BY NICK ADAMS, TED NORDHAUS AND MICHAEL SHELLENBERGER

COUNTERTERRORISM SINCE 9/11

Evaluating the Efficacy of Controversial Tactics

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436 14TH STREET, SUITE 820, OAKLAND, CA 94612,
PHONE: 510-550-8800 WEBSITE: www.thebreakthrough.org

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EXECUTIVE SUMMARY

In the wake of 9/11, the U.S. government employed several new counterterrorism (CT) tactics, some of which aroused a great deal of controversy. The controversial tactics included 'enhanced' interrogation, preventative detention, expanded use of secret surveillance without warrants, ethnic/religious profiling, the collection and mining of domestic data, and the prosecution of terror suspects in military tribunals. While there has been great debate over the morality and legality of these controversial measures, there has been significantly less attention dedicated to evaluating whether the tactics work to prevent terrorism. Even so, people on both sides of the security v. morality/legality debate make assumptions about the efficacy of various CT measures. Here we review multiple literatures to assess the efficacy of controversial CT tactics on their own terms, and evaluate their potential utility within larger state security strategies that depend on intelligence management, informant-recruiting, and maintenance of state legitimacy. We find good evidence that controversial CT tactics may have been counterproductive in several ways: increasing the ratio of informational 'noise' to terrorist 'signal,' undermining the state's legitimacy among potential civilian informants, and legitimizing terrorists' preferred status as 'warriors.' In no case is there credible evidence showing that these controversial CT measures significantly helped catch terrorists or offered other strategic advantages outweighing their disadvantages.

Key Findings

1. **THE MOST EFFECTIVE CT MEASURES ARE ALSO THE LEAST CONTROVERSIAL.** Across a range of government, think tank, and media reports, experts expressed general agreement on several elements of effective CT strategy, including: denying terrorists safe haven, drying up their funding channels[1], preventing them from accessing weapons of mass destruction, establishing multiple layers of port and border security, undermining terrorists' recruiting messages, and bolstering perceptions of state legitimacy to encourage the cooperation of bystander communities.

2. **WE FOUND NO CREDIBLE EVIDENCE DEMONSTRATING THAT THE USE OF CONTROVERSIAL CT MEASURES COULD HAVE HELPED PREVENT 9/11. NOR DID WE FIND CREDIBLE EVIDENCE THAT CONTROVERSIAL CT TACTICS HAVE PLAYED ANY SIGNIFICANT ROLE IN FOILING PLOTS SINCE.** Though some have suggested that post-9/11 CT tactics have aided efforts to thwart terrorist attacks, all available credible evidence suggests that the foiling of terrorist plots since 9/11 has owed to the help of citizen informants, foreign intelligence tips, and standard police work — a conclusion that security officials and other recent analyses affirm (Difo 2010).[2]

3. **WE COULD FIND NO CREDIBLE EVIDENCE SUPPORTING CLAIMS OF EFFICACY FOR CONTROVERSIAL CT TACTICS.** After an 18-month investigation and the review of well over 500 Government Accountability Office and Inspectors General reports, declassified intelligence documents, court transcripts, testimonials by security agents, and other documents, we could find no evidence demonstrating the efficacy of controversial CT tactics. Conversations with top national security and CT experts confirmed the absence of credible evidence. The burden of proving the tactics' efficacy today lies with those who promote their use.

4. **THE EXPANSION OF INVESTIGATIVE AND SURVEILLANCE POWERS AFTER 9/11 APPEARS TO COMPOUND THE CHALLENGES FACED BY SECURITY AND INTELLIGENCE AGENCIES BY INCREASING THE AMOUNT OF INFORMATIONAL 'NOISE' THEY MUST FILTER OUT TO DETECT TERRORIST 'SIGNALS.'** Signal detection, not intelligence-gathering, failed in the run-up to 9/11 and in the case of the would-be Christmas Day bomber. Policies allowing for easy surveillance of people who have little reason to be suspected of terrorism have flooded security agencies with informational noise and generated thousands of false leads that distract them from real threats. These signal detection failures are reflected in data on the numbers of cases the FBI has recommended for DOJ prosecution. Despite a several-fold increase in the use of expanded search and surveillance tools, the FBI is generating far fewer cases for prosecution than they did in 2002 and many more of them are being declined by the DOJ because they lack evidence of wrongdoing.

5. **EVIDENCE SUGGESTS THAT ETHNIC AND RELIGIOUS PROFILING, DIMINISHED DUE PROCESS STANDARDS, AND 'ENHANCED INTERROGATION TECHNIQUES' ALIENATE PEOPLE WHO MIGHT PRODUCE USEFUL INFORMATION FOR LAW ENFORCEMENT.** Countering terrorism requires that the state win the battle for "hearts and minds" among bystander populations. By treating populations with suspicion, the state may be discouraging cooperation and even reinforcing terrorist narratives and recruitment efforts.

6. **FOR THE ABOVE REASONS AND OTHERS, CONTROVERSIAL CT TACTICS HAVE BECOME INCREASINGLY UNPOPULAR WITHIN MILITARY AND SECURITY AGENCIES SINCE 9/11.** After using some ethnic and religious profiling shortly after 9/11, many in the FBI and TSA have come to see that form of profiling as a potentially dangerous distraction. Military and FBI leaders have condemned the use of torture, and the CIA has all but renounced enhanced interrogation. Many retired and active Generals, including Gen. David Petraeus, have declared the detentions at Guantanamo Bay a security risk to U.S. troops.

INTRODUCTION

In the years since the terrorist attacks of September 11, 2001 there has been great debate among policymakers and the public over the morality and legality of controversial domestic counterterrorism (CT) tactics like 'enhanced interrogation,' preventative detention, expanded search and surveillance powers, ethnic and religious profiling, the collection and mining of domestic data, and the prosecution of terror suspects in military tribunals. There has been strikingly less discussion over whether these tactics have succeeded on their own terms to prevent terrorist attacks, disrupt terrorist networks, deliver better intelligence, or end terrorism campaigns.

Opponents of controversial CT tactics often argue that the legal and moral principles violated by the tactics are so fundamental to American character that they should be held sacrosanct even in the face of terrorist threats. Proponents argue that the government should make exceptions to normal peace-time law and employ controversial CT tactics that uphold a higher morality of saving American lives. Neither group has seriously or consistently questioned the assumptions underlying this debate – that controversial CT tactics effectively reduce levels of terrorism. A close examination of that assumption could dissolve this major front of American political contestation since almost no public figure would support demonstrably ineffective (or even counterproductive) CT policies.

The implications of CT tactic evaluation, of course, go well beyond American political discourse. The 21st century appears to be one in which nation-states will continue to be susceptible to the violent political challenges of small groups of determined militants. If these states do not continually evaluate their tactics and approaches as they respond to disparate and evolving security challenges, they diminish their likelihood of success in their efforts to curb future political violence while promoting or maintaining other state objectives.

The paper will unfold in six sections. In Section II, we review the limitations and challenges of past and present CT evaluation research as we articulate our approach to the task. Finding that tactical evaluation is meaningful only in relation to some strategy, we outline U.S. CT strategy in Section III. There, we identify strategic objectives and key operational challenges of CT – including promoting state legitimacy, encouraging cooperative relationships with bystander communities, undermining terrorists' narratives, and prioritizing and coordinating intelligence – that can be used as supplemental criteria for tactical evaluation (in addition to evaluating CT tactics in terms of their ability to meet their own objectives). Section IV is the heart of the paper, dedicated to the evaluation of controversial CT tactics in terms of the methods and criteria established in Sections II and III. Section V briefly summarizes and discusses the key findings of Section IV. And finally, Section VI closes the paper with some recommendations to policymakers and NGOs.

Evaluations of CT tactics are rare, but some do exist (For a review see Lum and Kennedy 2006, or Crenshaw 2009). Their scarcity reflects, in part, understandable limitations on the scope or design of previous CT research. Also, the classification of information potentially relevant for CT evaluation appears to discourage some authors from approaching the task. Another challenge stems from the fact that the criteria upon which tactics can be evaluated often depend on shifting CT strategies in which they are embedded. We address these obstacles to assessing CT tactics as we describe our approach to the challenge.

Previous CT Evaluation

Most previous counter-terrorism evaluations have assessed entire national CT policy regimes without focusing on individual policies or tactics. By measuring numbers of terrorist incidents or death tolls before and after the implementation of a CT policy regime (Hewitt 1984; Department of State 2001-2008; Sheehan 2007), authors have been able to conclude that states either failed or succeeded in their overall efforts. However, such methods imply that CT policy regimes are indivisible in their composition and coherent in their effects. The methods fail to tease out which tactics caused a decrease or increase in terrorist incidents or deaths, and risk suggesting causal relationships to policymakers and the public that may not exist.

Other analysts have evaluated CT policy regimes qualitatively (Charters, 1994; Schmid and Crelinsten 1993; Wilkinson 2001; Art and Richardson 2007; Cronin 2009), but still rarely go into detail about the efficacy of specific tactics. When they do, their accounts are often so historically embedded that readers may have difficulty distilling general lessons about when particular CT tactics might be useful or not. Qualitative researchers' conclusions, too (like those of their counterparts employing more statistical approaches), tend to focus much more attention on broad CT strategies or policy regimes than on individual tactics.

Researchers' focus on the evaluation of CT strategy is not inappropriate. CT research is still an emerging field and a case can be made that questions bearing on strategy often deserve logical priority to those evaluating tactics. In fact, we employ a method of tactical evaluation that takes strategic considerations into account. But, we think focusing on strategic questions to the exclusion of tactical evaluation can fail to uncover those tactics that may actually be ineffective or even counterproductive for an overarching CT approach.

Our Approach

CT policies and tactics can and should be evaluated individually so that counter-terrorism can continually improve in response to evolving terrorist threats. Our method for evaluating CT tactics is two-fold. First, we ask if the CT tactic achieves its particular aim. Second, we ask if

the CT tactic has secondary consequences for broader CT efforts.

In the first step, we simply ask, for instance, whether expanding investigators' search, surveillance, or seizure powers after 9/11 has actually allowed law enforcement and intelligence agents to more easily capture terrorist plotters. We have been able to answer this question – and others like it – by referring to the explicit or implicit intentions of the CT tactic and comparing those to the effects of its implementation as reflected in various reports describing what CT tools have been vital in foiling terrorists' efforts. We also often employ a counterfactual analysis to the events of September 11th, asking: 'If CT tactic *X* had been used prior to 9/11 would the attacks have been prevented?'

The second step in our evaluative approach asks whether CT tactics (whether or not they accomplish their stated objectives) have secondary consequences for broader CT efforts. We pay particular attention to how the tactics overcome or exacerbate the key challenges of U.S. counterterrorism – gathering useful information, prioritizing and coordinating intelligence, promoting state legitimacy, encouraging community-generated tips and the support of bystanders, and undermining terrorists' narratives. Some of these operational imperatives – like intelligence gathering, prioritizing, and coordinating – are common to virtually all CT campaigns. The others, while potentially secondary to some CT strategies, are important for the current U.S. strategy against Al Qaeda and its affiliates and allies who continue to target U.S. interests. We note, therefore, that this paper, while its conclusions may be broadly applicable to many CT campaigns, is specifically geared for evaluating CT tactics employed by the U.S. against militant *irhabis*[3] who target the West.

In Section III we briefly outline the development and basic shape of U.S. CT strategy and provide further rationale for evaluating CT tactics by the criteria we have listed above. While we do not offer a detailed threat assessment and evaluation of counterterrorism practices (available in a forthcoming document), we briefly describe in this section the evolution of U.S. CT efforts from the pre-9/11 period through today and highlight elements of those efforts with which effective CT tactics should be compatible.

Our main analyses in Section IV pull together the work of many scholars, journalists, archivists, historians, think-tank analysts, and government-commissioned investigators. While this paper has been motivated by the relative dearth of reports carefully evaluating CT tactics' efficacy – and, as far as we are aware, the nonexistence of a single document compiling those evaluations and placing them in productive dialogue with other security literatures – we have drawn heavily from the few documents that do assess CT tactics.

Among them are evaluations of the efficacy of enhanced interrogation (see Rejali 2009; Fein et al. 2006; Rumney 2005-2006), civilian vs. military trials for terrorism suspects (Greenberg et al 2010; Zabel 2009; Gude 2010), airport screening relying on ethnic profiling (Chakrabati and Strauss 2002; Press 2009; Sandomir 2009), and data-mining techniques (National Research Council 2008; Jonas and Harper 2006). We review these documents along with related government documents, news accounts, suspect interviews, indictments, Congressional testimony, and journalistic investigations about terrorist plots and efforts to disrupt them.

We also draw on history and the social sciences to evaluate CT efficacy in a wider context. So, for example, in considering the effects of expanded surveillance activities since 9/11, we employ 'signal detection theory' to evaluate whether increasing informational 'noise' has reduced detection of the terrorist 'signal'. We draw on psychological research into human motivation to explore how coercive interrogation might exacerbate unproductive adversarial relationships between interrogators and their subjects. In weighing the efficacy of detention policies, we consider their impact on perceptions of state legitimacy in communities whose cooperation may be vital to CT efforts. We consider the results of mathematical models of social learning for evaluating the efficacy of airport profiling policies over time. And we consider how sociological theories of labeling and deviance may predict that terrorists would prefer to be tried (or even plead guilty) in military tribunals.

While CT is often imagined as a shadowy, secretive enterprise, much of how CT functions is known through years of court cases, news coverage, congressional testimony, books by high-ranking government security figures, investigative journalism, extensive leaks and declassifications, and countless government oversight reports. These sources constitute a robust body of publicly available information describing the uses and outcomes of the CT tactics we evaluate in this report.

A final important challenge to evaluating CT tactics is the fact that interpreting their effects depends, at least in part, on the broader strategy they are meant to advance. We now turn to a discussion of that CT strategy and the primary challenges to its implementation in order to identify and clarify contextual criteria by which we evaluate CT tactics' efficacy.

TACTICS IN CONTEXT: THE STRATEGY AND CHALLENGES OF COUNTERTERRORISM

Because CT tactics impact broader CT strategy, their efficacy cannot be evaluated only in terms of their intended objectives. A tactic that effectively meets its own objectives (e.g. destroying a terrorist safehouse) could nonetheless be harmful to CT strategy if it excludes the use of some other tactic better able to advance strategic aims (e.g. surveilling the safehouse and its members to learn more about their network and their upcoming operations). And because the implementation of any strategy is challenged at the level of operations (between high-level strategy and its on-the-ground tactical implementation), tactics must also be evaluated for their role in overcoming or exacerbating key operational challenges. In counterterrorism campaigns – because terrorists act covertly– a key operational challenge involves managing information about terrorists' movements and plans. Below, we briefly outline U.S. CT strategy and explore its operational challenges.

The Evolution of U.S. CT Strategy

The counterterrorism strategy of the United States has evolved throughout the latter half of the 20th century. In the 1960s, extremist Islamist terrorist acts rarely affected Americans directly. When they did, death tolls were small and the historical, policy, and political consequences were usually slight. Presidents were even routinely advised to avoid engaging directly in CT decisions since "there was little the U.S. government could do to prevent […] attacks, and it would be better to shield the White House from future blame" (Naftali 2005, 45).

By the 1970s and '80s, however, threats from terrorists at home and abroad had inspired the development of CT working groups and task forces in several bureaus of government.[4] While U.S. Presidents and Congress dedicated considerable resources to uncovering and stopping amateur militants, they also hewed closely to a strategy of denying terrorist the attention they needed to grow their movements (See Naftali 2005, Chapters 2 and 4). Historical precedent had also suggested that states too eager to fight terrorists often ceded legitimacy to militant groups by becoming too brutal, or too repressive (e.g. Argentina, Columbia). Overzealous security measures could actually drive some populations into terrorists' hands. As long as the state's moderate course (based mostly in law enforcement techniques) did not undermine citizens' trust in its ability to keep them safe, it did not appear useful to act in dramatic fashion.

To many, the events of 9/11 seemed to repudiate a strategy based on starving terrorists of the attention they sought. There was no ignoring or downplaying the atrocities. The state's legitimacy and reputation as a protector of its population had been frontally attacked.

Within days, nearly every commentator inside and outside U.S. security establishments declared that Al Qaeda must be denied a safe haven from which it could plot, train for, and

carry out future offensives. Weeks later, with widespread international support, the U.S. led an air and ground campaign into Afghanistan to root out Al Qaeda and their Taliban hosts. Though coalition forces were not able to capture Al Qaeda and Taliban leadership who crossed into Pakistan, they destroyed much of the middle tier of Al Qaeda's central organization, crippling the group and successfully denying it uncontested safe haven.

Security experts also agreed that terrorism could be combated by denying violent groups the resources they need to be successful. Taking advantage of an international mood favoring cooperation, the U.S. led global efforts to secure and monitor money and weapons that could be used by violent anti-government groups. The Department of the Treasury partnered with Belgium's Society for Worldwide Interbank Financial Telecommunication (SWIFT) to track and disrupt a significant portion of Al Qaeda's funding network[5]. And recent reports suggest that Al Qaeda's Afghanistan/Pakistan organization is experiencing financial difficulties (Levitt 2008, 8; Asharq Al-Awsat 2010).

The existence of an apparently robust network of sophisticated terrorists amplified unrealized fears of nuclear terrorism that had circulated since the 1950s. In response, international partnerships to track and secure nuclear weapons accelerated starting in late 2001 and, by many accounts, have helped reduce the already low probability that terrorists could access enough material to execute a nuclear attack (Mueller and Center 2008; Bergen and Hoffman 2010). Overlapping U.N. and international initiatives have also focused on reducing chemical and biological weapons proliferation by tracking and regulating the international sale of dangerous materials. Together, these initiatives have sought to reduce the threat of mass-casualty terrorism without requiring states to protect all potential targets at all times.[6]

In addition to working to secure the materials of terrorism at their source, the U.S. has also raised security levels at its borders and other points of entry into the country. The formalization of airport screening by the Transportation Security Agency (TSA) raised barriers to more weapons and explosives. And recent improvements to the passenger pre-screening system (discussed more thoroughly below) demonstrate its continual (if sometimes lagging) evolution with the terrorist threat. Despite popular criticism that the U.S. screens too few of the containers entering its ports, the Container Security Initiative of the Department of Homeland Security has also secured international cooperation with ports around the world to increase screening of nearly 86% of the cargo that eventually enters the U.S. (Deflem 2010, 51). Other agencies, like the Bureau of Immigration and Customs Enforcement and Customs and Border Protection round out a multi-layered defense of American borders that includes the securing of trade routes abroad and ports of entry at home (Ibid.).

President Bush and Congress also followed a policy consensus arrived at by two blue ribbon panels from the previous administration, creating a Department of Homeland Security (DHS) and passing legislation updating the information-sharing practices of the intelligence agencies.[7] Recent reports, especially in the *Washington Post*, suggest that efforts to coordinate intelligence sharing – a key recommendation of the 9/11 Commission – have not proceeded as quickly or effectively as planned. Although efficient information sharing appears to depend as much on institutional culture as design,[8] organizational changes have begun to increase the intelligence community's capacity to link information from multiple sources and agencies.

In keeping with a theme that restrained responses to terrorism had weakened the United States, President Bush and Congress also responded with policies seeking to give federal investigators and intelligence agencies expanded tools with which to do their work. Some PATRIOT Act provisions made it easier for federal investigators to surveil people, or search or seize their property. While the 14th amendment made it illegal for the government to single out American citizens for investigation based on their race, ethnicity, or religion, the FBI and Immigration officials pushed against this boundary with "voluntary" interviews of Muslim and Arab americans and the targeted "Special Registration" of Muslim and Arab immigrants. The Department of Justice also selectively detained or deported over 700 Arab and South Asian men - many students - for minor visa violations that typically would not have been enforced.

Though the U.S. had claimed a tradition against domestic spying for most of its history, President Bush signed a secret executive order allowing the National Security Agency (NSA) to intercept Americans' telephonic and electronic communications to and from foreign sources. The President also detained several hundred men on or near the battlefields of the "War on Terror," foreclosed their rights to *habeas corpus* petitions – disallowing them due process rights for their self-defense in a court of law – and created military tribun in which they could be convicted by evidence inadmissible in traditional criminal courts. The President, CIA, and Department of Justice (DOJ) also worked together to formalize a regime of physically and psychologically coercive interrogation procedures in the hope that the tools could elicit more information from terrorists than conventional interrogation techniques. The Department of Defense (DOD) simultaneously outlined its own set of coercive detention and interrogation practices.

Unlike the creation of multi-layered defenses and even the invasion of Afghanistan (which enjoyed widespread global support), these U.S. expansions of police and intelligence agencies' powers contravened the older counterterrorist wisdom that state action should preserve its

own legitimacy and deny terrorists rhetorical ammunition with which to recruit followers. But in the aftermath of the horrors of September 2001, and amid the ongoing fears that other attacks may be coming, such wisdom was cast aside in favor of more aggressive tactics.

The Emerging Counterterrorism Strategy

Over time, increasing numbers of CT researchers and strategists have come to articulate an approach to CT that combines some elements of past strategies while also emphasizing the importance of winning the "hearts and minds" of populations that terrorists would like to recruit to their cause. Such rethinking has often come from individuals within the traditional security apparatus including from General David Petraeus, General Stanley McChrystal, General Sir Rupert Smith (UK), Mike German (former FBI), Tom Parker (former MI-5), Stephen Kleinmann (Air Force reserve Colonel and former interrogator), Matthew Alexander (former Air Force interrogator in Iraq), and many more. Though U.S. CT strategy has shifted within the last decades, the current approach is based on the following objectives:

- Deny terrorists safe haven by conducting offensive military operations.
- Deny terrorists access to financial networks.
- Deny terrorists access to weapons of mass destruction (WMDs) or the materials for their production.
- Establish multiple layers of security screening for people and objects entering the country.
- Undermine terrorists' recruitment capability.
- Enhance perceptions of state legitimacy among the very people terrorists would like to recruit to their cause and win their loyalty by:
  - Providing these communities with direct aid or protection.
  - Building cooperative relationships with them.
  - Avoiding unnecessary casualties, abuse, or intimidation.
- Encourage these same communities to disavow and expose terrorists who may be in their midst.

Efforts to win the support of bystanders to terrorism and counterterrorism (bullet points six and seven) have become more prominent elements of U.S. CT strategy in the years since abuses at Abu Ghraib, Bagram, and Guantanamo prisons inflamed an anti-U.S. backlash among many Muslims (See Sheehan 2009 for a quantitative analysis of this backlash). Several works of CT scholarship (an increasingly popular field of interdisciplinary study) have also contributed to this shift in strategic emphasis. Canvassing the history of state clashes with terrorists, various authors have found that approaches which abuse or

repress bystander populations rarely speed the end of terrorism campaigns and often prolong them by transferring legitimacy from states to terrorist groups (Hewitt 1984; Art and Richardson 2007; Schmid and Crelinsten 1993; Charters, 1994; Wilkinson 2001; Sheehan 2009; Cronin 2009).

Emerging CT thought increasingly stresses the importance of state legitimacy for CT strategy. Establishing, maintaining and enhancing the legitimacy of CT operations encourages reliable reporting from communities in which terrorists might be embedded, undermines terrorist narratives charging the state with hypocrisy, and inspires cooperation from international allies. Legitimacy is thus seen as critical to the security of the nation state at home and abroad. In many ways, the newfound emphasis on legitimacy reflects the state's relearning of its basic nature. Max Weber defined the state as "a human community that (successfully) claims a *monopoly on the legitimate use of physical force* within a given territory" (italics in the original; Weber 1946, 78). While this quote has sometimes been reduced to the state having the "monopoly on violence," Weber emphasizes its "*legitimate use*."

A state that uses force illegitimately — arbitrarily, selectively, or for personal rather than public interests — may undermine the basis of its power as much as a state that fails to use force to defend itself and its citizens against external or internal aggressors. In the case of CT, states that use force illegitimately risk alienating potential citizen informants who are often critical to disrupting terrorist plots and networks. Citizen informants provided intelligence that helped foil many plots including those of the Lackawanna Six in 2002, The Portland Seven in 2003, James Elshafay and Shahawar Siraj in 2004, Michael Reynolds in 2005, and Faisal Shahzad in 2010 (Difo 2010).

As we evaluate CT tactics below, we will frequently use elements of current U.S. CT strategy as criteria to judge the efficacy of the tactics. If a tactic is successful in some regard but harms CT strategy overall – for instance, if it is perceived as abusive or illegitimate and causes people to think twice about reporting a relative, friend, or neighbor engaged in terrorist activities – its overall efficacy may be questionable. Before we move to those tactical evaluations, though, we must consider how some tactics might alleviate or exacerbate perennial obstacles to CT efforts.

Operational Challenges to CT: Sorting Information, Coordinating Intelligence

Even the best conceived strategies may falter if their implementation is impractical at the operational level. In the case of CT, the success of any strategy meant to root out covert militant groups will depend heavily on the availability and quality of intelligence about their whereabouts and plans. Unfortunately, the quality of

intelligence – its relevance to other information, truth-value, and urgency – is often not evident at the time it is received. A detainee's report of an impending attack could be lifesaving information, but it could also be a prideful bluff or an intentional misdirection intended to divert intelligence agents' time and resources. Thus, a key challenge, or perhaps *the* key challenge, to CT operations is the analysis, sorting, and prioritization of information of unknown relevance for defeating terrorists. In the language of 'signal detection theory' this is the challenge of identifying a relevant 'signal' in the midst of informational 'noise' (McNicol 2004).

Often, the relevance of incoming information cannot be determined without reference to information that is housed at some other U.S. intelligence agency. The 9/11 Commission highlighted this as a major impediment to preventing the attacks of September 11th. They concluded that the major failures leading up to the attack stemmed most directly from poor information coordination among the U.S.'s fifteen separate intelligence agencies and a failure to imagine and prepare for unseen terrorist tactics like the hijacking and weaponization of airliners (Kean et al 2004, Chapter 11). The commission made multiple recommendations, many of which were taken up by the Bush Administration and have already been discussed (Ibid., Chapter 12), but their most urgent was the restructuring and streamlining of the intelligence community. Though some positive steps have been made in this direction, a recent week-long *Washington Post* expose of the U.S. intelligence community, "Top Secret America," paints a dismal picture of the progress (Priest and Arkin 2010).

Given the dependence of CT operations on accurate intelligence that must be sorted and prioritized by a limited number of human analysts, and the poor state of intelligence coordination in the U.S., any CT tactic exacerbating the challenges of the intelligence community should be regarded with suspicion by policymakers and the public. Intelligence agencies are flooded with information to analyze – the vast majority of it just informational white noise. If some CT tactics are increasing the volume of this noise or decreasing the volume of terrorist signals, they may be more harmful than helpful to U.S. CT missions.

EVALUATING CONTROVERSIAL COUNTERTERRORISM TACTICS

Below, we evaluate the efficacy of several CT tactics. A tactic can be deemed effective if it accomplishes its intended goals, aides a CT strategy based in part on boosting the legitimacy of the U.S. relative to terrorists in the eyes of bystander populations (outlined on page 11), and does not exacerbate the intelligence challenges inherent to CT efforts.

Expanded Surveillance and Search Tools

Within five weeks of the 9/11 terrorist attacks Congress passed, and President Bush signed, sweeping CT legislation known as the USA PATRIOT Act (an acronym formed from the bill's official title: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism). Most of the provisions of the Act, and some accompanying revisions to the Foreign Intelligence Surveillance Act (FISA), are considered uncontroversial, even among civil liberties advocates. However, the act's expansion of some surveillance tools and the lowering (or elimination) of the evidentiary thresholds investigators must meet to surveil, search, or seize the property of Americans have been highly controversial since 9/11, inspiring political, judicial, and legislative contests over their constitutionality.

But questions of the expanded search and surveillance powers' *efficacy* should be of greatest relevance to policymakers, security agencies, civil liberties advocates, and the public. Has the eased usage of National Security Letter (NSL), roving wiretaps, "sneak and peek" searches, suspicious activity reports (SARs), and FISA surveillances helped law enforcement get information critical to CT operations that they could not have obtained using pre-9/11 standards and procedures? Have these loosened standards generated unintended consequences that were either productive or counterproductive to CT operations? Here we review the historical role of surveillance and judicial oversight, examine the available evidence for and against the efficacy of controversial PATRIOT Act and FISA provisions, and consider the implications of signal detection theory for expanded search and surveillance tools.

1. PLOT DETECTION

We begin our evaluation of the efficacy of expanded search and surveillance tools with an investigation into their ability to aide in the detection and foiling of terrorist activities. Since these PATRIOT Act provisions and FISA revisions were passed ostensibly in response to 9/11, we first ask whether they would have helped prevent those attacks in particular. In our review of news articles and intelligence reports we found no credible evidence suggesting that these provisions would have prevented 9/11 or even resulted in better intelligence about the plot. The 9/11 Commission Report blamed a range of factors for the attacks — lack of imagination, lack of understanding the danger, lack of information sharing, and

others — none of which included the idea that excessively high warrant standards had blocked the ability of the FBI or other agencies to receive a search or surveillance warrant.[9] The Commission's report listed ten "Operational Opportunities" the intelligence agencies missed, from the CIA's failure to put Khalid al Mihdhar on a watchlist in January 2000, to the FBI Headquarter's failure to act on urgent warnings about Zacarias Moussaoui raised by the Minneapolis FBI's offices (Kean et al 2004, 355-6). In the case of the latter, FBI HQ refused requests from the Minneapolis FBI field office to seek a warrant from the Justice Department for the search of Moussaoui's computer because it did not identify French intelligence, suspicious flight school attendance, and other evidence as a malicious pattern.

The preponderance of evidence suggests that the greatest barrier to more effective CT remains the operational challenges to intelligence sharing, analysis, and "connecting the dots" (what the 9/11 Commission called "institutional imagination"). Thus, the 9/11 Commission recommended reorganizing and centralizing the government's fifteen or more different intelligence agencies to promote institutional imagination and efficacy, but made no recommendation to expand search or surveillance tools (Ibid. Chapter 12).

Furthermore, our investigation into plots foiled since 9/11 uncovers no credible evidence that the expansion of search and surveillance tools resulted in the discovery of those activities either. According to our analyses of news accounts, FBI investigation reports, and recent studies on foiled terrorist plots, all were broken open due to the combination of well-deployed undercover agents, information from citizen or undercover informants, and tips from foreign intelligence agencies (Difo 2010).[10] Search and surveillance warrants, whose usage was eased by the PATRIOT Act, are only known to have been used in two cases (those of the Portland Seven, and Najibullah Zazi[11]). However, timelines of the investigations suggest that the warrants investigators sought and attained would have been authorized under pre-PATRIOT standards. The Portland Seven had startled a local citizen with their recreational gun use, and the FBI used an undercover informant to discover their interest in domestic attacks. Based on that information, the FBI attained surveillance warrants they would have been able to attain even before the passage of the PATRIOT Act.

In Najibullah Zazi's case, too, investigators did not need the PATRIOT Act to carry out their investigations. Their surveillance of Zazi started based on Pakistani intelligence reports that he had visited with Al Qaeda operatives during his trip to Peshawar, Pakistan in 2008 (Temple Raston 2010) .That evidence would have been sufficient for the FISA warrants they subsequently used to surveil him, with or without the PATRIOT Act or post-9/11 amendments to FISA. Similarly, the Joint Terrorism Task Force's 'delayed notification' or "sneek and

peek" search of his rental car would have been permitted according to case law developed in the 2nd and 9th Federal Circuits well before the PATRIOT Act was even imagined.[12] As Sam Rascoff, former NYPD intelligence officer, put it, "what's striking about the Zazi case is not so much that new tools were being used, but that old tools were being used in a comprehensive fashion, and that they were being stitched together in a thoughtful, strategic way, so that one tool naturally gave way to another" (Temple Raston 2010).

Since 9/11, even as CT agents and agencies have become more adept in their use of classic investigatory tactics and more attuned to patterns of suspicious behavior, they have still failed to piece together clues in important cases. But these failures have not been due to hurdles posed by judicial oversight or excessively-high warrant standards. British and U.S. intelligence agencies who were tracking Nigerian national Umar Farouk Abdulmutallab before he attempted a jet plane bombing on Christmas Day, 2009 were not impeded by high warrant standards nor did they need PATRIOT Act provisions to discover through an informant (i.e., Abdulmutallab's father) that he might be involved in a terrorist plot. In Abdulmutallab's case, as with 9/11, intelligence officials simply failed to put together various clues including communications with American provocateur Anwar al-Awlaki, a prior warning to the U.S. embassy by Abdulmutallab's father, and intercepted Al Qaeda communications that a Nigerian would be involved in a future attack.

2. DATA MINING

Three weeks after the 9/11 attacks, as it became apparent that many of the hijackers had lived and trained in the United States, President Bush signed an Executive Order making it easier for the National Security Agency (NSA) to listen in on communications between U.S. citizens and foreign callers whom the NSA "reasonably suspected" of terrorist involvement. And, the executive order allowed the NSA to operate these wiretaps without warrants or judicial oversight (i.e. from Federal Intelligence Surveillance Courts, FISCs).

The NSA had been fairly successful intercepting the signals of known U.S. enemies during the Cold War. Now it was being asked to identify America's enemies among the billions of people in and out of the U.S.

But this NSA-led "President's Surveillance Program" (PSP) met with significant challenges. First among them was the difficulty of managing and sifting through the giant masses of information (Bamford 2008). In response, the NSA developed computer algorithms to query data for transactions (e.g., fertilizer purchases) and communications (e.g., with Pakistanis) that set off "red flags" as defined by human analysts. Emails containing suspicious words and phrases like "bomb" and "convention center" might trigger a red flag. If enough red flags were associated with a single person,

the NSA might single that individual out for additional surveillance by human analysts.

All of this meant that the PSP's information trawling could only work if terrorists communicated about their plans on the phone or through email using very literal language. But, as anyone who has ever discussed a surprise party within earshot of the guest of honor can attest, it is easy for callers to substitute unrelated verbs and nouns for those that might reveal their plot. Human languages are famously subtle and labile when secrecy is a factor in communication.

An evaluation of the PSP conducted by the Offices of Inspector General (OIG) for the Department of Defense (DOD), DOJ, CIA and the Office of the Director of National Intelligence (ODNI) is damning in its faint praise of the program. Unable to cull together hard evidence of the program's efficacy, the Inspector General's report relied most heavily on the testimony of intelligence officials and analysts. According to the report: "NCTC [National Counterterrorism Center] analysts and ODNI personnel described the PSP information as 'one tool in the tool box' or used equivalent descriptions to explain their view that the PSP information was not of greater value than other sources of intelligence" (Department of Defense et al 2009). "In sum, the DOJ OIG found it difficult to assess or quantify the overall effectiveness of the PSP program as it relates to the FBI's counterterrorism activities. However, based on the interviews conducted and documents reviewed, the DOJ OIG concluded that although PSP-derived information had value in some counterterrorism investigations, it generally played a limited role in the FBI's overall counterterrorism efforts" (Ibid.). The bias of interviewees, though, may have contributed to suggestions that the program was worth continuing despite its undemonstrated value. FBI Director Robert Mueller stated, for instance, "that he 'would not dismiss the potency of a program based on the percentage of hits'" (Ibid.).

If the PSP was less effective than its proponents hoped, other NSA programs seeking to predict terror attacks faced more fundamental challenges. In a world where private firms were collecting massive amounts of financial, telephonic, and electronic transactional data, NSA leadership and their funders in Congress sought to use computers and algorithms to seek patterns of terrorist behavior within those data. The agency went to work compiling and indexing massive databases of existing intelligence case files, financial institutions' records of their clients' transactions, and telecommunications companies' records of clients' phone calls, emails, website visits, and text messages. They installed splitters at fiber optic connection points, effectively siphoning a mirror image copy of all telephonic and electronic communications for further analysis and sorting (Bamford 2008).

But, NSA efforts to pick out potential terrorists using sophisticated data-mining techniques were severely limited by the fact that there are too few terrorist plots and associated behaviors to identify a general pattern of (electronic, transactional) 'terrorist' behavior. The 'machine learning' that can make data-mining effective in domains like credit scoring requires vast stores of data on individual financial activity.

Machine learning works by comparing data on a subject's current financial history to the complete history of many people who were similarly situated at some point in their past. Because the computer knows with certainty how several people in socioeconomic situation 'x' performed financially at time t1, t2, t3, … t99, it can later predict how a person in situation 'x' at time t32 will behave. However, for the machine to learn what set of socioeconomic variables actually predicts future behavior – i.e. what 'similarly situated' means – it must have a complete and thorough 'training set' of data on a number of people covering a wide array of variables at least somewhat relevant to their financial performance (National Research Council 2008).

Because banks have kept so much data on their customers' transactional histories and those data are easily linked to other data – e.g. home ownership, occupation, number of children, age, education, ethnicity, gender, etc. - the 'training sets' for financial competence are comprehensive in terms of variables, complete over the financial lives of subjects, and relatively accurate. As banks continue to accrue more data, the software learns more and more about how its predictions were right or wrong and becomes even better at predicting financial outcomes in the future.

When applied to the case of terrorism, the NSA had hoped data-mining software relying on machine learning would be able to predict who will engage in terrorist activity weeks, months, or even years before their attacks are scheduled. But there simply are not enough data on terrorist activities to use the machine learning process (Ibid.). Comprehensive data sets on terrorists' activities prior to attacks only number in the dozens. Programmers would need several hundred cases, at minimum, for the machine learning process to be helpful.

But even these data are not likely to be helpful. More data about terrorist behaviors could be added as plots unfold but there is little reason to believe that terrorists openly engage in measurable behaviors that are both substantially related to terrorist activity (that could be used to establish a terrorist 'signal') and are clearly distinguishable from the common behaviors (i.e. irrelevant informational 'noise') of billions of non-terrorists. Before the 9/11 attacks, the activities of the hijackers — renting apartments, holding jobs, carrying passports, and buying car insurance in their own names — all appeared normal. Their phone numbers were in the local

phone book. Some of them even bought their boxcutters at a Target store just down the street from NSA headquarters. Even after 9/11, none of these activities would seem suspicious. And the most suspicious behavior — inquiring about how to fly but not land passenger jet planes — could only be noticed by human informants or agents, not computers sifting through petabytes of transactional data.

3. FALSE LEADS

While unnecessary informational noise poses a challenge to the detection of genuine terrorist signals, false signals actually distract attention and resources away from helpful CT efforts. To prevent the pursuit of false leads, states – for centuries – have regulated the ability of law enforcement to conduct searches and surveillance.[13] If evidentiary thresholds for attaining investigative warrants are set too low (or eliminated entirely), agents may, intentionally or not, pursue more weak leads than they would with stricter oversight. Expansive investigative powers threaten security and undermine state legitimacy if they distract the attention and resources of security agencies, encourage the harassment of innocents, or allow the guilty to go free.

Our review of news accounts and government reports has uncovered evidence that expanded search and surveillance tools after 9/11 increased informational noise and the pursuit of false signals. PATRIOT ACT provisions allowed the FBI to collect more and more information about people without demonstrating sufficient (or in many cases, any) cause for suspicion. Between the years 2000 and 2008, the issuance of National Security Letters (NSLs) — demands sent to companies to secretly gather financial and communications transactional information about individuals without their knowledge — increased over five-fold to 50,000 per year (Dept. of Justice 2007).[14] The number of FISA warrants sought and approved also doubled over the period to 2,400 (Electronic Privacy Info. Center 2008). And, the number of Suspicious Activity Reports (SARs), which are secret reports to the Treasury Department made by U.S. banks about their customers, grew six-fold to 1,250,000 by 2007 (Dep. of Treasury 2008). (Meanwhile, the number of FBI agents working on terrorism only doubled.)

With so much information being collected, one might think that the number of terrorism cases also increased dramatically over the period. However, the number of cases prosecuted by the DOJ dropped significantly from its post-9/11 high of 355 in 2002, to 34 in 2008 (the latest year for which data were available at the time of printing). Those numbers may reflect prosecutorial overzealousness in 2002 and/or a steady decline in the number of individuals engaged in terrorist activity over the period. In any case, the enhanced information gathering powers of the FBI did not seem to result in higher quality case files for prosecution. While in 2001, DOJ prosecutors declined only 33 percent of the terrorism cases the FBI referred for prosecution, in 2002 that declina-

tion percentage rose to 54%. By 2006, the DOJ rejected 87% of the terrorism cases the FBI referred for prosecution (Transactional Records Access Clearinghouse 2006).

These data plainly show that at the same time investigators were collecting more information they were also referring fewer cases to prosecutors overall, and a much higher percentage of those did not meet prosecutors' standards. While the Justice Department defends the use of its expanded search and surveillance powers, its Inspector General's Office has also reported on their limited effectiveness: "Many field agents and Headquarters officials we interviewed said it is difficult to isolate the effectiveness of national security letters in the context of a particular case" (Fine 2007-A, 45). Indeed, responding to an earlier journalistic investigation by *Washington Post* reporter Barton Gellman, then Assistant FBI-Director, Michael Mason could not recall a case in which NSLs had been essential or dispositive. "I'd love to have a made-for-Hollywood story, but I don't have one," Mason said. "I am not even sure such an example exists" (Gellman 2005).

The same can be said for controversial Section 215 of the PATRIOT Act, which expanded the scope of FISA search warrants to "any given thing" associated with a FISA investigation. When Section 215 was reviewed by the DOJ Inspector General, his report concluded, "We found no instance where the information obtained from a Section 215 order resulted in a major case development such as the disruption of a terrorist plot" (Fine 2007-B, 79). "Most of the agents we interviewed said the records obtained… did not contribute to the development of additional investigative information" but were useful for ruling out suspicions about a person (Fine 2007-B, 67).

Some policymakers thought that lowering evidentiary thresholds justifying search and surveillance would free terrorism investigators from wasting precious time seeking what they judged to be excessive permission from judicial authorities, arguing that in situations where time is of the essence, judicial oversight could put security at risk. But long before 9/11, agents could request and receive warrants very rapidly — within hours, not days — if they had evidence suggesting that someone might be involved in criminal activity. In emergency situations, investigators could even set a wiretap and then apply for its warrant later. In non-emergency situations judicial oversight often improves intelligence gathering by requiring careful investigative work critical to winning warrants *and* prosecuting cases. Contrary to the conventional understanding that investigatory oversight slows investigators, appropriate judicial oversight reduces the distracting noise of false leads, saves investigators the time needed to rule out the guilt of thousands of potential 'suspects,' and improves the quality of intelligence.

The argument could be made that it is not possible to know the effects of expanded search and surveillance tools because the valuable

intelligence and investigatory contributions resulting from reduced standards are classified. But if this argument were true, then only a remarkable and highly improbable coincidence (or some far-fetched conspiracy) could explain how all available evidence about disrupted plots – today known through news accounts and court cases – demonstrates no enhanced intelligence benefit from the expanded search and surveillance powers.

Out of concern for civil liberties, Congress required the Inspector General of the Department of Justice to investigate potential civil liberties abuses by investigators and placed some restrictions on the use of NSLs when it reauthorized the PATRIOT ACT in 2006. The reports coming out of these inspections confirmed that the number of actual prosecutions was dwarfed by the number of NSLs issued and people affected — and that the powers had been misused by the FBI. However, given the evidence of their inefficacy and counter-productivity lawmakers might also attend to the potential security drawbacks of NSLs and other expanded search and surveillance powers even when they are not abused.

Ethnic/Religious and Behavioral Profiling

Following 9/11, authorities employed multiple profiling tactics – like the FBI's "Interview Project," Immigration and Customs Enforcement's "Special Registration" program, and the Transportation Security Administration's Computer Assisted Passenger Prescreening System and 'behavioral' profiling tactics – in their attempts to home in on those individuals most likely to carry out terrorist attacks. The FBI's "Interview Project" screened tens of thousands of American citizens identified as Muslim and/or Arab. The interviews could not be mandatory without violating 14th amendment protections against differential treatment based on ethnicity or religion, but many Muslim and Arab Americans complied due to feelings of patriotism, obligation, and/or intimidation.

The Immigration and Naturalization Services (now Immigration and Customs Enforcement or ICE) also required male immigrants from Muslim majority countries to perform a 'Special Registration,' a process in which, over several months in 2002 and 2003, immigration personnel photographed, fingerprinted, and interviewed more than 80,000 registrants. Thousands of these men were deported for minor immigration violations, usually visa overstays. The rest were placed on a sort of probation requiring them to report to immigration authorities at least once per year and every time they entered or exited the country, changed jobs, changed addresses, or enrolled in universities, etc. They were also required to enter and exit the country only through designated airports or sea ports.[15]

The Department of Homeland Security's Transportation Security Administration (TSA) also took action seeking to filter potential terrorists from the rest of the population. The agency had to be mindful of Department of

Justice protocols (based on the 14th amendment) preventing involuntary ethnic/religious profiling of American citizens, but it did employ a Computer Assisted Passenger Prescreening System (CAPPS) especially sensitive to those who were traveling or had traveled to Arab- or Muslim-majority countries. The effect of CAPPS was to apply more stringent scrutiny to travelers with Arab and/or Muslim heritage while also comparing travelers' names, financial transactions, housing information, family connections, travel destinations, contact telephone numbers, seat assignments, dates of travel, passport information, method of payment, and amount of luggage to those of known terrorists or terrorists scenarios defined by databases and streaming intelligence reports. CAPPS (and its second and third generation offspring) then ranks passengers according to their likelihood of being a terrorist. The top 5 percent or so (the exact percentage is classified) are subjected to higher levels of screening that can include luggage searches, pat downs, additional screening, and/or brief interviews.

The TSA also employs behavioral profiling, whereby agents seek to discover passenger nervousness, irritability, or other suspicious signs that might indicate their intentions to commit terrorism. The methods are reputed to be highly effective in Israel, where the national airline, El Al, despite receiving almost daily terror threats, has not experienced a major attack in over three decades. TSA's use of behavioral profiling is much less intensive than El Al's. The latter approach submits every passenger to a battery of open-ended questions and psychological evaluations. By contrast, TSA's Screening Passengers by Observation Techniques (SPOT) program only closely questions the rare passengers that agents deem suspicious. In practice, probably owing to the human tendency to interpret the behaviors of poorly understood out-group members as 'exotic' (Tajfel 1982), TSA agents, according to multiple anecdotal accounts, have been prone to apply greater scrutiny to Muslim, Arab, Sikh, and South-Asian air passengers.

Given that the 19 airplane-hijacking suicide bombers of 9/11 were all Muslim and most were Arab (15 from Saudi Arabia, two from the United Arab Emirates, one from Egypt, and one from Lebanon), it was not entirely irrational for security officials – fearing that other terrorist cells might already be hiding in the country – to focus their attention on the one in 100 Americans of Muslim of Arab descent rather than on the entire population. In fact, the case for profiling has always seemed commonsensical: if police know the basic characteristics of their suspects (height, weight, eye-color, etc.), they should focus more attention on people sharing those characteristics. By reducing the number of people who must be questioned or searched, investigators can boost the strength of the 'signal' of terrorism and reduce the 'noise' from innocent populations.

1. ETHNIC/RELIGIOUS PROFILING

Despite the apparently sensible basis for profiling, there is no evidence that U.S.

profiling policies have worked to catch terrorists. According to a 2003 Government Accountability Office (GAO) Report on the FBI's 'Interview Program,' the FBI and DOJ provided no specific evidence that the program had generated any leads and over half of the FBI agents the GAO spoke with "expressed concerns about… the value of the responses obtained in the interview project" (Government Accountability Office 2003, pgs. 5-6). The massive 'Special Registration' program of ICE and DHS never captured any terrorists either. After two years of cataloguing and interviewing tens of thousands of immigrants and visa-holders the program was scaled-back (reducing visitors' reporting requirements) and re-named "US-VISIT." So far, there is no evidence of any terrorist being caught in the act by the CAPPS system either (or its second generation 'CAPPS II,' or its third generation 'Secure Flight'). And while TSA's behavioral profilers have suspected and interviewed hundreds of thousands of travelers, none of them were engaged in terrorist activities.

Religious and ethnic profiling fails similarly to data mining. There are simply too few terrorists from which to generalize a useful profile. While extremely few people are involved with terrorism, millions of American citizens, residents, and visitors are law-abiding Muslims and Arabs. A profiling policy that boosts the signal of Muslims and Arabs does not significantly boost the signal of terrorists, but instead amplifies a slightly narrowed bandwidth of informational noise representing Muslim and Arab populations.

The case of Brandon Mayfield clearly illustrates the poor outcomes generated by profiling based on widespread characteristics like religion. Mayfield, a Portland, Oregon attorney, was investigated and jailed by the FBI for several weeks on the grounds that: a) his fingerprints were a partial-but-weak match with those left by a Madrid Bombing suspect; and b) he had converted to Islam several years prior. Despite contravening objections and evidence provided by Spanish intelligence, the FBI rushed to judgment, obtained a series of FISA warrants and a "sneak and peek" warrant, entered Mayfield's home surreptitiously, took dozens of photographs, scanned his hard-drives, subpoenaed his phone and Internet records, and eventually detained him for two weeks while telling reporters that he was responsible for the Madrid bombings of 2004. By the time agents discovered Mayfield's innocence, thousands of investigator hours had been spent. Mayfield sued and the government paid two million dollars restitution to him in an out-of-court settlement (Epps 2007).

Profiling not only produces 'false positives,' like Mayfield; it may also generate 'false negatives.' The few terrorists able to pass through airport screenings since 9/11 – failed "shoe bomber" Richard Reid and would-be Christmas Day bomber Umar Farouk Abdulmutallab – illustrate how the policy may simply inspire

terrorist groups to shift the racial profiles of their operatives. Shoe bomber Reid was half-Caucasian, half-Jamaican, and a British national. Farouk Abdulmutallab was African, from Nigeria. Others, too, have shown the ability of terrorists to recruit outside phenotypical stereotypes to avoid ethnic profiling, including: Hispanic-American Jose Padilla, half-Pakistani, half-American David Headley (who adopted his mother's Judeo-Christian name), white Illinoisan Michael Finton, the home-schooled Californian Adam Gadahn (AKA Abu Yahya), Alabama-Native and former Junior Class High School President Omar Hammami (AKA Abu Mansoor Al-Amriki), Hispanic-American and one-time Boy Scout Bryant Neal Vinas, and blonde-haired, green-eyed suburbanite Colleen LaRose (AKA Jihad Jane).

Some researchers predicted this shift in recruiting strategy as early as 2002. Then, analysts used statistical modeling to demonstrate how any screening system applying heightened scrutiny to some profiles and not others could easily be overcome by terrorist organizations (Chakrabati and Strauss 2002). By simply sending their members on "dry run" flights without any explosive devices, extremist groups can determine who among their membership can pass through the system unhassled. Terrorists can reasonably infer that those who consistently fail to trigger the system do not fit the 'suspect profile' and are consequently ideal candidates to execute attacks. By testing the profile, Chakrabati and Strauss' model showed, terrorists can reverse engineer its components in only two or three iterations and easily beat it with non-Arab recruits. CAPPS profiles, therefore, can only outperform random-screening procedures if terrorists are unwilling to test the profiles more than a few times (Ibid.). To the greatest extent possible, many security experts conclude, searches of people and luggage should occur without a discernible pattern that can be reverse engineered.

Given the major weakness of a two-tiered screening system relying on profiling, security experts have also recommended applying the highest available levels of screening to all passengers (Chakrabati and Strauss 2002; Schneier 2009). It was the universal screening for metals and explosives that forced Richard Reid to attempt to use an unreliable shoe bomb in late 2001. Eight years later, the requirements that passengers submit their shoes to x-ray screening and carry no more than 3 oz. of any liquid onto a plane posed hurdles leading to the inadequate construction of Abdulmutallab's unreliable undergarment bomb. These defenses, far more than the extra-screening of behavioral profiling or pat-down searches, have deterred or complicated terrorist attacks. Enhancing screening for all can provide heightened security without creating a loophole for terrorists who do not fit the terrorist profile. If universal screening technologies are prohibitively expensive (e.g. if full body scanners cannot be deployed in every airport), evidence suggests that randomly selecting passengers for heightened screening is more

effective at catching terrorists and deterring them from attempting attacks than two-tiered profiling (Chakrabati and Strauss 2002; Schneier 2009).

2. BEHAVIORAL PROFILING

According to government reviews, news reports, and psychological studies, behavioral profiling does not appear to be any more effective than ethnic and religious profiling. The TSA's (Screening of Passengers by Observational Techniques) SPOT program attempts to recognize 'malintent' in travelers, but it is based on the assumption that terrorists will exhibit outwardly suspicious behavior that can lead interrogators to further probe for signs of duplicity. However, the peer-reviewed science on 'malintent' detection – recently reviewed in *Nature* – suggests rather strongly that it cannot work. And like other profiling, the program has resulted in no terrorist plot disruptions. Fewer than 1 percent of the 272,000 individuals interviewed by SPOT agents were arrested, all of them for criminal activities or outstanding warrants. With a 99% false positive rate for any criminal activity and 100% false positive rate for terrorism, it seems there is little to recommend the program.

Some claim that behavioral profiling has very effectively secured Ben Gurion airport in Israel. But officials there use so many layers of (time-consuming) security that their overall success cannot be attributed to a single factor. Terrorists might worry about face-to-face interviews with security officials who ask very specific but open-ended questions, but they also must worry about vehicle checkpoints on the way into the airport, multiple layers of x-ray machines and metal detectors, and sophisticated explosives-detectors for checked luggage. The blanket surveillance and questioning of air passengers – and the very time-consuming focus on non-Jewish passengers – might be one element in a security system causing terrorists to seek easier targets than the airport, but that does not mean that the U.S.-style behavioral profiling of SPOT can be effective. On the contrary, a side-by-side comparison of the security systems seems only to highlight the chasm between the two. And as Israeli security consultants who once hoped to scale the system up and bring it to the U.S. point out, "Adopting the full Israeli system won't work, because of costs, time and legal differences" (Guttman 2010). "People simply won't agree to spend all that time and money" (Ibid.)

3. AIRPORT SECURITY EVOLUTION

The DHS's most recent (Spring and Summer 2010) shifts in airport screening policy seem to incorporate some awareness of the limitations of profiling. According to news reports, the latest screening system will include a higher percentage of random-screening and some layers of security will remain 'unseen,' preventing reverse engineering (Zeleny 2010). Both of these modifications were recommended by Chakrabati and Strauss, Bruce Schneier, and other security analysts. In addition, TSA

reports it will be installing over 450 full-body scanners across the country by the end of 2010, 950 by the end of 2011, and 1800 by the end of 2014, enough for over half the security lines in the largest, highest priority airports. Eventually, the machines will fully replace magnetometers, since the latter fail to detect non-metallic weapons like ceramic knives or chemical explosives.[16] These changes appear to be steps in the right direction, but DHS still apparently has a good deal of faith in the value of profiling, as they are investing incredible sums – $1.3 billion through 2020 (enough to buy 8,000 body scanners) – in the development of an accurate terrorist profile for their CAPPS filters (Government Accountability Office 2010). Those efforts, as discussed above in the section on data mining, are likely to meet with continual frustration because data-driven solutions to the challenge of finding terrorists rely on the kinds of data that simply do not exist.

'Enhanced Interrogation Techniques'[17]

After 9/11, popular narratives of terrorists portrayed them as extremely hardened fighters, maybe even 'unbreakable.' Would they respond favorably to the interrogation methods developed by police to encourage criminals to confess their crimes or turn on their co-conspirators? Many who had the power to control or influence policy believed they would not. And given that hundreds or thousands of lives might be at stake, they thought that hardened terrorists might need to be softened up with harsher treatment.

Thus, the Bush Administration and the CIA General Counsel met with and orally requested opinions from the Department of Justice on how to legally widen the array of tools available to interrogators throughout late 2001 and 2002.[18] On August 1, 2002, Assistant Attorney General of the United States, Jay Bybee, sent memos to legal counsel for the White House and CIA explaining the conditions under which CIA interrogators could use techniques including "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."[19] A supplementary memo, by Deputy Assistant Attorney General John Yoo offered a legal opinion explaining how and why the techniques might not constitute 'torture' in violation of the U.N. Convention Against Torture.

In both documents, Bybee and Yoo assert that the methods probably do not cause long-term physical or psychological damage if used in reasonable doses. They also cite the fact that the methods (except for 'insects placed in a confinement box') are used on American military men and women as a part of their Survival, Evasion, Resistance and Escape (SERE) training. That program was first developed out of a Korean War training program designed to expose (and hopefully inoculate) soldiers to the brutality they might encounter if captured by the enemy.

It is unclear who broached the use of SERE tactics on terrors suspects first – CIA Director George Tenet and his number two John McLaughlin, or top executives in the White House. But the purpose of the tactics was clear: to bring more tools to bear in the struggle to get information out of terrorists. The tools were thought to work in one of two ways. The most physically coercive – like the slapping, shaking, walling, cramped confinement, and waterboarding – were designed to be so unpleasant as to force cooperation. Stress positions, sleep deprivation, and sensory disorientation were intended to break detainees' will from within by causing them to harm themselves and eventually slink into a state of psychological despondency. Both classes of coercion were intended to make it clear to detainees that they were not in control of their bodies and they could only experience relative calm and comfort by cooperating with their interrogators.

The long-time SERE trainers charged with implementing the new interrogation regime, James Mitchell and Bruce Jessen, believed that the methods could induce a state of "learned helplessness," first described by experimental psychologist Martin Seligman (Seligman 1972). Seligman found that punishing dogs with electric shock at random intervals, irrespective of their behavior, created despondent psychosis and pathological dependency. It is still not entirely clear why Mitchell and Jessen believed detainees in such mental states would produce valuable information, but Seligman has publicly distanced himself from that notion.

1. ENHANCED INTERROGATION AND INTELLIGENCE

In our review of declassified CIA documents, intelligence reports, investigative journalistic accounts, and even some interrogation transcripts (see 'Extended Bibliography' for a complete list) we uncovered no evidence demonstrating that enhanced interrogation techniques aided the thwarting of a single terrorist plot. However, as reports of prisoner abuse at Abu Ghraib, Guantanamo Bay, and Bagram Air Force Base surfaced, Bush White House and CIA officials, led by Vice President Dick Cheney, were quick to assert that enhanced interrogation had saved lives. The former vice president pointed to secret information allegedly demonstrating the techniques had worked. In 2009, he even publicly pressured the CIA to declassify memos showing "what we learned through the interrogation process and what the consequences were for the country."[20] When the documents emerged, Cheney claimed, "The documents released Monday clearly demonstrate that the individuals subjected to enhanced interrogation techniques provided the bulk of intelligence we gained about al Qaeda." The statement was technically true. The same people subjected to enhanced interrogation techniques – Abu Zubaydah and Khalid Sheikh Muhammed (KSM), in particular – were the same people who divulged a great deal of information to authorities. The

only problem with Cheney's story is that the available evidence suggests the detainees were most cooperative at the points in their interrogation when enhanced methods like waterboarding were *not* being used.

Abu Zubaydah — Mitchell and Jessen's first 'learned helplessness' case-study — is instructive. Operating in a secret CIA jail in Thailand, the SERE trainers were allowed to direct the second phase of the interrogation of Abu Zubaydah – then thought by some to be third in Al Qaeda's chain of command. The first phase had been carried out by FBI interrogators who nursed Zubaydah back to health after he sustained gunshot wounds during his capture and used traditional rapport-building approaches during his recovery (Isikoff 2009, April 25). They gained his trust and drew vital information about Al Qaeda's personnel and how the 9/11 attacks had been planned and carried out (Soufan 2009). He identified many Al Qaeda operatives including KSM, the mastermind behind 9/11 (CIA 2005). The former SERE-trainers contracted by the CIA then took over, claiming jurisdiction over the interrogations, slamming Zubaydah against a flexible plywood wall, slapping him, placing him in confinement boxes, and waterboarding him for several sleep-deprived weeks (Isikoff 2009). Finally, unable to secure any further information, they too determined that he must have already offered his most valuable information to FBI interrogators.

Though fewer details from KSM's interrogation have been made available to the public, there is no credible evidence suggesting that any of the information he provided was in response to coercive interrogation practices. What is known is that the CIA used a mix of coercive and rapport-based approaches and that he divulged his most useful information to an interrogator, Deuce Martinez, who eschewed the rougher tactics. As *New York Times* correspondent, Scott Shane, reports, "Mr. Martinez came in after the rough stuff, the ultimate good cop with the classic skills: an unimposing presence, inexhaustible patience, and a willingness to listen to the gripes and musings of a pitiless killer in rambling, imperfect English. He achieved a rapport with Mr. Mohammed [KSM] that astonished his fellow C.I.A. officers" (Shane 2008, June 22). KSM even reportedly wrote poems to Martinez's wife as a show of respect to Martinez. Over time the CIA transitioned to interrogation that used much less physical coercion and more rapport-based approaches. Reports from KSM's captors suggest that he offered his most useful information when interrogators appealed to his intellectual vanity. Apparently intelligence agents flattered him into giving multiple lectures about the structure and operation of Al Qaeda – turning him into a virtual CT consultant for the U.S.

A subsequent 2004 CIA Inspector General's report into enhanced interrogation techniques used on Zubaydah and KSM and others concluded that the coercive techniques had not uncovered evidence of imminent plots. FBI

Director Robert Mueller, in a December 2008 interview with *Vanity Fair* magazine, offered the same conclusion on the techniques' efficacy for gaining crucial information (Rose 2008). The one CIA operative who ever publicly stated that the CIA's "enhanced interrogation regime" saved lives, retracted his story two years later. John Kiriakou had said in an ABC interview that one application of waterboarding to Abu Zubaydah had produced actionable life-saving intelligence. It later came out that Zubaydah had been waterboarded 83 times, that Kiriakou witnessed none of the interrogations, and that he was repeating non-credible information he had heard from others. He now concludes, "In retrospect, it was a valuable lesson in how the CIA uses the fine arts of deception even among its own" (Stein 2010).

Claims that enhanced interrogation delivered critical intelligence to the foiling of terrorist plots have also been challenged by foreign intelligence agencies. After a staff associate to former Vice President Dick Cheney claimed in a book that a 2006 Heathrow hijacking attempt was disrupted by intelligence gathered from 'enhanced interrogation,' Peter Clarke, then-head of Scotland Yard's anti-terrorism division, called his account "completely and utterly wrong" because the "deduction that what was being planned was an attack against airliners was entirely based upon intelligence gathered in the U.K." (Mayer 2010).

2. DEFIANCE, LEARNED HELPLESSNESS, AND POOR INTELLIGENCE

Basic human psychology reveals why coercive interrogation has not proven effective. Humans may tend to seek pleasure and avoid pain, but they also regularly sacrifice their pleasure — even their lives — for what they view as higher goals. Parents sacrifice for children, children for parents, soldiers for nations, lovers for love, artists for creation, and many for money. Even so, reductive stimulus-response understandings of human nature persist, leading to simplistic interrogation strategies that overgeneralize based on a partial understanding of human behavior. Such simple and mechanical theories of human motivation ignore much of the knowledge accrued by the fields of psychology and social psychology over the last several decades, particularly the key distinction between 'intrinsic' and 'extrinsic' motivation. While external factors like rewards and punishment can certainly have some effect on peoples' behaviors, internal, intrinsic motivations are at least as important in determining their actions.

Irhabis are individuals invested in a powerful narrative that casts them as warrior heroes in a trans-worldly battle against injustice. Whether as well-educated moderns or working-class flunkies, they, like virtually all humans, are driven to be the primary causal agents in their lives (see Deci and Ryan 2004 for a thorough review of 'self-determination' research). They imagine themselves playing a decisive role in

history — providing a critical push to ridding the Islamic world of western influence — and effectively paving the way for an era of peace and justice.

Given these powerful psychological motivations, it may be very difficult for interrogators of Islamist extremists to devise any amount of purely external incentive (pleasurable or painful) capable of overriding a detainee's intrinsic motivation to control his own behavior and protect secrets to which he and his comrades have mutually committed themselves. 'Reactance' and 'defiance' theories both show that people tend to steel their wills against those who attempt to constrain their freedom or harm them (Brehm and Brehm 1981; Sherman 1993). Abusing and threatening people – as 'terror management theory' predicts – often causes them to hold more firmly to their ideological commitments (Solomon et al. 2004).

As for "learned helplessness," the evidence suggests it is counterproductive for interrogators (Fein et al 2006). The abuse, according to traumatic stress theory, causes many people to simply dissociate from the traumatic environment, psychologically withdrawing to the point that they may lose their connection with reality (Hobfoll 1991). Psychologists' and militaries' investigations into the efficacy of physically coercive interrogation highlight these concerns. The CIA's own previous interrogation manuals, published in 1963 and 1983, made much of the fact that some defiant individuals are better able to withstand pain than most civilians believe, while other broken individuals may provide unreliable information. "Use of force is a poor technique," the manual warned CIA agents, "yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear" (CIA 1963).

Physically coercive interrogation techniques intended to incentivize cooperation often appear only to escalate and prolong the battle of wills between captors and detainees. Another set of techniques was designed with the goal of undermining the will of the detainee itself. Throughout the 1950s and '60s, the CIA researched the effects of sleep deprivation, sensory disorientation (achieved by the constant presence of absence of sensory stimuli), and stress positions on detainees (McCoy 2006). Because these techniques are also incredibly uncomfortable and clearly adversarial, they still inspire unhelpful defiance, but they also weaken the individual psychologically in ways that some hoped might attenuate that defiance. The techniques also, though, alter subjects' mental states to the point where they become easily confused and open to suggestion (CIA 1963), psychotic break, hallucinations, and/or inability to distinguish between true and false memories (Mason and Brady 2009; Pilcher and Huffcutt 1996).[21] Prolonged sleeplessness and a loose connection to reality can easily result in false confessions or false allegations against others stemming from subjects' confabulation of

reality with fantasy or the introduction of false memories by interrogators.[22]

It was just such false information – delivered under torturous duress by Ibn al-Shaykh al-Libi – that supported the Bush administration's erroneous conclusion that Iraq had been involved in Al Qaeda's 9/11 attacks. That connection was strongly questioned by contemporary CIA and Defense Intelligence Agency (DIA) reports and later thoroughly debunked by a U.S. Senate Select Committee and in various media (United States Senate Select Committee on Intelligence 2006, pgs. 106-108; Kirk 2008).

Chasing the false leads of information given under duress has apparently become a major distraction at the FBI, adding to the signal detection challenges already exacerbated by other controversial CT tactics. A "seasoned counterterrorist agent" reported to *Vanity Fair's* David Rose recently that "At least 30 percent of the FBI's time, maybe 50 percent, in counterterrorism has been spent chasing leads [produced by detainees under duress] that were bullsh*t." They try "to filter them. But that's ineffective, because there's always that 'What if?' syndrome" (Rose 2008).

The self-defeating side-effects of enhanced interrogation have been warned against by history's military leaders for hundreds of years. "[P]utting men to the torture, is useless," Napoleon said. "The wretches say whatever comes into their heads and whatever they think one wants to believe." Recently, China banned the practice after reports revealed that it had led to false confessions, the executions of innocents and, conversely, freedom for the guilty (Jacobs 2010).

3. THE TICKING TIME BOMB SCENARIO

What about the "ticking time-bomb" scenario where 1) a nuclear bomb is armed in a major city; 2) it is scheduled to detonate within 24 hours; 3) security personnel have apprehended a suspect who they believe knows about the location of the bomb; and 4) they know that he knows this potentially life-saving information?

The ticking time bomb thought experiment is based on no confirmed incident in history (Scheppelle 2005) but rather an extreme hypothetical scenario designed by torture apologists (and promoted by the popular television show '24') to elicit the acknowledgement that in some situations enhanced interrogation could be justified. But such a conclusion rests on an assumption — that the suspect would confess rather than become defiant in the face of torture — which psychological and empirical evidence suggests is incorrect. KSM was waterboarded 183 times over a one month period without giving helpful information to interrogators (Shane 2009). The ticking time bomb would have exploded 29 days earlier — clearly, a faster solution would be needed.

Moreover, the limited temporal window of the ticking time-bomb scenario would only seem to work in terrorists' favor. In a scenario in which a terrorist suspect's secret knowledge is only rel-

evant for 24 hours (or, in the case of improvised explosive devices, some matter of days), the intransigent detainee only needs to remain defiant for a short period to realize his mission.

4. FROM SUSPECTS TO INFORMANTS

Putting detainees through a psychological ordeal might, in theory, "soften up" terrorists so that they can more easily be "broken." But there is no evidence that "breaking" detainees produces helpful intelligence anyway. The best intelligence appears to come from suspects who have been "turned" into informants through skillful interrogations relying on a rapport between interrogators and detainees (B'Tselem 2000, 51). Rapport-based approaches seek to uncover and leverage detainee's internal motivations to glory, recognition, power, and survival, without emphasizing and exacerbating an adversarial relationship. Skilled interrogators empathize with their subject and appeal to his vanity, his self-interest, and his love of his family. They sometimes use deception to trick him into believing that talking will help him or use trusted religious clerics or family members to seek the subject's cooperation (among other approaches). Often, as discussed later, it is the (even illusory) trust developed through rapport approaches that serves as the foundation of plea settlements delivering troves of useful intelligence.

These more sophisticated interrogation techniques rolled up Zarqawi's terrorist network in Iraq. One man providing life-saving information was promised help with a divorce from a shameful marriage and a chance for reconciliation with his first wife (Alexander 2008, Chapters 10-11). Another was promised that his son would be treated to a fair trial instead of being tried by his enemies (Ibid., Chapter 21). One most difficult subject of the interrogations in Iraq was a man who had offered no information to an inexperienced interrogator using an adversarial approach. But when he was fooled into accepting a bogus deal that would have made him a powerful man in post-occupation Iraq, he revealed information leading directly to Zarqawi (Ibid., Chapters 25-30). This may have been an anomalous case, however, since expert interrogators often complain that coercive interrogation tactics "poison the well," destroying the prospect of turning suspects into informers (Alexander 2008). This is what happened in Zubaydah's case, according to FBI interrogator Ali Soufan, who said, "Abu Zubaydah was making progress before torture techniques [were used]" (Soufan, 2009).

Rapport-based approaches, while they require interrogators with keen social skills, have proven themselves highly effective, generating large amounts of valuable information about terrorist networks. Despite the common misperception that terrorists are too 'hardened' to respond to anything but violence, many still have connections to family and friends that they care about, ambitions they wish to fulfill, and egos that can lead them to speak more openly than they intend when they are in the hands of a skilled interrogator.

Detention and Prosecution of Terrorism Suspects

Two months after 9/11, President George W. Bush issued an executive order asserting his power to detain certain terrorism suspects as '*unlawful combatants'* who, as neither criminals nor prisoners of war, were not subject to the detention and prosecution standards defined for either. Instead, these "combatants" would be tried in the first U.S. Military Tribunals since World War II. They could be detained preventatively and indefinitely without rights to full due process. These were some of the most controversial CT measures of the post-9/11 period. First instituted by President Bush's Executive Order of 2002 and then ratified by Congress in the 2005 Military Commissions Act, military tribunals also permitted the use of hearsay evidence and testimony acquired under enhanced interrogation — evidence civilian courts suppress (though these evidentiary standards for military commissions were revised to align more closely with Article III courts in 2009).

Today, the Obama administration is deciding whether and how to prosecute the remaining 175 detainees at Guantanamo Bay military prison, a focal point for much of the detention controversy. Pressure from several Senators and some 9/11 victims' families motivated Attorney General Eric Holder to back down from his plans to try alleged 9/11 conspirators in Manhattan. Opposition was based partly on public safety concerns and cost and partly on the assumption that a military tribunal was more likely to deliver a conviction than a civilian criminal trial. And today the Administration is considering supporting legislation that would remove 'Miranda' protocols requiring law enforcement to inform terrorism suspects of their right to an attorney. The unexamined assumption behind such a proposal is that *not* having an attorney will better motivate suspects to confess and become an informant.

While there has been considerable debate over the legality of preventative detention (which, for this paper's purposes, we define broadly as the non-battlefield detention of a person despite a lack of evidence sufficient to charge and hold him/her with a terrorism-related crime) and trying terrorism suspects in military rather than civilian courts, there has been less discussion of these tactics' efficacy for preventing, reducing, or ending terrorism. Their efficacy for combating terrorism cannot be measured by simply counting increased detentions or convictions since lowered evidentiary standards could simply produce greater counts of detained innocents while the guilty go unpunished. Instead, lowered evidentiary thresholds for detention and prosecution must be evaluated in terms of their ability to accurately identify and prosecute the genuinely guilty.

Altered due process standards and trial venues must also be evaluated for their ability to deliver good intelligence to security agencies while also preventing important state security secrets

from becoming known by the state's enemies. And finally, we must evaluate whether lower evidentiary standards for detention and prosecution increase or decrease the legitimacy of the U.S. and its allies relative to the legitimacy of its enemies. Effective justice processes must increase the motivation of individuals here or abroad to assist in CT efforts, and decrease the motivation of individuals to tacitly or actively support terrorist activity.

1. DELIVERING JUSTICE

Our review of indictment and prosecutions statistics for military tribunals and Article III civilian courts (e.g., federal district courts, courts of appeals, and the Supreme Court) shows that the latter venues have hosted orders of magnitude more terrorism cases and thus have produced many more terrorism convictions. Between September 11, 2001 and September 11, 2008, the Department of Justice has resolved 593 "terrorism-related" cases in Article III courts, winning convictions in 523 cases (by trial or plea). Of those convictions, 190 were of individuals associated with militant groups like Al Qaeda.[23] Military courts, by contrast, convicted just three people involved in terrorism over the same period.[24] Though the very low sample size for cases by military tribunals challenges efforts to compare the venues, we can at least conclude that civilian judges and prosecutors handling terrorism cases are more experienced than their counterparts in relatively untested military tribunals.

Some, even without substantial data, argue that trying suspected terrorists in military rather than criminal courts increases the chances of conviction. This *might* have been the case during the period from 2001 to 2009 when Military Commissions admitted statements made under duress and the testimony of hearsay witnesses. Then, a suspect might be convicted because some other detainee seeking to end a coercive interrogation falsely accused him of Al Qaeda ties.[25] But easing such convictions does not necessarily secure better justice, just more convictions.

The exceptional justice processes applied to terror suspects during and after the invasion of Afghanistan resulted, in part, from the fact that they were captured in a unique environment akin to a warzone but hardly resembling the atmosphere imagined by the drafters of the Geneva conventions. There was some legal ambiguity about how the U.S. should proceed. While The Red Cross and other human rights organization interpreted the Geneva conventions regarding detainee treatment as applying to any and all combatants, members of the Bush administration rejected this notion. They interpreted the conventions to mean that they were under no obligation to treat prisoners detained in Afghanistan as 'prisoners of war,' citing the fact that they were not operating according to rules of war requiring them to fight openly as uniformed soldiers. Neither, decision makers in Washington thought, was the U.S. obliged to treat them as regular

American criminal suspects since they were non-citizen combatants fighting against the U.S. in a foreign land.

That murky legal environment was anomalous, though, and could never serve as *the* model for detaining and prosecuting terrorism suspects. Very rarely do governments meet terrorists on open fields of battle. Instead, they track down terror suspects, investigate and surveil them, and finally arrest them on criminal terrorism charges. The situation in Afghanistan was unique because a semi-sovereign government of guerrilla fighters, the Taliban, was providing safe haven for Al Qaeda's training camps. Even today, as the U.S. military fights the same combination of guerrilla warriors and terrorists, it uses better-formalized detention procedures in Afghanistan and prosecutes the vast majority of its cases through the Afghan judicial system. In 2001 and 2002, however, these procedures were not in place. Thus, in addition to capturing many Al Qaeda and Taliban fighters, Coalition forces also detained scores of farmers and bystanders. Other future Guantanamo detainees were turned over to the U.S. by the Pakistani government and bounty hunters, who were, in some cases, more motivated to dispatch with tribal rivals than deliver Al Qaeda leaders.

Prosecuting terrorist suspects captured in murky situations by Coalition soldiers or Pakistani bounty hunters, not experienced police investigators, is qualitatively different from prosecuting terrorism suspects such as the would-be New York subway bomber, the would-be Times Square bomber, or the would-be Christmas day bomber. The guilt of the latter terror suspects, like the guilt of terror suspects tracked down by experienced investigators – is usually easily demonstrable even by the evidentiary standards of traditional criminal courts. The guilt of the former can be declared or asserted, but rarely proven, since little evidence rules out the possibility that they were simply in the wrong place at the wrong time. Convictions based on such slim evidence cannot be counted as effective counterterrorism since they may only imprison innocents.

Much of some policymakers' and commentators' opposition to holding civilian trials for 9/11 conspirators has been driven by concern that criminal trials mete out more lenient sentences than military tribunals. But this assumption, too, appears to be incorrect (Gude 2010). The military officers who comprise military tribunals' juries understand the "fog of war" better than civilians and may be more discerning between hard-core terrorists and their hapless accomplices – and more sympathetic to the latter. Such a notion may cut against popular intuition, but recent sentences delivered by military tribunals warrant observation. Osama bin Laden's driver, Salim Ahmed Hamdan — in the first military commission since World War II — was sentenced by a jury of military officers to just five and a half years in prison, not the thirty years requested by prosecutors. (Having already served most of those

years, Hamdan was free by the end of 2008.) A similarly short sentence was delivered for David Hicks. Both men are walking free today. While the sample size of military convictions is not large enough to analyze quantitatively, the terrorism suspects convicted by military tribunal received sentences much shorter than those delivered by Article III Courts for comparable crimes.[26]

2. INTELLIGENCE

Concern about trying terror suspects in criminal courts has also focused on the risk of intelligence leaks (Yoo 2009), but there exists no evidence demonstrating that Article III courts are a greater threat to government secrets than military courts. In 1980, Congress passed and the president signed into law the Classified Information Procedures Act (CIPA) to guard against intelligence-leaking during trials. CIPA allows prosecutors to call a pre-trial conference with the court and the defense to hammer out what information should be considered secret, and how all parties can effectively talk around it during public proceedings.[27] If the defendants attempt to contravene the pre-trial classified information guidelines set out by the court, they can be promptly silenced and held in contempt of court.

Some have argued that indefinite detention and denial of the right to counsel (such as through exemptions to Miranda rights) will result in terrorist suspects providing more and better intelligence sooner than they would if suspects had the right to *habeas corpus* and to legal counsel. Suspects, this line of reasoning goes, will be more likely to confess, share information, and otherwise provide good intelligence to law enforcement if an attorney is not present to counsel them. And if suspects have no prospect of appealing their sentence (through a *habeas corpus* petition), the thinking goes, they will be more likely to confess than if their case can be appealed.

However, there is good reason to believe that terror suspects are more likely to cooperate with authorities if they have attorneys to help them negotiate a cooperation agreement. In exchange for helpful information, the state might agree to forego the death penalty, keep humiliating information about the detainee from the public, offer better prison conditions, or not deport an innocent family member. Without a defense attorney to negotiate such an exchange, terrorist suspects may remain in a strictly antagonistic posture with the state. Court records and news accounts show that a number of terror suspects have entered into such cooperative bargains on the advice of their attorneys. Bryant Neal Vinas, convicted of a plot to bomb Penn Station in New York City, agreed to provide information and act as key prosecution witness in two terrorism trials in Europe. David Headley, to avoid extradition to India, Pakistan, or Denmark, pled guilty to charges that he conspired to attack a Danish newspaper that ran cartoons satirizing the Prophet Mohammed. Other instances

of cooperation include Ahmed Ressam, the would-be "Millennium Bomber," who offered copious and invaluable intelligence to security agents in his attempt to reduce his sentence. Henry E. Klingeman, a former federal prosecutor who defended Hemant Lakhani advises terrorism clients in clear terms, "Your defense here is to get a plea bargain to avoid a life sentence. There is no way you try this case and win" (Ryan 2010, June 10).

3. THE DISCURSIVE STRUGGLE

Lawyers can be so helpful for gaining the cooperation of suspects precisely because their clients are usually more focused on their image as holy warriors than on how they can help the state *and* themselves through cooperation. Many times, the capture of a terrorist suspect only represents a shift from violent struggle with the state to symbolic struggle with the state. Several terror suspects, consistent with the deviance and labeling theory of sociologist Howard Becker (1963) embrace the status of 'warrior' that military commissions confer. They reject comparisons to petty criminals implied by trial in traditional criminal courts, seek to fire their attorneys, and yearn for symbolic or real martyrdom via military commission. KSM, most famously, has made it clear that he would prefer 'martyrdom' before a military tribunal over a civilian trial (Glaberson 2008).

KSM's declaration was part of a larger communications strategy seeking to show the state's CT efforts to be hypocritical and unjust, and *irhabis*' efforts to identify themselves with a steadily escalating decades-long war for a more just world. On the day of his sentencing, the would-be Times Square bomber Faisal Shahzad also recited familiar aspects of this *irhabi* narrative, declaring himself a "Muslim soldier" fighting to defend Muslim people and Muslim lands. When pressed by the judge as to his willingness to kill women and children, he replied flatly, "It's a war" (Weiser and Moynihan 2010, June 21).

Martial rhetoric was difficult for the U.S. to avoid immediately after the 9/11 attacks, which were experienced by the public, commentators, and policymakers as acts of war. But, martial legal classifications feed *irhabis'* narrative of a holy war against U.S. tyranny. That framing of the struggle has had the unintended consequence of reinforcing the image terrorists create for themselves and deploy in their recruitment campaigns.

DISCUSSION AND CONCLUSIONS

Before the 9/11 Commission issued its findings, policymakers widely assumed that law enforcement and security personnel needed more powers to prevent terrorist acts. By the end of 2001, they were granted those powers. But the assumption that law enforcement and security agencies had been previously constrained is not supported by evidence available to the public. According to the government's own investigations, the 9/11 attacks resulted from security agencies' inability to piece together evidence of terrorist plotting in Phoenix, Minneapolis, San Diego, and other cities. Law enforcement and Intelligence did not need legislation expanding surveillance powers so they could gather more information. Rather, they needed better methods for sharing and evaluating the intelligence they already had.

The emotionalism of the post 9/11 period has dissipated sufficiently for policymakers to take a cold hard look at the evidence for and against various CT tactics. These tactics should be disentangled from one another so they can be evaluated separately. At the same time, CT efficacy must always be evaluated in context to ensure not only that it is harmonious with broader CT strategy but also that it does not exacerbate the significant signal detection challenges faced by the intelligence community. The controversial CT tactics we have reviewed often undermine the state's attempts to win the struggle for legitimacy and the cooperation of bystanders, play into terrorists' recruitment narratives, and produce more informational noise drowning out terrorists' signals.

Given the weight of evidence against the effectiveness of controversial tactics, the people promoting their use should bear the burden of proving their efficacy. Unless and until that happens (and we have not seen good evidence that it can or will), officials interested in providing effective security for their people should forgo the tactics' use and invest their energies in developing other practices able to improve CT outcomes.

RECOMMENDATIONS

1. **THE FEDERAL GOVERNMENT SHOULD DEVELOP STANDARD METRICS FOR EVALUATING INDIVIDUAL COUNTERTERRORISM TACTICS AND ACT ON THE RECOMMENDATIONS OF THOSE EVALUATIONS.** For U.S. CT agencies to effectively design and adjust CT approaches effective against an evolving terrorist threat, they must engage in constant, rigorous evalution. The Government Performance and Results Act requires all agencies of the U.S. government to set standards and measurements for their successful performance. But there is no consistent ongoing evaluation of individual CT tactics for their efficacy. Many evaluations – like the DOJ Inspector General's review of the FBI's use of more accessible search and surveillance tools -- focus more on the legality of tactics than their efficacy. In other cases, negative reviews are ignored. The NSA continues funding its data-mining projects despite the National Academies' of Science considered conclusion that they cannot work. And TSA continues SPOT despite GAO reports on its dubious efficacy.

2. **INDEPENDENT INSTITUTIONS SHOULD REGULARLY CONVENE CT EXPERTS TO CREATE RIGOROUS, PEER-DRIVEN PROCESSES TO EVALUATE CT TACTICS AND STRATEGY AND CREATE EVALUATION METRICS.** The most salient feature of contemporary evaluations of CT tactics is how few there are, despite the central role they must play in preventing terrorism. Security agencies and/or charitable foundations should regularly convene independent academics, think tanks, and government security analysts to discuss and debate critical CT questions. This effort should also result in greater peer review and perhaps even a refereed journal where these discussions and debates can take place.

3. **POLICYMAKERS AND SECURITY AGENCIES SHOULD UNDERSTAND THE CENTRAL ROLE THAT COOPERATIVE COMMUNITY RELATIONS PLAY IN UNDERMINING TERRORISTS' RECRUITMENT EFFORTS, DISRUPTING THEIR NETWORKS, AND FOILING THEIR PLANS, AND SEEK POLICIES THAT INCREASE THE LEGITIMACY OF U.S. COUNTERTERRORISM AND MOTIVATE INDIVIDUALS TO COME FORWARD WITH HELPFUL INFORMATION.** Since 9/11, Muslim and Arab Americans have overwhelmingly cooperated with federal security agencies seeking to investigate and disrupt plots. But if the state continues to regard these communities with suspicion, it risks escalating the unhelpful stereotyping of patriotic American citizens and alienating or chilling the support of perhaps our greatest intelligence asset when it comes to domestic CT security. Many U.S. government security agencies and officials now seem to appreciate the security threat posed by the deteriorating relations with affected communities, but our review highlights the need for more, and more productive, outreach efforts.

4. **LAW ENFORCEMENT AND INTELLIGENCE AGENCIES NEED TO RESPOND TO THE POOR SECURITY OUTCOMES OF CURRENT SURVEILLANCE STANDARDS BY ESTABLISHING MORE RIGOROUS PROTOCOLS FOR CARRYING FORWARD INVESTIGATIONS.** Chasing false leads distracts intelligence agencies from the process of "connecting the dots" so often cited as a challenge for them. Since expanded surveillance tools allow law enforcement and intelligence agencies to investigate people without an adequate evidentiary predicate, they need to discipline themselves by setting better surveillance standards within their organizations. In a similar vein, programs that inundate intelligence analysts with information but have shown little success, such as the NSA's data-mining efforts, should be terminated so that they no longer distract resources and attention from proven CT methods.

5. **MORE UNIVERSAL SCREENING METHODS SHOULD BE IMPLEMENTED IN AIRPORTS, GIVEN THEIR EFFECTIVENESS SINCE 9/11 IN PREVENTING ATTACKS.** Given that terrorist groups have avoided heightened airport screening by recruiting new members who do not fit CAPPS (or 'Secure Flight') profiles, DHS and the TSA need to universally apply the highest available levels of screening to all passengers. Universal screening for liquids and metal have already made it more difficult for terrorists to either bring, or effectively detonate, bombs on planes, as the botched bombing attempts of the shoe bomber and the Christmas Day bomber demonstrate. Minimally-invasive full body scanners can pose an even more effective barrier. TSA should install these scanners as quickly as possible and also consider greater implementation of randomized and unseen screening methods – which cannot be reverse-engineered by terrorists – if they continue to distinguish passengers for secondary screening.

6. **IMPROVE INTERROGATION PROTOCOLS THROUGH RESEARCH AND TRAINING PROGRAMS.** Interrogation is a critical opportunity for intelligence-gathering, but it remains more of an art than a science despite great improvements in understanding human motivation over the last thirty years. The present administration has taken an important step forward by creating a High-Value Interrogation Group, a team of highly-trained interrogators, to be used with high-value detainees. However, we recommend further steps like those proposed by Air Force reserve Colonel and former interrogator in Iraq, Stephen Kleinmann. He has called for "a new intelligence agency or sub-agency devoted solely to interrogation — *sponsoring research*, conducting training and building a team of sophisticated interrogators with linguistic and psychological skills" (Shane 2008, March 9) (emphasis added).

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ENDNOTES

1 Means employed to block terrorist financing have been applied in overbroad fashion at times, placing significant burden on Islamic charities. But experts widely support the goal of denying terrorists money they can use to execute operations.

2 As FBI Special Agent George Venezuelas said in a press conference after Faisal Shazhad's failed Times Square bombing attempt: "It's the tips from the public that really disrupt these terrorist plots."

3 There is an ongoing debate about which term is most appropriate for referring to the loose network of political Islamists employing terrorism against western targets. Using 'global jihadists' offers terrorists their preferred label of 'holy warriors.' 'Al Qaeda' is inappropriate in so far as terrorists are not the coherent global organization that name implies. Calling disparate terrorists 'Al Qaeda' serves to concretize their narrative power. The term 'militant Islamists,' has its own drawbacks. First, lay audiences often inaccurately link the term directly to Islam as it is peacefully practiced by hundreds of millions of people around the world, failing to understand that the term refers to exceedingly rare men and women who violently pursue a fundamentalist marriage of Islam and the state called 'political Islam.' Second, it is not clear that every 'Islamist' group (violent or not) is really as fundamentalist as they appear. Many may be using Islamic tropes as a way to voice other (sometimes democratic or populist) agendas that are formally banned by their relatively authoritarian regimes. We choose the term 'irhabis,' Arabic for 'terrorists,' to refer to terrorists who kill in the name of (some narrow and distorted interpretation of) Qu'ran (a text written in Arabic). Researchers might also refer to their struggle not as 'jihad,' but as 'Hirabah,' Arabic for 'unholy war.' For other, appropriate terms, refer to: http://smallwarsjournal.com/blog/2007/03/words-have-meaning/

4 Brian Michael Jenkins of RAND writes: "The volume of domestic terrorist activity was much greater in the 1970s than it is today. That decade saw 60 to 70 terrorist incidents, most of them bombings, on U.S. soil every year—a level of terrorist activity 15 to 20 times that seen in most of the years since 9/11, even counting foiled plots as incidents. And in the nine-year period from 1970 to 1978, 72 people died in terrorist incidents, more than five times the number killed by jihadist terrorists in the United States in the almost nine years since 9/11" (Jenkins 2010, viii)

5 While at least some of that financial activity has shifted to the traditional, informal, and difficult-to-trace *'hawala'* money transfer system, the original crackdown did result in at least two prosecutions of Al Qaeda financiers, the chilling of support for Islamic charities that might funnel money to radical Islamists, and later, the prosecution of scores of many (non-terrorist) hawala bankers in the U.S.

6 The effectiveness of these international efforts is somewhat disputed, but experts on threat assessment point out that building nuclear, chemical, and biological weapons is extremely difficult (Mueller and Center 2008; Leitenberg 2005).

7 As part of the USA PATRIOT Act of October, 2001.

8 One of the key problems with information sharing, yet to be fully overcome, stems from the perverse incentives of the intelligence community, which reward individuals for marshalling important information at the right time. If the information is broadly shared before it is clearly valuable, individuals may miss out on opportunities for praise and promotion. See Lee and Rao (2007) for a thorough discussion of the causes and effects of inter-agency information sharing.

9 Many have blamed a 'wall' between foreign intelligence investigations and domestic criminal investigations for the FBI's pre-9/11 failure to attain search and surveillance warrants for Zacarias Moussaoui. They argue that the Office of Intelligence Policy Review (OIPR) under Janet Reno's DOJ laid the foundation for that 'wall' in a series of bureaucratic memos that held little official weight but confused FBI officials seeking to remain on the proper side of FISA's "primary purpose" clause. However, others have persuasively argued that the "wall" debate was motivated by FBI officials' desires to excuse what was actually a failure to recognize the threat posed by Moussaoui. FISA warrants have been famously easy to obtain, even with the oversight of OIPR. Thousands have been approved since 1978 while only a handful have been denied. And the evidence FBI field agents had acquired on Moussaoui at the time would have been sufficient for a Title III or FISA warrant. It appears, instead, that FBI headquarters, in rejecting the Minneapolis field office's request to file a warrant application, simply failed to recognize the threat Moussaoui posed.

10 In "Ordinary Measures Extraordinary Results," Difo shows that controversial CT tactics have been used in only a small number of cases. Our closer analysis of those particular cases shows that the techniques were not in fact decisive for their outcomes.

11 It is possible that secret FISA or NSA surveillances were used in these or other investigations that resulted in foiled plots. However, there is little reason to believe that the post-9/11 changes to FISA would have made a difference in the course or outcome of these investigations. After 9/11, FISA language was altered to require that a "significant purpose" of a FISA surveillance was the gathering of foreign intelligence instead of the "primary purpose." Despite the change in language, though, federal courts have rejected opportunities to distinguish between the two standards (see U.S.A. v. Stewart, re Sealed Case, and U.S.A. v. Abu Jihaad for examples of post-FISA-amendment case law). Furthermore, FISA courts (FISCs) have continued to approve nearly all FISA applications with little or no objection. Thus, for all practical purposes FISA operates the same now as it did pre-PATRIOT. There is no public evidence describing the use of warrantless NSA surveillances in any of the investigations that resulted in foiled plots. We address NSA's programs below, but also note here that many of their surveillances appear to entirely duplicate FISA's function while avoiding the oversight of any external body (e.g. FISC). There is ample reason to believe that such low or non-exitstent evidentiary standards for pursuing such surveillances result in the pursuit of weak leads and the collection of informational noise that may distract investigators from terrorist signals.

12 Both the 9th and 2nd District Courts ruled in U.S. *v. Freitas (1988) and U.S. v. Villegas* (1990), respectively, that 'delayed notification' searches were permissible in cases where probable cause was evident and notification of the search would have disallowed investigators from gathering the evidence they needed to build their cases. So-called "sneak and peek" privileges were appended to standard probable cause warrants and constitutionally validated in several subsequent drugs cases. The PATRIOT ACT merely formalized these rules.

13 The state has long encouraged police to be discerning about who they would investigate and how aggressively they would pursue evidence. It was common law practice, in the Anglo-American tradition, that a constable would punish a person for 'trespass' if his allegations compelled the constable to enter the home of some innocent third party. This practice prevented the wasting of the constable's time with pointless investigations and protected his own reputation as someone who did not frivolously and unfairly breach the sanctity of the home (Kaplan 1961). As states bureaucratized and modernized their police forces, they placed similar restrictions on their own investigators to ensure that they did not waste their time pursuing unsubstantiated allegations. Thus the professionalizing police forces of the 18th and 19th centuries were usually required to seek permission from a 'magistrate judge' before surveilling a person, searching his private belongings, or seizing any of his property. The U.S. Constitution reflected these emerging norms and citizens' expectations about their privacy in the Fourth Amendment.

14 NSLs had been used before the PATRIOT Act but only against targets or subjects of an 'authorized investigation' into violent criminality or terrorism. The PATRIOT Act and a redefinition of the parameters of NSL-usage by then Attorney General, John Ashcroft, has expanded their use for even 'preliminary inquiries' into American citizens who have not been implicated in criminal or terrorist activity by probable cause evidence.

15 http://www.ice.gov/pi/specialregistration/index.htm

16 Like any security measure, full-body scanners are imperfect and may not detect weapons hidden in body cavities. They do, however, increase the burden of opera-

tionalizing terrorist weapons while denying terrorists an easy second-tier security screening.

17 In seeking to offer and present a dispassionate evaluation of security measures' efficacy, we choose to avoid the use of the term 'torture,' which bears more legal and moral connotation than we wish to consider here.

18 The Department of Defense undertook its own parallel coercive interrogation regime that resulted in at least a dozen deaths and the infamous abuses of Abu Ghraib detainees. The DOD regime is widely regarded as a failure. So, for the sake of clarity and charitable inquiry, here we only evaluate the coercive interrogation regime authorized by the Bush Administration and used by the CIA - an interrogation regime still advocated by some.

19 These ten are addressed in Bybee's memos to both the CIA General Counsel and the White House Counsel. For more details on each method, see pages 2-4 of either memo (available at http://www.aclu.org/accountability/olc.html).

20 On FOX News broadcast of "The Sean Hannity Show". April 2009

21 Jose Padilla may have suffered these effects after his extended period of isolation and sensory disorientation.

22 Muhammad Khatani, under the duress of sleep-deprivation and sensory disorientation, for instance, reported that thirty of his fellow Guantanamo detainees had been bodyguards for Osama bin Laden, charges that he later recanted and most experts agree were false.

23 http://www.politifact.com/truth-o-meter/statements/2010/feb/12/barack-obama/obama-claims-bush-administration-got-190-terrorism/

24 The sheer quantity of prosecutions and convictions is not a clear indicator of success or failure. There was an overuse of "terrorism-related" charges after 9/11 that may have distracted investigators and prosecutors from the most important cases. Of the 190 terrorism federal court prosecutions related to irhabi movements, fewer than a dozen stemmed from serious terrorism incidents. But those who believe that "experience is the best teacher" might prefer the more experienced Article III courts for terrorism cases.

25 For instance, while severely sleep deprived and disoriented, Muhammed Khatani accused thirty separate Guantanamo inmates of being Osama bin Laden's bodyguard.

26 Bin Laden's driver, Salim Hamdan, was sentenced to 5 years and 6 months in military commission for offering material support to a terrorist organization, while Ali Asad Chandia was convicted for the same crime and sentenced to 15 years by a civilian court. David Hicks, tried by military tribunal for crimes very similar to those of John Walker Lindh, was sentenced to 7 years in prison. Lindh, prosecuted in a civilian court was sentenced to 20 years. (See *Center for American Progress* Report: "Criminal Courts are Tougher on Terrorists than Military Detention")

27 For more on CIPA, see http://fas.org/sgp/crs/secrecy/89-172.pdf

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