaeda.²⁷² When the President authorized the program in 2002, he explicitly diluted the administrative review mechanisms that Congress had created, thereby exacerbating the risks of principal-agent problems, diminishing the extent to which the executive could signal its competence to citizens and other branches of government, and disregarding institutional solutions to disputes between the legislature and the executive branch. At first, these concerns may seem far removed from those that should animate a presidential response to a terrorist adversary. Perhaps an ordinary, short-term tactical justification could still be found for the President's actions. My point is simply this: allowing the debate to play out at that level is a mistake. Whatever else Americans are, they are also institutional architects. It is in the details of this architecture—how it deals with agency problems and information gaps, what participation means, and how disputes are resolved—that they might win their battles and reasonably manage their risks.

271. Perhaps intelligence analysts are hard at work doing precisely such investigations and evaluations behind closed doors. For three accounts questioning the capacity of current intelligence bureaucracies to do so, see THE COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT OF THE UNITED STATES 3–37 (2005), available at http://www.wmd.gov/report/wmd_report.pdf; 9/11 COMMISSION REPORT, *supra* note 46, at 254–77; SUSKIND, *supra* note 198, at 192–220. Moreover, if the President had more compelling rationales to support his particular policy, it is likely he could have made a more persuasive case. Finally, it is not obvious why making such a case about the marginal benefit of dispensing with the FISA courts would have revealed valuable intelligence to our adversaries.

272. These problems include, among others, the risk that expanding the scope of executive branch surveillance without some external review mechanism will dilute scarce resources, and that heightened political conflict arising from executive branch failure to follow statutorily prescribed procedures will damage the executive's subsequent credibility when requesting new counterterrorism authority from lawmakers.

Addressing these risks also depends on recognizing that transparency and process have costs as well as benefits.²⁷³ The technical soundness of some regulatory policies may benefit from a measure of discretion, or even secrecy. What makes modern administrative law potentially valuable as a strategic resource is not necessarily its level of transparency and procedural complexity. It is the fact that its precepts embody a political compromise that allows policy implementation in a system that mitigates some of the recurring organizational problems bedeviling both states and nonstate actors.²⁷⁴

Given FISA's politically complex heritage and organizational impacts, the NSA wiretapping illustrates the potentially complex and troubling consequences of diluting procedural constraints, particularly when the dilution is premised on a questionable interpretive strategy that ignores existing statutory enactments. Policymakers should evaluate the consequences of such a move not only with regard to the potential short-term tactical advantages it offers for pursuing terrorist networks, but also with regard to the broader strategic effect of undermining existing institutional solutions to administrative problems, particularly when similar problems repeatedly bedevil terrorist adversaries. If citizens and policymakers are capable of recognizing the extent to which organizational capacities play an important role in responding to external threats, then it is ironic indeed if they fail to consider the impact of counterterrorism policies on the administrative arrangements that shape those capacities. Lawyers, judges, and policymakers should therefore evaluate the NSA wiretapping program not only in terms of the tactical needs it allegedly serves. They should also consider its laudable institutional effects on administrative arrangements, that (over time) might otherwise allow us to avoid the problems our adversary is constantly seeking to resolve. Legislators are entirely capable of making mistakes, but it is worth recalling that FISA was created for a reason—

273. Cf. William J. Stuntz, *Against Privacy and Transparency*, NEW REPUBLIC ONLINE, Apr. 7, 2006, available at <http://www.tnr.com/doc.mhtml?i=20060417&s=stuntz041706> (discussing the negative aspects of government transparency).

274. Cf. Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 544–52 (2006) (discussing how more elaborate procedural arrangements governing regulatory action can mitigate interpretive disagreements about the meaning of a particular legal text in the administrative state).

one that resonates with tones of administrative supervision in a complex, bureaucratic state. Insisting that the President follow the most plausible reading of FISA is therefore considerably more than an appeal to formalism, and more even than an appeal to a particular view of privacy or rights.

Instead, FISA is best understood to encompass a basic insight about the nature of strategic competition among entities facing organizational problems. Competition among strategic adversaries—even of those as different as al Qaeda and our own advanced industrialized state—depends on the soundness and success of an internal administrative law that matches immediate tactics with broader strategic goals. Legislative bargaining produced FISA specifically to harness certain qualities associated with our admittedly imperfect but nonetheless valuable administrative mechanisms. Those qualities include provisions for a form of external review with considerable speed and secrecy and a means of signaling to the larger public executive competence in its use of surveillance powers.²⁷⁵ Dismantling FISA review thus runs the risk of leaving Americans without a solution to the same type of organizational monitoring and control problem that their terrorist adversaries are trying to solve.

Though it is useful to highlight these common problems, the argument is not meant to collapse the critical distinctions between nonstate actors and bureaucratic agencies in advanced industrialized countries. Neither is it meant to suggest that every aspect of strategic battles comes down to an entity's development of its administrative law. Though terrorist networks and state bureaucracies face similar problems, they also tend to confront different constraints in solving them. The costs of screening personnel or the importance of absolute secrecy, for instance, may be lower for a conventional state bureaucracy than for an illicit network.²⁷⁶

Rather, the preceding analogy underscores the advantages of recasting strategic conflicts in part as duels between differ-

275. Cf. Alistair Smith, *International Crises and Domestic Politics*, 92 AM. POL. SCI. REV. 623, 633–34 (1998) (displaying a model predicting the behavior and reactions of nations in crisis).

276. Indeed, conventional nation states are likely to hold over illicit non-state actors in developing hierarchical bureaucracies, operating with less-severe secrecy constraints, and building support among (and delivering services to) the mass public. In some sense, the structure of the modern, functioning nation-state has evolved to perform precisely such functions, and may therefore ultimately pose a greater threat than an illicit non-state actor struggling to solve the most basic organizational problems.

ent administrative arrangements. In the United States, American lawmakers and organized interests have built legal arrangements to manage recurring organizational problems. Al Qaeda members have made their own moves to solve pervasive organizational problems, and in some cases, these moves have included drives to create hierarchical arrangements not unlike those instituted in advanced industrialized countries. To wit: not all organizations must solve their dilemmas the same way. Yet no organization can avoid its encounter with a world of mixed motives, information gaps, and agency problems.

The implication of this comparison is deceptively simple, but ironically hints at the importance of complexity in evaluating the legacy of the September 11 attacks. It underscores the importance of thinking carefully about how organizational problems are being managed among adversaries. It suggests that the correct way to evaluate the NSA's warrantless eavesdropping tactics and similar enforcement strategies rests only partly on the immediate tactical advantage achieved against the adversary. Instead the evaluation should also include how the policy affects competition between administrative arrangements—and in particular, whether warrantless surveillance erodes the legal conventions and administrative arrangements that Americans have built to solve the challenges that more frequently bedevil adversaries such as al Qaeda.

CONCLUSION

Legal change is in some measure a product of how actors who can shape the law discuss the problems they are allegedly trying to solve, and how they choose to frame a conversation about the relevant costs entailed in solving those problems. In the years following the 9/11 attacks, those discussions have taken place in five subtly interconnected arenas: courtrooms, legislatures, executive branch offices, scholarly communities, and the media.²⁷⁷ Americans have witnessed fierce disagreements in those arenas about the methods and even the propriety of consequentialist analysis, and about the extent to which the danger posed by a nimble, secretive, and ruthlessly effective nonstate adversary justifies reshaping the legal architecture of surveillance or executive power. Yet participants in

277. Cf. FRIEDMAN, *supra* note 238, at 588–91 (discussing the role of social change, public perceptions, political developments, and diffusion of ideas through the media as sources of legal change).

these debates seldom question the analytic value of the prevailing metaphor of terrorist organizations themselves, one that repeatedly plays up the allegedly radical distinctions between our familiar bureaucratic structures and their disaggregated postmodern entities. Given the stakes in choosing a metaphor to depict organization of nonstate actors, one should ask whether the prevailing depiction matches what al Qaeda's own strategists describe.

Al Qaeda's own jihadi strategic studies provide a revealing portrait of the organization, particularly when they are read against the backdrop of political scientists' emerging studies of terrorists' organizational dynamics. Although obvious differences arise when comparing an occasionally amorphous nonstate actor to the bureaucratized government of an advanced industrialized country such as the United States, certain parallels exist between the internal management problems al Qaeda faces and the problems our own government addresses through an elaborate body of administrative law. Terrorist networks struggle to restrain overzealous action, to align the incentives of leaders and staff, and to promote a sense of public legitimacy about their goals and strategies. Belying conventional images of their unrestrained radicalism, al Qaeda and its analogues often enlist technocratic solutions to manage their money, to plan the delivery of services in territories they control, and to analyze public reactions. But in harnessing such technical knowledge they face considerable difficulties resulting from operational security and recruitment problems. In part because of these constraints, terrorist strategists often seek internal arrangements—analogueous to our own domestic administrative law—to realize long-term strategic goals. These arrangements emerge from learning from Western management texts, solving bureaucratic agency problems, harnessing expertise, generating information and participation, and adjudicating internal disputes. An investigation of al Qaeda's continuing efforts to fix its strategic goals and construct a law-like administrative framework to achieve them yields a number of tentative policy implications, including (for example) the conclusion that policymakers should evaluate counter-terrorism policies in part on the basis of whether these policies assist or hinder the organization's efforts to foment sympathy and participation among the Muslim and Arab public.

Ironically, key features of the legal system associated with the modern regulatory state both reflect and play an important

role in mitigating the challenges that confront terrorist networks. Terrorists networks, like a conventional advanced industrialized nation-state, face fundamental dilemmas where an element of hierarchy, bureaucracy, and rule-based norms is impescindible. Terrorists do not have formal administrative law, nor have they developed the social and political norms to conform to it. But, in contrast to conventional wisdom, their leaders are hard at work trying to fashion analogous versions. In effect, organizational success—for both terrorist networks and bureaucratized nation-states—depends on managing classic administrative law concerns: agency problems, the generation of expertise and information, legitimacy and participation, and the adjudication of disputes among actors who share power. By appreciating these parallels, Americans may garner a richer perspective on the value of their own internal arrangements. They should therefore understand strategic conflicts in part as a contest between dueling administrative arrangements managing risks that can never be entirely extinguished. And they would do well to evaluate counterterrorism policies in part on the basis of how those policies affect administrative capacity. Viewed this way, the persistent strategic challenge of managing terrorism-related risks will more readily resemble a struggle to reasonably mitigate murders, traffic accidents, and occupational safety deaths, and will less resemble an unrelenting struggle to reduce any possible danger to zero.