NEGOTIATING THE NON-NEGOTIABLE:

NATIONAL SECURITY & NEGOTIATION

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It requires little reflection to recognize that the word "terror" has saturated popular and academic discourse. This newly prominent yet age-old form of warfare has redefined the modern legal landscape on a domestic and international level, while simultaneously striking fear in the hearts of millions. And despite the multiplicity of working definitions for what constitutes as terrorism, one thing remains constant: at its most fundamental level, terrorism involves *Actors* with *Interests*. Unfortunately, this relatively simple realization is lost to the strong positional interests and calcified dogmas of American national security policy. The United States' current approach imprudently shifts the treatment of terrorism away from the political realm and restricts the resolution of these issues to reciprocal demonstrations of force. But terrorism is inexorably political, and political problems require political solutions. This article seeks to address the inherent inadequacy of this policy and in doing so, expose how foresight can often times be quite short sighted.

I

Those who oppose the use of negotiation in the national security context can cite a number of concerns. These challenges range in scope and have traditionally boiled down two main contentions: (a) floodgates—the idea that a negotiation would encourage further confrontation; and (b) legitimacy—the idea that recognition implicitly undermines U.S. interests by bolstering the legitimacy of terrorist organizations. These presumptions, however, are ill founded.

The floodgates concern is often cited and rarely challenged. Premised on the idea that a willingness to negotiate would provide incentive for future targeted attacks, the argument is used to characterize the United States' current "no negotiation" policy as a deterrent mechanism. But

the belief that radical actors might be inspired to further target the United States if it became amenable to negotiating with such groups finds its foundation in theory, not reality. Were this actually the case, one might expect the "terror market"—the economic backdrop shaped by nefarious conceptions of supply and demand—to reflect such incentives. But this could not be farther from the truth.

First, the available data indicates a lack of any preferential tactics by terrorist groups.[2] It seems that the decision of whether to kidnap a given individual seems to bear no relation to a particular country's anticipated amenability to negotiation. And with no indication of any particular targeting strategy, the repeated assertion that an "administration's decision to negotiate could encourage future terrorist kidnappings of Americans"[3] is of little substance. Second, the unprincipled reality of these organizations' approach to kidnapping exposes the farcical deterrent effect that is claimed to inhere to the current policy. Again, the targeting process is largely random and is principally based on opportunity and the favorable odds that a given victim will hail from a country that *might* be open to negotiation. So long as this continues to be the case, the general incentives at play will annul any deterrent effect that a single nation's policy might seek. In what can be described as a foreign policy permanence disorder, it seems that the United States operates under the assumption that a refusal to acknowledge the acrimonious policies of other countries might work to diminish the reality of their effect. But refusing to acknowledge the deleterious effects of these policies reflects an unprincipled dedication to ideology over

[2] *See* Joshua Fiveson, *A Prisoner's Dilemma: Negotiation and American National Security Policy*, THE HARV. KENNEDY SCH. REV. (2014) (noting the lack of any preferential trend amongst the kidnappings carried out by Al Qaeda in the Arabian Peninsula from 2008–14).

[3] Sen. Marco Rubio, YOUTUBE (June 2014) https://www.youtube.com/watch?v=f1U5n-m90rg (speaking about the Bergdahl prisoner exchange).

practicality. This limits the range of viable responses in situations involving U.S. citizens without affording any commensurate tactical or deterrent benefit.

Similarly, the legitimacy concern—the idea that the political recognition of these groups would implicitly work against the interests of the United States—has been largely misunderstood and mischaracterized. A policy that is open to principled negotiation tactics does not automatically confer legitimacy upon any one group or individual. Instead, this fear has been perpetuated by years of rote political reiteration without any actual evidence to support such a belief. Many experts have actually suggested that the exact opposite is true. "[A] state's acceptance of a party as a legitimate interlocutor," they argue, "does not automatically confer [legitimacy] upon the latter."[4] In this sense, legitimacy is instead the product of geo-political, normative values that culminate in a group's recognition on the international plane.

One need only think to the long-standing attempts at negotiation between Israel and Palestine to more fully underline this point. Legitimacy—there, in the sense of regional autonomy—is one of the main points of contention between the Israelis and Palestinians. This very concern has fueled what is widely known to be the most intractable conflict in modern history. However, the two groups have routinely met at the bargaining table, and doing so has not bolstered the very recognition that the Palestinians so forcefully seek. Instead, the ability to communicate has repeatedly resulted in cease-fires of varying degrees and has been one of the sole contributing factors toward resolution—however far away that might be.

[4] Harmonie Toros, *'We Don't Negotiate with Terrorists!': Legitimacy and Complexity in Terrorist Conflicts,* 39 SECURITY DIALOGUE 407, 413 (2008), *available at* http://sdi.sagepub.com/content/39/4/407.short

II

It has been long acknowledged that the true nature of any conflict lies "not in conflicting *positions*, but . . . between *each side's needs, desires, concerns, and fears*."[5] However, the United States' current approach to countering violent extremism pays no attention to this fact. This has worked to the detriment of the country's foreign policy and national security goals. To overcome this self-imposed impediment, the United States must make a coordinated effort to uncover and genuinely understand the interests of terrorist organizations. Doing so would ultimately allow the United States to more successfully counter what is quickly becoming an intractable enemy force.

One particular difficulty that accompanies this approach, however, is the unique organizational structure of terrorist groups. As has been highlighted by Al-Qaeda and its progeny, modern terrorist organizations are highly decentralized.[6] This makes it difficult to actually negotiate with an "organization" in an official sense. Regional franchises possess their own command structure and maintain a unique level of autonomy. These individual nodes of the larger ideological group also vary widely as to their individual tactics and immediate goals.

Strangely enough, this obstacle also represents a strategic opportunity for the United States. Because of the uniquely decentralized nature of these organizations, there exist both individual interests and more general, organizational or network based interests that may be at

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[5] Roger Fisher, William Ury, & Bruce Patton, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40–41 (2d ed. 1991) (emphasis added).

[6] *See generally* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 455 n.24 (2010) ("Within al Qaeda itself, prominent strategist Abu Mus'ab al-Suri also purportedly favored a decentralized approach to jihad over hierarchical, top-down organizations, which had proved too easy for counterterrorism authorities to dismantle.").

play in any given scenario. And just as the weakness of any structure lies in its joins, so, too, does that of a terrorist organization.

There exist an innumerable number of micro-level interests that an actor or a group might possess. For example, in the hostage-taker scenario an individual terrorist could possess individual interests such as loyalty to their own principles or in safe passage, while at the organizational level, the very same individual may have interests such as the publication of their views, avoiding negative publicity, or access to the political process.[7] Similarly, a particular franchise of a terrorist organization may also have a distinct divide between its regional interests—for example, autonomy from local government or a heightened voice in local political discourse—and those of the progenitor ideological group or the network as a whole. The United States must thus open channels of dialogue with these organizations to identify and manipulate the innately fractured nature of a terrorist network. By focusing on individual rather than organizational interests and working to divorce the two through targeted engagement,[8] the United States can work towards systematic isolation of the more ideological facets of these organizations. This would undermine the legitimacy of the group's extremist philosophy while simultaneously siphoning power from the aggregate organizational body.

Take, for instance, the Moro Island Liberation Front and its dealings with the Philippine government. Despite their strong ideological links to Al-Qaeda, the Philippine government was able to shift the group from extremism to legitimate engagement by focusing on the group's

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[7] Michael Ross Fowler, *The Relevance of Principled Negotiation to Hostage Crises*, 12 HARV. NEGOT. L. REV. 251, 288–305 (2007).

[8] *See generally* Audrey Kurth Cronin, *How Al-Qaida Ends: The Decline and Demise of Terrorist Groups*, 31 INT'L SEC. 7 (2006).

localized interest in self-governance. For nearly fifty years, the group laid siege to the region; struggles between the group and the government were a common occurrence, and the needless loss of life was an expectation. However, as the government progressively recognized the group's localized interests over Al Qaeda's ideological, macro-level prerogatives, the group scaled back its extremist tactics. This ultimately resulted in a four-part peace agreement that is still in the process of being successfully implemented.

III

It is also worth mention that a strategic negotiation policy would carry with it more than just increased effectiveness; such a policy would have the added benefit of efficiency and longevity. The current, almost reflexive reliance on the use of military force has worn a nation already tired of war. The United States military is at its lowest level in years. The men and women who fill its ranks are becoming disheartened, and many question the future fighting capacity of the country's standing force. As a result, there is more need than ever to consider how the United States can successfully counter the threat posed by terrorist organizations—with fewer resources—both now and in the future.

The relative efficiency of the United States' current approach to countering terrorism is abysmal. Since 2004, the number of extremist groups has gone from twenty-one in eighteen countries to forty-one in twenty-four countries.[9] All the while, over $4.4 trillion has been spent and over 350,000 lives have been sacrificed in the process.[10] A targeted negotiation policy, on the other hand, would allow the United States to more tactfully leverage its military assets

[9] James Kitfield, *Flynn's Last Interview: Iconoclast Departs DIA With A Warning* (Aug. 07, 2014, 12:42 PM), http://breakingdefense.com/2014/08/flynns-last-interview-intel-iconoclast-departs-dia-with-a-warning/
[10] Waterson Institute for Int'l Studies, *Costs of War Report*, THE COSTS OF WAR PROJECT (last visited Apr. 23, 2015), http://costsofwar.org/

without a concomitant increase in expenditures or risk—a more powerful, less costly projection of power. But how?

Negotiation, at its most fundamental level, boils down to a comparison of reserves. These reserves are commonly referred to as parties' best alternative to a negotiated agreement or their "BATNA." Better alternatives equate to more negotiating power, and absent any alternatives, a party sits at the bargaining table inherently disadvantaged. But through a longstanding reliance on the use of military power—in what is commonly referred to as a *global* war on terror—the United States has positioned itself without a BATNA. In so doing, the United States has erased what would otherwise be its strongest asset: the *threat* of military action. As a result, the United States continues to hemorrhage both real and political capital to little avail.

Take, for one, the internationally lauded disarmament of Syria's chemical weapon stockpiles. This success would not have occurred were it not for the Russian-brokered negotiations between Syria and the United States, which operated on the backdrop of threatened military action. By reserving the use of military force as a viable alternative to a negotiated agreement, rather than the first step, the United States was able to strengthen the motive to seek a political resolution. Had the United States already been involved in a military campaign against the Syrian government, there would have been little incentive for Syria to broker a deal—the worst outcome would have already come to bear. This, however, was not the case. And because the United States' BATNA—the use of military force to destroy the Syrian weapons—was stronger than that of Syria—keeping the chemical weapons and being subjected to targeted strikes—the resulting outcome was a negotiated agreement and both parties walked away from the table better for it.

A shift to a targeted negotiation platform would also have the added benefit of resource preservation. The military is composed of men and women, and lives should not be put on the line simply because they can be; war is an ultimatum, not a utility. Operating from within the shadow of military action allows the United States to more sustainably leverage its standing military assets and capitalize on the only thing more potent than the U.S. Military in action: the U.S. Military in wait. This reality calls for an immediate reprioritization of foresight before force.

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Negotiation is by no means a cure all. But a strategic approach to negotiation and national security would be far more beneficial than the current, ossified policies. By failing to capitalize on the inherent weaknesses that derive from the unique nature of modern terrorist organizations and counter-intuitively refusing to tactfully leverage the power of its military assets, the United States has placed itself on the road to failure in a war that nears its fourteenth year and has no end in sight. Even more, the traditional myths associated with these policies are tenuous at best and remain largely unquestioned. This must change.

The United States should engage these organizations—where appropriate—and attempt to create a dialogue. In doing so, it might better understand the animating interests behind these groups while simultaneously identifying incongruities amongst the organizational and individualized interests, which can then be strategically targeted and manipulated. Almost counter-intuitively, there is value in emphasizing the very attribute that makes these organizations so difficult to counter in the first place: their decentralized structure. This policy would have the added, downstream effect of incenting would-be extremists to open themselves

to more rational dialogue by demonstrating who the United States will and will not engage, thereby undermining the legitimacy of the wholly radical or extremist players and reinforcing the normative value of non-violence. And even more, this policy would result in a more effective and sustainable projection of power throughout the world—a consideration that has fallen by the wayside over the past fourteen years of war.

In the end, extremist groups such as Al-Qaeda and ISIS seek to find a voice that they believe has been stifled. Having no other means for communication with the United States, their savagery represents a direct line to the upper echelon of the U.S. Government. Through what can only be described as a perverse call and response, the United States and these organizations communicate through iterative violence. The brutal coordination is palpable, and resulting ballet is as predictable as it is lethal. But an eye for an eye is not a foreign policy platform; it is an anachronism. And it is about time the United States recognize that fact.