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**“Breach of Law, Breach of Security: A Muslim
American Analysis of US Counterterrorism Policies”**

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Abstract:

Since 9/11 debates on terrorism and counterterrorism have been poorly informed. Fear and ideology rather than reason and facts have guided our policymakers' decisions, creating a dichotomy between liberty and security. As a result, the US government has pursued policies that tend to be illegal, unethical and/or invasive.

In this paper I argue that the dichotomy between civil liberties versus national security is unsubstantiated, but that the relationship between the two concepts is highly interdependent. I argue this point in my paper by beginning with a brief history of terrorism and counterterrorism in the US prior to the September 11th attacks. Following that, I will use four case studies to examine current US counterterrorism policies: torture in interrogations, racial profiling, the NSA domestic surveillance controversy, and the use of FBI National Security Letters. Such policies not only erode civil liberties/human rights, but they also harm national security by obtaining dubious information via unethical means, diverting resources from real threats and eroding the important relations between law enforcement officers and ordinary citizens (particularly American Muslim communities). The paper concludes by offering a set of policy alternatives.

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Section I. – A Definition of Terrorism and its Challenges

Before beginning this paper, it is necessary to provide a definition of the word “terrorism.” However this is no easy task. According to researchers Albert J. Jongman and Alex P. Schmid, there are at least 109 different definitions of terrorism.¹ (The United States has at least three different definitions, between the Federal Bureau of Investigations [FBI], Department of State and Department of Defense.)² Some analytical hurdles to overcome before arriving at a definition include:

- *“Terrorism” vs. “Liberation”*. One man’s freedom fighter is another man’s terrorist. How is one to distinguish between the legitimacy of two different sides’ agendas? Is it through the ideology or through the means? Both?³
- *Terrorism as a crime vs. war*. Is it a criminal act or it is a type of warfare that needs to be conducted according to the law governing war?⁴
- *Targets*. Who is considered to be a civilian? Are humans the only targets of terrorism?⁵
- *State vs. non-state*. State security apparatuses engage in terrorism, like Iranian Revolutionary Guard Corps, as the Bush administration has argued, or the Israeli Defense Forces, as many Palestinians would charge? Or is it simply limited to non-state actors?⁶

Ultimately trying to build a universal consensus for an objective definition of terrorism is impossible. The fundamental problem with defining the term is that it is extremely subjective, shaped by ideology, politics and power. This is why definitions of the term continue to change.⁷ Nevertheless, in order to provide analytical clarity of U.S. counterterrorism, for this paper I define terrorism as:

A criminal act by non-state actors that seeks to employ violence against unarmed human civilians, as defined by the Geneva Conventions,⁸ for political purposes

Section II. – A Short History of Terrorism in the United States and Its Responses

Although the subject of terrorism has always been and continues to be a hotly debated and widely interpreted topic, one thing that its historians and contemporary analysts agree upon is that it is not a new form of violence. One historian speculates that it may predate regular warfare because, “...the fighting of armies involves a certain amount of organization and sophisticated logistics that primitive man did not have.”⁹ Recorded historical evidence supports terrorism’s origins at about 2,000 years with emergence of violent Jewish fanatical groups such as the Sicarii,¹⁰ however the term “terrorism” itself was not coined until 1793-4 during the French Revolution by Maximilien Robespierre. Interestingly, Robespierre’s usage of the term was a positive one, and furthermore, he applied the term as a tactical instrument of the state, as opposed to a non-state actor.¹¹

The first recorded instance of what might be argued as terrorism in America took place in 1622 when the Powhatan Native Americans attacked the Jamestown colony in 1622, killing 30% of its inhabitants.¹² Although there were sporadic uprisings and rebellions in early United States history, the first terrorist organization after the creation of the American republic was the white supremacist organization, the Ku Klux Klan (KKK). Formed in 1867, it was originally a non-violent social organization led by former Confederate general Nathan Bedford Forrest. However it soon turned to violence in 1868, murdering, beating up and intimidating black voters and white supporters of the Republican Party. Their attacks and intimidation were particularly effective in shaping voting patterns, "...help[ing] account for Georgia's [among other states'] quick 'redemption' and return to conservative white Democratic control by late 1871."¹³ After a massive Federal crackdown involving suspension of Habeas Corpus, legal convictions of "dubious constitutionality" and tough anti-Klan laws during 1871-72, the KKK disbanded itself. Although the KKK as an organization effectively ceased to exist, the Federal government's overreaction ended up being counterproductive by helping the organization achieve its political objectives:

These laws probably dampened the enthusiasm for the Klan, but they can hardly be credited with destroying it. The fact was, by the mid-1870's white Southerners had retaken control of most Southern states governments and didn't need the Klan as much as before. Klan terror had proven very effective at keeping black voters away from the polls. Some black officeholders were hanged and many more were brutally beaten. White Southern Democrats won elections easily, and passed laws taking away many rights that blacks had won during Reconstruction.

The result was a system of segregation which was the law of the land for more than 80 years. This system was called "separate but equal,"...

After the end of early KKK violence in 1872, a new threat from anarchist movements emerged: "first wave" of modern international terrorism struck America with Haymarket square bombing in 1886.¹⁵ Anarchist terrorism continued within the United States until 1927 until the execution of two Italian men, Nicola Sacco and Bartolomeo Vanzetti, who were arrested on charges of robbery involving murder.¹⁶ In the years between these two events, a series of bombings and murders took place that included the assassination of President McKinley in 1901, a string of mail bombings directed at government officials—that included a failed attempt at the Attorney General – in 1919, and the bombing of Wall Street in 1920 which killed at least 30 people. In response to the mail bombings, then-Attorney General Mitchell Palmer ordered a infamous series of dragnets against immigrant communities, called the "Palmer Raids", detaining thousands of individuals, holding many indefinitely or deporting them and sentencing a few to imprisonment or death based on very flimsy evidence, as was the case with the Haymarket bombing conviction and the arrests of the two Italian men.¹⁷ Eventually anarchist terrorism faded away from America, but it had little to do with the draconian and overreaching measures employed by Palmer. The Wall Street bombing and several other smaller attacks continued to occur after the notorious raids. As one terrorism analyst observes, "Clearly Palmer's raids had not swept up all the agitators, despite the free hand law enforcement was given to trample civil liberties in the name of increased security. The dragnet didn't work, and the terrorists remained free to strike."¹⁸ Over time, anarchist terrorism withered because

a new generation became more concerned with anti-colonial and nationalist struggles and other radical ideologies like communism and fascism.¹⁹

The 1920s until the 1960s saw relatively few terrorist attacks on the United States soil –the time period classified as the “anti-colonial wave” by terrorism historian David Rapoport–most likely due to its lack of overseas territorial possessions. The notable exception to this is Puerto Rico, which perhaps not surprisingly is the origin of the terrorists who committed the 1954 shooting of Congress.²⁰ America would experience a significant quantitative increase of terrorism on its main land shores beginning in the early 1960s and continues today. The 1960s until the fall of the Soviet Union in 1991, was when primarily leftist, anti-communist and ethno-nationalist (of various political tendencies) organizations were operating. These groups included Symbionese Liberation Army,²¹ Weather Underground Organization,²² Black Liberation Army,²³ Armed Forces of National Liberation and other Puerto Rican militants,²⁴ various Anti-Castro militants,²⁵ Armenian militants,²⁶ Jewish Defense League,²⁷ various white supremacists²⁸ and Al-Fuqra.²⁹ From the mid 1960s to early 1970s the FBI instituted its counterintelligence program (COINTELPRO) against various left-wing organizations as well as “white hate” organizations like the KKK. COINTELPRO had greater success in dismantling the KKK than with leftist and Black Nationalist militants because the former effort was run largely as a criminal investigation, targeting criminal acts, whereas the latter was subject to a series of counter propaganda efforts and dangerous techniques inciting violence among members and between other organizations.³⁰ Due to the illegal nature of many of the tactics used on leftist organizations and Black Nationalist organizations, many militants received little to no jail time. Their downfall had more to do with the collapse of the Soviet Union and the gains made by the civil rights movement than the FBI’s efforts. Public outcry from the Church committee investigating COINTELPRO led to enactment of the 1978 Foreign Intelligence Surveillance Act and barred counterintelligence techniques from being used in domestic terrorism investigations.

Beginning the early 1990s until today the majority of terrorist attacks on the US mainland came from white nationalists and others on the far Right.³¹ Most of these attacks were successfully prevented, although some, such as the 1993 World Trade Center attack and the 1995 Oklahoma City bombing, were not. After the 9/11 attacks occurred–which was due to intelligence and management failures, not criminal investigation techniques–³²several pieces of legislation weakening privacy laws and law enforcement and intelligence oversight were passed. It appears that history is repeating itself as civil liberties are being eroded under guise of security; laws are being flouted even under weaker standards, while few international terrorists are caught and prosecuted.³³

In this paper I will examine four cases studies: torture in interrogations, racial profiling, the NSA domestic surveillance controversy, and the use of FBI National Security Letters. I argue that such policies not only erode civil liberties/human rights, but also harm national security by obtaining dubious information via unethical means, diverting resources from real threats and eroding the important relations between law enforcement officers and ordinary citizens

(particularly American Muslim communities.) I will conclude by offering a set of policy alternatives.

Section III. – Torture, Interrogation and the “Ticking-Time Bomb Scenario”

In late May 2007, the New York Times ran an article covering criticism from experts commissioned by the Intelligence Science Board (ISB) of current interrogation techniques used by various law enforcement and intelligence agencies. Although the article notes that, “The science board critique comes as ethical concerns about harsh interrogations are being voiced by current and former government officials...,”³⁴ most likely the ISB’s concern has little to do with ethics per se.

Their concern, expected of professionals in their field, probably revolves around a single utilitarian question: *Does it help US national security?* Their answer was a clear “no.” Not only does torture harm US security interests by allowing terrorists like Bin Laden to use it as a rallying cry,³⁵ it is useless as an interrogation tool. The latter perspective was one of the central conclusions the ISB came to in a 372-page report, publicly released in January 2007, called, *Educating Information*.³⁶

The only slightly plausible justification for using torture is the “ticking time bomb scenario”—which posits that a government can justifiably use torture on a suspect they are certain possesses critical knowledge to stop a bomb that will imminently detonate and kill many people. This particular perspective is supported by academics like Bruce Hoffman and Alan Dershowitz.³⁷ However the likelihood of such a scenario depends on unrealistic conditions, such as:

- Law enforcement agents arrest the terrorist exactly during the time between bomb’s setup and its detonation
- Agents have the amount of intelligence to know this person has all of the information needed to locate the bomb and that this particular time is especially crucial
- The suspect him/herself has the remaining sufficient amount and quality of information to locate the bomb in time
- Torture will provide the necessary amount and quality of information to locate the bomb
- Torture will provide the necessary amount and quality of information quickly enough to locate the bomb and defuse it.³⁸

To debunk these assumptions, it is important to start off by recognizing that intelligence and law enforcement investigations very rarely rely on one human source to provide a full picture of what is investigated. It takes piecing together several different clues and pieces of evidence from many sources to get a broader understanding. Second, putting ethics and legal issues aside for the moment, both medical researchers and professional interrogators have repeatedly stressed the ineffectiveness of torture—in both its physical and psychological forms—as an interrogation technique.³⁹ Torture either validates and deepens the convictions of

terrorists, making them even more resistant, or causes weaker individuals to say anything to stop their pain. In both cases, torture is also a very time consuming process and most likely under a face-paced situation, the bomb will have exploded. Both ways, torture interrogators will probably not get information in time and even if they do, most likely it will be unreliable.⁴⁰ The information gleaned from highly coercive measures is outdated or false. A good example, of the practical troubles of torture-based information is notorious coerced confession by Ibn al-Shaykh Libi's of alleged ties between Al-Qaeda and the then-regime of Saddam Hussein.⁴¹ For his part, Bruce Hoffman could only produce a one anecdotal (and vague) example to support torture.⁴²

Beyond the practical concerns one must not forget that torture is not only ineffective and counterproductive, it is also illegal and unethical. Torture imposes a series of short and long-term physical and psychological damages on its victim⁴³ and mentally damages the torturers (the detailing of which are outside the scope of this paper).⁴⁴ While certain government officials may believe torture is legally defensible,⁴⁵ citing US and international law, domestic and international civil liberties/human rights groups and others have stated otherwise.⁴⁶ Even if the Bush administration were to invoke national sovereignty to flout international legal frameworks, like the Geneva Conventions—which prohibits “mutilation, cruel treatment and torture” of detainees—the US Uniform Military Code of Justice and the War Crimes Act of 1996 make it a crime to violate the Geneva Conventions. A 1994 Federal anti-torture statute strengthens these positions by making it a crime for any US national who, “commits or attempts to commit” torture.⁴⁷

Section IV. – Racial and Religious Profiling

Prior to 9/11 a national consensus outlawing the use of racial profiling was emerging. After the attacks occurred, this consensus quickly dissipated and attitudes among government and in large sectors of the public went in the opposite direction. Since then, public calls for racial profiling of Muslims – and others who “look Muslim” – have become common fare in public discourse. The logic of racial profiling supporters – both pundits and some public officials –⁴⁸ rests on the faulty premise that it is “a matter of survival” against terrorists. To the contrary, I argue that racial profiling is not only unethical, it also compromises America's legal foundations and its national security.

Before presenting my arguments over “racial profiling,” it is important to define the term. Since my focus on racial profiling deals with Muslims, it is important to that Islam is not a religion that is not confined to one particular skin color or ethnicity. Therefore in this paper, I have slightly modified Congressional Research Service's⁴⁹ definition of racial profiling. (I nonetheless retain the use of the term “racial profiling”, rather than modify it itself for the sake of terminological simplicity.) I define it as: *the practice of targeting individuals for police or security interdiction, detention or other disparate treatment based primarily on their race, religion or ethnicity in the belief that certain racial, religious and/or ethnic groups are more likely to engage in unlawful behavior.*

Racial profiling is discriminatory and unethical because, *prima facie*, one's ethnicity, race, or religion invites suspicion and action on an individual from law enforcement without any corroborating suspicious behavior or specific information demonstrating actual criminal activity.⁵⁰ As a result, some civil rights and police organizations have argued, that it can breed further mistrust and suspicion among people, violates peoples' constitutional rights and lead to a slippery slope of greater abuses such as the internment of Japanese-Americans during World War II.⁵¹ Yet in spite of its unethical nature, there are very few domestic laws that specifically prohibit racial profiling. In June 2003, the Department of Justice (DoJ) released a document entitled, 'Guidance Regarding the Use of Race by Federal Law Enforcement Agencies'⁵² which gives outlines to Federal officials on the use of race in law enforcement and national security matters. According to the Guidance document, race is only to be used as a factor when there is intelligence indicating that terrorists or criminals of a particular ethnicity will imminently attack a target and/or suspects must exhibit "suspicious behavior." Profiling someone simply because of stereotype and not based on intelligence and/or suspicious behavior is to be considered prohibited.

Unfortunately, there are several problems with the document: 1) Its guidance is just advice and thus is not legally enforceable among any federal law enforcement agencies, in spite of recognizing that the 14th Amendment and subsequent legal precedent bans subjective law enforcement based on race; 2) it does not discuss profiling based on religion or religious appearance, in spite of the Equal Protection Clause within 14th Amendment and later legal precedent; 3) it does not give provisions for oversight or redress against discriminatory practices inconsistent with the document's advice; 4) it allows for an exception under "national security" and fails to define what is an issue of "national security"; 5) it does not define "suspicious behavior" or even refer to any other documents that would define it – in spite of specific guidelines used by the FBI and local law enforcement agencies;⁵³ and 6) it does not pertain to state and local levels where most racial profiling takes place, where there is very little legal protection.⁵⁴

There are also practical reasons why racial profiling should be banned for policing/counterterrorism purposes, particularly when this relates to Muslims. The American Muslim community is extremely racially and ethnically diverse, reflecting the cultural pluralism of the larger global community.⁵⁵ This includes groups such as South Asians, Southeast Asians (Indonesians and Malays), Arabs, Sub-Saharan Africans, Caucasians and large groups of Caucasian, African-American and Latino converts. (In fact the second largest group of American Muslims is African-American converts, making up approximately 30% of the community.) How can one tell who is a Muslim and who is not? The only possible way to discern someone who is Muslim is by their possible "religious" clothing.

However not all Muslims may dress "religiously", whatever that may mean. Integral to a terrorist's ability to strike and survive is secrecy and the element of surprise. If Al-Qaeda operatives dressed "religiously" they would fit into stereotypes that make them very conspicuous. Unsurprisingly, the 9/11 attackers dressed like Westerners and some had shaved beards. That is why they have consistently sought after elite operatives who would best blend into their target

societies. Their recruits start off as secular, Western educated people (with little religious education) who easily become indoctrinated by an ideologically-tainted version of Islam.⁵⁶ Furthermore, they are not just from “traditional” Muslim groups like Arabs and South Asians, but include others like Caucasian converts.⁵⁷ Even operatives from a “traditional” group may try to manipulate their ethnic features in order to look like a “non-Islamic ethnicity” – like Latinos – in order to avoid suspicion, such as one foiled terror plot in New York City.⁵⁸ The use of majority Black East Africans on 7/21, as opposed to majority-South Asians on 7/7, is another example of race-switching tactics to avoid being ensnared by the clumsy trap of racial profiling.

In addition, racial profiling of Muslims can undermine critical sources of intelligence needed to prevent an attack. The best people who understand and truly know the difference between peaceful law-abiding citizens and the tiny minority of bloodthirsty fanatics are Muslims themselves, whether as members of intelligence and law enforcement communities⁵⁹ or vigilant citizens.⁶⁰ By profiling against individuals or groups from a specific racial, religious and/or ethnic background, (such as the 5,000 Muslims interrogated after 9/11)⁶¹ it not only has a huge negative impact on civil liberties, it fails to smash terrorist networks⁶² and alienates the communities law agencies need most to obtain the necessary intelligence to prevent an attack.⁶³ At best such tactics make people hesitant to constructively cooperate with law agencies and at worst become disillusioned with American society and become more receptive to extremist messages. A good relationship between law enforcement and Muslim communities is not just a great photo-op for politically correct purposes; it has extremely important strategic implications that enhance national security.

Also, racial profiling is ineffective because terrorists may not directly attack a target with their own operatives. Terrorists and common criminals have been known to use women and children to unknowingly transport a weapon to its intended destination. Two newsworthy examples are Anne-Marie Murphy⁶⁴ or the two-year old child whose teddy bear was stuffed with a gun.⁶⁵

Moreover, Muslim terrorist networks are not the only threat facing America. While not receiving as much attention as international Muslim terrorists have, domestic terrorism primarily from Neo-Nazis/White Supremacists and Christian extremists is still a major threat to American security. According to statistics from the Southern Poverty Law Center, at least 60 terrorism plots by domestic extremists have been foiled between July 1995 and May 2005. Of these 60 plots, 19 have been thwarted since September 11, and of these 19, 2 have involved possession of, or conspiracy to possess chemical weapons.⁶⁶ (The most recent case was the arrest of an alleged “lone-wolf” Neo-Nazi terrorist on July 30, 2007, not by law enforcement authorities, but a bounty hunter.)⁶⁷

Section V. – 2007 Protect America Act and NSA Domestic Spying

Leaks about the National Security Agency’s (NSA) domestic wiretapping program – also known as signals intelligence operations, or “SIGINT”⁶⁸ – first

appeared on December 16, 2005 in the *New York Times*.⁶⁹ The article revealed that since 2002 President Bush authorized the monitoring of "...international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants..." Almost six months later, the *USA Today* further revealed the same program was not limited to foreign communications, but "to create a database of every call ever made' within the nation's borders..." and so far has had "access to records of billions of domestic calls..."⁷⁰

The NSA's domestic wiretapping activities without judicial or congressional oversight are another clear example of problems with the Bush administration's counter-terrorism strategy, both legally and security-wise. Several legal analysts and privacy advocacy organizations contend the administration has severely restricted individuals' right to privacy by violating the Foreign Intelligence Surveillance Act (FISA) of 1978 (regulating wiretapping of a foreign power through a special court), Title III (governing domestic criminal wiretapping), a series of communications privacy laws and possibly the Fourth Amendment of the Constitution.⁷¹

Recently, news organizations reported that President Bush signed a bill quickly passed through the House and Senate, called the 2007 Protect America Act (PAA 2007), which allows warrantless domestic electronic spying by the National Security Agency to take place for up to 6 months.

In itself, this appears to sacrifice Fourth Amendment protections to security concerns, but when one takes a closer look at the law, there are several other important provisions to consider. According to one report:

- "...the law requires telecommunications companies to make their facilities available for government wiretaps, and it grants them immunity from lawsuits for complying. Under the old program, such companies participated only voluntarily..."
- "Second, Bush has said his original surveillance program was restricted to calls and e-mails involving a suspected terrorist, but the new law has no such limit... Instead, it allows executive-branch agencies to conduct oversight-free surveillance of all international calls and e-mails, including those with Americans on the line, with the sole requirement that the intelligence-gathering is 'directed at a person reasonably believed to be located outside the United States.' There is no requirement that either caller be a suspected terrorist, spy, or criminal.
- "The law requires the government to delete any American's private information that it picks up, but it contains an exception allowing agents to maintain files of information about an American that has foreign intelligence value or that may be evidence of a crime.

- *“As a check against abuse, the law requires Attorney General Alberto Gonzales and Michael McConnell, director of national intelligence, to design procedures for the program and to submit them for review by a secret national security court that normally approves warrant applications for intelligence-related wiretapping on US soil.”⁷²*

Furthermore, another media report notes:

- *“The conversation does not have to be about terrorism, just a matter of foreign intelligence interest.*
- *“The attorney general and the director of national intelligence have four months to submit to the secret national security court guidelines for determining what surveillance can take place without a warrant. The court then has six months to approve those procedures and cannot reject them unless it finds that the government has made a clear error in drawing them up, a legal standard critics say will make it nearly impossible for the executive branch to be denied. ... A little-noticed provision in the new law also suggests that warrantless physical searches of homes and businesses inside the United States may be allowed if the investigation concerns a foreign target of an intelligence investigation, a congressional aide said.”⁷³*

Based on this information, one can clearly see there are no provisions for protection against unwarranted physical or electronic search and seizures. Furthermore, there is no accountability. While it is true that calls being picked up by the NSA are supposed to be deleted, the provision about maintaining files of information that has “foreign intelligence value or crime” is elastic since foreign intelligence value is a both broad and subjective measure.

From a purely security standpoint, the NSA program gives us a chance to analyze the *effectiveness* of SIGINT and the agency itself in counter-terrorism operations. I argue that such an intrusive program is not only illegal and unethical, but ineffective and counterproductive to fighting terrorism inside the United States.

First, the extent to which wiretapping SIGINT contributes to these operations, may be overblown. As early as October 2002 the news agencies reported that the NSA had trouble penetrating and tracking Al-Qaeda cells because they “learned to evade U.S. interception technology—chiefly by using disposable cell phones or by avoiding phones altogether and substituting human messengers and face-to-face meetings to convey orders.” As the article illustrates, a heavy emphasis on SIGINT can be counterproductive to counter-terrorism efforts. Al-Qaeda members deliberately attempt to trigger false alerts by openly feeding disinformation. They can then plug up any internal communications leaks by observing when counter-terrorism forces act on the false intelligence. Determining the validity of information from SIGINT operations has been difficult even for the most experienced analysts because what are collected are vague statements that can be easily misinterpreted.⁷⁴

Second, according to the 2006 *USA Today* article, NSA officials claimed domestic SIGINT operations help fight terrorism by using the data produced for “social network analysis.” However the current social network analysis methods used to guide SIGINT operations called “snowball sampling,” (a type of electronic dragnet) are not well suited for the type of counter-terrorism operations traditionally done by FBI criminal investigators. Research conducted by two social network experts, finds that the snowball method is better suited for highly connected groups, as opposed to a small autonomous cell⁷⁵ which is the likely organizational structure of choice for the growing phenomenon of “homegrown” terrorist operatives.⁷⁶ The NSA’s snowball sampling methods gathered a massive volume of useless information that overwhelms analysts⁷⁷ and led FBI officials nowhere,⁷⁸ wasting limited resources and time. Furthermore, the domestic SIGINT operations put an enormous technical strain on the NSA’s resources, forcing the agency to consume voracious amounts of electricity—on top of dealing with its current computer problems—to sustain its current operational capacity. This jeopardizes American national security by running the risk of another electrical overload, similar to the one that paralyzed the agency seven years ago and left our nation vulnerable for nearly three days.⁷⁹

Both of these examples illustrate that the NSA, with its SIGINT focus, is not well suited for the type of work effectively conducted FBI criminal investigators. They show that electronic dragnets are not only ineffective, but also counterproductive to fighting terrorism. The problem with the domestic SIGINT program is not collecting information. In fact, the opposite is true – analysts are overwhelmed by the massive amount of information they have to examine, made only worse by dismal management practices that mishandle the human and technical means of such analysis.⁸⁰ (Mismanagement is allegedly also to blame for failing to institute a new data sifting program that could gather and analyze information more efficient while complying with privacy laws, prior to 9/11.)⁸¹ Getting the proper information is necessary, but analyzing it, investigating it and disseminating it to the right people are also imperative. Failing to do these other three steps were major factors that led to the 9/11 and 7/7 attacks.⁸²

Let us conclude this section by examining the broader implications of this program in the fight against terrorist networks. Even if the NSA were to return to working within the FISA framework, one must ask whether or not that is best legal approach to fighting terrorism. Assuming that administration’s highly questionable justification⁸³ for bypassing the FISA warrants—allegedly too difficult and slow to be approved—is true, one should consider that there are 94 federal judicial districts, but only one FISA court. By the time any security agency manages to get through the FISA process, it could have obtained permission for a criminal wiretap based on the Title III from any of the many other federal courts. Beyond time and logistics issues of FISA versus criminal courts, there is a larger conceptual conflict within policy circles. It is between using counter-intelligence versus law enforcement approaches to counterterrorism—which have enormous ramifications for both the legal and tactical directions in the fight against terrorist networks.

Former 16-year FBI veteran Michael German finds that instead of the current counter-intelligence approach that drives counter-terrorism policy, the FBI

and broader US government should be taking a more law-enforcement based approach instead. The common thread problem of a counter-intelligence approach is its strong need for secrecy. Tactically, “on the ground”, secrecy hinders the necessary intelligence sharing to combat terrorists out of a need to protect sources and methods, and prevents the exposure of good and bad practices, removing incentive for agencies to review and reform themselves when mistakes are made. Secrecy also allows more room for abusive practices that undermine America’s human rights and civil liberties foundations and diverting limited information-gathering resources from other areas, thereby wasting limited resources and distracting agents and analysts from real threats.⁸⁴

Section VI. – National Security Letters

NSLs are a special kind of administrative subpoena that the FBI uses to demand that private entities turn over documents or information without advance notice to or approval from a court. They are written directives to provide information from third parties like, “...telephone companies, financial institutions, Internet service providers, and consumer credit agencies, without judicial review. In these letters, the FBI can direct third parties to provide customer account information and transactional records, such as telephone billing records.”⁸⁵

Prior to the Patriot Act, restrictions on the NSLs were such that only a select few officials at the FBI headquarters would be able to sign off on a NSL request and then only if it had “specific and articulable facts” about the target and could only get information about “a foreign power or agent of a foreign power”, as defined by the Foreign Intelligence Surveillance Act of 1978. However after the Patriot Act, evidentiary standards were significantly lowered and agents only had to show how information sought by an NSL is “relevant” to an investigation, allowing them to get information about any person for foreign counterintelligence purposes and can get them signed off by officials at local FBI branches as well as many more officials at the national headquarters.⁸⁶

Prior to the Patriot Act, the NSLs were a tool one used solely for particular counterintelligence operations. However after its passage, the Patriot Act began to allow NSLs to be used for counterterrorism operations and overall relaxed rules for the conditions of its use. Under these new rules, an NSL could be sent to a person asking them for various kinds of information, and furthermore, they will be put on a gag order not to talk about it.⁸⁷

The results of applying NSLs to counterterrorism have been extremely alarming to say the least. According to a report by the Justice Department’s Inspector General (OIG), a series of abuses and mistakes that have been costly to civil liberties while providing extremely little support for counterterrorism efforts. They include:⁸⁸

- *Understated reports of FBI NSL usage.* Previous reports showed 30,000 demands for NSLs issued annually, the OIG report found at least 143,000 demands. Furthermore FBI data is incorrect due to delays in data entry,

inaccurate data entered into the FBI's database and NSLs not entered into the database.

- *Information retention and data mining of innocent Americans.* Under current NSL statutes, information is indefinitely held and easily retrieved, even in spite of evidence clearly demonstrating that an investigative target is not connected to terrorism. Even more alarming is that not only are Americans' private information indefinitely stored and accessed by the FBI, but this information is also given to other government agencies and even foreign governments. Finally, the FBI/DoJ does not have a policy of destroying information not crucial to an investigation. It also began issuing "guidance" (i.e. legally non-binding) on what to do with information gained from an NSL in November 2006.
- *Failure by the Intelligence Oversight Board (IOB) to aggressively and meticulously do its job.* Out of a possible 26 IOB violations sent to the FBI's Office of General Counsel (OGC), only 19 of which were referred by the IOB itself. The OIG did an analysis of just 77 cases out of the hundreds of thousands of NSLs sent out and found another 22 more IOB violations, 17 of which were not reported. One of the main reasons for these oversight discrepancies is that agents and analysts do not consistently cross the information received with what was requested by the letter.
- *Illegal use of NSLs to circumvent laws protecting information privacy.* FBI agents would use close working relations with third party entities to help guide them towards whatever telephone records they wanted. They then used special "exigent letters" or NSLs illegally, when such an emergency did not exist, in order to work around certain privacy laws. The same was done with "certificate letters" at the Federal Reserve Bank for financial information. In many cases agents used NSLs to obtain information even though it they did not bother to minimally prove its "relevance" to an investigation. Many times this was due to the fact that there was not an open or pending investigation at all. This was made worse due to inadequate responses by FBI lawyers to internally address abuses. Worse still, there were other cases where other Bureau lawyers felt intimidated into approving NSLs because they did not want to challenge their bosses who were approving the letters and risk their careers.

The OIG report also examined the effectiveness of this particular tool to fight terrorism. While the report provides the reader with anecdotal statements from some agents that NSLs are vital to counterterrorism operations, the report's systematic analysis of the NSLs' effectiveness contradicts such statements. Out of the 143,074 requested letters, only 153 proceedings emerged. Out of these 153, only 1 request led to a material support for a terrorism conviction. The report made no mention of how much the NSL contributed in that particular case and more broadly it did not make any mention of its contributing to stopping any terrorist plot. However, it did make mention of its effectiveness in three counterintelligence cases. One case led to a conviction, another led to the

revelation that an FBI agent was in contact with a foreign intelligence operative, and other led cleared the target of any fraudulent activity.

As with NSA wiretapping, using counterintelligence techniques in counterterrorism operations are not only disastrous for civil liberties; they are ineffective and counterproductive to fight terrorism. The OIG's report went further, not only detailing the illegal and invasive nature of both the legal and illegal uses of the NSLs, but how poorly they were at counterterrorism. The massive amount of information overwhelmed analysts, leading to significant discrepancies on whether or not the NSL was responded to properly. It also diverted limited resources from time-tested and legal criminal investigative work to fishing expeditions for people's private information.⁸⁹ Furthermore, in spite of acknowledging the success of NSL-led counterintelligence investigations, the OIG report also leaves one wondering whether such successes were worth the price paid in civil liberties and the possibility that such gains could have been achieved quicker and more efficiently without such a high cost.

Finally, based in part on the revelations of the OIG report, September 6, 2007 Federal judge Victor Marrero struck down the current statutes governing National Security Letters (NSLs), because its warrantless demands for information "violates the First Amendment and constitutional provisions on the separation of powers, because the FBI can impose indefinite gag orders on the companies and courts have little opportunity to review the letters."⁹⁰

Section VII. – Conclusion and Recommendations

After examining four different case studies of US counterterrorism policy, I find the notion of a zero-sum choice between civil liberties and human rights on one hand and successful counterterrorism policies on the other, false. In fact, as my analysis demonstrates, the relationship between upholding civil liberties through the rule of law and success against terrorism is interdependent. Our current policies hand terrorists a major victory by allowing the government to commit a double sin: unraveling the nation's civil liberties and compromising its national security. In order to change this trend, I offer the following policy recommendations:

- **Revive the distinction between the FBI's law enforcement and counterintelligence activities.** As the examples of the NSA wiretapping and the NSLs show, applying counterintelligence techniques to counterterrorism cases jeopardizes both Americans' civil liberties and their security. These techniques should be redirected to concentrate on the foreign espionage threats they are better designed to handle. One example to would be having Title III wiretaps used in counterterrorism investigations as opposed to FISA. The Title III adheres to the more stringent probable cause standard that force more efficient law enforcement responses, while being fast enough to secure a warrant from one of 94 different Federal district courts. Furthermore, instead of limiting the FBI's Criminal Division to domestic counterterrorism threats and leaving international terrorism to

counterintelligence agents, the FBI should let its Criminal Division handle all terrorism cases, both domestic and international.⁹¹

- **Focus on issues of agencies' mismanagement and proper inter-agency information sharing, not granting more powers.** The main failures among security agencies that led to the 9/11 attacks were a series of management failures⁹² and improper understanding of preexisting laws and guidelines to share information.⁹³ According Post 9/11 legislation giving wide latitude to intelligence and law enforcement agencies like the Patriot Act and the 2007 Protect America Act need to be significantly revised and/or repealed altogether. This needs to be coupled with reviving aggressive congressional and internal bureaucratic oversight mechanisms that ensure agencies are working efficiently and lawfully, rather than unnecessarily violating peoples' civil liberties.
- **Put greater emphasis on collection and analysis of open source intelligence (OSINT).** OSINT is important to law enforcement and intelligence communities because it provides useful information that can shape analysts' and agents understanding of closed sources of information by contextualizing it.⁹⁴ It can lead to better analysis of information and therefore improved and more targeted countermeasures to prevent terrorism. (One expert even goes so far as to say that it is often better than classified information.)⁹⁵ Analysts have also noted terrorists use the Internet for various propaganda and strategic and tactical analytical purposes. As one report observes, the terrorists have, "...put their team's playbooks online. By mining these texts for their tactical and strategic insights, the United States will be able to craft effective tactics, techniques and procedures to defeat followers of the movement."⁹⁶ One analyst found evidence pointing to the 2004 Madrid bombings being guided by a document publicly posted online⁹⁷ and another was able to provide a basic targeting calculus that Al-Qaeda uses.⁹⁸ Since it is publicly available information, it is also an excellent means of obtaining critical knowledge while reducing the need to use intrusive and sometimes ineffective and counterproductive tools.
- **Strengthen counterterrorism efforts locally.** Due to the failures against Al-Qaeda, it is not only able to carry out attacks from its central organization, but also inspire "homegrown" copy-cats. Homegrown terrorism operates on a decentralized model, therefore counterterrorism policies must respond at the same level. It is recommended to have a community-policing model that simultaneously emphasizes good relations with Muslim communities while incorporating counterterrorism priorities.⁹⁹ Such a strategy allows for better information sharing and provides law enforcement officials with the ability to conduct proactive and targeted investigations directed at criminal individuals instead of entire innocent communities. (After all, proactive, targeted law enforcement responses have proven to be the best response to capturing terrorists and de-legitimizing terrorism.)¹⁰⁰ Local community policing actions are a much better alternative

to racial profiling, as well as the NSA domestic spying, and FBI national security letters, which target innocent people and overwhelm analysts with useless information while missing real threats. At the state level, significant legal gaps exist for prosecuting acts of terrorism, particularly its “homegrown” variant.¹⁰¹ These gaps need to be addressed in a manner that protects liberties through sufficient evidentiary and privacy standards while allowing for successful prosecutions. Finally, in order to coordinate local efforts with regional and national law enforcement organizations, better management of Joint Terrorism Task Forces is absolutely imperative.¹⁰²

- **Ban the use of torture.** Torture is not only immoral it is ineffective and counterproductive to fighting terrorism. Techniques like waterboarding, beatings, sleep deprivation, sexual humiliation, attack dogs and exposure to extreme heat and cold, as well as sending suspected terrorists to other countries where they could be tortured using other harmful physical techniques. Interrogations should be strictly monitored, not only to keep track of possible violations of human rights norms, but also for further research to know what techniques work under which conditions. The new Army field manual for interrogations,¹⁰³ as well as the findings in the *Educating Information* report provides useful and ethical frameworks for research.
- **Highlight American Muslim contributions to local and national security.** Unfortunately much of the national discourse surrounding American Muslims is shrouded in fear rather than facts. This is especially true regarding terrorism. Unfounded charges of extremism and terrorism have the potential to undermine relations between Muslims and their neighbors, leading to alienation and self-segregation, which may gravitate some toward extremism, thereby creating a vicious cycle and a self-fulfilling prophecy. Law enforcement officials must be extremely proactive in this regard by publicly emphasizing American Muslims’ assistance and cooperation in preventing extremism and terrorism.

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