

# The Path Not Taken: Reimagining the Post-9/11 World

## Rebecca Hamilton

Rebecca Hamilton (@bechamilton) is an Assistant Professor of Law at American University, Washington College of Law and author of “Fighting for Darfur: Public Action and the Struggle to Stop Genocide.” She is a member of the editorial board of *Just Security*.

There was nothing necessary or inevitable about the U.S. government’s decision to respond to 9/11 through the lens of war. Instead, it could have treated the terrorist attacks as crimes and responded with criminal law. The many successful prosecutions of international terrorists in U.S. federal courts before and after 9/11 demonstrate the plausibility of such a counterfactual.

Had the United States used its criminal justice system to address the 9/11 attacks, such a response would have had its own challenges, and it is hard to say with certainty how the United States would have handled these. Still, exploring this counterfactual provides a useful lens into the policymaking considerations and potential consequences of an alternative approach.

The following fictional piece takes the prior prosecutions of international terrorists as a jumping off point for reimagining what the media coverage of this 20th anniversary might have looked like if the United States had treated 9/11 first and foremost as a crime, rather than responding with military action.

\* \* \*

*September 7, 2021*

*NEW YORK – The 16-year-old granddaughter of a New York City firefighter who was killed as the second World Trade Center tower collapsed on Sept. 11, 2001, stood at the front of a packed courtroom in the Southern District of New York earlier today. She was present at the sentencing hearing of a Saudi man, convicted on conspiracy charges related to the attacks that killed her grandfather. Though her voice wavered, the teenager looked at the convicted man directly as she presented her victim impact statement about the loss of a grandfather she had never met.*

*The court is just 15 minutes' walk from Ground Zero, where preparations are underway for the 20th anniversary commemorations of the attacks of Sept. 11, 2001. On Saturday, some of the same families who filled the courtroom this week will be gathering at the 9/11 Memorial Museum for the annual reading of the names of the nearly 3,000 people killed in the attacks.*

*For many Americans, the clear, blue sky morning of Sept. 11, 2001, feels like yesterday. In events that were previously unimaginable, 19 hijackers used four commercial airliners to launch the single deadliest terrorist attack on U.S. soil. In the years since, victim impact statements, like the one read in court this morning, have ensured that the legacy of harm inflicted on that day has remained central to decision-making over the fate of the surviving perpetrators. The influence of the voices of these 9/11 families is reflected in the number of al-Qaeda affiliates now serving life sentences in ADX Florence, the Bureau of Prisons SuperMax facility in Colorado, and in the death sentences handed down to the men who helped plan the attacks.*

*This anniversary, though, is also an opportunity to reflect on what the nation's response to the terrorist attacks has been over the last 20 years, beyond the individual outcomes in each trial. Despite overwhelming pressure to respond with force, the United States focused its energy on the courtroom. It demonstrated to the world that its criminal justice system is capable of prosecuting grave crimes in a manner that is fair, efficient, and effective. All of those complicit in the 9/11 attacks who have been prosecuted in federal courts have received trials that domestic and international experts have recognized as fair and consistent with respect for the rule of law.*

*Moreover, relying on broad conspiracy charges and material support statutes, interrogations by FBI specialists have unearthed detailed information on the ways in which al-Qaeda operates. This information, in addition to supporting the work of federal prosecutors, has helped foil future attacks planned by the terrorist organization.*

*Yet the way in which the United States has secured custody of some of these defendants has raised concerns among human rights groups. 9/11 co-conspirators located in allied nations were readily identified and brought into U.S. custody through existing extradition agreements. A number of suspects in other locations, however, have been subject to rendition, in some cases with the alleged involvement of U.S. Special Operations forces.*

*Human rights groups argue that these renditions have been unlawful, and defense counsel have sought to convince judges that this illegality prevents U.S. courts from exercising jurisdiction over the defendants. Federal prosecutors have responded in each case that they*

*satisfied criminal procedural rules in that there was no “unnecessary delay” before the defendant’s presentation before the court. To date, courts have accepted the government’s argument, allowing the cases to proceed.*

*Although information gained from the criminal defendants has been credited with preventing further terrorist attacks by al-Qaeda, the possibility of a future attack has continued to loom in the minds of U.S. intelligence officials.*

*“Al-Qaeda is no longer the major threat I think about when I wake up each morning,” said a senior intelligence officer, on condition of anonymity. “But they haven’t gone away either. Their hideouts in the hills of Afghanistan feel distant for now – I just hope that lasts.”*

*His comments reflect a broader debate that has surfaced on numerous occasions since 9/11 about whether the United States should have sought to “wipe out” al-Qaeda by force and attacked the governments that provided them safe haven. In the years immediately following the attacks, several members of Congress pushed for an invasion of Afghanistan to overthrow the Taliban. Others have since argued for military action that would not require American troops on the ground.*

*“The U.S. should develop a lethal drone program to target the 9/11 co-conspirators that we have failed to bring into custody,” a leading Senate Republican said earlier this week. “We could destroy the core of al-Qaeda without putting our service members in harm’s way.”*

*The suggestion of a drone program is not a new one. But in the absence of any further attacks, there has been little appetite for taxpayer dollars to go toward such a program. Recent polling shows most Americans prefer the government to prioritize immediate domestic needs in healthcare, employment, and education, after 18 months of living through a global pandemic.*

*This 20th anniversary is perhaps also a moment to reflect on the path not taken by the U.S. government in the wake of attacks that roiled the nation, and the world. History is replete with examples of nation states responding to violence with more violence. Had the United States put itself onto a war footing in the aftermath of 9/11, the nation we know today could well look very different. Those public officials who have supported the criminal law approach taken by the U.S. government say lives have been saved and American communities strengthened. Their 20th anniversary reflections, compiled by an independent think tank in Washington, D.C. earlier this week, are filled with questions meant to reaffirm the path taken:*

*“How many service members might we have lost if the United States had responded with the power of its military, instead of the power of its prosecutors?”*

*“How many trillions might have been devoted to defense spending at a time when a global economic recession and, now, a global pandemic, have posed existential threats to the health and well-being of ordinary Americans?”*

*“How would communities across the country have fared if instead of treating the 9/11 co-conspirators as criminals, we had instead defined them by their professed religious beliefs?”*

*As commemorations begin this weekend, the words from the victim impact statement, read with such poise in the courtroom this morning, are worth reflecting on:*

*“I had no control over the actions you took that led to my grandfather being taken from me, before I was even born. But I stand before you to tell you that you did not win. You will sit in a jail cell. And while you are there, I want you to know that alongside my family, my community, and my generation, I am working to build a world that is safe for everyone.”*

\* \* \*

Counterfactual narratives are notoriously subject to challenge. Had the U.S. government responded to 9/11 as a crime, one can imagine plenty of variations to the 20-year viewpoint offered above.

We can say with certainty that absent the war lens that followed 9/11, the estimated 7,000 U.S. service members and 8,000 contractors who have lost their lives in Iraq and Afghanistan – and the overwhelming, if contested, number of civilians – would not have been killed in those locations. We cannot say that, freed from the strain on military resources that those wars created, the United States would not have deployed these same people to Syria or elsewhere with consequences – perhaps better, perhaps worse – that are unknowable.

We can be sure that the estimated \$5.4 trillion in current dollars spent on appropriations connected to the War on Terror would have gone elsewhere. And likewise for the estimated \$7 billion spent on Guantanamo Bay. We cannot be certain that those dollars would have gone instead to say healthcare, education, or reducing our fiscal deficit. But it seems plausible to suggest that had the notion of what constitutes a “threat” to the American way of life been different, financial and human capital from the public and private sectors may have been reoriented accordingly.

We can posit, as President Barack Obama did, that absent the invasion of Iraq, there would have been no ISIS. And a careful counterfactual analysis undertaken by Hal Brands and Peter Feaver provides some confidence for this hypothesis. Yet that does not preclude the possibility that a different terrorist organization would have emerged, or that al-Qaeda would have continued to pose a significant threat.

What we can confidently assert is that the structure of the laws and institutions created to support and legitimize the war footing that the United States has placed itself on since 9/11 would be markedly different if we had responded to 9/11 as a crime. There would also have been a different narrative about what it means to be (or to be perceived as) Muslim and/or Arab in America, and how we understand America's role in the world. After 20 years, the United States is long overdue for such reflections, which will be critical for policymakers at future forks in the road.