How democracies fight insurgents and terrorists

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Abstract: Democracies violate some of the laws of war in the Geneva Conventions and
some peacetime criminal justice norms when they fight insurgents and terrorists.
Restraints on excesses and abuses weaken in a national security emergency. A balance
between security measures for effective counter-terrorism and maintaining democratic
values tends to tip for security at the expense of civil liberties. Based on the British
experience in Northern Ireland, the Israeli response to the Palestinian intifada, and the
Bush administration’s “war on terror,” I find that the “maximum security state”
improvised by the Bush administration after 9/11 violates democratic norms beyond what
is required for security, but that a “business as usual” approach advocated by others is
ineffective for thwarting terrorist acts and bring terrorists to justice. Instead, emergency
measures should be grounded on “good intelligence and the rule of law” which
criminalizes recruitment of terrorists and advocacy for terrorism, and which authorizes
robust detection, identification, surveillance and search yet leaves unchanged the rest of
criminal justice for arrest, detention, interrogation and prosecution.

Unconventional warfare

In the present time and foreseeable future, most warfare will not be between states but
between states and non-state entities, be they insurgents, guerrillas, transnational
terrorists, war lords and bandits, or some combination of these, sometimes helped and
even sponsored by states. Of 231 armed conflicts identified by peace research data bases
(Oslo, Uppsala) between 1946 and 2005, 167 have been internal conflicts, compared to
43 interstate wars and 21 colonial wars [Marshall and Gurr, 2003]. The new mode of
armed fighting has been called by various names: ‘new wars’, civil wars, unconventional wars, asymmetric warfare, insurgency and counterinsurgency, global war on terror; I will refer to it as ‘unconventional warfare.’

Studies of how democratic states fight unconventional adversaries – insurgencies and terrorists - found that they violate to some degree the rules of war (the Geneva Conventions) and the peacetime criminal justice process because these time-honored institutions obstruct containing insurgency and preventing terrorist attacks. What emergency measures should democrats accept for legalizing and implementing effective counterinsurgency and counter-terror and at the same time protecting civil liberties and democracy? This is an important question because the restraints that normally operate in a democracy for checking abuses and excesses by the government - separation of powers, an independent judiciary, competing political leaders and parties, civil society, and others – can’t be counted on to do so in a national security emergency.

Several assumptions and justifications for emergency measures result in ineffective measures, unnecessary curbs on civil liberties, abuse in the criminal justice system, high cost for modest benefit, and other unwanted consequences. 1. Worst case and doomsday scenarios, e.g. the “ticking bomber” armed with a WMD (weapon of mass destruction, such as a nuclear bomb). They distract focus on the most likely sources of danger and methods of thwarting them. 2. Excessive and ill-informed fears, often politically driven, that exaggerate the power and cleverness of the insurgents and the vulnerability of an open society to stealth and deception. These lead to security overkill, excessive curbs on civil liberties, and misallocation of resources. 3. Alarmist views of governmental powers and abuse of civil liberties, i.e. rights once lost are never regained. These end up tying the hands of security agencies for disrupting and preventing terrorists. 4. Faith in technology, such as data mining and indiscriminate electronic surveillance. This creates a false belief that a treasure trove of information about hidden adversaries is uncovered and leads to neglect of human intelligence and traditional spycraft. 3 5. The necessity of secrecy in counter-terror operations based on unsubstantiated claims that “lives have been saved”, “invaluable information has been gotten,” and disclosure “helps the enemy.” Some
secrecy is necessary and can be handled in the courts without jeopardizing national security, but much of it hides human incompetence and inefficient methods. Reliance on legal and constitutional precedent, e.g. what President Washington did during the Whiskey Rebellion and President Lincoln did in the Civil War and how Congress and the Supreme Court responded. Precedents can illuminate history but have limited bearing on contemporary unconventional warfare; legal and constitutional precedent should not be ignored, but other criteria must weigh in decisions about emergency measures against insurgents and terrorists. Insurgents and terrorist are criminals who should and can be dealt with in the normal criminal justice system. For terrorist acts, and suicide bombing in particular, the goal is prevention and not prosecution after the criminal act (obviously no successful suicide bombers can be prosecuted). Insurgents and terrorists are adversaries in a war that can be fought according to the rules of war between states. Those rules are premised on the ability of the belligerents to identify combatants from non-combatants, and that is precisely what cannot be done in unconventional warfare where identifying adversaries and obtaining intelligence about their activities are problematic.

The behavioral approach to fighting unconventional warfare uses empirical criteria for measuring effectiveness, e.g. what rate of “false positives” (misidentification of an innocent person as a terrorist) and “false negatives” (mistakenly not identifying a terrorist) does a technique or measure generate? The behavioral approach rests on an empirical study of what insurgents, terrorists and their supporters actually do from the very start of the process that sets them off on a violent path to final violent actions: recruitment, indoctrination, financing, training, organization maintenance, support groups, communications and travel, promotion and advocacy of violence, planning, and the final execution of violent attacks. Research covers the sites, associations and groups in which these activities take place, their places of worship, neighborhood pubs and clubs, student associations and study groups, websites, and their domestic and international linkages. The approach also studies the security forces’ and justice system’s responses for prevention, containment and prosecution of the armed fighters, terrorists and their supporters: specification of proscribed actions and organizations; identification and
surveillance of suspects, organizations, and accomplices; searches; detention and interrogation; charging with a crime; prosecution; and incapacitation. The final step in the behavioral approach is to determine what legal framework, security measures and justice procedures effectively deter, contain and incapacitate insurgents and terrorists with the least abridgement of civil liberties and the fewest violations of the laws of war.

Though the emphasis is on terrorism, I analyze insurgencies and terrorism within a single behavioral framework because many insurgencies resort to terrorist actions and terrorists often embed in failed states (as Al Qaeda did in Afghanistan under the Taliban and does in the tribal areas of Pakistan on the Afghan border) for transnational terrorism and further insurgencies. Because external states intervene in unconventional wars, as the Soviet Union did in Afghanistan and the United States did after the 9/11 attacks, a linkage exists to transnational terrorism. Jessica Stern [2004, p.27] writes that the goal of jihadist terrorists is “expelling the occupiers and non-believers from the Arabian Peninsula and all the countries of Islam…forcing U.S troops out of Saudi Arabia or Western troops out of Iraq…” In retaliation for occupation of Arab lands, al Qaeda and jihadists mount terrorist attacks for punishing and disengaging the West from the Arab and Muslim world. Fighting foreign insurgency spills over into domestic terror attacks and precipitates a security emergency on how to prevent them.

A further linkage was created by the Bush administration when foreign (non-Afghan) fighters captured during the Afghan war were treated as “enemy combatants” by executive order rather than as prisoners of war under the Geneva Conventions. Their treatment in a special prison at Guantanamo Bay and the justice process there – notably torture and the suspension of habeas corpus – have become a major controversy about what violations of peace time justice are justified in security emergencies. It is an international issue because the Red Cross, Amnesty International, Human Rights Watch, the UN and international agencies and foreign governments are stakeholders on prisoner rights. How to prevent terrorist attacks, how to fight insurgents successfully, and what is effective justice without weakening valued democratic institutions in an emergency -- these are intertwined topics.
The democratic dilemma: the lesser evil

In unconventional wars, democracies violate some rules of the Geneva Conventions, and some civil liberties and human rights norms in justice. It was so for the British government in Northern Ireland 1968-1998, the French government during the Algerian war of independence 1954-1962, the Israeli-Palestinian conflict from early 1990’s to the present; and the U.S. in the Afghan and Iraqi wars and the “global war on terror.” Research [Davenport et al 2007] finds that democracies do resort to torture, though less so than autocracies. When Amnesty International annual reports and State Department country reports are combined into a human rights index (the CIRI index), Foster [2007] finds that as the number and severity of terrorist events increases, due process rights in justice decrease. Compared to anarchy in a failed state, insurgent victory, or repression, these violations by democracies are a lesser evil [Ignatieff, 2004], but they are an evil nonetheless and should be kept to a minimum.

Unconventional warfare is an unsettling experience for professional armies trained to fight other professional armies. Neil Livingstone [1989 p.85] writes that “fighting terrorism is a dirty kind of warfare that often has more in common with a murderous encounter in a dark alley than a classic military engagement…those who are accustomed to viewing the world in black and white terms will probably find it unsettling.” The killing of their comrades by invisible snipers, land mines, roadside bombs, attackers and suicide bombers disguised as civilians, use of civilian shields, and the sight of atrocities against civilians it is their mission to protect puts tremendous pressure on officers and soldiers and the authorities to find effective countermeasures, at any cost. The experience of officers and men at the grassroots of combat convince many of them that the laws of war make them vulnerable while they protect the insurgents. John Kerry, the Democratic presidential candidate in 2004, told “Meet the Press”: “I committed the same kind of atrocities as thousands of other soldiers have committed in that I took part in shootings in free fire zones. I conducted harassment and interdiction fire, I used .50 caliber machine guns, which we were granted and ordered to use, which were our only weapon against
people. I took part in search and destroy missions, in the burning of villages. All of this is contrary to the laws of warfare, all of this is contrary to the Geneva conventions, and all of this is ordered as a matter of written established policy by the government of the United States from the top down.” [quoted in The New Yorker Magazine, July 26, 2004, p.61]

Kerry was talking about the Vietnam War, but similar violations of the laws of war have been reported for the Iraqi war. For instance, “Three former members of the Army’s 82nd Airborne Division say members of their battalion in Iraq routinely beat and abused prisoners in 2003 and 2004 to help gather intelligence and to amuse themselves.” [NYT 9/24/05] The journalist Dexter Filkins [2005] reported on counterinsurgency by a battalion in the Sunni Triangle under the much decorated Lt. Col. Nathan Sussman. When the insurgents fired a mortar into his compound, Sussman retaliated with 28 artillery shells, 42 mortars, and two airstrikes, one with a 500 lb bomb, the other with a 2000 lb bomb. His response was not “proportionate” under the laws of war, but, said Sussman, “We just didn’t get hit after that.”

**The Legal Mind**

The debate about strict adherence to the Geneva conventions in counterinsurgency and the abridgement of peace time justice rights for insurgents and terror suspects has been dominated by lawyers and legal theorists, including government lawyers, military lawyers, and military advisers on one side and the human rights, NGO and international law community on the other. Jack Goldsmith, former Head of the Office of Legal Counsel in the U.S. Department of Justice, who was an inside participant when the Bush administration made crucial decisions about the war on terror, writes that [Goldsmith 2007, p.130] “lawyers weren’t necessarily expert on al Qaeda, or Islamic fundamentalism, or intelligence, or international diplomacy, or even the requirements of national security…(lawyers) dominated discussions on detention, military commissions, interrogation, Guantanamo, and other controversial terrorism policies.” All sides scrutinized treaties and laws and judicial precedents, and debated atypical cases or
hypotheticals like the ‘ticking bomb’ scenario. They did not discuss actual counterinsurgency combat operations, identifying and tracking down terrorists, and bringing them to justice.

The legal debate ranges over a wide spectrum. On one extreme, Richard Posner [2006], a judge on the U.S. Court of Appeals for the Seventh Circuit and prolific legal scholar and author, generally defends preventive detention, warrantless wiretaps, data mining of domestic communications, coercive interrogation for intelligence purposes, military tribunals, and much executive authority to deal with terrorist threats. On the other extreme, Lord Hoffman, the British law lord, argued against indefinite detention without trial of foreign terror suspects: “I do not underestimate the ability of fanatical groups of terrorist to kill and destroy, but they do not threaten the life of the nation, …the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.” [http://crookedtimber.org/2004/12/17].

Unlike judges and lawyers, the behavioral approach rests on empirical study of unconventional war. The behavioral approach is consequentialist: counterinsurgency and counter-terror should be regulated by specific measures that are likely to be effective, yet at the same time tempered by commitment to democratic values. The behavioral approach does have a moral foundation, expressed a century ago by Max Weber [1958, pp. 119, 121]:”for the politician…the proposition holds, ‘thou shalt resist evil by force’ or else you are responsible for evil winning out…No ethics can dodge the fact that one must be willing to pay the price of using morally dubious means or at least dangerous ones – and face the possibility or even the probability of evil ramifications.”

The laws of war and peacetime justice in unconventional warfare

In conventional warfare, treaties and conventions that bind adversaries are symmetrical and reciprocal, as in the treatment of prisoners and the protection of civilians. Both sides benefit from compliance. In states versus insurgents, there is no symmetry and reciprocity.
The insurgents have no chance of success waging conventional war against a more powerful adversary. They do not wear uniforms and do not carry weapons openly. They depend on the civilian population, including women, children and elderly people, to provide food, funds, recruits, information about the security forces, and active support in retreating from attacks back into safe places or simply disappearing in the population. If they do not get cooperation from the population by persuasion, they get it with intimidation, coercion and fear. Insurgents murder many civilians and rival fighters among their own people, sometimes more than the non-combatants that the security forces kill in counterinsurgency operations. Those killed are called “collaborators” or “traitors” though they are for the most part bystanders who do not actively support the insurgents. Sometimes they are tortured before they are executed, as a warning to others.

Counterinsurgency experts agree that for successful containment, deep intelligence on the identity, location, and activities of the insurgents must be obtained. Lt. General David Petraeus [2006] advises his troops that “Intelligence is the key to success.” For terrorist expert Paul Wilkinson [2001 p.66] “the secret of winning the battle against terrorism…is winning the intelligence war…” It is the population that can provide the intelligence, and it will provide it only if the government provides security from the insurgents. The U.S. Amy/Marine Corps Counterinsurgency Field Manual [2007] emphasizes that successful counterinsurgency needs to protect civilians in order to gather much-needed intelligence, i.e. troops have to be deployed and remain in inhabited areas so that they remain in touch with people and afford them protection. As one detainee told French Lieutenant David Galula in the Algerian war when he refused to talk in an interrogation [Galula 2006, p.89]: “Mon Capitaine, you must understand the situation. We are not afraid of you. The fellaghas, they will cut our throats.”

There is a fundamental clash between respect for human rights and counterinsurgency. Human rights law was developed for safeguarding individual liberties against a tyrannical state. Emergency powers and justice are meant for the defense of democracy and individual liberties against violent attackers of democracy and individual liberties. Human rights and criminal law assume innocence until guilt is proven. Intelligence for
counterinsurgency rests on suspicion of complicity with the insurgents and on doubt that innocence can be proven conclusively. The peace time justice system produces few false positives (guilty when in fact not guilty) at the risk of false negatives (not guilty when in fact guilty). Counterinsurgency is the opposite: suspects are caught in a wide net for the sake of finding a few who are insurgents or terrorists. Unless surveillance is targeted on high probability suspects, many false positives are generated.

Frustrated by the inability to tell insurgents from ordinary people and by the lack of cooperation on the identities and activities of the insurgents, the security forces resort to collective punishment, mass arrests, searches, detentions, coercive interrogation, internment, forced population removal into camps, and combat operations that risk high civilian casualties (collateral damage). I refer to these modes of counterinsurgency as “dirty warfare” and “emergency justice”: they violate the Geneva Conventions and peacetime criminal justice norms. Democracies resort to dirty warfare and emergency justice because the laws of war and peacetime criminal justice are seriously flawed for containing insurgency and fighting terrorists.

The Third Geneva Convention and Additional Protocols define the right of combatants and the protection of civilians [Gutman and Rieff 1999, “Combatant status” and “Civilian Immunity”]. For civilians, these ban torture, hostage taking, deportations, wanton destruction of property, summary executions and other similar actions. For civilian protection, it restricts the mode of warfare that puts them at risk, such as excessive collateral damage, and mandates proportionate rather than excessive response to armed attack. For combatants, they define lawful armed forces as those whose members wear uniforms or identifiable insignia that distinguish them from civilians at a distance, carry arms openly, and are subject to an organization that enforces compliance with the laws of war. Combatants are those who take an active part in the hostilities. If they meet these criteria, soldiers and other combatants have prisoner of war rights, including the right not to be subject to physical and mental torture, and the right to be repatriated without delay at the end of warfare.
Insurgents and terrorists for the most part do not wear uniforms or identifiable insignia, conceal their weapons when not in actual combat or in safe areas, and when trapped by the security forces they may throw away their weapons and merge into the civilian population. Under the principle of “discrimination” in the laws of war, it is the responsibility of the combatants to distinguish between combatants and civilians, and it is permissible to target combatants only [Neier 2006]. At the same time, the insurgents contravene the laws of war by using civilians as shields to bloc enemy fire and escape capture. Bystanders either support the insurgency or are more afraid of the insurgents than of the security forces who don’t protect them from later reprisals. Interrogation of bystanders will not reveal the identity of the insurgents (since coercive interrogation is prohibited) and, without proof, all must be considered civilians and released. The terrorists will therefore leave the area at the first opportunity and rejoin their comrades in the insurgency. Under these circumstances, the insurgents keep escaping, regrouping and fighting. The security forces cannot contain the insurgency if there is strict adherence to the laws of war.

The asymmetry of the Geneva Conventions in unconventional warfare is captured in the following example. In the Northern Ireland insurgency, the Provisional Irish Republican Army (PIRA, a.k.a Provos) developed a routine for snipers to get away from an ambush in 2-3 minutes, with the help of neighborhood volunteers or auxiliaries: the sniper would change clothes, be wiped clean of forensics, dump his weapon, escape in a stolen auto, then dump the get-away vehicle. [Hamill 1985 p.79; Toolis 1996 p.125-6]. If the insurgency is an organized armed conflict, and that means the laws of war apply, then a combatant is defined as taking part in the hostilities by attacking enemy combatants or military objectives. Auxiliaries do not attack the security forces. Should they therefore be non-combatants who are not legitimate targets for the security forces? Unless an insurgent is caught with a weapon that has just been fired and explosives traces are found on his hands or clothing, there is not enough evidence that will stand up in an ordinary court of law to convict him. By contrast, British soldiers were issued a “Yellow Card” (“rules of engagement”) instructing them not to fire their weapons except in clearly defined circumstances as set down in the Geneva Conventions, i.e. the target
unambiguously carries a weapon. As one soldier put it, “it was difficult to see your friends blown up around you, pick up the bits, and put them in a plastic bag, and then go and read your Yellow Card.” [Hamill 1985 pp.50, 130, 137].

The sharp legal distinction between combatant and civilian in the Geneva Conventions is unrealistic from a behavioral standpoint. In the laws of war, combatants are permitted to take a direct part in hostilities, which means attacking enemy combatants or military objectives. All other are non-combatants or civilians. Civilians “shall enjoy the general protection against the dangers arising from military operations…unless they take direct part in the hostilities.” In unconventional warfare, many people in non-combat roles are part of the clandestine infrastructure of the insurgency: they shelter and supply the combatants with food, funds and other resources; provide intelligence, lookouts, messengers, weapons cashes and transport, and safe places, including religious buildings, hospitals, and schools. Some activists are women, children, older people, clergy. Without such a supportive covert organization, insurgency is not possible. Since these activists do not carry and use weapons, the Geneva Conventions define them as “civilians” who cannot be detained as POWs and thus incapacitated or removed from the fighting. Under these constraints, an insurgent or terror infrastructure cannot be dismantled.

How do the security forces respond to insurgents?

Alice Hills writes that [2004, p.222] “The central question confronting today’s political and military leaders is…reconciling a restrictive legal and moral framework with … the nature of urban war.” Urban guerrilla warfare tends to be “hit and run” in the sense that insurgents will snipe, ambush, assassinate, or car bomb and quickly disappear rather than stand their ground and fight it out with the security forces.

Urban guerrillas have chosen to stand and fight on a few occasions, in Jenin on the West Bank in 2002, in Grozhny in Chechnya, in Fallujah in Iraq, in the Nahr-al Bared refugee camp in Lebanon when the insurgents holed up in a dense civilian area (usually apartment buildings) and decided to hold it rather than escape. In the Geneva
Conventions this is a situation where civilian casualties by both sides ought to be minimized (minimum of collateral damage; proportionate use of force). If one interprets that literally, the insurgents should not be fighting in crowded urban sites in the first place, and the security forces should avoid the use of heavy weapons like artillery, mortars, tanks, and air strikes. What is the alternative? Sending foot patrols into narrow streets and alleys to recover the area house by house, floor by floor amounts to signing a death warrant for the attacking soldiers as they get picked off by the insurgents from behind well fortified emplacements. No commander will ever agree to do that to his men. What the commander will do is warn the civilians to evacuate the area, giving them safe passage – which also means some insurgents escape disguised as civilians – and then shell the buildings with artillery and tanks, aerial bombardment, and other destructive weapons until all the insurgents are killed or surrender (or escape). That puts the civilians who did not flee at risk. That is what the Israeli Defense Forces did in Jenin, the U.S. Army did in Fallujah, the Russian army did in Grozhny, the Lebanese army did in Nahr-al-Bared.¹¹ That is what also occurred in conventional warfare, e.g. the siege of Stalingrad, of Budapest, of Berlin, in World War II.

The French army in the battle of Algiers decided not to destroy the Casbah, the Arab section of the city used by the insurgents as a huge safe base to conduct terrorist attacks in the rest of the city. Algiers was after all the capital of ‘Algerie Francaise’. Instead General Massu and the paratroopers “cleansed” the Casbah of terrorists. They divided it into a grid saturated with checkpoints, conducted house to house searches, mass roundups and detention of suspects, without judicial formalities, interrogated suspects using torture (including electric shocks, water boarding, and executions) to make them reveal the identities of FLN insurgents, bomb makers, bomb planters, and explosives caches. In six months the insurgents and bombers in Algiers had been killed or captured and the FLN network dismantled, but at a huge price of war crimes and crimes against humanity [Horne 1987]

In urban counterinsurgency, violations of the Geneva Conventions occur, unless one simply turns over a city to the insurgents. Clearly, the Battle of Algiers type of war
crimes should be avoided; clearly entire neighborhoods ought not to be reduced to ruins (and in fact were not when the insurgents surrendered). But when the British army decided not to occupy the “no-go” districts in Belfast, civilians remained at risk of violence: rioting, forceful evictions from homes, arson, ethnic cleansing, sectarian shootings, and revenge murders. When the security forces are unable to control urban areas, conditions approaching anarchy are reached, as in much of Baghdad after 2005, with huge civilian casualties, refugee flows, revenge killings, sectarian massacres, and devastation.

Most insurgents do not confront the security forces in open armed combat to hold territory. They have three main weapons: suicide bombers, hidden bombs by the roadside or in vehicles set off by timers or remote control, and snipers. Suicide bombers are by far the most lethal. In a ten year period, yearly casualties for Israel were 43.6 per year from suicide bombs, compared to 8.4 from remote control bombs and 3.7 for shooting attacks (snipers) [Pedhazur, 2007].

Police methods for crime investigation do not identify the responsible agents for these attacks, let alone prevent them. Snipers vanish in urban apartment complexes or into fields and forests. A concealed roadside bomb or vehicle bomb leaves no identifiable culprit. Suicide bombers can not be arrested unless they botch the attempt, though they might be intercepted.

The dilemma of counterinsurgency is lack of intelligence. As Bing West [2007] put it for the Iraqi insurgency, “American and Iraqi soldiers have no idea who their enemies are”. This blindness invites human rights abuses, violations of the laws of war, and subversion of justice. Lacking intelligence on insurgents, the security forces cast a wide net of surveillance, detention of suspects and indiscriminate searches. The criteria for distinguishing suspects from ordinary bystanders are set low; anonymous uncorroborated denunciations and hearsay evidence are accepted as proof of guilt; and bystanders who happen to be at the wrong place at the wrong time are caught in broad sweeps.
detention. These methods produce mostly false positives – people detained and charged with offenses when they are in fact innocent – and don’t allow clearing of mistakes.  

The British response to the Provisional Irish Republican Army

For fighting insurgents and terrorists, democracies enact and implement emergency laws and measures. In Northern Ireland, the British government resorted to a formidable set of military and police measures, emergency laws and special courts, for containing the insurgency, while pursuing a political strategy which after three decades bore fruit in the Northern Ireland Peace Agreement [Elliott and Flackes 1999 pp.657-665; Oberschall 2007 chapter 6].

During the worst year of the “Troubles” in 1972 when 21,000 British troops were deployed, not counting police and other security forces, there were 12,000 terrorist incidents, 470 deaths and about 5000 injuries. In 1973, 75,000 homes were searched and about two thousand terrorist suspects detained. From 1969 to 1998, there were altogether 3289 deaths due to political violence and associated criminal acts. These casualties occurred in insurgent attacks (ambushes, sniper fire, hidden bombs), security forces shoot outs with insurgents, sectarian revenge killings, mob violence at sectarian interfaces, and even some hunger strikers committing slow suicide in internment [M. Sutton, 1994; Elliott and Flackes 1999 “Security Statistics” pp. 681-689].

The principal adversary and target of the British and Northern Ireland security forces was the Provisional Irish Republican Army (PIRA). The core PIRA volunteers were organized into small teams of 30-40 men called local brigades who planned and implemented ambushes, shootings and bombings, assisted by more numerous “auxiliaries” who drove getaway cars, acted as lookouts, destroyed incriminating evidence ahead of police investigation, transported weapons and explosives to ambush sites and provided temporary refuge to volunteers on the run [Toolis 1996, pp125-6 and chapters 5 and 6; Louise Richardson 2007, p.73]. In Republican neighborhoods most
bystanders were PIRA supporters and sympathizers who refused to cooperate with the authorities.

Lacking information for distinguishing hard core PIRA from sympathizers who were breaking no laws and bystanders who were simply conforming to community sentiment, the security forces at first undertook massive, indiscriminate sweeps. Operation Demetrius in August 1971 was an attempt to catch, arrest and intern PIRA members. Demetrius triggered rioting on a large scale. The initial internment of suspects was followed by 143 killings, 729 explosions, and 1437 shooting incidents for the balance of the year [Hamil 1985 pp.57-66]. Thousands of house searches for weapons ammunition and explosives were conducted and few were found. Indiscriminate repression increased PIRA support and recruitment, and the dragnet misidentified many of the internees as PIRA. With scant information for identifying PIRA snipers, bombers and volunteers and distinguishing them from those who were not breaking any laws, many detainees were never charged with any crimes and were later released. The rest were interned without trial.

The British army was faced with rooting out the PIRA from dense urban neighborhoods in North Belfast and the Bogside in Derry, which had became hotbeds of PIRA activity. From the Bogside, the Derry brigade of the PIRA managed to destroy the entire commercial city centre from 1971 to 1973 “which looked as if bombed from the air” [Toolis 1996, p. 305]. In the rest of Derry, as a result of continued violence, the Catholic and Protestant populations became totally separated, by coercion and seeking security, with the exception of a few enclaves. The British government decided to let these districts become “no-go” neighborhoods, even though the army knew that they were being used for PIRA recruitment, organization, bomb manufacture, and safe places. That was the price of “no-go” districts.

Coercive treatment of detainees for extracting confessions was later investigated by domestic and international agencies. The European Court of Human Rights, in Ireland versus United Kingdom, 13 December 1977, found that British treatment of some
detainees was “inhumane and degrading” but fell short of “torture” (paragraph 167). The Court recognized that inhumane and degrading modes of interrogation yielded a “considerable quantity of information” that led to the identification of 700 PIRA members, and the discovery of “individual responsibility” for 85 unexplained incidents (i.e. shootings, bombings).

Abuses and excesses in counterinsurgency were eventually checked by accountability to the Parliament. Investigation of abuses by the government, the Army, and police were delegated to parliamentary committees presided over by prestigious judges and public figures: the Compton Report (1971) investigated the brutal treatment of terrorist suspects after internment without trial; the Parker Committee (1972) investigated the interrogation of detainees; the Gardiner Report (1973) dealt with civil liberties and human rights in a security emergency; the Bennett Report (1979) investigated the interrogation techniques of the police and the ill-treatment of detainees. The UK government and public opinion accepted their findings and acted on their recommendations, e.g. Prime Minister Edward Heath banned hooping, wall standing, noise, and food and sleep deprivation of detainees [Elliott and Flackes, 1999 pp.177, 211, 265, 391]. As the insurgency became contained, emergency justice was gradually tempered, and military means of fighting the insurgency were replaced by policing. Over two decades the British government enlisted the support of the Irish government for a political solution, which culminated in the Northern Ireland Peace Agreement of 1998 and its implementation in the following years, and the Irish government in turn closed its border to weapons smuggling by the PIRA and cracked down on PIRA safe places in the Irish Republic [Oberschall 2007 chapter 6].

In time the army developed a more efficient intelligence system and data base for identifying PIRA volunteers and auxiliaries which enabled targeted surveillance of terrorists at border crossings, in Republican pubs, at houses and farms of known Republican families, using observations posts, infrared sensors, undercover teams of the Special Branch, informers within the PIRA, and the interrogation of detainees. A new counterinsurgency strategy phased out the military and phased in the police. Annual deaths decreased from 200-300 in the mid-seventies to less than a hundred in the early
nineties, and these were mostly civilian deaths in sectarian revenge and tit-for-tat paramilitary murders [Elliott and Flackes 1999, p. 683, Table 3].

The principal counter-terror measures were the Prevention of Terrorism Act of 1971 (and later amendments) which authorized arrest of suspected terrorists on suspicion (later, on “reasonable” suspicion) and detaining them for 48 hours without charging them with a crime, proscribing organizations (making them and membership in them illegal), criminalizing financial contributions and solicitation for them, among other powers. The Diplock Courts (1972) were non-jury courts for a wide range of terrorist offenses. The Emergency Provisions Act (1978) authorized wide search and arrest and internment without trial, listed proscribed organizations, and outlawed wearing hoods, masks, and paramilitary uniforms in public. Other measures banned broadcasting by members of proscribed organizations and ended the “right to silence” for terrorist suspects. After abuses in suspect interrogation became public, courts excluded statements by accused obtained under torture or inhumane and degrading treatment. Despite these emergency measures, proving guilt and incarcerating PIRA militants was problematic for the authorities. In Northern Ireland, in a twelve month period in 1977-78, 2800 were arrested for PIRA related incidents under a three-day detention power; of these 35% were later charged as a result of confession after interrogation, and most of these were convicted in Diplock courts, but many convictions based on PIRA informers promised immunity from prosecution, without corroborating evidence, were overturned on appeal [Ellison and Smyth 2000 chapter 6; Hamill 1985 p.290].

In insurgencies, the security forces suspect that at least some local people know who planted roadside bombs, where the bombs are, who collects “taxes” for the insurgents, and so on, but they know that even those who were not on the insurgents’ side are too scared to talk: they don’t want to be shot or their family members maimed. Witnesses are intimidated and do not come forward: eyewitnesses typically “saw nothing.” Although the security forces get some intelligence from informants, seized documents, electronic intercepts and the like, these often don’t meet the standard for “probable cause” in making an arrest and often leave room for “reasonable doubt” on conviction. Information
from “hearsay” sources like undercover agents and intelligence reports is not permitted under rules for admissible evidence in the courts.\textsuperscript{16} Though worthy legal principles for ordinary crime, they raise the bar for conviction in unconventional warfare and allow many insurgents to walk through. It was a price the British government and public became willing to pay in lieu of special military tribunals, indefinite preventive detention and drastic emergency measures (internment) used at the start of the insurgency.

The commander of the Derry Brigade of the Provisional Irish Republican Army (PIRA), Martin McGuinness, organized the destruction of all the shops in the Derry city center and later was the PIRA Director of Operations and Chief of Staff. He was never convicted of a terrorist offense in Northern Ireland, though he was arrested and convicted on lesser charges and spent some time in prison. In one incident, he was arrested near the Eire border close to a car with 250 lbs of explosives and five thousand rounds of ammunition, but was convicted only for membership in the PIRA and sentenced to six months [Toolis 1996 pp.39-46p. 151]. The head of the Coalisland unit of the East Tyrone Brigade of the IRA from 1987-to 1991 was killed in an ambush on his way to yet another killing. Everyone in the village knew that he was a terrorist and had killed several times, including two old age pensioners. The local IRA brigade had twenty active members whose identities were an open secret within the community, and were known to the authorities. He himself had been arrested and interrogated on eight occasions under the Prevention of Terrorism Act. His home was frequently raided. But there never was sufficient evidence to convict him “beyond a reasonable doubt”.

To prevent concealed bombs and snipers (the PIRA did not engage in suicide bombing), British security deployed many checkpoints close to the Belfast city centre (the favorite target) and undertook massive surveillance of houses, pubs, farms, and border crossings from the Irish Republic used by PIRA suspects [Elliott and Flackes 2000 p 643]. Interrogation of suspects caught by surveillance and information from PIRA informers and undercover agents were very productive for containing the insurgency [Hamill 1985 p.135].\textsuperscript{17} With targeted rather than indiscriminate surveillance, the police estimated that by early 1990s, 70% of planned PIRA operations had been abandoned on security
grounds, and that of the remaining 30%, 80% were prevented or interdicted [Elliott and Flackes 1999 p.646]. Containment was the precondition for a successful political settlement of the conflict. The British experience in Northern Ireland shows that containment together with a political settlement can be made to work with limited and temporary violations of the Geneva Conventions and of peacetime criminal justice.

**Israeli counterinsurgency**

More than most states, the Israeli government discloses a great deal of information about its security activities and grants human rights and peace advocates and the media access to politically sensitive and incriminating evidence on coercive interrogations and torture of terrorist suspects. The Occupied Territories in Israel have been under martial law, giving the Israeli Defense Forces (IDF) greater powers than the UK emergency legislation gave the British authorities in Northern Ireland.

At the conclusion of the 1967 war, the West Bank and Gaza became Israeli occupied territories with over one million Palestinians. Israel gradually imposed a civil and military administration and established control with identity cards, permits (from travel to house building and work in Israel), checkpoints, military bases, sealed borders, and firm control of water, electricity grid, telephone system, among others. Though the Palestinian economy benefitted, it was at the expense of freedom, human rights and dignity. Starting in December 1987, Palestinians revoluted against the occupation with demonstrations, roadblocks, rioting, stone throwing and firebombs against Israeli soldiers. The Israeli Defense Forces (IDF) deployed tens of thousand soldiers to disperse hostile crowds, keep roads open, protect Israeli settlers, enforce curfews, break strikes, and repress the revolt. The toll was formidable: In three years, Israeli soldiers killed 750 Palestinians, wounded 13,000, demolished 350 homes, placed forty thousand in administrative detention and arrested sixty thousand [Schiff and Ya’ari 1989; B’Tselem 1998], compared to only 13 Israeli soldiers and 13 civilians killed.
The IDF was however in a dilemma. It was designed to fight Arab armies with tanks, artillery and airstrikes. How cope with an uprising when the militants are embedded in hostile crowds and neighborhoods, including women and children that provide a shield? How can militants be identified and detained when standard policing does not work? In what amounted to large scale preventive detention of suspects, the IDF resorted to mass arrests, coercive interrogation for extracting confessions, trial in military courts admitting such confessions, and internment in camps. The most common abuses to make high value suspects talk were forced standing, hooping, painful shackling to pipes and rings, sleep deprivation, beating and kicking, violent shaking, threats and psychological abuse [Human Rights Watch/Middle East 1994]. The security services (Shin Beth, also known under various acronyms) did not deny that such interrogation methods were used on some detainees, but justified them with the “necessity clause”, i.e., “if necessary to save human life,” in its guidelines.

The vast majority of detainees was convicted on the basis of confessions that they were members of an illegal organization i.e. Hamas, Islamic Jihad, Tanzim, al Qassam Brigade, al Aqsa Brigade, and others committed to the armed struggle for the liberation of Palestine who targeted Israeli civilians in terror attacks, not just soldiers. Of 83,321 Palestinians tried in military courts between 1988 and 1993, only 3.2% were acquitted. Aside from physical pressure to make detainees cooperate, the security services threatened to deny driver’s licenses, work and building permits, or travel permits unless information was traded. Seventy percent of detainees plea-bargained in return for information about other militants and their activities. With Palestinian informers, a network of undercover agents, and a huge data bank on the Palestinian population for verifying the information obtained, the Israeli security services knew a great deal about their adversaries, and possessed powerful tools.

In January 1997, in a case of torture brought by a Palestinian against Shin Beth in the Israeli Supreme Court, the security services argued that violent “shaking” of a suspect (which may cause brain damage and harm to the spinal cord on top of lesser pain and injury) was necessary for questioning a non-cooperative Palestinian who might have
information about a terrorist attack. It provided evidence to the High Court that in the past two years it had foiled some 90 terrorist acts in Israel through shaking of suspects: ten suicide bombings, seven car bombings, 15 kidnappings of soldiers and civilians, and some sixty other attacks ranging from shootings and stabbings to placing explosives. Carmi Gilon (former head of Shin Beth) reports that “violent shaking” used on 8% of Hamas and Islamic Jihad detainees in “ticking bomb” cases, for which special permits were required, “led to results” nine times out of ten [Ganor 2005 p.160]. Coercive interrogation and torture sparingly targeted on high value suspects were effective intelligence tools for containing the Palestinian uprising. By 1992, as measured by casualty statistics, it had much diminished [www.btselem.org/English/Statistics].

The Israeli “ticking bomb” scenario is based on repeated real world events: there is no certainty about an imminent attack by a ticking bomber, and no accomplice has been captured who knows with certainty the identity and whereabouts of the bomber. For Carmi Gilon, there is only “a suspicion that perhaps Mustapha knows about Ahmed, who recruited a suicide bomber…that is the best intelligence you can get. That is what you know about a ‘ticking bomb’ even though ultimately the information may not be true.” Another experienced Israeli security official said that “I have no doubt that a ‘ticking bomb’ justifies interrogation that employs physical pressure…the question is whether this is a ticking bomb, how do you know when…maybe it will go on ticking for two more months and you have a whole month to prevent the explosion.” [Ganor 2005 pp.160, 165]. The moral and legal dilemmas of whether or not to authorize torture, or use it without authorization, are more complex and subtle than the armchair scenario with its foregone conclusion.19

The IDF knew full well that containment of the uprising did not achieve a stable peace. It warned that without a political strategy for peace, the Palestinian people would in time engage in another uprising, but this time with “rifles” rather than “stones” [Schiff and Ya’ari 1989 p.288]. When the Oslo peace process floundered and the Camp David negotiations failed in the summer of 2000, a second bloody intifada broke out. Insurgents
used firearms and suicide bombers regularly penetrated into Israel. Casualties surged for both adversaries.

In response to the epidemic of suicide attacks in 2001 and early 2002 against Israeli civilian targets, the Israeli Defense Forces (IDF) undertook Operation Defensive Shield in April 2002. The IDF reoccupied the West Bank, made preemptive arrests of terrorist suspects, interrogated suspects coercively and took other punitive measures, e.g. house demolitions of suicide bombers’ families [Ganor, 2007 pp.274-276]. Analysis shows that punitive measures after attacks, like house demolition, deportation, and targeted assassination have not had demonstrable effects on diminishing Palestinian attacks[20]. West Bank checkpoints yielded few terror suspects at the cost of much harassment and collective punishment. The most effective IDF weapon was arrest, detention and coercive interrogation of suspects, torture in extreme terror attacks cases, trials in military courts where confessions were sufficient for a conviction, and incarceration. The outcome was a sharp increase of thwarted suicide bombings and terror attacks, and a decrease in the number of completed suicide bombings. In 2002, 67% of 167 suicide bombings attempts were prevented, and in 2004, 90% of 130. By 2006, completed suicide bombings were down to two. To totally seal off Israel and the Israeli settlements from terror attacks, the Sharon government constructed a security barrier at great expense, drawing international criticism and creating a further obstacle to a peace settlement with the Palestinians, Syria and Lebanon.

Though the uprising was contained at a much lower level of violence than at the peak of the intifada, without a credible political process for negotiated peace, analysts believe that mass violence and war have been postponed, not eliminated. Even with mass detention and incarceration of terrorist cadres, a young, unemployed and growing population has an enormous pool of young men to fill the shoes of the dead and incarcerated militants. Without a peace treaty, Israel is fated to keep retaliating with military strikes against terrorist weapons launched over the security barrier. Arnon Sofer, a Sharon adviser, expected a permanent state of warfare after the Gaza disengagement [Jerusalem Post 5/10/04] : "…we will tell the Palestinians that if a single missile is fired over the fence
(i.e. the security barrier) we will fire ten in response. And women and children will be killed, and houses destroyed…closed-off Gaza is going to be a human catastrophe…the pressure at the borders will be awful…if we want to remain alive, we will have to kill…all day, every day. If we don’t kill, we cease to exist.” The Lebanese war and continued fighting around Gaza after unilateral disengagement bear out Sofer’s expectations.

The U.S. counterinsurgency and counter-terror response

Before the 9/11 attack, the U.S. had experienced a number of terrorist attacks both in the U.S. and abroad – the 1993 bombing of the World Trade Center; the Khobar Towers bombing in Saudi Arabia; the 1998 African embassy bombings; the thwarted millennium bomb plots; the attack on the USS Cole in Yemen in 2000 - and had conducted several counter-terror operations. These provided a lot of behavioral information on Islamic terrorists, their supporters, organizations, financing, and operations. Based on these events, a New York Times investigative team published in a three part series on January 15-17, 2001 – several months before that fateful September - a detailed account of al Qaeda and associated terrorists, which was subsequently confirmed and rounded out in the 9/11 Commission Report [2004] four years later. The foreign fighters from the Soviet-Afghan war had spread after their victory over many countries and formed terrorist cells, affiliated with al Qaeda, for overthrowing secular Arab governments and attacking U.S. targets. There was much international travel in this vast, loosely connected network, some for recruitment, some for training in explosives in Afghan and Pakistani camps, some for transporting money, weapons and explosives. There was a huge industry in false papers and passports; most terrorists had several names and identification documents; false claims of political asylum enabled some jihadists to become residents in Western states; mosques with fanatical imams indoctrinated and radicalized young men for jihad; Islamic charities acted as a cover for raising and transferring funds to terrorist cells; sleeper agents lodged in safe houses amid the local population and worked in legitimate businesses whose income financed the local cell; terrorists engaged in multiple plots and attacks in several countries; it took a few months to two years from
starting a sleeper cell to terrorist attack. For attacks on U.S. targets, al Qaeda assisted local cells.

The most insightful information on al Qaeda and terrorist operations was from human agents rather than from high tech electronic surveillance: Jamal al Fadl was an al Qaeda operative who sought U.S. protection in 1996 when he feared he would be killed for embezzling al Qaeda funds. He helped identify and locate al Qaeda sleeper cells in many countries [Clarke 2004 p.147-8]. Ali Mohamed was a double agent who had managed to become an instructor at Fort Bragg in a Green Beret unit and was involved in several terrorist plots and attacks; when he was charged for lying to a grand jury in New York about his role in the 1998 embassy bombings, he turned FBI informant in a plea bargain [The 9/11 Commission Report p.68]. Abdullah Anas, an Algerian who had been an Afghan fighter and close associate of the top al Qaeda leaders, became the leader of an Algerian Islamic party, broke with Osama bin Laden over killing civilians as a terror tactic, and described al Qaeda’s structure in the news media [www.cooperativeresearch.org/profiles].

All of this and more behavioral information about international terrorism was available to any one who cared to read the pages of national papers like the New York Times, the Washington Post and the Los Angeles Times. U.S. security and intelligence agencies of course knew more. When the terrorist suicide attack took place against the World Trade Towers and the Pentagon on 9/11/2001, the Bush administration was caught unprepared on counter-terrorism [Clarke 2004; Suskind 2006]. From November 2001 to January 2002, a small group of trusted advisers, officials and lawyers in the White House, the Justice Department, and the Pentagon improvised a maximum homeland security strategy for counter-terror, emergency justice and the “global war on terror.” They covered every possible front – detection, identification, surveillance, search, detention, interrogation, prosecution, incapacitation. Behavioral evidence of the effectiveness of the measures taken was a low priority amid fear, almost panic, about more terror attacks, and the demand for government action, any action. It was not an intelligence based strategy that focuses on identification and surveillance of terrorists and disruption of their operations.
“Hunting (terrorists) down” writes Malcolm Nance [2008 p.74] “requires an educated, deeply institutionalized counterintelligence apparatus that relies on experts to perform detailed groundwork intended to study, stalk and expose enemy operations. …the United States has taken the opposite approach.” A strategy that fails to identify and capture terrorists risks excesses and abuses when the authorities are desperate to prove that they are protecting the public’s safety and the country’s security.

President Bush claimed extraordinary powers in matters of national security largely unchecked by the Congress, international conventions and treaties. The administration created an enormous security apparatus for homeland security and in the global war on terror. John Negroponte, director of national intelligence, said in an interview [NYT 4/21/06] that the U.S. now employs 100,000 people “stealing secrets and analyzing information to help protect national security.” The budget for all intelligence agencies totaled $44 billion. The USA Patriot Act defined terrorism and associated criminal actions, expanded the authority of U.S. law enforcement for fighting terrorists, increased the authority to detain and deport immigrants suspected of terrorist related acts, and authorized domestic search of phone, email, medical and financial records in national security cases by means of national security letters requiring no probable cause or judicial oversight.23 The FISA Act of 1978 had created a court for approving warrants for wiretaps and electronic intercepts of a foreign suspect with a U.S. citizen or resident requiring “probable cause.” Despite FISA, President Bush authorized a secret warrantless wiretap and intercept program for detection and surveillance. It encompassed telecommunications companies, commercial financial databases (e.g. First Data, Western Union) and NSA, CIA, FBI and other government data banks catching an estimated three billion communications each day with automated computer analysis for sorting intercepts, referred to as “data mining” [Suskind 2006 pp.85-87]. The Congress passed a new warrantless wiretap law [NYT 8/6/07] and a Federal Appeals Court upheld it [NYT 7/7/07]. New surveillance powers legalize NSA data mining, provide immunity to telecommunications companies and expanded powers beyond wiretap intercepts to physical searches and collection of business records without court approval [NYT 8/24/07; NYT 2/13/08]. A secret Terrorist Watch List (TWL) was established by presidential
directive. It is estimated that the TWL has several hundred thousand entries [USA Today 6/4/08; Los Angeles Times 3/18/08].

The President assumed the power to designate a foreign soldier in the Afghan war, as well as anyone not captured in battle but suspected of being a member of the Taliban or of a terrorist organization, as an “illegal enemy combatant,” making them subject to indefinite preventive detention, harsh interrogation and treatment, and prosecution in military tribunals with many fewer rights than in federal courts (e.g. suspension of habeas corpus, access to exculpatory evidence). According to a senior intelligence officer [NYT 11/4/05] this overturned U.S. practice: “The policy of three Presidents – Jimmy Carter, Ronald Reagan, and George H.W. Bush – was that Afghan mujahedeen insurgents we supported and Soviet adversaries be treated under the Geneva Convention when prisoners.” It is under this authority that 770 detainees ended up in the Guantanamo military prison. The USA Patriot Act authorized a registration program of legal immigrants from Arab states considered breeding grounds for terrorists. Eighty-three thousand were thus registered.

The President and the executive branch authorized harsh treatment and coercive interrogation of detainees in Afghanistan, the Iraqi war, and in Guantanamo, amid secrecy, even torture under some circumstances as in the CIA rendition program for high profile terrorist suspects, despite considerable opposition by military lawyers [NYT 4/3/08] and the FBI [NYT 3/22/05]. In 2002 The FBI witnessed detainees handcuffed in a fetal position for up to 24 hours, intimidation by snarling dogs, extreme hot and cold treatment, extreme noise and light treatment, sexual humiliation, “short-shackling”, and others, which it reported to senior FBI, Department of Justice, and National Security Council higher-ups who took no action [NYT 5/17/08; 5/21/08]. Military doctors aided the interrogators in conducting and refining coercive interrogations on how to increase stress level and exploit fears. [NYT 6/24/05]. In the CIA rendition program, according to then CIA chief Porter Goss, about 100-150 high profile suspects were transferred to the custody of foreign governments, almost certainly for torture in secret [NYT 3/18/05]. Under worldwide criticism when these techniques were exposed in the Abu Ghraib and
other revelations, the Defense Department banned “hooding, duct tape over the eyes, beating, shocking with electricity, water boarding, extreme heat and cold exposure, mock executions, the use of dogs”. 26 Nevertheless, the CIA was authorized by President Bush under the Military Commission Act (MCA) in October 2006 to resume “enhanced interrogation techniques” that would allow more severe treatment than used by military personnel, and the Congress declined to deprive him of that authority [NYT 6/19/07; 7/21/07]. 27

Of the entire architecture of emergency measures, only the justice process for enemy combatants in Guantanamo was persistently contested in the courts. Combatant Status Review Tribunals created by the Pentagon made determinations whether the detainee was properly designated as an enemy combatant and detained in Guantanamo. Unlike a court hearing, the Tribunal reviews denied lawyers to detainees, did not disclose the charges against them, relied on secret evidence, allowed evidence from coercive interrogation, impeded access to exculpatory evidence, and denied appeal to federal courts. 28 The military commissions contravened the fundamental principles of justice in democratic states. When challenges on behalf of detainees eventually percolated to the Supreme Court in Hamdan vs. Rumsfeld in June 2006, the Court in a five to three decision invalidated the military commission system: as Justice Stevens wrote "information used to convict a person must be disclosed to him…a military commission …lacks the power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions.” The Bush administration and Congress responded with a Military Commissions Act that allowed reliable hearsay evidence (e.g. inmate informants), the submission of classified evidence “outside the presence of the accused” (denying lawyer and defendant access to and cross examination about that evidence), evidence obtained in coercive interrogations, and denied federal jurisdiction over habeas corpus challenges, among other limitations of defendants’ rights. The Act was challenged in Federal Appeals Courts and was found unconstitutional by the Supreme Court in a 5:4 decision in June 2008. Justice Kennedy wrote for the majority that the justice procedure in the MCA was not a constitutionally adequate substitute because it fails to offer “fundamental procedural protections of habeas corpus.” [NYT
Although hundreds of prosecutions of suspected terrorists have occurred in the federal courts, only one trial of detainees has yet taken place in the military commissions.

Do the post 9/11 measures thwart and catch terrorists?

These formidable emergency powers in the fight against terrorists were made possible by a compliant Republican-controlled Congress and a public traumatized by the 9/11 terrorist attacks and fearful of further attacks on U.S. soil, with only the federal bench, and in particular the Supreme Court, acting to limit the expanded powers of the executive branch. How effective are they in thwarting domestic terrorist attacks and in the global war on terror?29

The U.S. had neglected human intelligence on transnational terrorists [9/11 Commission Report p.97; Richard Clarke 2004, p. 237]. To make up for the intelligence deficit, the thrust of U.S. counter-terror after the 9/11 was on mass surveillance that yields a very high percentage of false positives. Lots of suspects have been arrested but most have been released or prosecuted for minor crimes, not terrorism. Coercive interrogation has yielded scant evidence of terrorist activity. A majority of “illegal enemy combatants” in Guantanamo have been released because they were low level soldiers in the Taliban army, misidentified, or for lack of evidence. The U.S. has however had some successes in the global war on terror, in cooperation with other intelligence services, combining traditional spy-craft and human intelligence with targeted electronic surveillance.

The Terrorist Watch List (TWL), according to a Justice Department audit, has inaccurate, incomplete, and outdated information [Los Angeles Times 3/18/08]. The biggest problem is misidentification (i.e. false positives) e.g. Nelson Mandela, Nobel Peace Prize winner and former President of South Africa. The “no fly” list included Senator Ted Kennedy and Congressman John Lewis. The television program “60 Minutes” located twelve persons named Robert Johnson who were regularly pulled for questioning at airports. Few arrests have resulted from the TWL. Of 20,000 Americans and foreigners flagged by the data base, only 550 have been detained or refused entry into the U.S., mostly
foreigners. Whether any arrests and prosecutions on terrorist related offenses have taken place as a result of the TWL has not been disclosed [News and Observer 8/25/07].

The search for detection, identification and surveillance relied on data mining. Based on the merger and interception of email and phone communications and financial transactions data banks, with billions of daily messages, the huge data bank machine “needed high quality inputs to perform: otherwise it just thrashed, undirected, and caused damage in all directions” [Suskind 2006 p.118]. And quality inputs were lacking: “in the months after 9/11 NSA sent a steady stream of telephone numbers, email addresses and names to the FBI in search of terrorists. The stream became a flood, requiring hundreds of agents to check thousands of tips a month. Virtually all of them led to dead-ends or innocent Americans [NYT 1/17/06]. Law enforcement and counterterrorism officials admitted that the program had uncovered no active al Qaeda networks inside the U.S. planning an attack.”

An analysis of “data mining” concludes that “though data mining has many valuable uses, it is not well suited to terrorist discovery…the possible benefits for finding planning or preparation for terrorism are minimal. The financial costs, wasted effort, and threats to privacy and civil liberties are potentially vast.” [Jonas and Harper 2006]. According to Fareed Zakaria [2006], the best sources of intelligence on jihadist cells have tended to come from within localities and neighborhoods and not from NSA electronic data mining or from coercive interrogation of suspects in Guantanamo.

The justification for coercive interrogation of terrorist suspects is that there is no other way of making them provide intelligence. Mark Bowden [2003] interviewed experienced (retired) CIA and Israeli interrogators, most of whom believe that these measures are useful when they target suspects who are likely to possess the information sought and there are means of verifying coerced statements. That is not how they were used in various U.S. detention facilities. A military intelligence officer who was familiar with interrogation practices at Guantanamo told Jane Mayer [2005 p.70] “the order from
above was ‘get me results!...there was huge frustration. General Miller really unleashed a lot of aggressive tactics…” An FBI memorandum dated May 10, 2004 dismissed intelligence obtained by the military with coercive methods as ‘suspect at best’ [NYT 3/22/05]. Jack Coonan, the FBI special agent who headed the Osama bin Laden unit, said about the interrogation of detainees at Guantanamo that “there was nothing coming out of there of value, nothing. Anybody that I knew…there thought it was a complete waste of time.” [Frontline 7/13/05] After General Miller took charge and authorized harsh interrogation, Jack Coonan comments that “…the people I know that were there and that have talked to me said (coercive interrogation) wasn’t effective…to the extent that you are going to find out… a lot of critical stuff about what al Qaeda is doing, the chances of that happening are minimal…most of these people are fodder…they are not the brains…(the brains) are not what is in Guantanamo.”

In 2002, the CIA and the FBI at that time held an inconclusive debate on the effectiveness of torture for “high value suspects,” and the CIA decided on torture in the secret rendition program. Two “highest value” terrorist suspects are Abu Zubaydah, captured in Pakistan in 2002, and Khalid Sheikh Mohammed (KSM), the alleged 9/11 mastermind, captured also in Pakistan in 2003. Because their names and activities had been tracked for some time, it was known that they had lot of information about al Qaeda and planned terrorist operations. Both were held and tortured in secret CIA prisons.

Abu Zubaydah at first wouldn’t talk, then he was waterboarded, subjected to deafening noise, harsh lights, threatened with medication withheld -- and told the interrogators just about anything they wanted him to admit: al Qaeda targeted in the U.S. shopping malls, banks, supermarkets, water systems, nuclear plants, apartment buildings, the Statue of Liberty; al Qaeda was close to building a crude nuclear device [Suskind 2006 p. 115]. It was all worthless information; nothing could be verified. Under benign questioning, he identified Jose Padilla, who was later arrested.

KSM was water boarded one hundred times in two weeks, and produced obvious fabrications and disinformation, though he knew bin Laden’s and Zawahiri’s
whereabouts (the no.1 and 2 leaders of al Qaeda). He yielded little useful intelligence, such as plans for terrorist operations, although he provided lot of information about past plots and activities. He did identify the head of an al Qaeda cell in Britain (Esa al Hindi), which later contributed to the thwarting of a terrorist plot by the British police.

“Buzzy” Krongard, the no. 3 at the CIA, said about these coercive interrogations: “They went through hell, and gave up very, very little.” [Suskind 2006, pp.228, 327; NYT 6/22/08].

Within the U.S., the war on terror has not resulted in prosecutions of bona fide terrorists. A voluntary registration program of immigrants from Arab and Muslim states in 2002 and 2003 netted 83,000 persons, and led to the identification of 13,000 illegal immigrants, many of whom were placed in deportation proceedings, but none was charged with crimes related to terrorism [NYT 12/21/04]. A New York University Law School [Center on Law and Security n.d.] research group tracked all 510 Department of Justice prosecutions on terrorism and terrorism related charges and found only four cases of prosecutions for “attempting to commit terrorism.” Another study tracking 6472 cases opened by the Justice Department on “international terrorism” found that a majority were closed without prosecution and that most of the remaining were about immigration violations and fraud (false Social Security ID or driver’s license) [NYT 9/4/06]. Both of these studies found close to 100% false positives on terrorists.

A more tightly drawn group of insurgent and terrorist suspects are the detainees at Guantanamo whom Secretary Rumsfeld referred to as “the most dangerous, best trained, vicious killers on the face of the earth.” These detainees were screened by the CIA and by military intelligence before being transferred from Afghan and other foreign detention sites as “illegal enemy combatants.” Because the Department of Defense was successfully sued by attorneys representing detainees, it released redacted transcripts of prisoner status reviews. An in-depth analysis of 132 cases [Hegland 2006] found that “Many (detainees) are accused of hostility against the U.S. and its allies. Most, when captured, were not involved in terrorist activity, were Taliban foot soldiers at worst, and
were often far less than that. And some, perhaps many, are guilty of being foreigners in Afghanistan and Pakistan at the wrong time. And much of the evidence, even the classified evidence, is flimsy…largely based on admissions by the detainees themselves, or on coerced, or worse, interrogation of their fellow inmates, some of whom have been proved liars.”

Of the total 770 detainees, about 500 have been released. Of the remaining, some would be repatriated when and if arrangements can be made with their home country; for some there is insufficient evidence to bring them to trial but they are considered too dangerous to be released. Twenty “high value” detainees have been transferred to Guantanamo from various secret CIA prisons. Of these six have been charged before a military commission, but no trial has begun [NYT 8/9/07; News and Observer 6/15/08]. If one assumes that all twenty will eventually be tried and found guilty on some terrorist related charge, but not the others – not a sure thing in view of torture in these cases – the false positive rate for the entire Guantanamo operation is 97%.

Have any terrorist cells in the U.S. been identified and terror attacks thwarted? In October 2006, President Bush claimed that the U.S. and its partners have disrupted at least ten “serious” al Qaeda plots since 9/11 – including three attacks inside the U.S., and five more efforts to case targets in the U.S. [www.whitehouse.gov/news/releases/2005/10/20051006-7.html]. A follow up investigation by New York University researchers found that in eight cases there was no public record of any detention or legal proceeding, detentions resulted in five cases, and convictions in two [Center on Law and Security 2006, pp.16-21]. The single conviction in the U.S was a tasking case when an Ohio truck driver with al Qaeda links scouted the possibility of collapsing the Brooklyn Bridge by cutting the suspension cables with gas torches, and concluded it could not be done. According to the “worldwide terrorist incident tracing system” of the National Counterterrorism Center (NCTC) [www.nctc.gov], there were 18 terrorist incidents in the U.S. from 1/1/04 to 12/31/07, resulting in zero loss of life and nine injuries. None of them is attributed to Muslim extremists. The most frequent suspect organization is the Earth Liberation Front, an
extremist environmental group. The most recent incident listed is the 10/26/07 bombing that damaged the Mexican consulate in New York City.

The government alleged that it had discovered a “sleeper cell” in Lackawanna following up on a tip to the FBI by a member of the Arab-American community [Washington Post 9/9/07]. The case involved six immigrants from Yemen who were fascinated with the al Qaeda jihad, travelled to training camps in Afghanistan before 9/11, but decided not to follow up with terrorist action. At the time of their arrest, none was actively plotting an attack. Analysts have found that the Department of Justice regularly inflated its terrorist related conviction counts with hundreds of terrorist cases that did not qualify because they involved minor crimes not connected with terrorists, e.g. a massive crackdown by airport security netted many arrests for immigration violations and were counted as terror related threats [Washington Post 2/21/07]. In five years of the war on terror, the FBI could not point to a single arrest and prosecution of an active, operational terrorist [Suskind 2006 p.280]. Tom Ridge told CNN shortly after he resigned as head of homeland security: “Can I tell you today, there are X number of incidents (of terrorism) we were able to thwart or prevent? I cannot” [quoted in Raban 2005 p.25). After reviewing the evidence about terrorist activity in the U.S. and ineffective counter-terror measures, John Mueller concludes that the most plausible reason there have been no terrorist attacks in the U.S. since 9/11, despite dire warnings, is that “no terrorists exist in the U.S. and few have the means and inclination to strike from abroad.” [2006 p.2]. Muslims and Arabs in the U.S. are an integrated and successful minority and are by and large unreceptive to jihadist appeals. During this time, there has been much Islamist terrorist activity in the Middle East, in Pakistan, in Afghanistan, in North Africa, in South Asia, in Europe, with thousands of terrorists arrested and incarcerated, often with U.S help.

Democratic restraints?

Four restraints operate in a democracy for limiting excesses and abuses in unconventional war and in emergency justice [Oberschall 2007 pp.73-80]: 1. professionalism within the
military itself; 2. checks from within the polity due to the separation of powers, an independent judiciary, limits on the authority of the executive, competitive political parties; 3. a vigorous civil society, an independent and free media, public opinion; and 4. commitment to treaties and conventions that regulate war and justice, and sensitivity to allies and international standards and opinion.

In the Iraqi and Afghan wars, these restraints have not worked well. A maximum security mentality was unleashed by 9/11 and was fueled by politicians who outbid one another on security and on achieving victory [NYT 5/21/04;10/24/04]. Senator Patrick Leahy, chairman of the Senate Judiciary Committee, was among a handful of legislators who wanted explicit Congressional authorization for the Bush administration emergency measures, but Congressional opposition melted in the face of opinion polls indicating strong support for the White House plan. The military lawyers in the Judge Advocate General’s Corps were the most persistent internal critics [NYT 7/28/05], but their disagreements had no impact on public and Congressional opinion until two years later when emails were leaked to the New York Times (8/1/05). Within the armed forces and U.S. security agencies, hundreds knew about the abuses taking place at Abu Ghraib and Guantanamo. The media, the Congress, and the public were kept in the dark by a veil of secrecy concealing abusive actions. In 2002, the FBI found out about abusive treatment of prisoners at Guantanamo, compiled information about it, and provided it to higher-ups "but their concerns fell on deaf ears: officials at senior levels at the FBI, the Justice Department, the Defense Department and the National Security Council were all made aware of the FBI agents’ complaints, but little appears to have been done…” [NYT 5/21/08]. At Abu Ghraib, Joseph Darby, an ordinary soldier in the 372nd Military Police Company, became a whistle blower, which led to the prison photos being broadcast on CBS’s 60 Minutes II on April 28, 2004. Darby had to be put into protective custody because he and his family received death threats [www.jfklibrary.org/profileincourageaward/2005]. Another whistle blower, Army Captain James Yee, the Muslim chaplain at Guantanamo, suffered a worse fate. He was arrested and imprisoned on charges of espionage, adultery and possession of pornography. Later all charges were dropped but the news story shifted from prisoner abuse to Yee’s
moral character and Muslim espionage at the base. When Major General Anthony Taguba completed his investigation of Abu Ghraib abuses, he had a hard time getting anyone in the Pentagon to read it [News and Observer June 22, 2007]. The higher-ups in the Department of Defense, the Justice Department and the White House were determined to push responsibility down to guards with rank of staff sergeant or lower.

All four restraints failed in the Iraqi war and the Global War on Terror. The public believed the Bush/Rumsfeld “few bad apples” abuse explanation. Polls indicated that the public was not troubled by the Iraqi prisoner abuse, which went unmentioned in the 2004 Presidential debates [Pew Research Center for the People and the Press, 13 June 2005]. It was not the checks and balances of democratic government and the institutional supports for human rights and law, but mounting U.S. casualties and lack of success in Iraqi counterinsurgency that turned the public against the Bush administration [Gelpi 2006 pp.139-142]. Eventually and slowly, the Federal Courts and the Supreme Court started questioning and rejecting the legal architecture of the Bush security state. Because restraints are fragile, it is important to craft emergency measures that avoid the excesses and abuses of a maximum security state yet are effective in counterinsurgency and counter-terror.

What now?

The U.S., Britain, Israel and some other democracies have fought unconventional wars, and continue doing so. To some degree, albeit in different ways, they have violated the norms of peacetime criminal justice and the Geneva Conventions, and they have infringed on civil liberties because these norms stack the cards in favor of insurgent and terrorist success. What should be a democratic emergency law framework in unconventional warfare? There are some obvious guiding principles: such a framework should be lawfully enacted; limited and temporary; periodically reviewed and justified; phased out as the state gains the upper hand over the insurgents; terminated altogether at the end of emergency; effective in fighting the unconventional adversaries; chosen to
diminish civil liberties as little as possible; and implemented by officials who are held accountable. What concretely follows?

There is no lack of suggestions, debates and justifications for emergency measures, much of it in law, civil liberties and national security publications and forums. They range over all aspects of the topic, from identification of terrorists to prosecution and incapacitation. A partial list includes, with some qualifications too long to spell out, greater presidential powers, preventive detention, special terrorist courts, military tribunals, withholding evidence from the defense for national security reasons in terrorist trials, lowering the standards for ‘reasonable doubt’ and ‘probable cause’, electronic monitoring of domestic and foreign communications, profiling, merger of data bases from varied private and public sources, surveillance of individuals and groups who are suspect, infiltrating suspect groups, restrictions on speech (advocacy and glorification of terrorism), coercive interrogation and torture, national identification cards, criminalizing actions that lead to a terrorist act (like recruitment and planning), surveillance cameras in public places, freezing the assets and closing the businesses of suspects. Much of the discussion and debate is on the constitutionality and legality of these measures, and how far they diminish civil liberties. Many assumed without evidence that the proposed measures are necessary for national security, and effective. Strategic analysis is lacking, i.e. the notion that when some measures are taken others may not be needed. There is little supporting evidence presented from real world terrorist events and the actual operation of security forces, law enforcement and the courts.

For instance, Richard Posner [2006 pp. 93-98] has a comprehensive discussion of the legal obstacles to detection and surveillance of terrorists in the FISA law of 1978 and the FISA court. Yet the record of the FISA Court for 1978-2000 is 19,000 warrant applications approved and only 5 rejected, and after 9/11, 6650 accepted and only four denied, more a “rubber stamp” than an “obstacle” [Suskind 2006, p.36; NYT 2/5/06]. Anthony Lewis [2008] worries that hate speech codes are a menace to free thought and that vigorous political dissent would be persecuted. Yet Canada, Britain, France,
Germany, the Netherlands, South Africa, India and Australia have such laws or signed conventions banning hate speech and their democracy has not suffered [NYT 6/12/08].

The behavioral approach studies both the insurgency and the security and law enforcement processes from start to finish. Unfortunately comprehensive behavioral research on these topics has either not been conducted or has been kept secret by security agencies. To be sure, the 9/11 commission has investigated both the terrorist and the law enforcement actions leading up to the suicide airliner attacks on the World Trade Towers and the Washington targets and has made dozens of recommendations based on its findings. In contrast, at the time of the 1960’s riot waves and civil disorders in U.S. cities, the National Advisory Commission on Civil Disorders compiled a huge statistical data base on cities, riots, rioters, law enforcement response and much else, in addition to very detailed case studies of the most destructive riots. These data were analyzed for patterns and yielded policy recommendations to law enforcement. In the absence of systematically compiled and abundant data, my analysis uses newspaper accounts of terrorist arrests and prosecutions, information released for the public by the Justice and Defense Departments and other agencies, testimony of experts at Congressional committee hearings, terrorist trials, investigative reporting, and publications by authors knowledgeable about national security who have had access to classified sources, and scholarly research.

**Emergency measures justified by the behavior of terrorists**

Research has found that Islamic extremists want to overthrow a secular Sunni Arab governments by insurgency and suicide bombing (Algeria, Morocco, Yemen, Jordan, Egypt, Saudi Arabia), want to expel the infidels (Westerners) from the lands of Islam (especially Iraq, Saudi Arabia, Afghanistan), and want to punish Western states in their homelands for war and occupation in Muslim states (London and Madrid underground suicide bombings, New York World Trade Towers airplane suicide attack) [Pedhazur et al 2007]. The most likely threat to Western democracies is from those who want to expel infidels from the lands of Islam and to punish them for occupation there. They are
ideologically similar and organizationally linked, albeit loosely. A less militarized and interventionist U.S. foreign policy should reduce the risk of terrorist attack against U.S. foreign and domestic targets. Diplomacy for denying terrorists safe havens and training bases in other states, and covert state assistance, is crucial in an overall counter-terror strategy. Nevertheless, given the importance of oil and the entanglement of international oil politics with the fate of Arab governments, it is likely that U.S. policy and actions in the region will keep offending some Islamist groups. Even the peaceful Danes have discovered that the culture clash between their traditions and radical Islam risks terrorist violence.

A comprehensive study of 624 suicide assaults from 29 different countries perpetrated by 25 terrorist organizations, from 1982 to 2005, found that recruitment and radicalization of suicide bombers and terrorist takes place in a community that instills a culture of death and hatred, and praises and glorifies suicide attackers: “…the marketing of a death culture is conducted via three main avenues: (1) glorification of suicide attackers themselves; (2) the glorification of the ideology and its ideas in whose name they carried out the suicide attacks; (3) the dehumanization of the enemy and therefore the reinforcement of the moral legitimacy of the suicide attacks” [Pedhazur et al 2007 p.6].

For counter-terror, a key strategy is to block recruitment of terrorists by religious leaders who glorify, advocate, and market martyrdom and the death culture. Brian Jenkins, the Rand Corporation terrorism expert, writes that [NYT 6/15/07] “unless we can impede radicalization and recruitment, then we are condemned to a strategy of stepping on cockroaches one at a time.”

Marc Sageman [2004; 2008 p.7] has assembled and studied a large data set on 400 al Qaeda terrorists who targeted the U.S. They tend to be upper and middle class professionals and engineers, highly educated in comparison to the average in their countries of origin. They joined al Qaeda in their middle twenties; most were married and many had children. Only four had any hint of mental disorder. Most joined the jihad while living in another country from where they grew up. Because of personal experience of a moral violation or the humiliation of their country or religion, they felt moral outrage
which they shared on the internet with others (chat rooms, web sites). Conversion to jihad is not a solitary decision but takes place in interpersonal relations and with social support. They formed links with others like themselves and congregated in the same mosques, student associations, neighborhood clubs, Islamic bookshops, and often lived together. In these local communities they became radicalized by militants who advocated the violent overthrow of corrupt Arab regimes and other Islamist causes. Terrorists, until incapacitated, participate in multiple plans and attacks, ranging over several states. Peter Clarke, the senior terrorism official at Scotland Yard, stated [NYT 11/5/07]: “we are seeing networks…and links between individuals that cross local, national and international lines…suspects work together or individually…often connected by evidence on computers and cell phones that require painstaking investigation before charges are brought.” Pierre de Bousquet, director of France’s domestic intelligence service concurs [NYT 8/1/05]: “People of different background and nationality are working together. Some are European born or have dual nationalities that make it easier for them to travel. The networks are less structured than we used to believe. Maybe it is the mosque…maybe it is the neighborhood, and that makes it more difficult to identify them and uproot them.” The former head of MI5, Eliza Manningham-Butler, reported that local plots in Britain “have links back to al Qaeda in Pakistan, and through these links al Qaeda gives guidance and training to its largely British footsoldiers here” [Washington Post 11/11/06].

Some telling examples of radicalization and support in an Islamic community, false passports and travel, multiple aliases, and international reach of Islamic terrorists’ modus operandi is typified by Raed Hijazi. Nashiri was arrested in the United Arab Emirates (UAE) as a suspect in the USS Cole bombing. He was holding several forged passports with different names, from several countries. He had been to Yemen, Saudi Arabia, Pakistan, Afghanistan and Chechnya [Daily Telegraph 9/1/03]. A British official commented that “in the UK when an al Qaeda suspect is arrested it is not unusual to find 15 different identities and 20-25 credit cards” [Daily Telegraph 9/1/03]. Hijazi was born in California to Jordanian Arab-American parents. He was converted to the jihadi cause in a mosque community and the Islamic Assistance Organization while studying at
California State University in Sacramento. The mosque arranged his weapons training at a terrorist camp in Afghanistan. Another terrorist there persuaded him to join in starting a Jordanian cell that would target Jews and U.S. interests in Jordan. To raise money, he returned to the U.S. and drove a cab in Boston in 1997 and sent $13,000 to his accomplices in Jordan. With a U.S. passport he travelled easily in Jordan, Turkey, Syria and elsewhere for recruiting other terrorists, bought detonators in London, and received advanced explosives training at an Al Qaeda camp in Afghanistan.38

As can be seen from the Hijazi case, infiltrating radical mosque communities by undercover agents, getting insiders to inform on their activities, and other modes of surveillance when suspicious activity is found, makes sense as a preventive counter-terror strategy. Objections against “religious and ethnic profiling” make no sense from a behavioral point of view. There is much research and evidence from trials around the world that radical Islamist imams and mosque communities breed terrorists and that other religious communities have not been a threat to the U.S. Recruitment and indoctrination of terrorists has to be disrupted, and it cannot be done by methods that impact on all equally, like airport security searches, or by untargeted, haphazard selection. For prevention, it is crucial to criminalize actions preliminary to the final act of terrorism e.g. recruitment, advocacy and indoctrination. Criminalizing them authorizes probable cause for surveillance and search, and disrupts terrorists prior to final violent acts. These measures have to be carefully crafted and implemented. Civil libertarians object to the abridgement of free speech which has been authorized only in the case an “immediate” expectation of violence. The historic experiences for this principle are those of angry mobs urged on with hate speech by an irresponsible leader for attacks on minorities and their properties. The angry crowd situation is a public danger, but a far greater risk to life and property comes from a bomb attack on crowded transportation by a covert group biding their time. Hate speech and incitement to violence are the instruments of recruitment and justification for terrorists, even if the danger is not “immediate” in the angry mob sense. 39
For identification of terrorists a vast amount of information is obtained in searches and seizures from address books, computer hard drives and discs, and other materials found in safe houses. Such information allow international cooperation among security agencies to follow up links that lead to further names and locations of terrorists. To get at such a treasure trove in the fight on terrorists, a strong case can be made for lowering the probable cause standard for such searches. A July 2004 counter-terror operation shows the loose network structure of terrorist cells and how searches uncover links that lead to further searches and more links to final terrorist cell destinations by piecing together a variety of bits of information. U.S. based electronic surveillance from an e-mail intercept – called signal intelligence or signet – got a hit on Musaad Aruchi, nephew of Khali Sheikh Mohammed (KSM) and cousin of Yousef (The 1993 World Trade Center bomber and Millenium bomb plot planner), both in detention by this time and on all watch lists. Information passed to Pakistani intelligence led to Aruchi’s arrest in Karachi. His computer had casing photos of New York landmarks, Heathrow airport, and other sites, plus names, phone numbers and addresses. One of these was for Khan, a computer techie who operated an internet hub for al Qaeda. Khan was forced by interrogators to send urgent emails to his accomplices from Indonesia to Britain and ask for quick reply. Many did, thus revealing themselves, and a global manhunt got under way. Dozens were located and arrested [Suskind 2006 p.317-8]. One Khan email link was to Dhiren Barot, who had been named by KSM under torture a year and a half earlier as an al Qaeda chief in Britain but hadn’t been located. British police arrested thirteen, including Barot, on suspicion of terrorism related offenses [The Observer 8/8/04]. Police seized compact discs and computer plans for gas cylinder explosives, and plans for a radioactive dirty bomb. All these plans were successfully thwarted by searches and by pursuing the links in the terrorist structure and identifying the plotters.

Human intelligence for identification and detection of terrorists has been very useful. Wireless and wiretapped surveillance is not free of error. The greatest U.S. intelligence failure before 9/11 was not thwarting the Nairobi embassy bombing even though the Kenya police and the FBI had wiretapped the phone in the terrorists’ safe house and were monitoring five phone lines in Nairobi used by al Qaeda cell members [Report of the
Ramzi Yousef, the mastermind of the plot in Manila to blow up a dozen U.S. airliners over the Pacific, was arrested after a tip from a man in Pakistan who recognized him from one of thousands of matchbooks that had been distributed in Asia with his photo and a million dollar reward for information leading to his arrest [Clarke 2004 p.93]. Khalid Sheikh Mohammed’s capture resulted from an informant inside al Qaeda who had become disillusioned with killing of civilians and also hoping to get a $25 million reward. He tipped off the CIA and the Pakistani police about a meeting KSM was going to attend, and they captured him [Suskind 2006 pp204-6].

Abu Zibaydah’s capture in Pakistan started when a border guard grew suspicious about a group driving near the Afghan border. When they refused to talk, the driver was bribed and revealed that Abu Zibaydah was somewhere in Faisalabad. Several select neighborhoods were put under electronic scanner surveillance, i.e. targeted surveillance, and eventually two calls to Afghanistan were detected from one of several houses. All houses were raided and Zibaydah was captured. Although he revealed little of any value under torture, his notebooks, diary, phone numbers, and a sign-in list for visitors with their names, passport numbers and nationalities was treasured intelligence, which was passed on to various governments [Suskind 2006 pp.114-5; 165].

Ahmed Ressam intended to attack Los Angeles airport and attempted to smuggle chemical explosives into the U.S. at a Washington State ferry landing during the millennium national security alert. At the U.S. border he presented a genuine but fraudulently obtained Canadian passport which passed the database checks. A vigilant female customs official thought he acted suspiciously and a search of his vehicle uncovered the explosives and led to his arrest and the thwarting of the airport bombing [Clarke 2004 p.211]. After the 1993 World Trade Center bombing the FBI managed to identify the vehicle that carried the bomb from metal scraps and traced it to a truck rental agency in New Jersey. According to the 9/11 Commission, “the Counterterrorist Center at the CIA combed files, queried sources around the world and the NSA ramped its intercept network and searched data bases for clues, and came up with nothing.” But one
of the terrorists returned to the rental to claim a $400 deposit, was arrested and interrogated, and the other terrorists were identified [Report of the 9/11 Commission, pp. 71-72].

Massive, non-targeted, electronic surveillance – like data mining – is shrouded in secrecy. It is not known what its performance has been in detection and identification of terrorists in the U.S. Unclassified information suggests that it is not an effective tool. When a suspect has been identified by some other means, the data bank might retrieve past communications that reveal links which in turn can be targeted. Much electronic surveillance is targeted, starting from a tip-off as in the Abu Zibaydah capture or from email and phone addresses seized in a search. These situations are precisely what the 1978 FISA law and FISA court were designed for.

Terrorism investigations are labor intensive, lengthy, and can range over several states and continents. This is the justification for preventive detention for a longer period of time than 48 hours before a suspect must be charged in a court, but not an excuse for indefinitely holding a suspect when there is insufficient evidence for a prosecution. In a German case in the city of Ulm, a group of three based in an “Islamic Information Center and Multicultural House” targeted American military installations in Germany and Frankfurt Airport. After a tipoff from U.S. intelligence, three hundred law enforcement personnel worked full time on the case for months, and on the day of the arrest, 41 buildings were raided. The group leader was charged with incitement to violence [NYT 9/9/07]. Peter Clarke reported that in “Operation Crevice” seven hundred officers had thwarted a plot by eight ethnic Pakistani UK citizens to construct a large bomb with ammonium nitrate intended for a London site [NYT 8/1/05]. The British prime minister Gordon Brown reported that three suspects were held in a plot to bomb transatlantic airliners and that the investigation involved “two hundred cell phones, four hundred computers, and 8000 CDs, DVDs and discs, which together contained an estimated 6000 gigabytes of data.” [NYT 7/5/07]. As these data and links are mined and connected by security agencies, accomplices are discovered and evidence for charging them with crimes collected. But they take a long time and tie up much police labor.
Surveillance in a loose network terror environment must be painstaking and wide in scope, and requires international cooperation. In a case of four terrorists who botched a 2005 London transit attack – they made their own bombs from chemicals and materials purchased in stores (e.g. hydrogen peroxide) which failed to explode – a closed circuit television image showing the men fleeing the underground station was eventually matched with a surveillance photo of one of the suspects at a training camp in the Lake District. In another instance, three men in Britain were convicted of “inciting terrorist murder though extremist websites” they operated on the internet which provided bomb making instructions, depicted video beheadings in Iraq, and urged the commission of terrorist acts in the name of Islam. The police discovered the three when a man in Sarajevo (Bosnia) was arrested and possessed a video that showed them preparing for an attack, and were listed on his computer “buddy list” [NYT 7/6/07 and 7/10/07].

The material on coercive interrogation reviewed earlier does not justify its use: it leads to abuses, unverifiable and false information for the most part, and confessions under duress that will not stand in a court of law. In extreme cases, such as the epidemic of suicide attacks against Israel in 2002 and 2003, it may well be a last resort and has thwarted such attacks. In the total package of anti-terrorism measures, there could be a small space for the authorities to apply for a warrant in a special court for coercive interrogation in an emergency situation, for specific suspects, for a limited time, under supervision, and for the purpose of detecting and thwarting terrorist attack, not to force a confession.

If recruitment is disrupted, and identification, detection and surveillance are given ample scope in counter-terror measures, coercive treatment of suspects and torture are not needed by the authorities for arresting suspects with few false positives and for prosecuting them with ample evidence of their crimes. Special terrorist courts and military tribunals for safeguarding national security secrets in terrorism prosecutions, or to facilitate conviction by depriving defendants of some rights they have in ordinary criminal courts, then are also unnecessary. Jack Goldsmith and Neal Katyal [2007], two law professors, propose a “comprehensive system of preventive detention ...overseen by
a national security court” because it would handle classified evidence in a sensible way (e.g. without compromising intelligence sources), unlike ordinary civilian courts, and because of the complexity of terrorist trials (e.g. translations from foreign languages). However, a former federal prosecutor who prosecuted terrorist cases describes specific ways that complexity and classified information were handled in an ordinary court, and argues that neither a national security court nor a special detention system are necessary [Kelly Anne Moore 2007] On secrecy, David Cole [2003 pp.172-176] writes that “Since 1987 I have represented thirteen non-citizens against whom the government has sought to use secret evidence…in each case in which the charges were disclosed, they consisted of little more than guilt by association. In no case was the non-citizen ultimately determined to pose any threat to national security.” He cites specific cases where the “secret” turned out to be known to the public, based on hearsay, double and triple hearsay, mistakes easily disprovable (e.g. with a record of phone calls), and, as one judge remarked in a “secrecy” case, the quality of the classified information raises “formidable doubts about the veracity of the allegations.”

A problem in some terrorist prosecutions is circumstantial evidence that is difficult to verify: no fingerprints on vehicles that are blown up, accomplices who have personal knowledge of the suspect and his actions can’t be located or are dead , financial transfers in cash by couriers (the hawala system) leave no credit card or bank trails. Rahim al-Nashiri, the alleged al Qaeda operation chief in the Persian Gulf and mastermind of the USS Cole bombing in 2000, is now in custody in Guantanamo and about to face a military commission. In the Verbatim Transcript of Open Session Combatant Status Review Tribunal Hearing (for ISN 10015, March 14, 2007) , the tribunal officers ask him to respond to evidence against him (a partial list):
1. explosives training in Afghanistan and presence at various insurgencies –Nashiri denies training, he visited battlefields to inform others about them, in Chechnya he was part of an Islamic aid organization
2. using the alias Bilal (one of many Nashiri used) , according to a confessed U.S. embassy bomber in 1998, Nashiri helped get him a false passport – Nashiri denies any knowledge of the bomber, many people are called Bilal
3. he bought 50 kg. of explosives for the two bombers of the USS Cole – Nashiri admits to buying explosives, but they told him it was for digging wells
4. alias used by Nashiri found on contract for purchase of a vehicle used in USS Cole operation – that is possible, because his identification papers with his alias was stolen; someone else purchased the vehicle with the stolen ids.
5. he purchased the boat for the operation – that is true, but it was for fishing and tourism; he was in business with the two bombers but did not know about their bombing plans. He admits knowing many people in the USS Cole operation through the fishing businesses they all belonged to.
6. he repeatedly met with Osama bin Laden, took money from him and distributed it to various people in the Middle East – Nashiri admits knowing and meeting bin Laden frequently and taking money in $3000-$4000 amounts, but these were not for financing terrorist operations. Bin Laden is a generous man, he helps a lot of people when they get married, start a business, etc. What bin Laden gave him personally was for joint fishing ventures.

And so it goes. All these stories and denials are typical spin by terrorist suspects. His explanation might be true for each item, taken singly, but a common sense interpretation of these events in toto (plus other evidence I did not list), based on knowledge of terrorist organization and practices, is that he was an al Qaeda paymaster in a Mid-Eastern network and organized the attack on the USS Cole, with many accomplices.40 Perhaps because the CIA did not believe that circumstantial evidence was strong enough to convict him, during his detention in secret prisons he was tortured and confessed to being a member of al Qaeda and to the Cole bombing, and much else besides (e.g. bin Laden has a nuclear bomb), which he claimed at the hearing were false.

Some analysts believe that to keep dangerous terror suspects in custody when there is only circumstantial evidence requires some form of administrative or preventive detention. Kenneth Roth [ 2008 p.13] thinks the “crime of conspiracy” and “providing material support to terrorists” are adequate instruments to prosecute because “the government often possesses plenty of evidence…from computer and cell phones seized,
financial records, and witnesses…” Unfortunately, as Nashiri indicates, that is sometimes not likely to be true. The answer to the problem of circumstantial evidence is not torture for confession, administrative detention, nor special courts that deny justice rights to defendants. Rather the answer lies in specifying behavioral criteria and actions, based on the modus operandi of terrorists, which cumulatively and in combinations define terrorist activity and membership in a terrorist organization, and prosecuting the suspect for these. Among suspect actions and explanations would be, e.g. having several aliases and possessing forged passports under a variety of names; claiming to be in business but having no fixed business location, financial records of any kind, names of clients, business income, or any proof of legitimate business activity; attending flight school but not wanting to learn how to land aircraft; presence on a battleground because one is “interested in observing fighting”; or going to Afghanistan (from Yemen, Algeria) to find a bride because they are “cheaper” there than back home.

**Conclusion**

The democratic counter-terror strategy I advocate is grounded on an empirical analysis of what insurgents and terrorists actually do and on effective law enforcement experience for containing and incapacitating them. Its corner stones are “good intelligence and the rule of law.” Criminalize recruitment of terrorists and advocacy of terrorism, and authorize robust detection, identification, surveillance and search by the police and security agencies, i.e. provide for “good intelligence.” Leave much of the rest of the criminal justice system unchanged, i.e. arrest, detention, interrogation, prosecution, habeas corpus, and other defendants’ rights.

These measures are more limited than the current post 9/11 maximum U.S. security state, but do diminish some civil liberties for the duration of a national emergency. There is a trade-off in the strategy. Criminalizing recruitment and advocacy and more police authority for detection, identification and surveillance will together enable security agencies to compile evidence and thwart terrorists before violent attacks and keep the integrity of the rest of the law and justice system. Failure to expand authority for “good
intelligence” leads to pressures for incapacitating terrorist suspects with preventive detention or in special courts, i.e. weakening the “rule of law.” 41

What a democratic strategy of “good intelligence and the rule of law” for fighting terrorists is can be learned from the British experience. After studying what works and what does not in effective counterinsurgency from the Northern Ireland “Troubles,” and after learning more from post 9/11 Muslim terrorist actions42, the British government developed an effective counter-terrorist strategy. It criminalizes the entire range of terrorist activities and focuses on targeted surveillance for maximum intelligence, which allows it to identify and arrest terrorist before they strike, while leaving much of the criminal justice system intact. Sir David Omand, security and intelligence chief in the Blair Cabinet explained the trade-off when he remarked that good intelligence “takes the pressure off tinkering with the rule of law.” [quoted in David Cole 2008]

Recent anti-terrorist legislation in the UK defines new terrorist crimes and anti-terrorist measures: assisting or supporting the principal, called ‘accomplice liability’; funding terrorist activity; attending terrorist training places; membership in proscribed organizations; glorification of terrorism with the intention of promoting attack; distribution of terrorist publications; authorizing the government to close places of worship that are centers of incitement to terrorism; deportation of foreign clerics who incite terror acts; extending the time for detention before charging a suspect; restricting the freedom of movement of suspected terrorists, and developing a biometric system for a national identification card [Beckman 2007, chapter 2]. The British have deployed surveillance cameras in public places on a massive scale. Closed circuit television cameras scan public places in shopping malls, on main streets, airports, railroad cars, stores and bars, and images thus obtained have been used to track and arrest suspects in major bombing cases. Wiretap warrants may be issued by the secretary of state for national security reasons. The police can designate areas in which pedestrians and vehicles can be searched without suspicion of crime.43
How intrusive and how effective is the surveillance system? Jonathan Evans, chief of MI5 (domestic intelligence) estimated in a 2007 interview that “two thousand people” pose a threat, and that the police are “currently working on 30 suspected plots and on 200 terrorist related groups and networks.” [NYT 11/5 and 6/07] Assuming (from the British terrorist group examples) that a group has on average 5 members, that gives 1000 suspects. Doubling that figure to include network links outside the group gives another thousand suspects to monitor, which added together are the two thousand people who pose a threat cited by Evans. If these figures are correct, the UK has a ‘terrorist watch list’ with two thousand names, who are being surveilled intensively, in a country of sixty-one million people. Between September 2001 and March 2007, 1228 people were arrested on suspicion of terrorist offenses in the UK, and of these 669 have been released, 224 convicted, 114 awaiting trial and the balance in other statuses. That gives an approximate 50% false positive arrest rate, compared to the close to 100% for U.S. terrorist detainees cited earlier [MI5 webpage: “Terrorist plots in the UK”].

The British surveillance system has been reasonably effective. Evans claimed 15 thwarted plots since 2001: the most important one was the 2006 plot by 24 terrorists to bomb ten transatlantic airliners; the greatest failure was the July 7, 2005 suicide bombing by four terrorists that killed 52 in the London underground and bus transit system. The British have shown that there is an effective democratic response to terrorism that avoids the excesses and abuses of the “maximum security state”, and equally avoids the security dangers posed by “business-as-usual.”

References

Abbreviation for New York Times = NYT


Beckman, James, Comparative Legal Approaches to Homeland Security and Anti-Terrorism, 2007, Burlington VT, Ashgate


Bowden, Mark, “The Dark Art of Interrogation” *Atlantic Monthly*, 2003 October


Burke, Jason, “Al Qaeda” 2004, *Foreign Policy* May/June


Galula, David, *Pacification in Algeria*, 2006, Santa Monica CA, Rand Corporation

Ganor, Boaz, “Israel, Hamas, and Fatah” in Alt and Richardson 2007

Gelpi, Christopher “The Cost of War: How Many Casualties Will Americans Tolerate” Foreign Affairs 2006 Jan/Feb

Goldsmith, Jack The Terror Presidency, 2007, New York, Norton


Gutman, Roy and David Rieff, eds., Crimes of War, 1999, New York, Norton


Hegland, Corinne “Who is at Guantanamo Bay” National Journal 2006, February 8

Hills, Alice, The Future War in Cities 2004

Human Rights/Middle East Watch, “Israel’s Interrogation of Palestinians from the Occupied Territories, Treatment and Ill Treatment” 1994 New York, HRW


Kalyvas, Stathis, The Logic of Violence in Civil War, 2006, Cambridge UP

Kaplan, Edward, “Tactical Prevention of Suicide Bombing in Israel” Interfaces 36 (6) 2006

Lewis, Anthony, Freedom for the Thought We Hate: A Biography of the First Amendment, 2008, New York, Basic Books


Mayer, Jane, “The Experiment” New Yorker Magazine 2005, July 11 and 18

Moore, Kelly Anne, “Take al Qaeda to Court” New York Times 8/21/2007

Mueller, John, ““Is There Still a Terrorist Threat?” Foreign Affairs 2006, Sept/Oct

Nance, Malcolm, “How (Not) To Spot a Terrorist” Foreign Policy 2008, May/June


Oberschall, Anthony, Conflict and Peace Building in Divided Societies, 2007, Abingdon UK, Routledge


Richardson, Louise, “Britain and the IRA” in Alt and Richardson 2007

Roth, Kenneth, “The Law of War in the War on Terror” 2004, Foreign Affairs, Januray/February

Roth Kenneth, “After Guantanamo.The Case Against Preventive Detention” 2008, Foreign Affairs May/June

Sageman, Marc Understanding Suicide Networks 2004 Philadelphia, University of Pennsylvania Press
1 Unconventional wars tend to last longer than conventional wars. Some persist indefinitely in failed states and spill over into other states. Massive repression and scorched earth against rebellion, as the Romans and Ottomans practiced, was a common state response [Luttwak 2007], but democratic states in the contemporary world rightfully reject such measures. Rather than a unilateral victory, they seek to contain the insurgency and negotiate a stable peace with their adversary.

2 From the U.S. Code: “Terrorism is premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents” [Nance 2008 p.42].

3 Suskind [2006, p.85, 208, 284-289] writes that the electronic surveillance system catches an estimated three billion communications daily… “the massive data sweeps, loosely targeted, implicated the privacy of tens of thousands of Americans to find odd bits of worthwhile intelligence, or a splinter of evidence worthy of its day in court.” He also reported that the CIA Office of Science and Technology, using a high tech method known as “steganography”, became convinced that hidden messages in daily al Jazeera
broadcasts pointed to an attack on international aircraft that would dwarf 9/11. After an international terror alert and many cancelled flights, and no incidents, it was concluded that the intelligence operation was a big mistake.

4 The Classified Information Procedures Act empowers federal judges to protect the defendant’s right to confront all evidence against them while safeguarding the government’s legitimate intelligence secrets. CIPA rules have worked satisfactorily in terrorism cases.

5 Vice-President Cheney’s “one percent doctrine” for emergency measures sets a 99% false positive rate as an acceptable standard; that means e.g. imprisoning or detaining ninety-nine innocents for the sake of incapacitating one terrorist [Suskind 2006 chapter 1].

6 Jack Coonan, the FBI special agent heading the “Osama bin Laden unit” from 1996-2002 repeatedly referred to the “ticking bomb” scenario as an “improbable event”, a “red herring”, nor a “real world” event [ABC News, 9/16/06; NPR News Hour 12/2/05].

7 An example of the legal mind at work was the discussion at the Brookings Institution on March 17, 2006 on the “president’s war powers: has the government gone too far?”, chaired by the legal writer and reporter Stuart Taylor, with a distinguished panel of historians and constitutional law experts. The discussion was a fascinating seminar on the constitution and Supreme Court rulings focusing on Washington, Hamilton and Jefferson’s actions during the Whiskey Rebellion, Truman’s seizure of the steel mills during the Korean war, the authorization to use force in the Gulf of Tonkin resolution, and other historic moments. Mid-way through, Stuart Taylor was moved to ask “What has all this to do with nuclear terrorism?”

8 According to a report by the U.S. to the United Nations Committee on the Rights of the Child, 2500 people under the age of 18 (most 16 and 17 years old) have been detained for periods up to a year or more since 2002 in the Iraqi war [NYT 5/20/08]. The report states that “The juveniles...have been captured engaging in anti-coalition activities such as planting improvised explosive devices, operating as lookouts for insurgents, or actively engaged in fighting...”

9 For Northern Ireland, figures are available from 1981-1998 [Elliott and Flackes,1999, “Security Statistics” pp.681-683] : Total deaths of civilians due to the security situation: 1208. Killings by paramilitaries: 1065 (Republican 734; Loyalist 331); killings by security forces: 143. In Iraq, as of April 2006, Iraqi Body Count estimated between 34,511 and 39,660 civilian deaths, of which American fire accounted for 37% of deaths; sectarian, revenge and criminal deaths were 36%; insurgent attacks were 10%, and unknown agents were the remainder 17%. In the Afghan war, a report to the United Nations Human Rights Council states that “International military forces have killed as many as 200 civilians in the first four months of 2008...the Taliban have killed 300 civilians in the same period.” [NYT, 5/16/08].

10 “No government can hope to defeat an ...insurgency unless it gives top priority to, and is successful in, building an intelligence organization” [Robert Thompson, 1966, p. 84]. For Thompson, there are two main sources of intelligence: captured documents and captured insurgents.

11 When the Iraqi army invaded Sadr City in Baghdad in May 2008 and the Mahdi army fought them from buildings, “U.S. and Iraqi forces responded by calling in earth shattering airstrikes and firing tank rounds at the buildings from which they took
fire…More than 1000 people were killed, many of them civilians caught in the crossfire.” [Raleigh News and Observer 5/25/08].

12 In the Iraqi insurgency, an analysis of U.S. casualties from May 2003 to March 2004 attributes 31% to bombs and improvised explosive devices (IED), 15% to rocket propelled grenades and mortars, 11% to small arms fire, 13% to downed helicopters, and 31% to accidents of all types [Ian Beckett 2005 pp.7-8]. A later report for October/November 2005 attributed 60% of U.S. military fatalities to IEDs [NYT 12/19/06].

13 The U.S. military estimated that between 85-90% of the prisoners at Abu Ghraib had no intelligence value (at the time that the prisoner abuses occurred) [Mark Danner 2005].

14 The counter-terrorism measures operated with a 65% “false positive” rate, but the appeals courts raised the bar on conviction.

15 Jurors and judges are threatened and murdered. In Northern Ireland, non-jury Diplock courts were instituted for the period of the emergency because of the intimidation of jurors and witnesses [Elliott and Flackes 1999, p.659-60].

16 The Diplock courts mentioned above are a case in point.

17 “The major way of getting information (on the PIRA) was getting informers “ e.g. tell a PIRA suspect that his wife will be charged for possession of explosives in their home and risk a long prison sentence unless the suspect turned informer [Toolis 1996 p.195].

18 This section on the effectiveness of Israeli counterinsurgency and counter-terror is not a complete history of the Israeli-Palestinian conflict [cf. Oberschall 2007 chapter 5].

19 In one case of a ticking bomb that comes closer to the armchair scenario than most, Abd al-Halim Belbaysi admitted that he had planned a terrorist attack at Beit Lid on January 22, 1995 at which two suicide bombers had blown themselves up and killed two Israelis. He confessed that three bombs had been built at his house, and he revealed the hiding place for the third bomb before it could be used in another suicide attack [http://home.att.net/~slomansonb/Israel.html].

20 IDF statistics in 2004 indicate that 928 arrests were made for suspicion of terrorist activity (which means that a Palestinian was on a security list and not necessarily that he was transporting a weapon or explosives) at 122 checkpoints, which gives 48 checkpoint days per arrest, i.e. thousands of Palestinians stopped and antagonized for every arrest. As a deterrent, checkpoints yielded mostly false positives and a huge number of angry Palestinians.

21 An investigation of the methods used by the IDF to interdict suicide attacks based on 79 Palestinians detained between July 2005 and January 2006 found that they were physically abused, humiliated, threatened, deprived of sleep, and held in appalling conditions [B’Tselem, “Absolute Prohibition; The Torture and Ill-Treatment of Palestinian Detainees” May, 2007]. Another study found that information thus obtained “results in intelligence driven search and pursuit that end with the capture of a would be bomber at a checkpoint, roadblock, or other en route location [Kaplan 2006 pp. 553-561].

22 The most notorious were the Finsbury Park Mosque in London, the Islamic Cultural Center in Milan, and the Third World Relief Agency in Vienna [Clarke 2004, p.138].

23 According to Suskind [2006, p.38-39], before 2001 a few hundred national security letters were issued annually, and thousands annually after 9/11, augmented by thousands of subpoenas from a federal court in Omaha.
How names are put on the list, and deleted, has been a closely guarded secret. Entries, names and persons are not the same number because Arab and Russian names come in variants when spelled with Latin alphabet, and some persons have aliases. According to an informal Terrorist Security Center spokesperson, the list has about 300,000 persons, mostly foreign, and about 15,000 U.S. citizens. The Department of Treasury’s public “Specially Designated Nationals and Blocked Persons” makes illegal any financial transactions with the approximately seven thousand persons and organizations listed; it has mostly Arab “global terrorists”, and Russian/Ukrainian and Colombian narcotics traffickers.

A Federal appeals court in 2007 rejected the President’s authority to define “unlawful enemy combatant” on his own authority and to hold them in indefinite military detention. Some of the abusive treatment of detainees in various prisons and detention facilities was not for interrogation purposes but a form of collective punishment for being Taliban, al Qaeda and supporters held responsible for the 9/11 terrorist attacks.

It is unfortunate that water boarding has received so much Congressional and media attention. Compared to others modes of coercive interrogation (painful shackling and handcuffing, sleep deprivation, 18-24 hour questioning for 50 days, etc., whether we call them torture or by some other name), it has been little used.

558 reviews were held, and some transcripts with redacted names and passages were disclosed publicly under the Freedom of Information Act.

Secretary of Defense Donald Rumsfeld famously asked the following question of himself at a news conference: ” Are we capturing, killing, or deterring and dissuading more terrorists every day than the madrassas and radical clerics are recruiting, training, and deploying against us?” [quoted in the 9/11 Commission Report, p374-5]. He was unable to answer his own questions.

There was no accountability. In congressional hearings, General Hayden refused to disclose how NSA determines to intercept an American phone call or email: “I can’t give details without increasing danger to Americans.”[ NYT 1/24/06]. Attorney General Gonzales refused to disclose how an American citizen becomes targeted for eavesdropping: “Our enemy is listening!” [NYT 2/6/06]. Congressional oversight did not interfere with data mining. Much about the operations was not disclosed to the Congressmen and what was disclosed was imperfectly understood [Suskind 2006 p.40].

The NCTC defines a terrorist incident “when groups or individuals acting on political motivation deliberately or recklessly attack civilians/non combatants or their property and the attack does not fall into another special category of political violence such as crime, rioting, or tribal violence.”

There is a huge literature on counterinsurgency and terrorism produced by military and security agencies and think tanks that tell how to identify terrorists, what weapons they use, how to search their safe houses, how to disarm bombs, how to set up roadblock searches, and so on, which is useful for soldiers and police, e.g. Nance [2008].

None of the many recommendations in the Report [Report of the 9/11 Commission, chapters 12 and 13] deal with specific issues of fighting terrorism, like preventive detention, searches, special courts, coercive interrogation, and the like.
34 Such terrorist teams are most likely to use conventional explosives. According to Jason Burke [2004 p.24], “Although Islamic militants (including bin Laden) have attempted to develop a chemical or biological arsenal, those efforts have been largely unsuccessful due to the technical difficulty of creating, let alone weaponizing, such materials…Nor is there compelling evidence that militants have come close to creating a ‘dirty (nuclear)bomb.’” Compared to the threat of nuclear annihilation in the space of thirty minutes from an exchange of nuclear armed ICBMs in the Cold War, any terrorist threat to the survival of the U.S. is minuscule.

35 In 2006 and 2007, several men with al Qaeda links were arrested on suspicion of preparing a terrorist attack in Denmark [NYT 9/11/07]. In May 2008, al Qaeda claimed responsibility for a suicide attack on the Danish embassy in Pakistan, and Danish police expected a further attack in Denmark itself, in revenge for the publication of cartoons of the prophet Mohammed.

36 An Iraqi police officer in Diyala province described the death culture of al Qaeda in Mesopotamia as follows: “In these (terrorist) families…the conversations at dinner are about suicide bombs, about explosives, about improvised explosive devices.” [NYT 7/5/08].

37 According to the anthropologist Roger Ballard who studied Muslim extremists, adherents to Salafism believe that “there is an obligation to physical jihad or struggle when one part of the global community of Muslims is suffering.” [NYT 7/31/05]. One Salafist group founded a learning center and an Islamic bookshop where they produced and distributed militant CDs, videos and internet materials, e.g. in a CD, they juxtaposed images from the Crusades with war-mutilated Muslim infants.

38 Hijazi was later arrested when Jordanian intelligence suspected a terrorist attack in Jordan at the millennium and was watching some suspects belonging to the Jordan cell. Before the bombing plot was activated against the 400 room Radisson hotel in Amman and Christian tourist sites with 5200 lbs of acids and agri-chemicals mixed into explosives, the Jordanian police intercepted a call from Abu Zubaydah in Afghanistan (a high official within Al Qaeda) to a cell member – a careless call that was not in code, about “the time for training is over”– and decided to arrest the suspects. An Algerian with a false French passport confessed under interrogation, and other detainees followed, which led to the explosives case, the safe houses and shortly the arrest of Hijazi [NYT 1/15/01; Report of the 9/11 Commission pp.174-5].

39 There is a tendency to analogize between prevention that interferes with free speech, as in the case of child pornography, and prevention of terrorism. Such analogies are of dubious relevance. Prevention of terror ought to be justified on its own merits, based on empirical data on the terror process.

40 If one assumes that each item in a list of circumstantial evidence has a probability of incriminating the suspect of 0.3 (and of not incriminating him 0.7), then ten independent items have a 0.03 probability of not incriminating him, or one expects 3 out of 100 that he is not guilty. In terrorist cases, for proving that the suspect is a member of a proscribed organization, that to me is a reasonable standard of proof.

41 When identification is faulty, abuses down the law enforcement chain follow. Many foreign fighters and ordinary people were picked up in Afghanistan and Pakistan after bounties of $5000 for Taliban and $10,000 for al Qaeda members were widely publicized
in leaflets. They were sent to Guantanamo and treated harshly. One interrogator told Jane Mayer [2005, p.60]: "At the time we didn’t even understand what al Qaeda was. We thought the detainees were all masterminds. It wasn’t the case. Most of them were just dirt farmers in Afghanistan." About two hundred are still detained in Guantanamo, after seven years, and have not been tried in any court.

42 The London Metropolitan Police organized “Operation Kratos,” a new strategy against suspected suicide bombers, because the Irish Republican attacks were hallmarked by telephoned warnings and largely aimed at economic and military targets, whereas the new terrorist threat is from indiscriminate mass casualty attacks with no warning [www.met.police.uk/docs/kratos_briefing.pdf].

43 There are flaws in the British emergency measures. Despite much investigation, indictments against some terrorist suspects have been frustrated by a lack of detailed evidence that would stand up in court. Deportation and extradition to states that practice torture are illegal, and so is indefinite preventive detention. There remains confinement of a dangerous suspect to his home, under “control orders,” with many restrictions, at great expense to the state and without a clear exit, e.g. the case of Abu Qatada [NYT 7/3/08].