

BALANCING NATIONAL SECURITY AND FREEDOM:
REACTIONS TO TERRORISM AND ITS EFFECT ON CITIZENS' CIVIL
LIBERTIES, CIVIL RIGHTS, AND PRIVACY

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ABSTRACT

This thesis portfolio analyzes the balance between national security and freedom, and the safe guards in place designed to protect liberty while increasing security. This portfolio finds that the impact of national security measures on citizens' freedoms is not as substantial as conventional wisdom assumes and safeguards implemented to prevent such intrusion are functioning effectively.

The first chapter of this thesis portfolio tests the conventional wisdom that as national security increases freedoms must decrease. After large events threatening national security occur it is presumed governments increase citizens' security by restraining traditional freedoms. By conducting a quantitative analysis of the level of terrorism and freedom within nine selected countries the evidence suggests after countries see a significant increase in the level of terrorism, freedom within that country does not decrease at a consistent observable level.

This thesis continues to look at the United States Government's reaction to the September 11th attacks and the impact the Department of Homeland Security (DHS), State and Local Fusion Center Program has on citizens' civil liberties, civil rights, and privacy. This chapter finds the DHS State and Local Fusion Center Program minimally impacts citizens' civil rights, civil liberties, and privacy and fulfills its statutory requirements to protect such rights while securing the homeland.

Finally, an analysis of the Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) is conducted to determine if the proactive safeguard intended to limit US Government, and DHS's intrusion on citizens is functioning as intended. Based on a review of current program, published impact

assessments, and other publicly available information this chapter finds the Office of CRCL is effective in proactively protecting citizens' civil rights and liberties.

Thesis Readers: William Clinger and Lisa Jaeger

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INTRODUCTION

Public discussions on the appropriate balance between national security and citizens' freedom have continually surged into the national spotlight since the terrorist attacks on September 11th, 2001. Finding the appropriate balance between security and freedom is not a new issue and has been debated even before our founding fathers wrote the United States Constitution and Bill of Rights. Benjamin Franklin famously wrote in 1755 "Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety". Franklin's quote is often cited as a battle cry for civil libertarians who denote governments' intrusion on citizens' freedoms and the need to prevent it. As far back as Thomas Hobbes' *Leviathan*, citizens discussed the struggle between security and freedom. Although, the fullness of the debate between security and liberty cannot be satisfied within this paper, this thesis examines post 9/11 security policies, and programs designed to protect citizens' rights in order to determine if the government has infringed on citizens' freedom.

It is important for the public to discuss the appropriate balance between security and freedom because our country's history shows that in times of crisis our government has the power to tilt the balance between security and freedom in favor of security. During World War II our government created internment camps for Japanese Americans, detaining Japanese immigrants without proper justification or due process in fear they were a threat to national security. Further, after the United States was founded our government passed the Alien and Sedition Acts in 1798 that were intended to counter the threat from France, but in reality restricted citizens severely. These acts increased the residency requirement for citizenship, allowed the President to deport or imprison anyone

“dangerous to the peace and safety of the United States” and severely restricted speech critical of the government, including in the press.¹ In our nation’s history our government has, at times, tipped the balance in favor of security too far and this paper is a means to measure the balance between freedom and security in the post 9/11 era.

More recently, the National Security Agency (NSA) public disclosures in the summer of 2013 have resurrected debate about the appropriate balance between security and privacy in the post 9/11 era. The NSA disclosures highlighted the cost of citizens’ privacy and civil liberties in the public sphere and reignited debate on the appropriateness of government programs that have been enacted since 9/11 in the name of security. To date no evidence has been uncovered that shows the NSA systematically or negligently went beyond the bounds of the law, although the disclosures have been interpreted by many to go beyond the spirit of those laws.

In the era of post 9/11 policies intended to counter the threat of terrorism, citizens’ liberties have not been thrown to the wayside. The PATRIOT Act, despite criticisms for its intrusiveness, did incorporate a sunset clause that ensured the law would be reevaluated to balance the interest of security and liberty. Furthermore, when the Department of Homeland Security was founded it included an Officer of Civil Rights and Civil Liberties to represent the interests of citizens. Other offices created after 9/11 such as the Office of Director of National Intelligence and the Terrorist Screen Center included offices of privacy and civil liberties to limit their impact on citizens.

The first chapter of this thesis tests the conventional wisdom that when a terrorist attack occurs causing mass casualties a government will react strongly by restricting

¹ US Library of Congress, “Primary Documents in American History” Accessed, 26 October 2014, Available at: <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html>

citizens' civil liberties in order to prevent further acts of terrorism, protect citizens, and prosecute the perpetrators. By analyzing data on the magnitude of terrorist attacks, and the level of freedom within a country, this chapter tests the aforementioned conventional wisdom. The level of civil liberties within a country is quantified using the civil liberties index within the Freedom House "Freedom in the World" publication. The level of terrorism within a country is quantified as the number of casualties per year recorded in the Global Terrorism Database. This research hypothesizes that, when terrorist attacks occur causing a large number of casualties, there will be a substantial decrease in the level of civil liberties in that country.

Nine countries - United States, United Kingdom, Spain, Pakistan, Turkey, Georgia, Russia, Saudi Arabia, and Egypt - are analyzed in chapter one of this thesis to test the hypothesis that when a terrorist attack occurs a country will react by restricting citizens' rights. This chapter looks at those nine countries separated into three categories including free, partially free, and not free to determine if there is a relationship between a country's predisposition for freedom and the country's reaction to a terrorist event. Data from 1990 through 2012 is used to determine trends occurring within a country and if citizens' freedom changes in relation to any increases in casualties due to terrorism.

Findings from chapter one suggest that of the nine countries studied, those that were considered free saw no decrease in civil liberties, as recorded by Freedom House "Freedom in the World". The countries considered not free saw a slight reduction in civil liberties after high levels of casualties due to terrorism. The remaining three countries considered partially free saw little change in civil liberties after experiencing high level of casualties due to terrorism. By using the University of Maryland's National

Consortium for the Study Of Terrorism and Responses to Terrorism (START), Global Terrorism Database (GTD) to measure the number of casualties per year within a country, along with Freedom House's Civil Liberties Index, this chapter found little observable relationship between magnitudes of terrorism and a country's level of civil liberties.

The second chapter of this thesis portfolio analyzes the Department of Homeland Security's State and Local Fusion Center Program and its impact on citizens' privacy, civil liberties, and civil rights. The chapter analyzes if the State and Local Fusion Center Program is meeting the guidelines and requirements set forth in the Homeland Security Act of 2002 that requires the Department to protect citizens' civil rights and civil liberties in its efforts to secure the homeland. This chapter will primarily analyze federal guidelines and regulations applicable to the State and Local Fusion Center Program. There is a unique necessity to critically evaluate the role that State and Local Fusion Centers play within the United States' National Security paradigm because of their ability to leverage law enforcement and intelligence capabilities in addition to federal, state, and local resources, which prior to 9/11 were traditionally separate functions.

This chapter draws upon State and Local Fusion Center Program Office reports submitted to Congress, interviews with Fusion Center officials, DHS Office of Civil Rights and Civil Liberties and Office of Privacy's Impact Assessments publications, and other sources to analyze the impact the State and Local Fusion Center program has on communities and citizens.² This chapter looks further at the training and review processes in place to protect citizens' civil rights, civil liberties, and privacy.

² See appendix A and B for DHS and DHS, Office of Intelligence and Analysis organization charts.

Findings from an analysis of the DHS State and Local Fusion Center Program conclude the DHS is sufficiently protecting citizens' civil rights and civil liberties while executing its State and Local Fusion Center Program intended to share information between Federal, State and Local Governments. The DHS State and Local Fusion Center Program, with assistance from DHS components such as the Office for Civil Rights and Civil Liberties, has instituted programs and training designed to educate and reinforce the importance of protecting civil rights and civil liberties while executing its mission of protecting the homeland. This chapter also finds DHS has successfully guided the network of Fusion Centers in the implementation of programs designed to protect citizens' rights, despite not having direct control of State and Local Fusion Centers.

The third chapter explores whether the Department of Homeland Security Office for Civil Rights and Civil Liberties is fulfilling its mission and if their actions are sufficient as defined in the Homeland Security Act of 2002 and applicable regulations, executive orders, and directives. The Office for CRCL is a safeguard built into the DHS that most other intelligence and law enforcement departments do not have. It is important to evaluate the utility of this office because of its uniqueness in law enforcement and intelligence agencies. This chapter is designed to be a 10-year review of the Office for CRCL reviewing its role and effectiveness in preemptively protecting citizens' civil rights and civil liberties.

To evaluate the DHS Office for Civil Rights and Civil Liberties this chapter looks at applicable statutes, regulations, executive orders, and directives that guide the day-to-day and overall operations of the Office of CRCL to determine what standard they should be meeting in order to operate as intended. The chapter proceeds by drawing upon

publicly available information released by DHS, the Government Accountability Office, and CRCL reports to Congress to evaluate the office's activities. By drawing upon these sources this chapter identifies actions by CRCL in pursuit of its statutory obligations.

Findings in chapter three conclude that the Office for Civil Rights and Civil Liberties is successfully involved in many aspects of oversight to ensure the Department of Homeland Security is protecting civil rights and civil liberties while also ensuring homeland security. The office is fulfilling its mission and their actions are sufficient as defined in the Homeland Security Act of 2002 and applicable regulations, executive orders, and directives. This paper recommends three ways the Office for CRCL and the DHS could increase transparency and increase citizens' civil rights and civil liberties. First, the office could report metrics for its role in reviewing reports and policy. Second, it needs to publicize when they are holding community engagement events before, not after, they occur. Third, the office needs to show substantive evidence that the information the office is obtaining through engagement events is being incorporated in their proactive policy review program.

This portfolio finds no evidence of a seismic shift in the balance between citizens' freedom and national security. Since the terrorist attacks in 2001 security has been a paramount priority within the United States and abroad, however citizens' freedoms have not been diminished in pursuit of security. Academics and journalists have written extensively on the balance between freedom and security in the post 9/11 era. This thesis portfolio will focus on governments' reactions to terrorism and the means to balance security and freedom.

CHAPTER ONE

Research Question: Is there a relationship between the between the magnitude of terrorist attacks, and the level of citizens' civil liberties within that country after the terrorist attack?

The research presented in this chapter tests the conventional wisdom that when a terrorist attack occurs causing mass casualties a government will react strongly by restricting citizens civil liberties in order to prevent further acts of terrorism, protect citizens, and prosecute the perpetrators. This chapter analyzes the relationship between the magnitude of terrorist attacks, and the level of citizens' civil liberties within that country following an attack. This chapter uses the Global Terrorism Database and the Freedom House index to quantify terrorism and civil liberties respectively. This research hypothesizes that, when larger terrorist attacks occur causing more casualties, there will be a substantial decrease in the level of civil liberties in that country.

This chapter concludes that of the nine countries studied, those that were considered free saw no decrease in civil liberties, as recorded by Freedom House "Freedom in the World". The countries considered not free saw a slight reduction in civil liberties after high levels of casualties due to terrorism. The remaining three countries considered partially free saw little change in civil liberties after experiencing high level of casualties due to terrorism. By using the University of Maryland's National Consortium for the Study Of Terrorism and Responses to Terrorism (START), Global Terrorism Database (GTD) to measure the number of casualties per year within a country, along with Freedom House's Civil Liberties Index, this chapter analyzed whether there is an observable relationship between magnitudes of terrorism and that country's level of civil liberties.

How the Terrorism Variable is Calculated

This chapter uses data collected by the University of Maryland's National Consortium for the Study Of Terrorism and Responses to Terrorism (START), Global Terrorism Database (GTD) to measure the magnitude of terrorist attacks. The GTD is an open source database that collects event information for all terrorist incidents around the world.³ The GTD categorizes incidents and includes 45 variables for each incident. To measure the magnitude of the terrorist incidents this chapter uses the total number of casualties. This variable includes both those injured and fatality injured during the attacks.

The START GTD has three criteria used to determine what events qualify as terrorist incidents. First, "The act must be aimed at attaining a political, economic, religious, or social goal." Second, "There must be evidence of an intention to coerce, intimidate, or convey some other message to a larger audience (or audiences) than the immediate victims." Third, "The action must be outside the context of legitimate warfare activities, i.e. the act must be outside the parameters permitted by international humanitarian law (particularly the admonition against deliberately targeting civilians or non-combatants)."⁴ It is important to explicitly define terrorism because there is significant debate on how terrorism should be defined.⁵

How the Civil Liberties Variable is Calculated

³ University of Maryland (UMD), National Consortium for the Study Of Terrorism and Responses to Terrorism (START), Global Terrorism Database (GTD), Last Accessed 11/5/2012, <http://www.start.umd.edu/gtd/>

⁴ UMD, START, GTD, <http://www.start.umd.edu/gtd/search/>

⁵ Cooper, Harold HA. "Terrorism The Problem of Definition Revisited." *American Behavioral Scientist* 44, no. 6 (2001): 881-893.

This chapter uses the civil liberties index in the Freedom House “Freedom in the World” publication for measuring the level of civil liberties within a country. Freedom House divides civil liberties in four sub-categories: (1) freedom of expression and belief, (2) freedom of association, (3) rule of law, and (4) personal autonomy and individual rights. The civil liberties index is based on 15 questions individually scored on a 0-4 scale and then aggregated to create the civil liberties index on a 0-60 scale.⁶ Freedom House has only recorded civil liberties on a 0-60 scale since 2003. This scale is preferred over Freedom Houses 0-7 scale because the larger scale more accurately shows subtle changes in civil liberties. This chapter uses the 0-60 scale when appropriate but, for terrorist events prior to 2003 it will be necessary to use Freedom House’s 0-7 scale.

Nine Countries Selected for Analysis

This chapter looks at nine countries that the Freedom House “Freedom in the World” publication considers to be free, partially free, and not free. The Freedom House rating which will be used to determine the countries status takes both political rights and civil liberties into account when creating it’s index on a 1-7 scale (1 representing the most free and 7 the least free).⁷ The Freedom House rating is made up of 10 political rights questions and 15 civil liberties questions in which countries receive 0 to 4 points per question (0 representing the least freedom; 4 representing the most freedom). The assigned responses to the 25 questions are then averaged resulting in the Freedom House rating known as the “freedom rating”. The Freedom House rating assigns countries a

⁶ Freedom House, Last Accessed 11/5/2012, <http://www.freedomhouse.org/report/freedom-world-2012/methodology>

⁷ House, Freedom. "Freedom in the World 2013." *Democratic breakthroughs in the balance* (2013). <http://www.freedomhouse.org/report/freedom-world-2013/methodology#.UwKgSEJdXqY>

status by applying the following scale: Free (1.0 to 2.5), Partly Free (3.0 to 5.0), or Not Free (5.5 to 7.0).⁸

This chapter will look at nine countries that are, as of 2012, considered to be free, partially free, and not free as recorded by Freedom House's "Freedom in the World" rating. The free countries this research will analyze are United States, United Kingdom, and Spain; the not free countries are Russia, Saudi Arabia, and Egypt; and the partially free countries include Pakistan, Turkey, and Georgia. This research has selected these nine countries as a sampling of countries that have had large fluctuations in the level of terrorism as recorded by the Global Terrorism Database.⁹ Furthermore, analyzing countries that are free, partially free and not free will include countries whose preexisting civil liberties environment are at all points along the civil liberties index. For example, if a country is free it will be hard to analyze if that country gains any freedom after a terrorist attack, and vice versa for not free countries. For this reason this research includes countries across the civil liberties spectrum.

Background on the Terrorism and Civil Liberties Balance

When large terrorist attacks occurs causing a significant number of casualties we expect a stronger response from the government than if terrorist attacks are small or fail to cause numerous casualties. In response to the September 11th terrorist attacks targeting the World Trade Center, Pentagon, and Flight 93, the government reasoned, in order to effectively fight this new adversary it needed new tools. These new tools that the government used to fight terrorism included restricting citizens' civil liberties. Through legislation such as the Uniting and Strengthening America by Providing Appropriate

⁸ Freedom House, 2013

⁹ Freedom House, 2013

Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) we saw the government broaden its ability to fight terrorist and perceived threats to the United States homeland.¹⁰

Surveillance initiatives that were included in the Patriot Act, such as the roving wiretaps, modernized counter terrorism investigative powers by allowing warrants to follow the individual and not the single device as before. Roving wiretaps allowed the government to follow an individual with a warrant and listen to his or her communication. Previously, separate warrants were required to listen to a subject's communication on different devices they used. This initiative is argued not to have infringed on citizens rights but upgraded counter terrorism investigation tools to the 21st century.¹¹ In an era when a subject could purchase and dispose of several cellular phones at their convenience, these measures helped level the playing field for investigators.

Further, provisions the Department of Justice implemented such as detainee-lawyer communication monitoring were highly criticized by some and defended by others. Supporting scholars assert that such privileges were only used when there was reasonable suspicion that such communications may facilitate future acts of violence and terrorism.¹² If an attorney was abusing such rights in order to facilitate terrorism, with reasonable suspicion, the government could monitor conversations. Attorney General John Ashcroft exercised this privilege prior to the indictment of Attorney Lynne Stewart who was later convicted of terrorism related charges while representing Sheik Omar

¹⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107 –56. 115 Stat. 272 (2001). Retrieved from <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>

¹¹ Tin, Jan C. "Unobjectionable But Insufficient"

¹² Tin, Jan C. "Unobjectionable But Insufficient" p 1151

Rahman, a participant in the first World Trade Center Bombing in 1993.¹³ Lynne Stewart was accused and convicted of providing material support to terrorists. Stewart used her client attorney confidentiality privileges to facilitate “the blind Sheik's” terrorist planning and communication.

Immigration policy following 9/11 changed dramatically and supporters cite such changes were necessary in order to prevent further abuse of our immigration system by terrorists. The Patriot Act clarifies that providing material support for terrorism constitutes terrorist activity and is a deportable act. Further, the creation of various terrorist watchlists has created a measure of screening that was not previously established.¹⁴ Various terrorist watchlists maintained by the US Government prevent known or suspected terrorists from obtaining legal entry into the United States through ports of entry. Supporters of stricter immigration policy cite that non-US citizens have fewer rights and thus stricter scrutiny can be legally applied to immigrants in the name of counter terrorism and national security. It is known that terrorists have abused visa and immigration programs in an attempt to gain legal access into the United States. Imposing harsher restrictions to our immigration system to prevent potential terrorists from entering the US is argued to be well within our laws.

The steps taken by the US Government to fight terrorism were intended to prevent another large-scale terrorist attack from occurring within our borders. In support of that effort the federal government has expanded the role state, local, and tribal governments play in the intelligence community, post 9/11. The government was trying to better

¹³ Johnson, Kevin R. "Civil Liberties Post-September 11: A Time of Danger, a Time of Opportunity." *Seattle J. Soc. Just.* 2 (2003): 3.

¹⁴ Tin, Jan C. "Unobjectionable But Insufficient"

“connect the dots” between seemingly insignificant and disparate pieces of information that may when put together prevent an attack within the homeland.

The federal government was looking to partner closer with local, state, and tribal governments to facilitate information sharing. These new programs positioned local and state governments to act as intelligence collectors adding information to the broader intelligence picture. Further, this same information collected by law enforcement for intelligence purposes could also be used for prosecuting potential criminal and terrorists. The new role of law enforcement plays in intelligence matters blurs the line between two. Previously, intelligence and law enforcement were separated because of the different due process procedures needed in the court law.

The Federal Government recognized after 9/11 that small disparate pieces of information might be of greater significance when put into the big picture. For example, if a state or local police officer pulls a driver suspicious driver over for speeding, by itself that information is of no value. Now, if that information is merged with the federal government's knowledge that he has links to terrorism it becomes more significant. Furthermore, it becomes even more significant if the law enforcement officer notices he had several bags of fertilizer in his back seat¹⁵ of his car and the subject's license said he lives in an apartment in Northwest, Washington DC.

Previous Academic Studies

Previous research has analyzed governments' reactions to terrorism through the use of both quantitative and qualitative methods. There is an active discussion amongst

¹⁵ Fertilizer is a commonly used chemical to create homemade explosives.

scholars about the relationship between governments and terrorism.^{16 17 18} Discussions include studies that look at different countries, their types of governments, and their relation to terrorism. The academic discussion on the relationship between governments and terrorism divide roughly into two schools of thought. Those that assert democracies encourage terrorism and terrorism is more prevalent in democratic countries. The second school includes those that believe democracy deters terrorism and terrorism is more prevalent in restrictive authoritarian countries.

Initial studies on the relationship between democracy and terrorism, relevant to the current discussion of terrorism, started with William Lee Eubanks and Leonard Weinburg's article "Does Democracy Encourage Terrorism?" Eubank and Weinburg were not the first academics to study the relationship between terrorism and a countries' political structure in which it occurs, but they were the first modern and relevant attempt to empirically study the relationship between the presences of terrorist groups and democracies. Eubank and Weinburg lead the discussion finding that democratic governments have more terrorist groups present than non-democratic countries.¹⁹ They used data from the "World Directory of Terrorist and Other Organizations Associated with Guerrilla Warfare, Political Violence and Protest" which organizes terrorist groups by country of origin. They also used "Democracy: a worldwide Survey" for the classification of countries' regime type. Eubank and Weinburg found that democracies have a high presence of terrorist groups. Their study, although one of the first to measure

¹⁶ Eubank, W. L. and L. Weinberg. 1994. "Does Democracy Encourage Terrorism?" *Terrorism and Political Violence* 6 (4): 417-435.

¹⁷ Eubank, W. & Weinberg, E, 1998. "Terrorism and Democracy: What Recent Events Disclose." *Terrorism and Political Violence* 10:1: 108-118

¹⁸ Sandler, T. 1995. "On the Relationship between Democracy and Terrorism." *Terrorism and Political Violence* 7 (4): 1-9.

¹⁹ Eubank, W. L. and L. Weinberg. 1994. "Does Democracy Encourage Terrorism?" *Terrorism and Political Violence* 6 (4): 417-435.

the level of terrorist groups, fails to account for the significance these terrorist groups play within their countries. Scholars have looked at Eubanks and Weinburg's and objected to their findings asserting that there is no relationship between democracy and terrorism and the data used is faulted.²⁰

Other research has found evidence to challenge the findings of Eubank, Weinberg, and scholars who support the positive relationship between democracy and terrorism. First, the scholars who reject this relationship have challenged the evidence presented by William Lee Eubanks and Leonard Weinburg on methodological grounds asserting that the statistical analysis performed is faulted, and the variables used are not accurate in order to support their findings. Todd Sandler makes a case for using terrorist event data rather than presence of terrorist group data as used by Eubank and Weinburg in their initial research.²¹ Sandler points to several factors that make using the presence of terrorist groups a faulty source of data for measuring terrorist activities. First, countries that are authoritarian in nature and restrict citizens' civil liberties are more likely to underreport terrorist group activity or presence. Sandler further supports the use of event data because it is more difficult for restrictive countries to underreport or hide terrorist events, than it is for them not to acknowledge the existence of terrorist groups.²² Further, Sandler sites how "spill over terrorism" is not accounted for in Eubank and Weinbergs study. There are countries that may experience several terrorist events but not be the home base for any particular terrorist group. With Sandler's focus on the importance of the data used and the source of the information researchers continued to look for new

²⁰ Sandler, T. 1995. "On the Relationship between Democracy and Terrorism." *Terrorism and Political Violence* 7 (4): 1-9.

²¹ Sandler, T. 1995.

²² Sandler, T. 1995.

data sources to study the relationship between terrorism and the countries in which it occurs.

With this new data in hand scholars have presented evidence that terrorism is more often found in countries that are not democratic, contrary to past findings. Max Abrahms used yet another dataset to analyze terrorism and country type finding democracies do not have a higher presence of international terrorism.²³ Abrahms used the National Counter Terrorism Center (NCTC), Worldwide Incident Tracking System (WITS) data and found, of the top 10 countries most frequently targeted by terrorist, only two of the were free countries.²⁴ Abrahms points to traditional used data sets that track terrorism, such as the RAND-St Andrews, Department of State, and ITERATE databases, which disproportionately track international terrorism while overlooking domestic terrorism because these databases were designed primarily for policy makers most interested in international terrorism.²⁵ For the country variable Abrahms used the Freedom House's "Freedom in the World" ranking to determine countries' level of democracy. Amongst Abrahms' findings he determined that not free countries were twice as likely to have terrorist incidents and as much as six times as many fatalities as free countries. These findings go against previous analysis by Eubank and Weinberg that has determined free democracies were more likely to see terrorist events.

New Study Presented

Following Sandler's analysis and suggestion that event data would be a better measure for the presence of terrorism, Eubanks and Weinberg's published another paper

²³ Abrahms, M. "Why Democracies make Superior Counterterrorists."

²⁴ Abrahms, M. "Why Democracies make Superior Counterterrorists."

²⁵ Abrahms, M. "Why Democracies make Superior Counterterrorists."

in 1998 addressing these questions and concerns.²⁶ While using event data (opposed to group data) gathered by the US State Department's Patterns of Global Terrorism and Rand-St Andrews Chronology of International Terrorism, Eubank and Wienberg again found that "terrorist events are far more likely to occur in free and democratic settings than any other alternative."²⁷ In addition to these findings they also found that countries that have recently underwent a regime change were more likely to experience terrorism than countries, which have not.²⁸

Since these studies, other scholars have used a variety of variables and data sets to analyze the relationship between democracy and terrorism. Among these, scholars have used the frequency of terrorist attacks²⁹ terrorist attacks according to their location, the perpetrator's nationality, and the victim nationality, among other variables.³⁰ Eubank and Wienberg in their 2001 study again found by using frequency of terrorist event data that free countries³¹ are more likely to see high levels of terrorist attacks compared to countries that are not free.³² Specifically, they analyzed the relationship between terrorism and democracy by using Robert Wessons classification of how countries were ruled in the mid 1980's³³ in comparison to the frequency with which there citizens were either victimized or perpetrated by terrorist attacks according to the ITERATE (International Terrorism: Attributes of Terrorist Events, 1978-1990, ITERATE III).

²⁶ Eubank, W. & Weinberg, E, 1998. "Terrorism and Democracy: What Recent Events Disclose."

²⁷ Eubank, W. & Weinberg, E, 1998.

²⁸ Eubank, W. & Weinberg, E, 1998.

²⁹ Eubank, W. & Weinberg, E, 1998.

³⁰ Eubank, W. & Weinberg, E. 2001. " Terrorism and Democracy: Perpetrators and Victims"

³¹ Free Countries are Defined by Freedom House Freedom in the World for 1984-1985

³² Eubank, W. & Weinberg, E. 2001. " Terrorism and Democracy: Perpetrators and Victims"

³³ Wesson, Robert, (Ed.) 1987, "Democracy: A Worldwide Survey" New York: Praeger

Again, for the third time their study found that terrorism is most likely to occur in stable democracies.³⁴

Theories on the Causes of Terrorism

There is a robust discussion on the causes of terrorism, why it occurs, how terrorism works, and what the effects are.³⁵ While attempting to understand the effects of terrorism, scholars have also sought to understand the relationship between terrorism and democracy, and more broadly the relationship between terrorism and the countries in which it occurs. Those that assert that there is a positive correlation between terrorism and democracy believe this is due to the freedoms and civil liberties associated with democracy³⁶. Citizens within a democracy often have freedom of speech, movement, and assembly which terrorists are thought to exploit in order to facilitate their actions unnoticed by law enforcement and other governmental entities tasked with protecting there country from threats foreign and domestic in origin.³⁷ Those that assert that terrorism is more likely in countries that are non democratic and have less civil liberties reason that this is because citizens' have no way to express their political will and opinion, opposing their current political situation, in peaceful means.³⁸

Arguing against the relationship between democracy and terrorism scholars reason democracies are great counter terrorism mechanisms in and of them selves due to the outlets and avenues they provide for citizens to voice their political opinions and influence their government and the laws they implement³⁹. Democratic governments are

³⁴ Eubank, W. & Weinberg, E. 2001. " Terrorism and Democracy: Perpetrators and Victims"

³⁵ Crenshaw, M. 1981. "The Causes of Terrorism." *Comparative Politics* 13 (4): 379-399.

³⁶ Eubank, W. & Weinberg, E, 1998. "Terrorism and Democracy: What Recent Events Disclose."

³⁷ LI, Quan. 2005. "Does Democracy Promote Or Reduce Transnational Terrorist Incidents?" *Journal of Conflict Resolution* 49:278-297

³⁸ LI, Quan. 2005.

³⁹ Abrahams, M. 2007. "Why Democracies make Superior Counterterrorists."

representative of its citizens by definition and citizens' ideal, opinions, and values are represented in the government.⁴⁰ Further, democracies provide an avenue for its citizens to express dissent and influence change within their government. Free and fair elections in democracy also promote non-violent means of creating political and policy change. Furthermore, when there is a conflict amongst groups, the courts allow for an impartial resolution to the issue.⁴¹

The opposing argument is that free and democratic countries are more likely to experience acts of terrorism perpetrated against them. Supporting this argument, scholars suggest that open democratic societies facilitate terrorism because it allows perpetrators to plan and execute activities relatively unnoticed and at little cost.⁴² Further, as Abrahms acknowledges, although democratic societies have little tolerance for attacks perpetrated on their population, they have also made a commitment to adhere to a high level of civil liberties that makes them vulnerable. While maintaining their expected level of civil liberties it makes it difficult for free societies to adopt harsh measures to counter terrorism and possibly prevent future attacks.⁴³ In line with this argument, assuming terrorists are rational actors, they would choose to attack democracies because they have a greater chance of receiving concessions and their actions resulting in political change.⁴⁴

The existing literature and studies analyzing the relationship between terrorism and the environments that it occurs in have looked at numerous variables including terrorist groups and where they exist, terrorist events and where they occur, in addition to the ideological reasons why terrorist attack the targets they do. This chapter will look

⁴⁰ Abrahms, M. 2007. "Why Democracies make Superior Counterterrorists."

⁴¹ Schmid, A. P. "Terrorism and Democracy."

⁴² Li, Quan 2005

⁴³ Abrahms, Max, 2007.

⁴⁴ Ibid.

more closely at the relationship between terrorist attacks, and how the level of civil liberties changes after an attack.

Method of Analysis

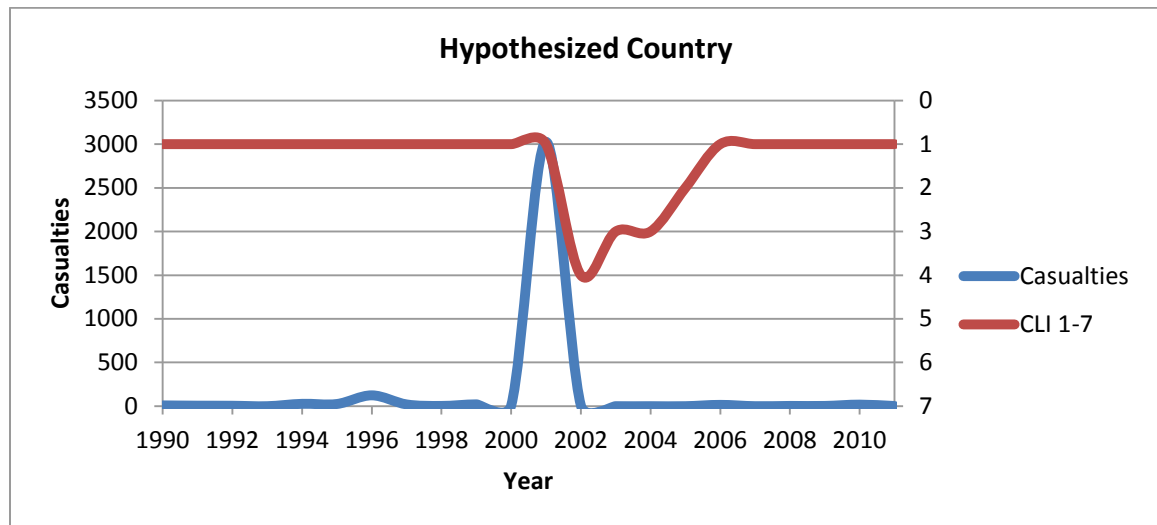
This chapter will analyze if there is an observable relationship between the level of civil liberties and casualties due to terrorism within a country and if countries' civil liberties decrease after large increases in the level of terrorism. In order to determine if there is a relationship, this chapter will use the data gathered from the START database and the Freedom House "Freedom in the World" publication. These two data sets will be plotted on the same line graph for each country analyzed. The graph will present the number of casualties due to terrorism on the left y-axis and the countries' civil liberties index on the right y-axis. The x-axis will have the corresponding years from 1990 through 2011. Graph 1.1 displays how the graph will be presented and this chapter's proposed hypothesis. Analyzing the data and plotting it on the graph will establish if there is suggestive relationship between the magnitude of terrorist incidents and level of civil liberties. The number of casualties for each country will be presented across time from 1990 to 2011 across the x-axis. This total includes the number of people killed, and injured for each incident in the year, including the perpetrator if they were killed or injured.

Analysis of the level of Terrorism and Civil Liberties

When comparing the number of casualties due to terrorism to the level of civil liberties in a country, conventional wisdom suggests as the level of terrorism increases, the level of civil liberties will decrease. Of the nine countries selected and analyzed in this chapter, this relationship is not seen in three countries categorized a "free" country.

Only a slight relation can be seen in “partially free” and “not free” countries between the magnitude of terrorist event and the level of civil liberties within those countries.

Graph 1.1 Hypothesized Graph of Casualties and Civil liberties



Free Countries Terrorism and Civil Liberties Analysis

United States

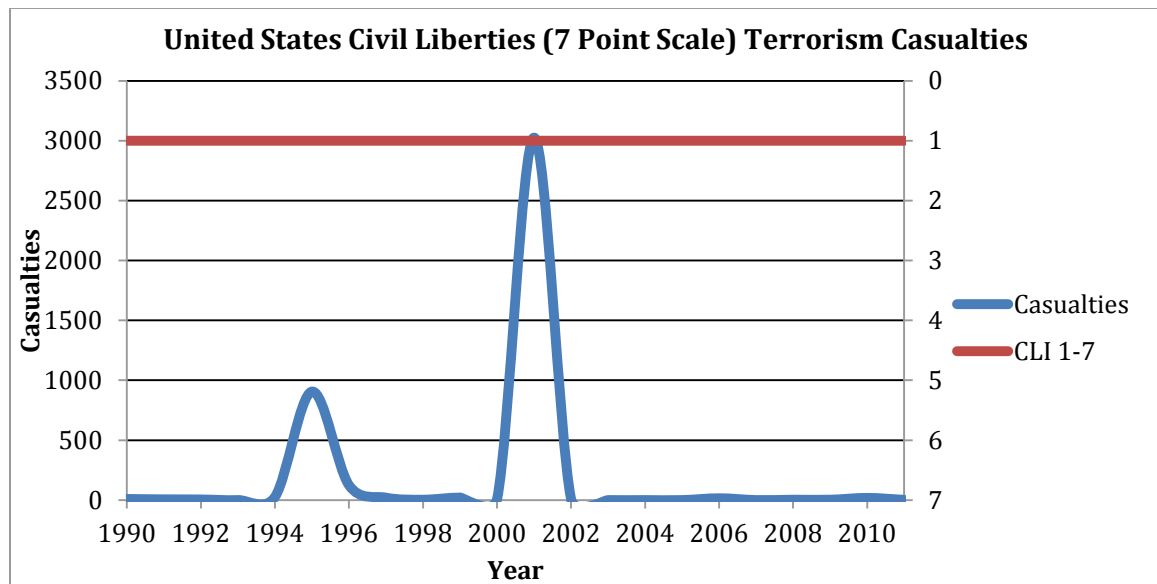
The United States (US) experienced its worst terrorist attack in its history when Al Qaeda attacked on 11 September 2001 causing approximately 3000 casualties. In 1995 the United States also saw a spike to 906 casualties due to terrorism as a result of the Oklahoma City Bombing perpetrated by Timothy McVeigh. The 2001 and 1995 increases in casualties due to terrorism are clearly evident on graph 1.2 and 1.3.

Following the terrorist attacks in 2001, The United States' civil liberties index (CLI) fluctuated between 55 and 56 on the 60 point scale from 2003 to 2008, as seen in graph 1.3.⁴⁵ The fluctuation seen on graph 1.3 between 55-56 may be a result of changing counter terrorism policy and its effect on civil liberties, although the US's overall rating

⁴⁵ 0=Low Level of Civil liberties, 60=High level of Civil liberties

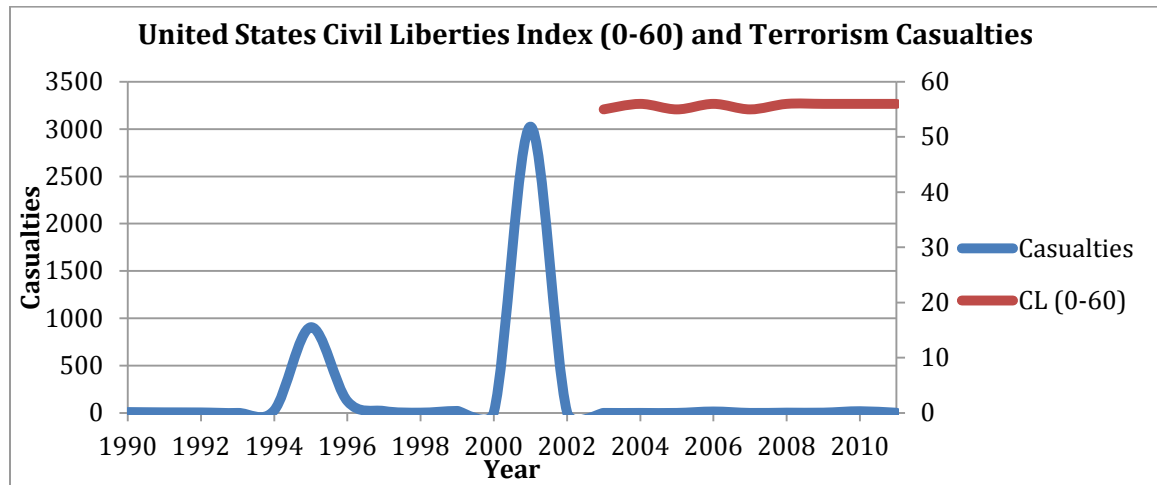
remained very high on the over CLI and the fluctuation small. Additionally, the fluctuation may only be seen on the 0-60 scale, and not the 1-7 scale, because the larger scale can more accurately show fluctuations in the CLI. According to the Freedom House Index 7 point scale, The United States maintained a CLI of 1 from 1990 through 2011.⁴⁶ The overall level of civil liberties is still considerably high even amongst other free countries such as Spain, and Great Britain, who maintained approximately a 57 to 53 CLI and 56 to 55 CLI respectively during the same time period. The hypothesis presented in this chapter is not supported by the data for the United States. No change in civil liberties is evident after increases in the level of terrorism within the United States.

Graph 1.2 United States Level of Terrorism and Civil Liberties (7 point Scale)



⁴⁶ 7= Low Level of Civil Liberties, 1= High Level of Civil Liberties

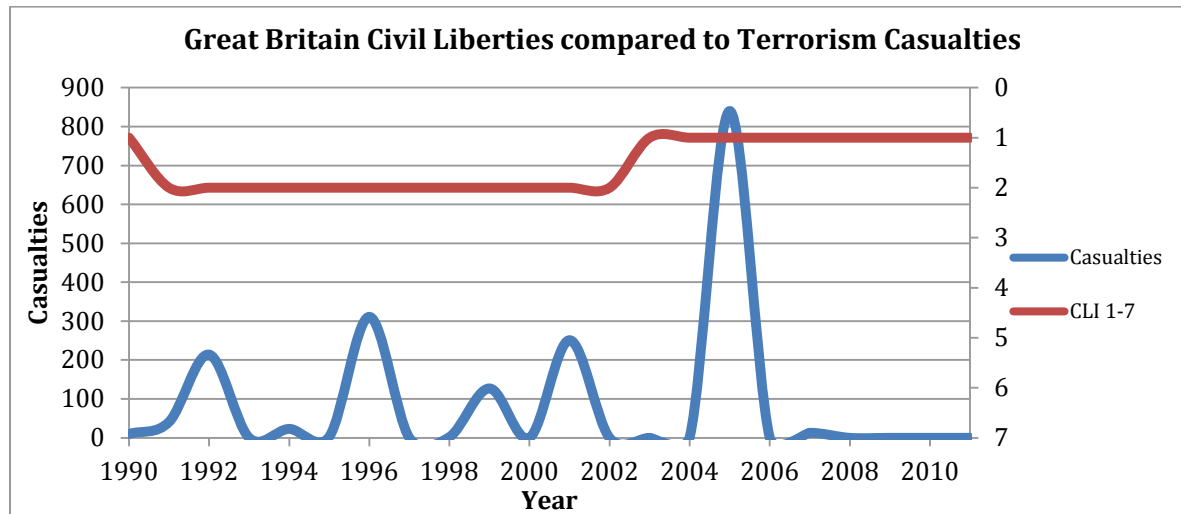
Graph 1.3 United States Level of Terrorism and Civil Liberties (60 point Scale)



Great Britain

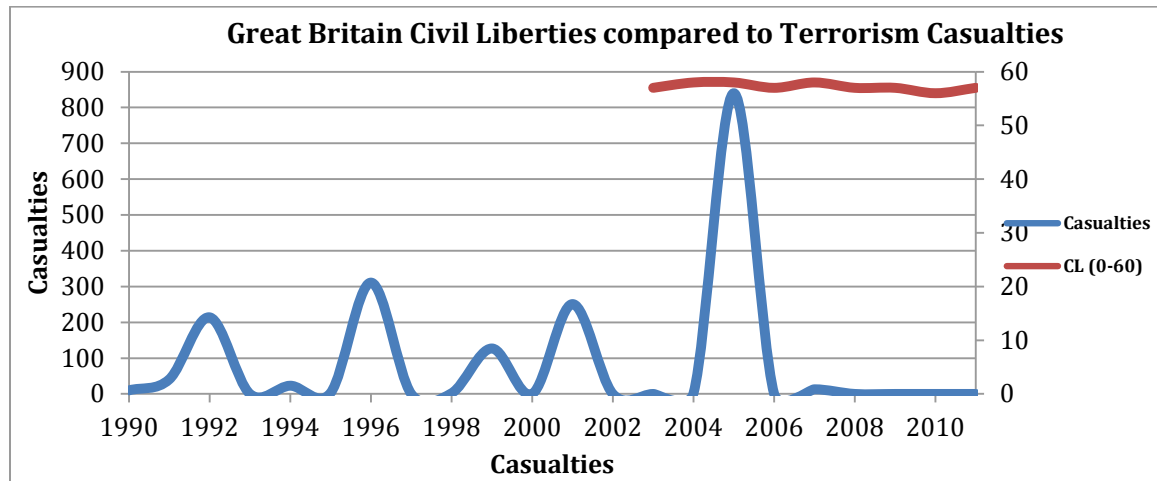
Great Britain has also experienced a significant threat of terrorism throughout the past two decades. Throughout the 1990's the Irish Republican Army (IRA) was a significant threat conducting attacks on British interests in order to obtain political ends. Following 2001, international terrorist organizations such as Al Qaeda became a primary concern for Great Britain. On 7 July 2005, four suicide bombers who subscribed to Al Qaeda's violent Islamic ideology attacked Great Britain's underground train system causing approximately 700 casualties. The 7/7 attacks were the largest attacks since 1990s. Graph 1.4 displays data from the Global Terrorism Database as evidence of the significant threat from terrorism Great Britain experienced throughout the 1990's and the number of years casualties due to terrorism exceeded 100.

Graph 1.4 Great Britain Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Great Britain's CLI overtime, compared to the number of casualties from terrorism does not support the hypothesis that GB's CLI would decline as terrorism casualties increased. After experiencing sustained threats from terrorism, and several spikes in casualties from terrorism throughout the 1990's, Great Britain's CLI did not decline. In fact Great Britain has maintained an overall high CLI throughout the past two decades as seen on graph 1.4 and 1.5. Additionally, after experiencing a spike in casualties from 2003 to 2008, GB's CLI fluctuated between 55 and 56 and stayed steady at 56 from 2008 on. The consistently high overall level of civil liberties in Great Britain nullifies the presented hypothesis. Moreover, Great Britain's CLI from 1990 to 2004 actually increases 1 point on the 7 point scale at a time when Great Britain was experiencing an increase in the number of casualties due to terrorism. This is in evidence negates the hypothesis that civil liberties would decline after the 7/7/2005 London Underground Bombing or IRA attacks throughout the 1990s.

Graph 1.5 Great Britain Civil Liberty Index (60 Point Scale) and Terrorism Casualties

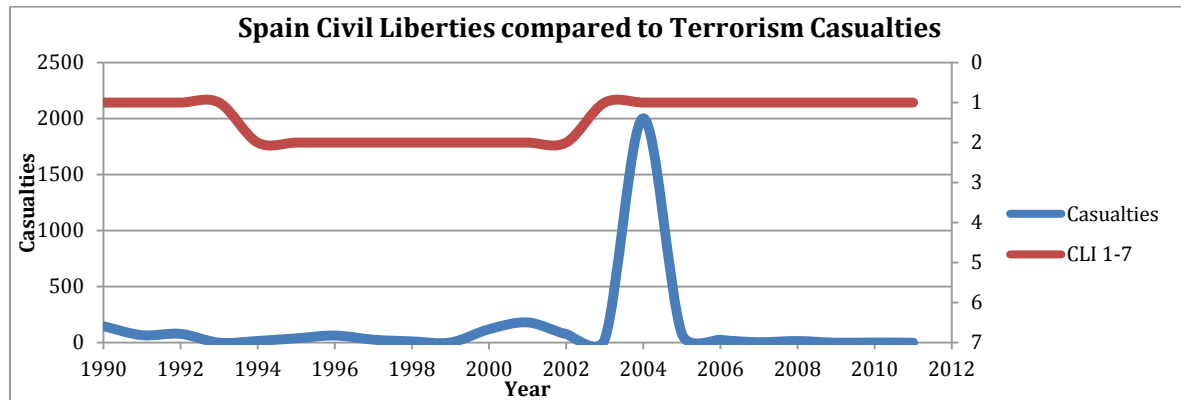


Spain

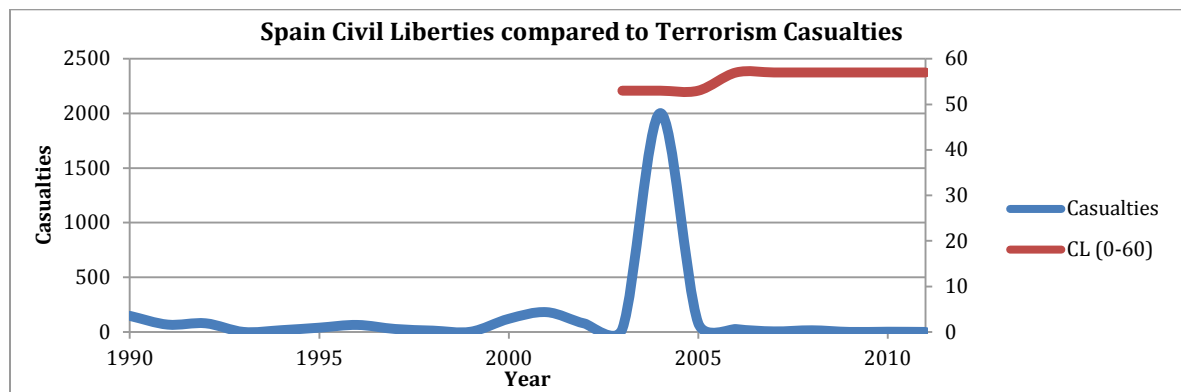
On 11 March 2004 Abu Hafs al-Masri Brigades, a violent Islamic extremist group associated with Al Qaeda attacked Madrid, Spain by placing 10 bombs in commuter trains causing approximately 2000 casualties.⁴⁷ Following the 2004 train bombing Spain's CLI increased from 53 in 2004 to 57 in 2006 on the 60 point CLI as displayed on graph 1.7. Furthermore, Spain's CLI increased from 2 in 2003 to 1 on the 7 point CLI in 2004 and was sustained until 2011 as seen in graph 1.6. This evidence rejects the hypothesis that as casualties due to terrorism increase civil liberties index will decrease. The change in Spain's CLI suggests that after a terrorist attack occurs a government does not restrict its citizens civil liberties, but may in fact increase them slightly. Similar to Great Britain, when Spain saw an increase in casualties due to terrorism their CLI did not decrease.

⁴⁷ National Consortium for the Study of Terrorism and Responses to Terrorism (START). (2012). Global Terrorism Database [Data file]. Retrieved from <http://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtidid=200403110007>

Graph 1.6 Spain Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.7 Spain Civil Liberty Index (60 Point Scale) and Terrorism Casualties



Partially Free Countries Terrorism and Civil Liberties Analysis

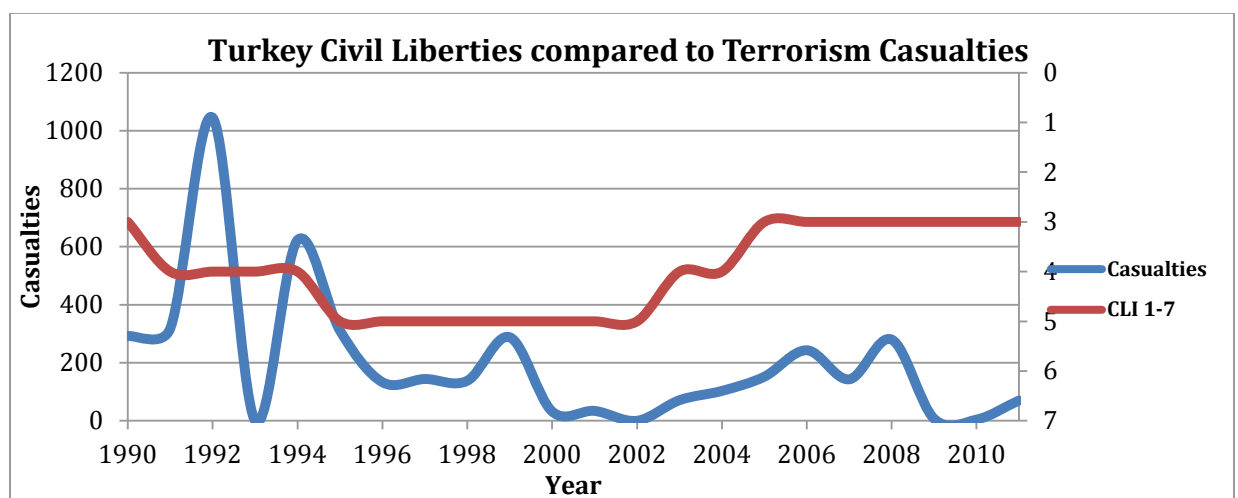
Turkey

In 1992 Turkey experienced a surge of casualties due to terrorism that exceeded 1000. During this time Turkey was involved in an escalated conflict with the Kurdistan Workers' Party, also known as the PKK. Following Turkey's escalated level of casualties in 1992 they experienced a shift in their civil liberties index recorded by Freedom House. Graph 1.8 displays Turkey's decreased level of civil liberties from 1990 through 2002 and their increase in casualties throughout the early part of the 90's. Turkey's CLI was a 3 in 1991 and shifted to a 5 in 1995 through 2002.

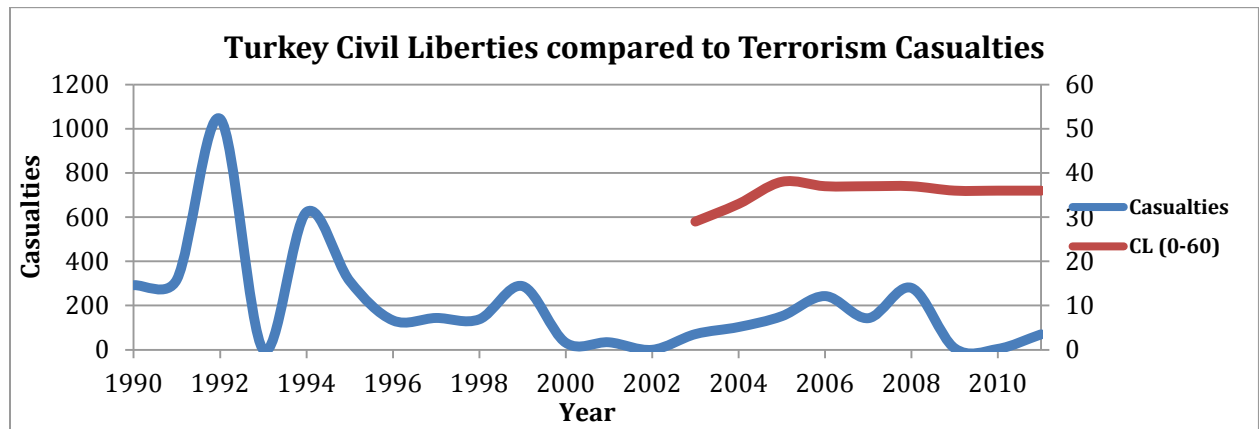
The Freedom House's 60-point CLI does not provide more detailed information on Turkey's level of civil liberties in the 1990's because the 60 point CLI was not used until 2003. The 60 point CLI (Graph 1.9) does however show that throughout the 2000's, when Turkey's level of casualties due to terrorism was relatively low, compared to its level in the 1990s, their level of civil liberties remained consistently high. Although, Turkey's CLI was higher than it was in the 1990's it was still relatively low compared to free countries such as the US, Great Britain, and Spain who all maintained CLI between 1 and 2 on the 7 point index.

The decreased level of civil liberties during a time of increased casualties due to terrorism, as seen on graph 1.8, is consistent with this chapter's hypothesis that after a country experiences a large terrorist attack civil liberties will decrease. The change in CLI that Turkey experienced is very different than that observed by countries considered free by Freedom House. In countries considered free by Freedom House, after a rise in casualties, the level of civil liberties did not decrease as observed with Turkey's data.

Graph 1.8 Turkey Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.9 Turkey Civil Liberty Index (60 Point Scale) and Terrorism Casualties



Pakistan

Pakistan has had a substantially high level of casualties due to terrorism throughout the past two decades. This reached a 20-year high in 2009 when approximately 7000 people were killed due to terrorism. Pakistan's history is complex consisting of conflicts between many factions within its population. Many of the terrorist attacks in the later half of the 2000's can be attributed to the Tehrik-i-Taliban Pakistan (TTP) who increased the number of attacks in order to influence the Pakistani Government.⁴⁸ Considering Pakistan's historically high level of unrest, conventional wisdom and the hypothesis for this chapter expects that their CLI would decrease throughout the past 20 years.

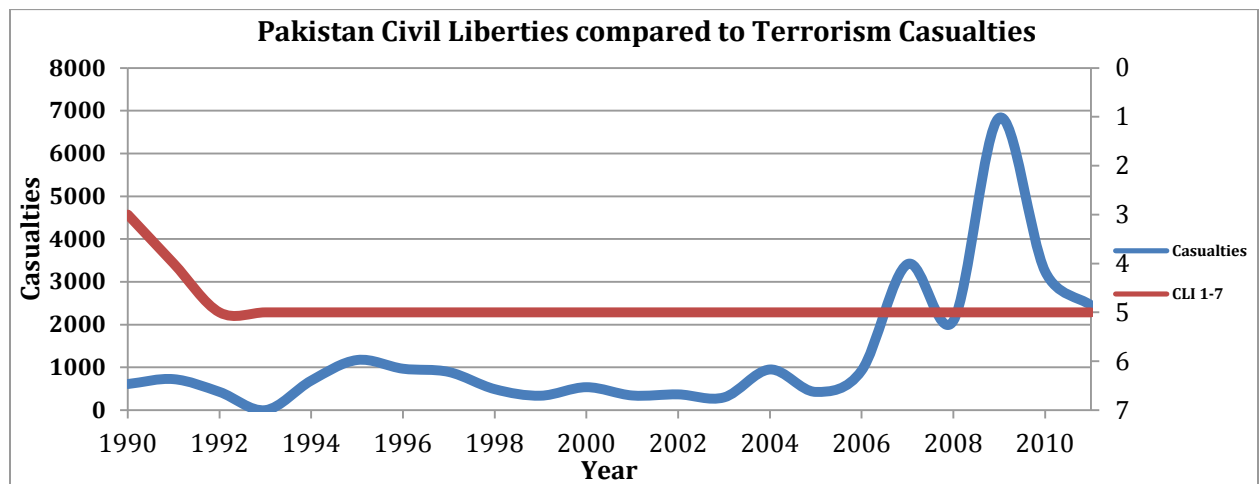
Graph 1.10 displays Pakistan's high level of casualties due to terrorism throughout the past 20 years and increase throughout the later part of the 2000's. On the

⁴⁸ National Consortium for the Study of Terrorism and Responses to Terrorism (START). (2012). Global Terrorism Database [Data file]. Retrieved from http://www.start.umd.edu/gtd/search/Results.aspx?expanded=no&casualties_type=b&casualties_max=&start_yearonly=2007&end_yearonly=2008&criterion1=yes&criterion2=yes&criterion3=yes&dtp2=some&success=no&country=153&ob=GTDID&od=desc&page=1&count=100#results-table

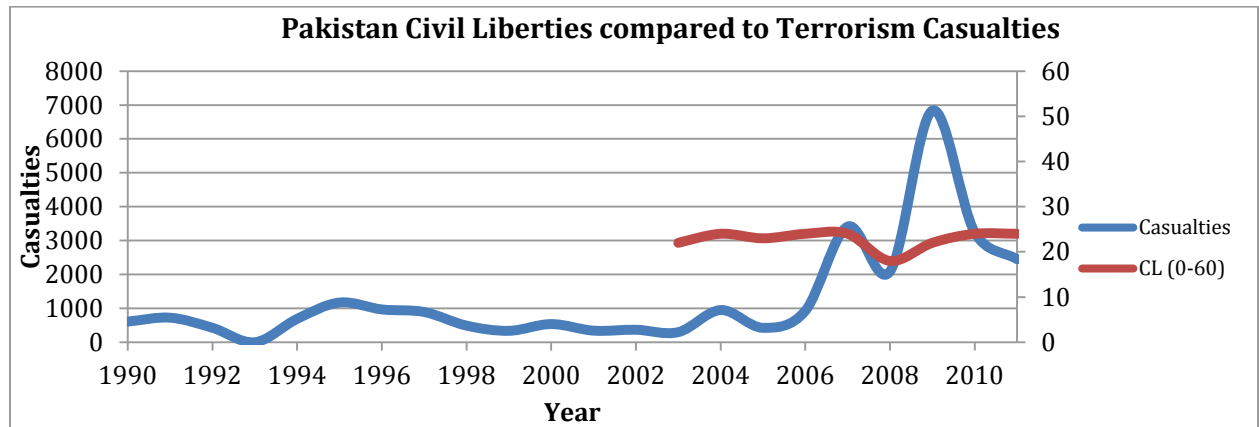
7-point CLI Pakistan's level of civil liberties remained constant at a 5. Pakistan's level of civil liberties is consistent with the high level of casualties.

Graph 1.11 displays a slight decrease in Pakistan's level of civil liberties between 2007 and 2010 while Pakistan experienced a slight increase in terrorism. In 2007 Pakistan experienced an increase to over 3000 casualties and the next year their CLI dropped to 18 from 24 the previous year. This is the only noticeable change in Pakistan's CLI throughout the 21 year sample in which they continually experience high levels of terrorism. Pakistan's relationship between civil liberties and terrorism supports this chapter's hypothesis, although the relationship is weak due to Pakistan's other spikes in terrorism and little movement in its CLI. Pakistan's level of civil liberties and terrorism does not strongly support the hypothesis for this chapter.

Graph 1.10 Pakistan Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.11 Pakistan Civil Liberty Index (60 Point Scale) and Terrorism Casualties

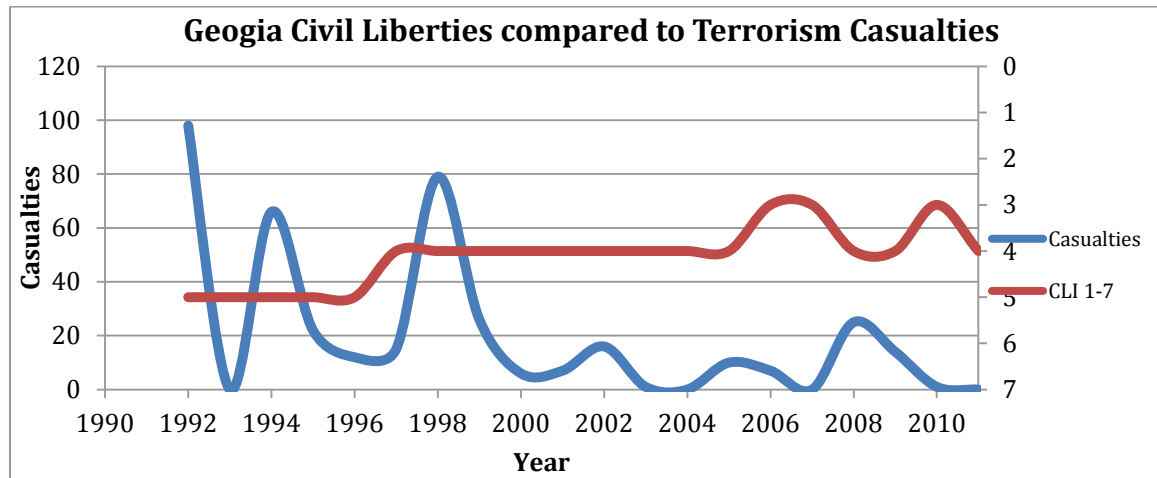


Georgia

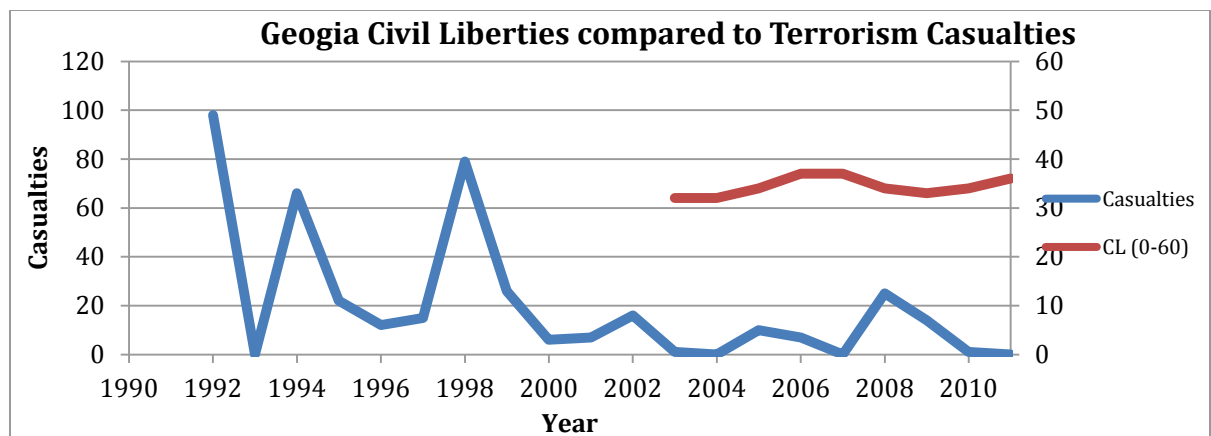
Throughout the past twenty years Georgia has not experienced a substantial number of casualties due to terrorism as displayed on graph 1.12 and 1.13. Georgia experienced its largest number of casualties in 1992 and 1998 with approximately 80 casualties in those respective years. The global terrorism database attributes the attacks in 1992 to the Abkhazian Separatists who fought the Georgian government leading to the 1992-93 Georgia-Abkhazia War.⁴⁹ Although, the level of civil liberties within Georgia has remained moderate throughout the past two decades, registering a 4 from 1996-2006 and only fluctuating one point plus or minus outside that time, Georgia's civil liberties level has slowly increased overall since 1992. Georgia's overall level of civil liberties is low in comparison to other countries that have had low levels of terrorism such as the United States, Great Britain, and Spain. Georgia's relationship between civil liberties and terrorism does not support the hypothesis of this chapter. Georgia's CLI has not decreased following any times of increased levels of terrorism.

⁴⁹ <http://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=199212020005>

Graph 1.12 Georgia Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.13 Georgia Civil Liberty Index (60 Point Scale) and Terrorism Casualties



Not Free Countries Terrorism and Civil Liberties Analysis

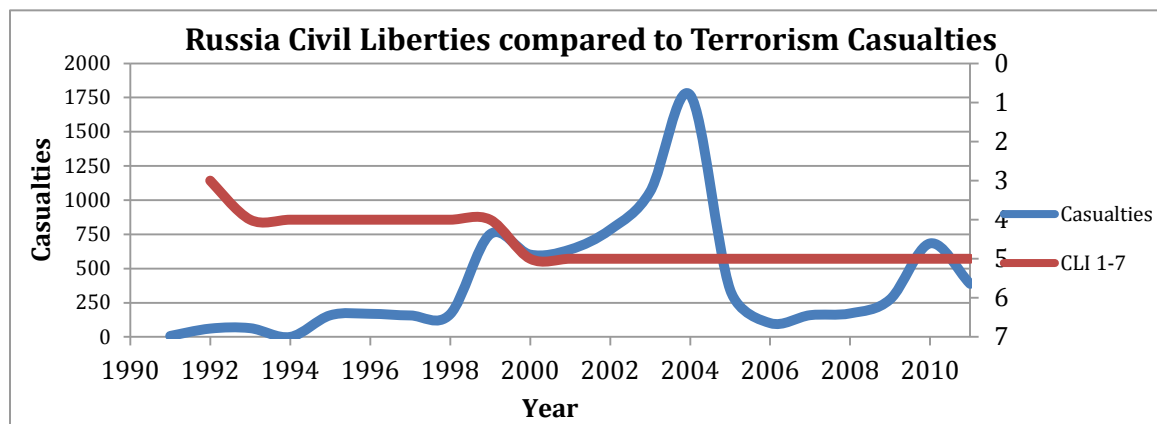
Russia

From 1996 to 2004 Russia's casualties due to terrorism have steadily risen until they reached a high of approximately 1800 casualties in 2004. A majority of this unrest can be attributed to the Chechnya Conflict in which Chechnya sought independence and self-governance from Moscow.⁵⁰ This conflict reached its boiling point in 2004 during the Beslan School Hostage Crisis that ended with the death of 380 people and the capture

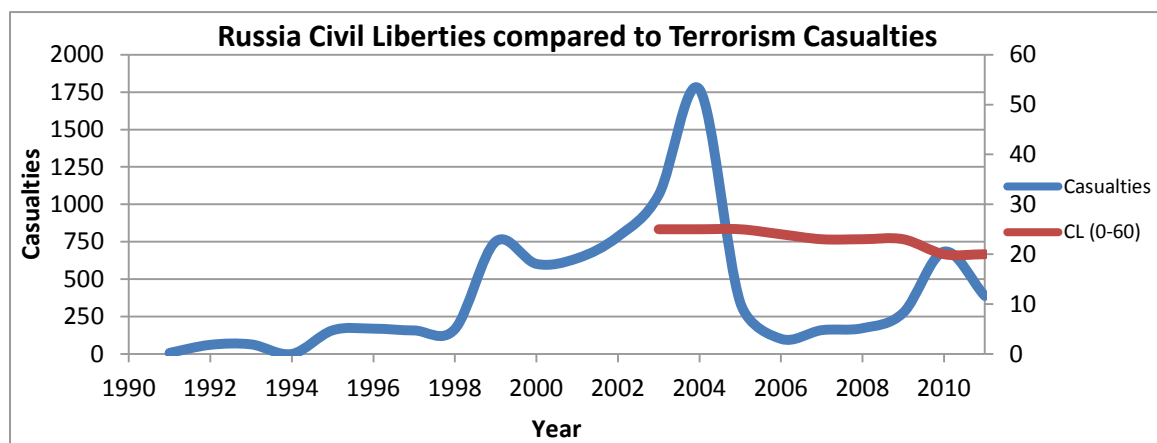
⁵⁰ <http://news.bbc.co.uk/2/hi/europe/3293441.stm>

of over 1100 people.⁵¹ Russia experienced a slight decrease in its level of civil liberties from 1992 to 2011. Russia's CLI on the 7-point scale decreased from a 3 in 1992 to a 5 in 2000-2011. Russia's civil liberties have decreased throughout the past two decades but there does not appear to be a substantial decrease in the level of civil liberties following a period of high casualties as displayed on graph 1.14 and 1.15. The relationship observed supports the hypothesis in part and refutes it in part too. It supports the notion that as more casualties are attributed to terrorism civil liberties will decrease, but there does not appear to be an observable reaction due to a single terrorist event or specific time period.

Graph 1.14 Russia Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.15 Russia Civil Liberty Index (60 Point Scale) and Terrorism Casualties



⁵¹ http://news.bbc.co.uk/2/shared/spl/hi/world/04/russian_s/html/1.stm

Egypt

Throughout the past two decades Egypt has seen several spikes in the number of casualties due to terrorism. The first spike in the number of casualties due to terrorism was from 1994 to 1997 and the second from 2003 to 2006, both can be seen on graph 1.16. The first rise is attributed to the rise in activity by Al-Gama'a al-Islamiyya and the Luxor Massacre in 1997.⁵² The second rise in terrorism seen on graph 1.16 the GTD attribute to the Abdullah Azzam Brigades, an Al Qaeda affiliate who on 23 July 2005 conducted an attack in Sharm Al-Shaykh, Egypt using 3 suicide car bombs.⁵³

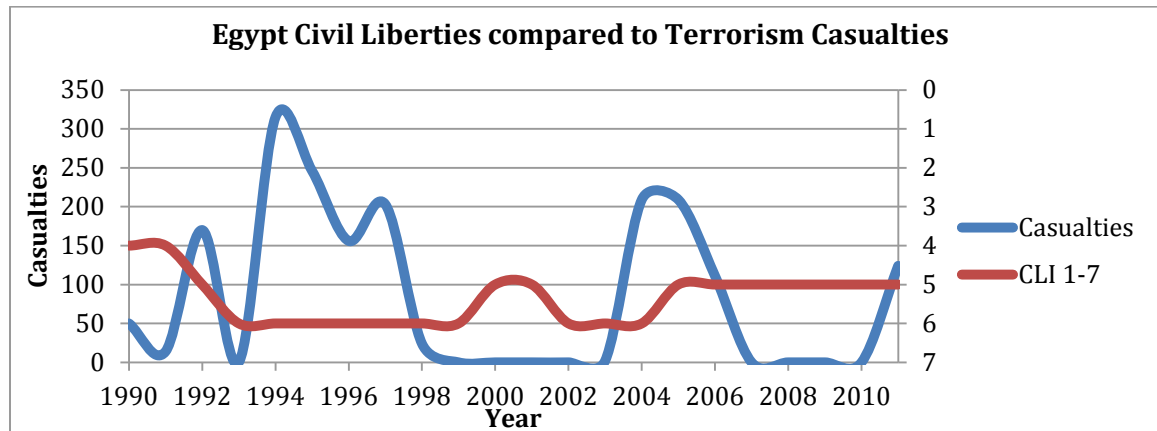
Egypt's CLI index on the Freedom House 7-point scale has remained low throughout the 90's and 2000's fluctuating between a 5 and 6 but never shifting in one direction significantly following a spike in casualties. Looking at the Freedom house 60 point CLI on graph 1.17, in 2006 there is a slight increase in the level of civil liberties within Egypt following the 2005 attacks and the resulting increase in casualties. Egypt's terrorism and civil liberties data not support this chapter's hypothesis or conventional wisdom, although because Egypt has a low CLI it may be difficult to observe a large reduction in civil liberties within a country that already has a substantially low level of civil liberties.

⁵² Terrorist organization Profile, START

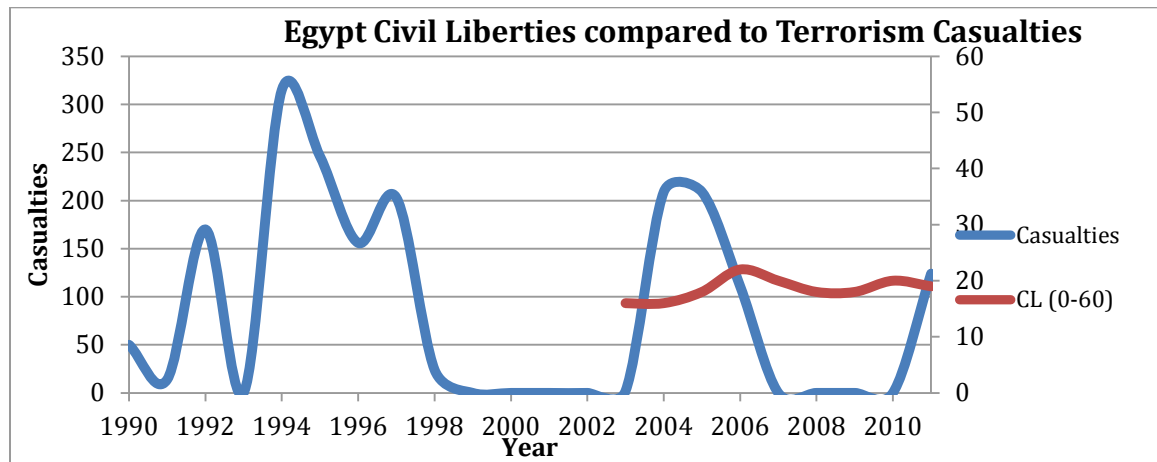
http://www.start.umd.edu/start/data_collections/tops/terrorist_organization_profile.asp?id=3760

⁵³ <http://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtdid=200507230001>

Graph 1.16 Egypt Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.17 Civil Liberty Index (60 Point Scale) and Terrorism Casualties



Saudi Arabia

Throughout the 21-year period observed on graph 1.18 Saudi Arabia (SA) has experienced a relatively low level of terrorism recorded by the GTD, although Saudi Arabia saw a significant increase in terror activity in 2004 amounting to approximately 300 casualties. The most notable attack was the Al-Khobar Massacre on 29 May 2004 perpetrated by the Al-Haramin Brigades, a known affiliate of Al Qaeda in Saudi Arabia,

which resulted in approximately 22 deaths and more the 148 wounded.⁵⁴ The group was motivated by ideologies similar to Al Qaeda central and called for an end to western intervention in the Arabian Peninsula while claiming the west was starving them of their resources.⁵⁵ Following this attack the level of civil liberties changed.

Graph 1.19 displays how following Saudi Arabia's 2004 increase in casualties their civil liberties index surprisingly increased from the lowest index of 7 to 6 on the 7-point CLI scale. On the 60-point scale Saudi Arabia's CLI actually increased 3 points following the spike in casualties.

The observed movement in Saudi Arabia's CLI does not substantial support this chapters hypothesis. The observed relationship actually refutes the hypothesis because it provides another example of a country experiencing an increase in casualties and an increase in civil liberties, albeit small. Saudi Arabia's CLI was very low prior to the spike in casualties and did not have any direction to go but up, although the hypothesis of this chapter would expect SA's CLI to decrease or remain at the lowest level follow the 2004 increase in casualties.

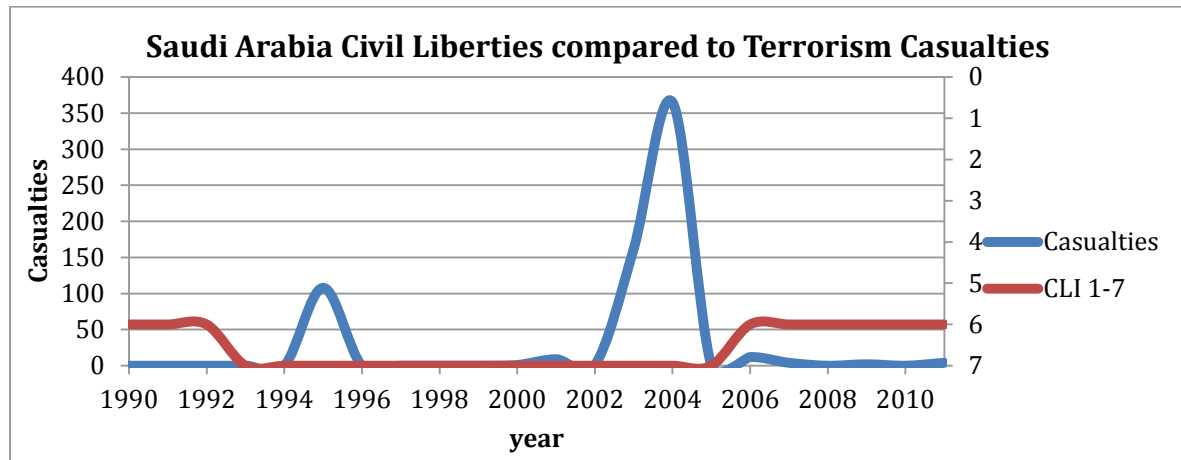
⁵⁴ <http://www.nytimes.com/2004/05/31/world/latest-terrorist-attack-increases-doubts-about-ability-saudi-arabia-pump-more.html>

<http://www.start.umd.edu/gtd/search/IncidentSummary.aspx?gtidid=200404210012>

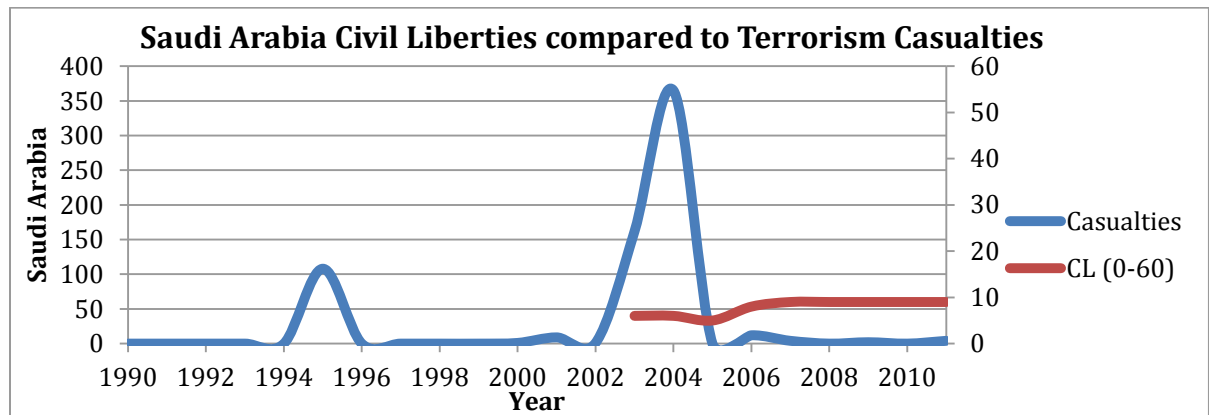
<http://www.trackingterrorism.org/group/al-haramain-brigades-islamic-movement-change>

⁵⁵ <http://www.theguardian.com/world/2004/jun/06/saudi-arabia.jasonburke>

Graph 1.18 Saudi Arabia Civil Liberty Index (7 Point Scale) and Terrorism Casualties



Graph 1.19 Saudi Arabia Civil Liberty Index (60 Point Scale) and Terrorism Casualties



Findings

This chapter predicted that after a large terrorist attack occurred, causing higher number of casualties, the level of civil liberties would decrease within that country. This relationship was not observed in most countries studied. Table 1 provides what relationships were observed within the nine countries analyzed. In free countries, after casualties due to terrorism rose, civil liberties did not substantially decrease; in fact Spain in 2004 saw civil liberties increase after experience a rise in terrorism. Partially free countries saw little to no relation between the number of casualties due to terrorism and the level of civil liberties, although Turkey observed a slight decrease in civil liberties in

1992 when casualties exceeded 1000. Not free countries also observed only a slight variation in civil liberties after rise in casualties due to terrorism.

Table 1.1 Findings

| | Country | Correlation |
|----------------|---------------|-------------|
| Free | United States | ~ |
| | Great Britain | ~ |
| | Spain | ^ |
| Partially Free | Turkey | V |
| | Pakistan | V |
| | Georgia | ^ |
| Not Free | Russia | V |
| | Egypt | ~ |
| | Saudi Arabia | ^ |

| Key | |
|--------|---|
| ~ | No observable relationship |
| ^ | Increase in civil liberties index following an increase in casualties |
| V | Decrease in civil liberties index following an increase in casualties |
| Green | Supports Hypothesis |
| Yellow | Neither Supports nor Refutes hypothesis |
| Red | Refutes Hypothesis |

Of the nine countries studied three countries, only Turkey, Pakistan, and Russia saw a decrease in civil liberties after an increase in casualties due to terrorism. This relationship was small within the countries it was observed and not as significant as hypothesized.

No relationship was seen within the United States, Great Britain, and Egypt to either support or nullify the proposed hypothesis. Although all countries analyzed

experienced a noticeable increase in terrorism at one point, their level of civil liberties neither increased nor decreased following these events.

Spain, Georgia, and Saud Arabia experienced slight increases in civil liberties following periods of increased terrorism, directly refuting the proposed hypothesis for this chapter. This relationship was unexpected and against conventional wisdom, especially since each of the three countries this relationship was observed in was within one of the three categories, free, partially free and not free, and not isolated to only one type of country.

Potential Flaws in Research

Using the Freedom House “Freedom in the World” data set to measure the level of civil liberties hindered the ability to observe any significant changes in level of civil liberties. The civil liberties index, which was recorded on a 7 point scale prevented any smaller changes in the level of civil liberties from appearing on the index. The 0-60 civil liberties index was preferable scale to use, but was only recorded since 2003. The 60-point scale allowed for smaller changes in the level of civil liberties to be observed. Due to this limitation, further research could utilize a different data set that is more accurate and shows smaller changes in the level of civil liberties. Also, researchers could look at specific terrorist attacks that have occurred after 2003 and policy that may have been implemented in response to those attacks.

Areas for Future Research

Further research can be done to examine the legislative response governments have taken in response to terrorist attacks. After a terrorist attack is perpetrated upon a country, governments may pass legislation in order to portray they are getting tough on

terrorism and taking measures to protect its citizens. For example, in response to September 11th terrorist attacks the United States past substantial legislation to support law enforcement, and the intelligence community's ability to counter terrorism.

Future research may look at performing a regression analysis for several years to help determine if the magnitude of terrorism caused a change in civil liberties within that country. If a regression analysis was conducted the independent variable would be the magnitude of the terrorist incidents, and the dependent variable would be the level of civil liberties. Variables that would need to be controlled for include civil war, international war, regime type, gross domestic product per capita (GDP per capita), population size, and signature of the International Covenant on Civil and Political Rights have been found to influence human rights performance.⁵⁶ These variables are known to influence the level of civil liberties and terrorist incidents within a country (both magnitude and frequency of terrorist incidents).

⁵⁶ Piazza, J. A. and J. I. Walsh. "Transnational Terror and Human Rights." *International Studies Quarterly* 53 (1): 125-148.

CHAPTER TWO

What is the Department of Homeland Security, State and Local Fusion Center Program's impact on citizens' privacy, civil liberties and civil rights?

State and Local Fusion Centers are complex organizations often governed by a combination of Federal, State, and Local laws while integrating a variety of law enforcement and intelligence capabilities that require careful oversight to ensure they do not infringe on citizens' rights. The chapter analyzes if the State and Local Fusion Center program is meeting the guidelines and requirements to protect citizens' civil liberties, rights, and privacy, as set forth in "The Implementing Recommendations of the 9/11 Commission Act of 2007" (9/11 Commission Act), which amended the Homeland Security Act of 2002, among other governing statutes and executive orders.⁵⁷

Why create Fusion Centers?

State and Local Fusion Centers were created in response to the National Commission on Terrorist Attacks Upon the United States (2004), hereafter referred to as 9/11 Commission, that found the terrorist attacks on September 11th 2001 were partially successful due to the government's inability to successfully share information between Federal, State, and Local agencies.⁵⁸ The former's failure to share information between State, Local, and Federal agencies is the function of today's Fusion Centers. Although Fusion Centers are a product of the 9/11 Commission recommendations they have also been significantly influenced by the Homeland Security Act, the Intelligence Reform Act

⁵⁷ Congress, U. S. "Implementing recommendations of the 9/11 commission act of 2007." In 110th Congress. August, vol. 3. 2007. Accessed July 15, 2014, from <http://www.govtrack.us/congress/bills/110/hr1>

⁵⁸ Newbill III, Raymond R. Intelligence Sharing, Fusion Centers, And Homeland Security. No. AFIT/ICW/ENG/08-08. AIR FORCE INST OF TECH WRIGHT-PATTERSON AFB OH SCHOOL OF ENGINEERING AND MANAGEMENT, 2008.

(2004), and the National Strategy for Information Sharing (2007) among other legislation, executive orders, and directives enacted after September 11th.⁵⁹

Road to 9/11 Commission Act and Creation of the Fusion Center Initiative

Prior to the enactment of the 9/11 Commission Act in 2007, other major legislation laid the foundation for the establishment of the Fusion Center initiative under DHS. The Homeland Security Act of 2002 assigned DHS with the responsibility of organizing and sharing information between Federal, State, and Local government agencies.⁶⁰ Further, in 2004 Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) that required the President to create the Information Sharing Environment for the purpose of sharing terrorism related information.⁶¹ Finally, in 2007 Congress passed the 9/11 Commission Act codifying the establishment of the Fusion Center Initiative and DHS as the lead with support from the Department of Justice and the Federal Bureau of Investigation.

9/11 Commission Act Role in Codifying the Fusion Centers Initiative

The 9/11 Commission Act of 2007, section 521, signed into law by the President of the United States in August of 2007, directed the Secretary of Homeland Security, with consultation from the Program Manager for the Information Sharing Environment (PM-ISE), Officer for Civil Rights and Civil Liberties (CRCL), Chief Privacy Officer (PRIV), Privacy and Civil Liberties Oversight Board (PCLOB), to establish the State, Local, and Regional Fusion Center initiative.⁶² The Fusion Center initiative, as set forth in 2007 by

⁵⁹ Bush, George W. "National strategy for information sharing." (2007).

⁶⁰Department Of Homeland Security, Interaction With State And Local Fusion Centers: Concept Of Operations; December 2008 <http://fas.org/irp/agency/dhs/conops.pdf>, pp44 accessed July 13 2014

⁶¹ United States Congress, Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat 3638 at 3665

⁶² United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p4.

the 9/11 Commission Act, was designed to increase the flow of information “in two directions, between State, Local and Region Fusion Centers and the Department of Homeland Security.”⁶³ The 9/11 Commission Act continues to define what a Fusion Center consists of, and what their responsibilities are. Further, the act defines the roles and responsibilities of the Department of Homeland Security’s Intelligence Officers assigned to Fusion Center.

What constitutes a Fusion Center and what are their primary functions?

Fusion Centers are, as defined by the 9/11 Commission Act, “a collaborative effort of 2 or more Federal, State, Local, or tribal government agencies to detect, prevent, investigate, apprehend, and respond to criminal or terrorist activity.”^{64,65} In order to support information sharing between multiple levels of government and several agencies, the act defines specific actions the Department of Homeland Security (DHS) should support. These actions include facilitating communication and coordination between SLFCs, providing operational and intelligence advice, serving as the point for disseminating homeland security information, and providing training and exercises to encourage information sharing.⁶⁶ The Act also directs the DHS to review information at the State and Local level relating to homeland security and incorporate said information into the Departments information analysis. The Fusion Center Initiative was designed to leverage both the Federal government’s analytical resources, and the state and local government’s wide array of information pertinent to homeland security.

⁶³ United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p4

⁶⁴ US Congress, 9/11 Commission Act, August 3 2007. <http://www.law.cornell.edu/uscode/text/6/124h>

⁶⁵ United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p4

⁶⁶ United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p5

Countering terrorism is not the sole mission of fusion centers despite it being their founding principal objective. Fusion Centers are often referred to as all-crime centers, or all-hazard focused centers. With every fusion center having been independently designed, and primarily run by the States, they often utilize these centers to facilitate intelligence led policing, and crisis-emergency response. Different State Fusion Centers have slightly different areas of focus. For example, a Fusion Center near the Southwest border may focus on drug smuggling, gangs, and illegal immigration where a Fusion Center in New York City will focus on counterterrorism, among other activities.

The proliferation of Fusion Centers can be attributed to the post 9/11 era policies that placed an emphasis on sharing information in support of national security and counterterrorism, although several State Fusion Centers existed before 9/11. Currently there are 78 Fusion Centers within the United States majority of which operated by State Governments, although local governments operate select fusion centers often in major urban areas.⁶⁷ States that had intelligence driven law enforcement organization prior to 9/11 were primarily focused on activities related to gangs, drugs, and white-collar crimes, not terrorism.⁶⁸ For states that had intelligence centers prior to 9/11, today's fusion centers are an extension of those operations. Today's Fusion Centers are more interconnected with Federal departments, such as the Department of Homeland Security (DHS) and the Department of Justice (DOJ). Fusion Centers are no longer isolated focusing only on activities within their State and more aware of issues in surrounding jurisdictions often helping where they can, according to former Fusion Center Director

⁶⁷ US Department of Homeland Security; Fusion Center Locations and Contact Information; available at <http://www.dhs.gov/fusion-center-locations-and-contact-information>

⁶⁸ Eack, Kevin D. "State and Local Fusion Centers: Emerging Trends and Issues." Homeland Security Affairs. 2. (2008). www.hsaj.org (accessed November 2, 2011).

Ron Brooks. Most Fusion Centers' mission space has expanded to include counter terrorism and work together with other centers to exchange information.

Definition of Intel Analysts at Fusion Center

DHS Intelligence Officers (IOs) assigned to State and Local Fusion Centers serve as the main conduit for communication between the Federal government, and State and Local government's for threat information. The IOs are responsible for reviewing State and Local information that is relevant to homeland security and fusing that information with federal intelligence to create a more complete threat picture for all consumers. By fusing that information, the IOs are responsible for creating and disseminating intelligence threat products derived from State, Local, and Federal sources and passing that complete threat picture to stake holders at the Federal, State and Local level of government providing a unique prospective using unique information not available at the Federal level.⁶⁹ This two-way relationship was designed as a mutually beneficial relationship for Federal, State, and Local governments.

Advocates for civil liberties and privacy have been opposed to Fusion Centers pro-actively gathering intelligence and sharing information across large swathes of the government; despite most fusion centers claiming they do not actively collect intelligence or investigate crimes.⁷⁰ Fusion centers are intended to act primarily as analytical and collaborative components for intelligence gathered by Federal agencies such as CIA, FBI, or DHS, and law enforcement entities within their State.⁷¹

Define Privacy, Civil Liberties, and Civil Rights

⁶⁹ United States Department of Homeland Security, Privacy Impact Assessment (2008), p5

⁷⁰ Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014

⁷¹ Only one Fusion Center is known to actively participate in investigations within their jurisdiction and that is Arizona's Fusion Center (Arizona Counter Terrorism Information Center).

For the purpose of the chapter and in order to define the scope of language being referred to in this chapter, the terms privacy, civil rights, and civil liberties will be defined using the DHS, DOJ, Information Sharing Environment (ISE) and Fusion Centers Privacy Policies this chapter analyzes.

Civil Liberties will be defined as an individuals fundamental “rights, such as freedom of speech, press, or religion; due process of law; and other limitations on the power of the government to restrain or dictate the actions of individuals. They are the freedoms that are guaranteed by the Bill of Rights—the first ten Amendments to the Constitution of the United States. Civil liberties offer protection to individuals from improper government action and arbitrary governmental interference. Generally, the term “civil rights” involves positive (or affirmative) government action, while the term “civil liberties” involves restrictions on government.”⁷²

Civil Rights will be defined as the states “role in ensuring that all citizens have equal protection under the law and equal opportunity to exercise the privileges of citizenship regardless of race, religion, gender, or other characteristics unrelated to the worth of the individual. Civil rights are, therefore, obligations imposed on government to promote equality. More specifically, they are the rights to personal liberty guaranteed to all United States citizens by the Thirteenth and Fourteenth Amendments and by acts of Congress.”⁷³

⁷² New Jersey Regional Operation and Intelligence Center, Privacy Policy; Delaware Valley Intelligence Center, Privacy Policy; Department of Justice, Global Information Share Initiative “Privacy, Civil Rights, Civil Liberties Policy Templates for Justice Information Systems”

⁷³ New Jersey Regional Operation and Intelligence Center, Privacy Policy; Delaware Valley Intelligence Center, Privacy Policy; Department of Justice, Global Information Share Initiative “Privacy, Civil Rights, Civil Liberties Policy Templates for Justice Information Systems”

Privacy will be defined as an “individuals’ interests in preventing the inappropriate collection, use, and release of personal information. Privacy interests include privacy of personal behavior, privacy of personal communications, and privacy of personal data. Other definitions of privacy include the capacity to be physically left alone (solitude); to be free from physical interference, threat, or unwanted touching (assault, battery); or to avoid being seen or overheard in particular contexts.”⁷⁴

Liberty Versus Security Literature

The appropriate balance between security and liberty has been debated amongst scholars and citizens for hundreds of years. As far back as Thomas Hobbes in *Leviathan*, the debate between the two concepts has been a fundamental question in all-free societies.⁷⁵ The contemporary debate on liberty and security in the United States can roughly be categorized to three schools of thought. The first is, by disposition, highly sympathetic to the national security policy and legislation that was implemented in response to 9/11 and views these measures to be within the United States constitutional limits and values and proportional to the threat. The second school of thought is more libertarian in nature and believes that the Government is infringing on citizens’ rights by implementing unconstitutional national security policy. Lastly, some believe a more pragmatic approach is necessary and the government needs to balance both civil liberties and national security based on the threat environment. This approach is known as the ‘pragmatic authoritarian libertarian’ approach. This balance needs to be carefully struck

⁷⁴ New Jersey Regional Operation and Intelligence Center, Privacy Policy; Delaware Valley Intelligence Center, Privacy Policy; Department of Justice, Global Information Share Initiative “Privacy, Civil Rights, Civil Liberties Policy Templates for Justice Information Systems”

⁷⁵ Hobbes, Thomas. *Leviathan, or the matter, forme and power of a commonwealth ecclesiasticall and civil*. Yale University Press, 1928.

and frequently checked to ensure that any threats to personal liberties are proportional to the threats against security.

Open discussion on the appropriate balance between national security and freedom is an important check on government's ability to overstep its authorities as this country witnessed between 1956 and 1971 during the Federal Bureau of Investigation (FBI), Counter intelligence program (COINTELPRO).⁷⁶ The 1950's and 60's were a time of unrest and civil disobedience in the United States. During this period our Country was involved in an unpopular war in Vietnam, and battling issues with race at home. Concurrently, the FBI introduced its COINTELPRO, which they used and abused their authority to monitor and investigate citizens who were exercising their first amendment right to free speech. These citizens, who were within their right to exercise non-violent dissent of the US government's activities, were scrutinized and often inappropriately monitored or arrested when their views did not align with or critical of the government. COINTELPRO is just one example in our government's history when they have inappropriately used their authority in the name of protecting liberty.

Introduction to Fusion Center Literature review

Fusion Centers were developed, not without debate, in response to the 9/11 Commission that identified the terrorist attacks on September 11th were in part successful because of the failure to share information. Since the conception of Fusion Center, critics have argued they a form of domestic intelligence that restricts, or has the potential to restrict citizens' civil rights, liberties, and privacy. Alternatively, others have supported the development of Fusion Centers and their increased sharing of information amongst

⁷⁶ United States Department of Justice, Federal Bureau of Investigation, "FBI Records: The Vault: COINTELPRO", accessed July 19 2014, <http://vault.fbi.gov/cointel-pro>

Federal, State, Local, and sometime private sectors in the name of securing our nation. The discussion of the proper role of Fusion Centers and domestic intelligence is a microcosm of the larger debate between national security and liberty this nation has discussed since it's founding.

The Center for Strategic & International Study (CSIS), a bi-partisan think tank, has been supportive of DHS Fusion Centers and the value they add by bringing together counterterrorism and homeland security entities at the state and local level, because they are the entities most likely to encounter suspicious activities and potential indicators of threat activity.⁷⁷ Further, they have commended DHS for the transparency Fusions Centers have provided, especially when dealing with information related to US citizens.⁷⁸ Although, CSIS warned DHS and Fusion Centers they must be cautious the controversy and scrutiny they face from civil liberties advocates and that it does not hinder their increased utility in sharing homeland security information.⁷⁹ The issues of scrutiny was also identified by Ron Brooks, who stated Fusion Centers, and law enforcement operate on public trust and if they do not uphold that trust it will undermine their mission's success.⁸⁰

Others also assert that Fusion Centers are a success resulting in enhanced counterterrorism analysis and increased information sharing. The case in favor of enhancing information sharing between Federal, State, and Local agencies occurred on September 9th 2001 when a Maryland State Trooper stopped Ziad S Jarrah for speeding. Jarrah was one of the hijackers on September 11th 2001 and had the Maryland State

⁷⁷ Nelson, Rick and Wise Rob "Homeland Security at a Crossroads: Evolving DHS to Meet the Next Generation of Threats". Center for Strategic & International Studies, February 1 2013.

⁷⁸ Nelson, Rick and Wise Rob "Homeland Security at a Crossroads", 7, 10.

⁷⁹ Nelson, Rick and Wise Rob "Homeland Security at a Crossroads", 7, 10.

⁸⁰ Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014

Trooper had access to the information sharing environment in place today, he would have known Jarrah was on a CIA watchlist, and associated with terrorism, thus possibly disrupting the terrorist attacks on September 11th.⁸¹ The 9/11 Commission cited the September 11th attackers were able to exploit the gap between foreign intelligence, federal and local law enforcement capabilities in addition to legal restrictions sharing intelligence information with law enforcement in order to successfully conduct the attacks, among other cited dysfunction. Fusion centers were designed to bridge the gap between intelligence agencies and law enforcement agencies, principally DHS, FBI, and CIA, and State and local law enforcement.⁸²

Fusion Center advocates claim they play a critical role by providing unique information, only available to local and state entities, to be used to produce intelligence products that provide an enhanced threat picture. By bridging the gap between Federal, State, and local information collected from a broad array of sources including law enforcement, public health and safety, and private sector, it allows the intelligence community to better understand the threat environment. This enhanced ability to analyze data translates into better decisions by policy makers and more actionable intelligence for law enforcement.⁸³ Law enforcement officers know their communities intimately and are the best eyes and ears to identify anomalies. Their ability, combined with the national security community's ability to identify larger trends and threats, has been combined to prevent adversaries from falling between the cracks of local law enforcement, and federal

⁸¹ Rollins, John, and Tim Connors. *State fusion center processes and procedures: Best practices and recommendations*. Manhattan Institute, 2007.

⁸² Rollins, John. "Fusion centers: Issues and options for Congress." Library of Congress Washington Dc Congressional Research Service, 2008. 5

⁸³ Rollins, John. "Fusion centers: Issues and options for Congress." Library of Congress Washington Dc Congressional Research Service, 2008. 6, 87.

intelligence and law enforcement. Fusion centers were principally designed to fill the void, and breakdown the barriers that were preventing information sharing and disabling all parties involved to accurately understand the current threat environment.

Throughout several conversations with fusion center personnel, they have expressed FCs' astute awareness to the hyper scrutiny their centers face when it comes to interacting with us personal information.⁸⁴ Several FC personnel have noted that they are keenly aware that their centers existence and success rests on the public's perception and understanding that the FC and the government are not abusing their powers or infringing on their freedoms.⁸⁵

Torin Monahan has been a prolific writer and critic of Fusion Centers' mission, scope, and impact on citizens' civil liberties, civil rights, and privacy. Monahan cites Fusion Centers mission creep from counterterrorism to a self-declared all crimes, all hazards focus as a significant threat to citizens. Too little activity related to terrorism, a need to show "value added" in areas of responsibility, and pressure to use resources available to Fusion Centers have been three factors driving the shift in focus from counterterrorism to all crimes, all hazards.⁸⁶

Monahan and Regan further describe the function of Fusion Centers as not all-knowing entities but centers that bring together personnel and information from a wide array of agencies, both federal and local, that enables law enforcement or intelligence agencies to query each other for relevant information without full visibility to where the

⁸⁴ Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014

⁸⁵ Rollins, John. "Fusion centers: Issues and options for Congress." Library of Congress Washington Dc Congressional Research Service, 2008. 5

Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014.

⁸⁶ Regan, Priscilla M., and Torin Monahan. "Beyond Counterterrorism: Data Sharing, Privacy, and Organizational Histories of DHS Fusion Centers." *International Journal of E-Politics (IJEP)* 4, no. 3 (2013): 1-14.

information is going or how it will be used.⁸⁷ The issue Monahan and Regan foresees with organizations that blend data from such a wide variety of sources and provides that information to a variety of customers is data sharing may become ambiguous and violations or infringements may be difficult to document because of how the information is being shared.⁸⁸ The way Fusion Centers share information creates, what Monahan and Regan coins, “zones of opacity” by eluding public records requests under national security exemptions, not recording database searches, or who the information customers are.⁸⁹

Concerns that Fusion Centers will impede on citizens’ civil liberties, civil rights, and privacy are not unsubstantiated according to Monahan who cites several examples of Fusion Centers engaging in activities that constitute racial profiling, political profiling, illegal data mining, and illegal data collection.⁹⁰ Monahan and the American Civil Liberties Union (ACLU) cite an example of a threat report produced by a Fusion Center targeting university students at a historically black university as a possible group that may engage in race based extremism based on the State’s historical precedence dating back to the civil war. The ACLU claimed such an assessment based on the evidence provided was clearly a case of racial profiling.⁹¹

Another example cited by Monahan was a Fusion Center’s involvement in the covert infiltration into numerous nonviolent peace activist groups that were brought to

⁸⁷ Monahan, Torin, and Priscilla M. Regan. "Zones of opacity: Data fusion in post-9/11 security organizations." *Canadian Journal of Law and Society* 27, no. 3 (2012): 301-317.

⁸⁸ Monahan, Torin, and Priscilla M. Regan. "Zones of opacity" 316.

⁸⁹ Monahan, Torin, and Priscilla M. Regan. "Zones of opacity" 316.

⁹⁰ Monahan, Torin. "The future of security? Surveillance operations at homeland security fusion centers." *Social Justice* (2010): 88.

⁹¹ Monahan, Torin. "The future of security?" 88.

public light after an ACLU freedom of information act request.⁹² The investigations into the groups continued despite the undercover agent reporting that threats of violent activity were not evident. Further, the activities were labeled as “primary crime” and “terrorism anti-government” by law enforcement as justification for the activity, although Monahan asserts the activities were not. Activities by law enforcement and FCs that target individuals based on political affiliation, if continued, could have chilling effect on citizens’ freedom of speech, association, and religion, according to Monahan.⁹³

The ACLU is a prolific watchdog of Fusion Centers, and critical of their activities, claiming that they operate with little to no oversight while infringing on citizens’ rights.⁹⁴ The ACLU claims, citing a Senate Intelligence Committee report on Fusion Centers⁹⁵, that DHS personnel author intelligence reports that routinely infringing on citizens’ civil liberties and civil rights, Fusions Centers withheld information from congressional oversight committees, and DHS conducted no meaningful oversight of Fusion Centers or their activities.⁹⁶ The DHS provides civil liberties, civil rights, and privacy training to all Fusion Center personnel, although the ACLU claims the several hours of training provided to these intelligence and law enforcement personnel is not enough to teach all the nuisances of the law.⁹⁷ The ACLU again alleged that Fusion Centers were trampling citizens’ rights through DHS’s suspicious activity reporting initiative that allows the collection and retention of citizens’ information based on often-

⁹² Monahan, Torin. "The future of security?" 88.

⁹³ Monahan, Torin. "The future of security?" 89.

⁹⁴ Dansky, Kara. "Senate Homeland Security Committee Misses the Mark with Statement on DHS "Fusion Center" Program" 10 October 2012. Available at: <https://www.aclu.org/blog/technology-and-liberty-criminal-law-reform-national-security-free-speech/senate-homeland>

⁹⁵ Senate, U. S. "Federal support for and involvement in state and local fusion centers." (2012).

⁹⁶ Dansky, Kara. "Senate Homeland Security" 10 October 2012.

⁹⁷ Dansky, Kara. "Senate Homeland Security" 10 October 2012.

groundless information.⁹⁸ Further, the ACLU obtained documents through a freedom of information act request that shows Fusion Centers themselves have often questioned the suspicious activity-reporting (SAR) initiatives' privacy policy, retention of data, and lack of guidance on how the system works.⁹⁹ Recently, as of July 10th 2014, the ACLU represented five plaintiffs who have sued Eric Holder, the Attorney General, and the Department of Justice seeking a "permanent injunction" on the SAR program.¹⁰⁰

The ACLU has been extremely critical of the Federal government's SAR initiative that engages state and local law enforcement, private sector, and private citizens to submit suspicious activities reports for review and inclusion in an anti-terrorism database.¹⁰¹ The ACLU has warned that such an initiative would lead to violations of privacy, racial and religious profiling, and interference with constitutionally protected activities.¹⁰² Further, the ACLU has issues with the scope of the suspicious activity reporting initiative because the DHS and FBI has encouraged any and all reporting that may be potentially be related to terrorism. The ACLU has warned that many of these "potentially terrorism related activities" may encompass activities that are lawful and protected under the first amendment.

Protective Measures for Civil Liberties Civil Rights and Privacy

⁹⁸ Choudhury, Nusrat. Where's the Suspicion in Government's "Suspicious Activity" Reports?". 13 October 2013. <https://www.aclu.org/blog/national-security-technology-and-liberty/wheres-suspicion-governments-suspicious-activity>

⁹⁹ Choudhury, Nusrat. Where's the Suspicion in Government's "Suspicious Activity" Reports?". 13 October 2013.

¹⁰⁰ <http://www.theguardian.com/world/2014/jul/10/civil-liberties-groups-lawsuit-suspicious-activity-database>, accessed July 12, 2014

¹⁰¹ Mass, Julia Haurumi, & German, Michael. "The Government is Spying on You: ACLU Releases New Evidence of Overly Broad Surveillance of Everyday Activities". ACLU. <https://www.aclu.org/blog/national-security-technology-and-liberty/government-spying-you-aclu-releases-new-evidence>

¹⁰² Mass, Julia Haurumi, & German, Michael. "The Government is Spying on You".

The DHS has put in place several safeguards to protect citizens' civil liberties, civil rights, and privacy from the potential impact the State and Local Fusion Center Program may pose. As of March 2013 the DHS, Office for Civil Rights and Civil Liberties has published an Impact Assessment examining SLFCP's effect on citizens' rights.¹⁰³ The DHS in 2008 also released a Privacy Impact Assessment examining the impact the Fusion Center Initiative has on citizens' privacy.¹⁰⁴ Additionally, individual State and Local Fusion Centers have released privacy policies outlining their handling of potential sensitive information and the centers activities that may infringe on citizens privacy such as social media collection.¹⁰⁵ This section will take an in depth look at the programs in place to protect citizens' civil liberties, civil rights, and privacy and if they are adequately protect citizens' rights. Currently the DHS, Office of CRCL is training, advising, guiding, and providing technical assistance to Fusions Centers in order to implement measures that safeguard CRCLP.

DHS Guidance

In 2006 DHS and the Department of Justice (DOJ) published *Fusion Center Guidelines*, which advised State and Local Fusion Centers to write, publish, and adhere to privacy and civil liberties policies.¹⁰⁶ Further, in 2008 DHS published *Baseline Capabilities for State and Major Urban Area Fusion Centers* that outlined three additional layers of protection. DHS recommended within these publications Fusion

¹⁰³ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. "Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers", 2013

¹⁰⁴ United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p5

¹⁰⁵ New Jersey, New Jersey State Police, Regional Operation and Intelligence Center. Philadelphia Police Department, Delaware Valley Intelligence Center.

¹⁰⁶ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. "Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers", 2013, 22 Intelligence, Law Enforcement. "Fusion Center Guidelines." *Department of Justice-Bureau of Justice Assistance. Criminal Intelligence Coordinating Council* (2006).

Centers appoint a privacy official, develop a comprehensive privacy policy, conduct outreach, training related to privacy, and develop a mechanism for auditing to ensure adherence to these policies.¹⁰⁷ It appears as of the 2012 National Network of Fusion Center Assessment all but one FC has appointed a Privacy Officer and as of the 2013 CRCL Impact Assessment DHS CRCL has trained 68 Officers of the 78 DHS recognized FCs.¹⁰⁸ The DOJ and DHS subsequently released a “Privacy, Civil Rights, and Civil Liberties Compliance Verification for the Intelligence Enterprise” tool for verifying policies were in compliance with applicable laws and regulations.¹⁰⁹ This guide provides essentially a checklist that allows FCs to assess whether their CRCLP policies are fully developed and implemented within their centers.¹¹⁰

DHS Training

Beyond providing guidance and templates for PCRCL policies, DHS has also provided training and education to Federal, State and Local officials and executives. This training includes the Naval Postgraduate School’s, Center for Homeland Defense and Security course that discusses the necessity of protecting citizens’ civil liberties, civil rights, and privacy. An ACLU policy analyst has previously led discussion within this course and the ACLU’s white paper critique of Fusion Centers is required regarding for all participants.¹¹¹ DHS, CRCL, Privacy and I&A have also provided an extensive

¹⁰⁷ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 23

¹⁰⁸ “2012 National Network of Fusion Centers Final Report”, June 2013, http://www.dhs.gov/sites/default/files/publications/2012_National_Network_of_Fusion_Centers_Final_Report.pdf, Assessed July 13 2014.

¹⁰⁹ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 23

¹¹⁰ DHS, DOJ, “Global Justice Information Sharing Initiative, Privacy, Civil Rights, and Civil Liberties Compliance Verification for the Intelligence Enterprise”, June 2010.

¹¹¹ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 23

training program for analysts at Fusion Centers. As of the close of fiscal year 2012 DHS has provided privacy and CRCL training to 50 Fusion Centers.¹¹² DHS estimates to have trained 1,309 fusion center staffers in addition to 754 liaison officers, and other employees at Fusion Centers on the importance on requirements of protecting citizens CRCLPs.¹¹³ In an effort to customize training to the diverse roles every fusion center plays DHS has developed nine classes to offer Fusion Centers and their personnel.^{114, 115}

The Office of CRCL and Office of Privacy continually conducts two classes for intelligence analysts deploying to Fusion Centers, “Privacy Fundamentals for Fusion Center professionals” and “CRCL Fundamentals for Fusion Center Professions”.¹¹⁶ The former outlines information sharing authorities and parameters, how to report incidents, and intelligence reporting and privacy. The latter teaches trainees how to spot red flags, what first amendment activities are protected, and how to recognize potential civil liberties or civil rights issues.¹¹⁷ The DHS has also implemented a “Training the Trainers” program in order to train privacy, civil liberties, and civil rights Officials located onsite at FCs.¹¹⁸ As of 2013, DHS had trained Privacy/Civil Liberties Officers from 68 of the 78 recognized Fusion Centers. Beyond training on site Officers, and

¹¹² US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 22

¹¹³ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 236

¹¹⁴ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 36

¹¹⁵ Classes include: Civil Rights and Civil Liberties Basics: Red Flags; Privacy Fundamentals; Cultural Tactics for Intelligence and Law Enforcement Professionals; First Amendment Issues for the ISE; Privacy, Civil Rights, and Civil Liberties Basic Concepts; Intelligence Analysts: Product Review Exercise; Transparency and Public Trust: Reach Out to the Community; 28 C.F.R. Part 23; Fusion Center- Specific Issues & Perspectives.

¹¹⁶ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 35

¹¹⁷ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 35

¹¹⁸ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers”, 2013, 37

conducting on site training, the Office for CRCL also has an online portal for FC personnel to conduct training through, and has offered customized courses to meet the unique needs of individual FCs.

Oversight and Review of Programs and Products

DHS has several layers of review that products and programs written by DHS deployed analysts must go through, before they can be disseminated or programs can be implemented. Within DHS the Office for Civil Rights and Civil Liberties, Office of Privacy, Officer of General Counsel, and I&A leadership all must all coordinate and review products and programs to ensure all CRCLP concerns are addressed before disseminating a product or implementing of a program. This four-layer review process ensures that all equities are represented and protected within a product. The Office of Intelligence and Analysis, which DHS deployed IOs are a part of, produces approximately 1000 products a year and every one goes through this review process to ensure protection of citizens' rights.¹¹⁹ This review process is only mandatory for DHS deployed personnel, because Fusion Centers are state and locally operated, DHS does not have the authority to mandate Fusion Center products go through DHS's review process.¹²⁰

Fusion Centers that do not have a formal review and coordination process in place should implement a program that ensures protection and objective representation of civil rights, civil liberties, and privacy. Incorporating a review process that objectively analyzes products and programs could ensure that FCs do not infringe on citizens' rights-

¹¹⁹ United States, Government Accountability Office, "DHS Intelligence Analysis: Additional Actions Needed to Address Analytic Priorities and Workforce Challenge", Jun 4, 2014, GAO-14-397 accessed at: <http://www.gao.gov/products/GAO-14-397>

¹²⁰ US Department of Homeland Security, Office of Civil Rights and Civil Liberties. "Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers", 2013, 36

whether civil, constitutional, or statutory rights. Further, the review process would help balance the interest of law enforcement and intelligence officials, with the interests of private citizens.

Implementing Formal Community Outreach Programs for Fusion Centers

According to the DHS Fusion Center Assessments, in the 2011 only 17 Fusion Centers had formalized community outreach programs, and 33 Fusion Centers had outreach programs in 2012.^{121,122} Although the Fusion Center Assessment identified an increase in formalized outreach programs between 2011 and 2012, DHS should increase pressure on States to create formal outreach programs within the communities in which they reside. Outreach programs would be a great way for fusion centers to communicate their mission and focus to the public. Also, it would enlist communities' assistance to inform law enforcement and Fusion Centers when the public identifies suspicious activity that may be of interest to law enforcement. DHS has initiated the "If You See Something, Say Something" initiative that encourages the reporting of suspicious activities. Further, the DHS and FBI have the suspicious activity reporting programs for reporting unusual or suspicious activity. Community outreach programs would assist Fusion Centers in a multifaceted way that would further their goal and educate the community.

Analysis, Evaluation, and Recommendations

Outreach and Community Engagement

¹²¹ "2012 National Network of Fusion Centers Final Report", June 2013, p23
"2011 National Network of Fusion Centers Final Report", May 2012, p22

¹²² The Fusion Center Assessments were a result of The Government Accountability Office (GAO) in 2010 recommending DHS implement a process that better enables them to measure performance objectives of Fusion Center.¹²²

DHS CRCL, PRIV and officials at State and Local FCs need to continue outreach and community engagement in order to educate their customers, the public, and private industry on what they do, the safeguards in place, and the utility in reporting information to them. According to the 2008 PIA, the Office of Privacy has engaged the public through meetings that enhance the public's understanding of what Fusion Centers are designed to do, but these examples are antidotal and not programmatic in nature.¹²³ DHS, The Office of Privacy and FCs have to better engage the public and the communities they serve to better educate their communities and build trust.

Mentioned in the previous chapter of this thesis portfolio, the Office for CRCL has engaged the public and addressed issues encompassed in this chapter related to freedoms, privacy, civil liberties and civil rights, although more inclusive public engagements could be conducted to enhance the visibility of these engagements. Furthermore, the community roundtable discussions hosted by CRCL do not directly address the issues and concerns of Fusion Centers.

State and Local Fusion Centers have conducted outreach and discussions with local communities on an ad hoc basis, according to a discussion with Ron Brooks-former director of the Northern California Region Intelligence Center.¹²⁴ Although, additional formalized outreach could be initiated in order to cement open lines of communication. Fusion Centers have brought in critics of their program, such as the ACLU and communities, to discuss areas of concern and ways to remedy those issues.¹²⁵ Additionally, according to State and Local law enforcement and Fusion Centers they are

¹²³ United States Department of Homeland Security, *Privacy Impact Assessment* (2008), p.ii

¹²⁴ Brooks, Ron, Former Fusion Center Director of Northern California Regional Intelligence Center. Interview by Jonathan Kelly, July 19th 2014. July 19, 2014

¹²⁵ Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014.

cognizant of the necessity in communicating openly with local communities in order to build trust. FCs understand their ultimate success depends on the trust of their community, as shown in interviews the Congressional Research Service conducted with FC personnel and conversations with former Fusion Center Director Ron Brooks.

This chapter recommends better public outreach and engagement, although that does not need to occur exclusively through roundtables or meetings. More publicly available information, that is easier to access through organization's website or social media could act as a venue to inform the public about current events. There are various vectors and venues all entities involved in the State and Local Fusion Center program could use to better communicate with the public. Some Fusion Centers have robust engagement efforts and publicly available information; while other Fusion Centers do not, and this is likely a result of centers various governing entities.

Limited Evidence Suggesting Over Reach

Limited evidence has been discovered to indicate civil liberties, civil rights, or privacy have continuously, systematically, or negligently been abused or laws broken. DHS Office for CRCL has received only two formal complaints as of the publishing of the CRCL Impact Assessment in March 2013. This limited evidence could be a result of not having established avenues for redress, or evidence that there is no actual issue. This chapter supports the CRCL Impact Assessments recommendation to DHS that they increase the avenues of redress for the public who may be impact by Fusion Center activities.

The Senate Committee on Homeland Security and Governmental Affairs released a report in 2012 that was extremely critical of Fusion Centers' effectiveness to generate

useful and legal intelligence. Although the Senate Report cites several examples where reporting could have over stepped bounds, oversight authorities, including DHS CRCL, and senior reviewers who identified issues within reports and prevented them from being disseminated. The Senate Report cited intelligence reports written, that if published, could have violated privacy rights, and civil liberties of US citizens. The Senate Report continues to provide several examples where information included in intelligence reporting derived from State and Local Fusion Centers were not appropriately collected and violated citizens civil liberties.¹²⁶ The collection and drafting of potentially illegal intelligence reports is cause for concern, and likely an issue of poor training as identified by both DHS CRCL and the Senate Report, although the identification of problematic reports by supervisors is, at minimum, a sign of a functioning review process because it resulted in the cancellation of potentially violating reports.

Privacy Policy Template Used by State and Local Fusion Centers

In 2013 all but one Fusion Center had written a Privacy Policy in accordance with the guidance provided by DHS and DOJ. The privacy policies are commendable for informing the public of FCs commitment to protecting CRCLP. Although, most of the privacy policies reviewed when gathering sources for this chapter followed a very similar template and included similar, if not identical language.¹²⁷ The boilerplate and vague language used by Fusion Centers when writing and publishing their privacy policies undermines the legitimacy of the policy. Further, the privacy policies often fail to identify what legal oversight processes are in place for the FC. In comparison, DHS has

¹²⁶ United States Senate, "Federal support for and involvement in state and local fusion centers." (2012). 23

¹²⁷ Privacy Policies published by the Delaware Valley Intelligence Center (DVIC), New Jersey Regional Operations and Intelligence Center (NJROIC), Delaware Information and Analysis Center (DIAC), California State Threat Assessment Center (CSTAC) were reviewed when composing this research.

a very thorough review process for all products and programs, as outlined above, but SLFC privacy policies' do not identify who has primary legal oversight. Since most FCs are run by State and/or Local police it is assumed that their Office of General Counsel or Attorney General's Office perform legal oversight. This chapter suggests that State and Local Fusion Centers more clearly define what legal oversight they have and avenues citizens have for redress.

Oversight Boards and Privacy Officers

Privacy policies published by FCs identify privacy committees and the privacy officers as the main representatives advocating for and overseeing CRCLP issues within the fusion centers. The 2012 National Fusion Center Assessment reported that "only 27.3% of fusion centers (21) reported that their P/CRCL Officer was experienced in P/CRCL issues before being assigned to the position within the fusion center, and 87% of fusion centers (67) reported that their P/CRCL Officer has additional duties beyond P/CRCL protections that account for the majority of his time."¹²⁸ The lack of a dedicated Privacy Officer is potentially an issue because they may lack full investment in representing all CRCLP equities when reviewing products and programs. Further, if they are severing in a dual capacity they may have vested interest in the success of the product or program and not objectively review the product/program.

Areas for Additional Research

This chapter was written to fully analyze the body of literature critically evaluating the national Fusion Center initiative that encompasses federal, state, and local agencies while fusing the capabilities of law enforcement and intelligence organizations. Further questions and research could be conducted to examine operational redlines of

¹²⁸ "2012 National Network of Fusion Centers Final Report", June 2013, p23

fusion centers. Ron Brooks and other fusion center personnel cite the Code of Federal Regulations (CFR) 28, Part 23 as the main governing law that guides what they are operational capable of perusing and including within their holdings.¹²⁹ CFR 28, states that information can be maintained in criminal intelligence databases if it “reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to that criminal conduct or activity.”¹³⁰ Additional research should analyze if this standard is adequate for protecting citizens’ CRCLP and if agencies properly maintain this standard throughout their operations.

Conclusion

Compliance with 9/11 Commission Act and Applicable Laws

Ensuring “that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland” is one of DHS’s primary missions designated by law within the Homeland Security Act.¹³¹ Additionally, the 9/11 Commission Act directs the DHS to establish the State and Local Fusion Center Program for sharing information between Federal, State, and Local governments. The combination of these two statutes entrusts DHS to establish the State and Local Fusion Center program while also ensuring civil rights and civil liberties of persons are not diminished. Through the implementation of the various programs, oversight processes, training programs, and other programs outlined in this chapter, DHS is fulfilling their mandatory responsibility to protect citizens civil rights and civil liberties, although continued improvement are needed to ensure continued protection.

¹²⁹ Brooks, Ron, Interview by Jonathan Kelly, July 19th 2014.

¹³⁰ United States, Department of Justice, Code of Federal Regulation (CFR) 28, Part 23. Criminal Intelligence Systems Operating Policies

¹³¹ US Congress, Homeland Security Act of 2002, November 25 2002

Influencing Change Within Fusion Centers

The DHS can only guide and influence how State and Local Fusion Centers operate. DHS is not the executive agency for any Fusion Center therefore they lack the authority to mandate Fusion Centers operate in a specific way. Their primary role is to ensure the proper sharing of information, and coordination amongst Fusion Centers and the Federal government. DHS does have substantial influence on how State and Local Fusion Centers operate but they don't control their budget, policies or daily operations. The DHS can only directly influence and control how DHS personnel deployed to Fusion Centers operate and what information they share. DHS in consultation with the Network of National Fusion Centers can influence and shape policies within Fusion Centers.

Restricting Federal Grant Money to Influence Change

DHS can strongly influence how Fusion Centers operate by making federal policy mandatory within Fusion Centers as a condition of accepting federal grant money. During the establishment of the National Network of Fusion Centers, Fusion Centers received a substantial amount of federal grant money to assist in their establishment, although as Fusion Centers mature and federal spending for national security subsidizes Fusion Centers are becoming less dependent on grant money. Nevertheless, DHS could influence and enforce CRCLP policy within Fusion Centers by making CRCLP protections a condition of grant money that is tied to equipment, and personnel.

Impact of the Fusion Center Program on Citizen's Civil Rights and Civil Liberties

There is little evidence to suggest Fusion Centers have regularly, or negligently trampled on citizens' privacy, civil rights, or civil liberties as accused by some scholars, advocates, and politicians. The DHS with assistance from its components has instituted

measures that reinforce the importance of protecting citizens' rights while also ensuring national security. Further steps could be taken to cement policies within Fusion Centers that protect CRCLP, although DHS and State and Local Fusion Centers have systems in place that offer some protections. The DHS State and Local Fusion Center Program continues to balance between national security and citizens' right and this chapter assesses DHS has struck an appropriate balance.

CHAPTER THREE

Research Question: Is the Department of Homeland Security (DHS) Office for Civil Rights and Civil Liberties (CRCL) fulfilling its mission and are their actions sufficient as defined in the Homeland Security Act of 2002 and applicable regulations?

This chapter analyzes the Department of Homeland Security (DHS), Office for Civil Rights and Civil Liberties (CRCL) to determine if they are protecting civil rights and civil liberties in accordance with the Homeland Security Act of 2002 and regulations that guide their mission. The importance of this analysis and the review of these protections afforded to citizens' civil rights and liberties was evident in 2004, when Daniel Sutherland, the DHS Officer for CRCL, spoke at the Heritage Foundation while reviewing the accomplishments and role of the Office for CRCL one year after its establishment. Daniel Sutherland and Michael Chertoff spoke again in 2008 at the Heritage Foundation to review the role of the Office for CRCL 5 years after DHS's establishment. The Office had established itself, as a proactive means for protecting CRCL within the DHS and in this sense was a libertarian institution by design. In keeping with this tradition of checks and reviews, this chapter is designed to be a 10-year review of the Office for CRCL.

Findings from this chapter suggest the Office for CRCL is protecting civil rights and civil liberties of citizens while also ensuring homeland security. The Office for CRCL conducts training, oversight, and public outreach and is involved with many aspects of the homeland security enterprise to ensure that citizens' are protected in DHS's efforts to secure the nation. After reviewing the functions and activities of the Office of CRCL, this chapter recommends three ways the Office for CRCL and the DHS could

increase transparency and protection of citizens. The Office first needs to report metrics in support of their effort of reviewing department reports and policies. Second, the Office needs to better advertise to the public when they are holding community engagement events. Lastly, it is suggested evidence be presented that information obtained through community engagement events is influencing and being incorporated into changes within the department.

Background

The liberty versus security debate traces as far back as Thomas Hobbes' and is a fundamental question at the heart of liberal societies.¹³² Although, the contemporary debate on liberty and security in the United States can roughly be reduced to three schools of thought. The first is, by disposition, highly sympathetic to the national security policy and legislation that was implemented in response to 9/11 and views these measures to be within the United States constitutional limits and values and proportional to the threat. The second school of thought is more libertarian in nature and believes that the government is trampling on citizens' rights by implementing unconstitutional national security policy. While fighting the war on terrorism this school of thought alleges the government has trampled citizens' rights by conducting unwarranted search and seizures, wiretaps, and violated habeas corpus, among other violations, all in the name of national security. Lastly, some believe a more pragmatic approach is necessary and the government needs to balance both civil liberties and national security based on the threat environment. This approach is known as the 'pragmatic authoritarian libertarian'

¹³² Arnhart, Larry. *Political Questions: Political Philosophy from Plato to Rawls*. Waveland Press, Sep 11, 2002, 2002.

approach. This balance needs to be carefully struck and frequently checked to ensure that any threats to personal liberties are proportional to the threats against security.

Pro Government Counter Terrorism Policy

Select scholars have supported the United States' counter terrorism policy that followed the September 11th attacks. Among them, Jin C. Ting convincingly argues the steps the government has taken in response to 9/11 are within the United States constitution limits and values, and proportional to the threat.¹³³ Supporters of post 9/11 initiatives claim the government's response was necessary, justified, and legal. The US Government has the responsibility to protect the constitution against enemies foreign and domestic, and their reaction was in fulfillment of their obligation. Furthermore, John Yoo, who was Deputy Assistant Attorney General from 2001 to 2003 and helped form the legal justification for much of the post 9/11 counter terrorism policy, strongly supports this policy and cites its foundation in constitutional power.¹³⁴

Those that support the US Government's counterterrorism policies claim our current enemy is different than our enemies of the past and this new enemy requires different methods and policies in order to protect our homeland. The terrorists who desire to cause harm to the United States will attempt to utilize our liberties within a free and open society to facilitate their actions. The groups that are seeking to attack us do not wear uniforms or represent a country. These groups are acting clandestinely on behalf of an idea and motivated by causing chaos and harm to our society.

Opponents to Government Counter Terrorism Policy

¹³³ Tin, Jan C. "Unobjectionable But Insufficient--Federal Initiatives in Response to the September 11 Terrorist Attacks." *Conn. L. Rev.* 34 (2001): 1145.

¹³⁴ Yoo, John. *The powers of war and peace: The Constitution and foreign affairs after 9/11*. University of Chicago Press, 2008.

Select scholars, media, and public commentators, have strongly opposed post 9/11 counter terrorism policies while questioning the effect these policies have had on people's civil liberties and civil rights. Opponents question these policies effects on reducing habeas corpus rights, immigration rights, government transparency, free speech rights, right to a speedy and public trial, search and arrest warrants based on probable cause, and presumption of innocence, among others.¹³⁵ Countering terrorism presents a unique issue that differs from other types crime because, by its nature, crimes need to be prevented before they occur and our judicial system is traditionally used in rendering damages after an event or action occurs.¹³⁶ Furthermore, there is a paradox between trading liberty for security because with absolute security there is no freedom and with absolute freedom there is no security.¹³⁷

David Cole, among others, has argued in support of limited government intrusion on citizen's civil liberties and civil right citing the 9/11 Commission Report. He claims that the 9/11 attacks occurred not because the attackers abused the United States highly regarded civil rights and civil liberties and our free and open society, but because the paradigm of intelligence and law enforcement agencies resulted in the stove piping of information that prevented the system from working.¹³⁸ Further, he claims that the 9/11 attacks were primarily planned over seas where the US Government has significantly fewer restrictions protecting civil rights and civil liberties. David Cole's argument

¹³⁵ Baker, Nancy V. "National security versus civil liberties." *Presidential Studies Quarterly* 33, no. 3 (2003): 547-567.

¹³⁶ Baker, Nancy V. "National security versus civil liberties."

¹³⁷ Hobbes article

¹³⁸ David, Cole, and James X. Dempsey. *Terrorism and the Constitution: Sacrificing civil liberties in the name of national security*. The New Press, 2006.

concludes that laws, rights, and liberties were not impeding the government from ensuring national and homeland security.

Title II of the Patriot Act, Enhanced Surveillance Procedures, vastly expanded the government's ability to intercept communications and conduct searches using one warrant while blocking notification of the search to the person.¹³⁹ Further, under Title II government agencies were now permitted to share information between law enforcement and intelligence agencies. The Foreign Intelligence Surveillance Act was also expanded under Title II of the Patriot Act allowing for surveillance at the lower standard of a preponderance of evidence.¹⁴⁰ Opponents to the newly expanded powers given to government agencies are uneasy about the limited oversight given to these new powers, which leave room for them to be abused.¹⁴¹

The Judicial branch has traditionally given preferential treatment to the Executive Branch during times of war.¹⁴² During past conflicts, such as World War II and the Civil War, the courts have given great latitude to the President. World War II saw the creation of internment camps for Japanese immigrants who were seen as a threat to national security. Also, during the Civil War President Lincoln suspended habeas corpus for those detained.¹⁴³ Opponents to current policy argue that past actions are not sufficient justification for current infringement of rights.¹⁴⁴ Past and present struggles for civil rights such as LGBT movements, women's suffrage movements, and civil rights movements of the 50's and 60's should be a cautionary tale for using previous unjust

¹³⁹ Baker, 560

¹⁴⁰ Baker, 561

¹⁴¹ Baker, 561

¹⁴² Baker, 548

¹⁴³ Cole, David, and Dempsey, James X.. Terrorism and the Constitution: Sacrificing civil liberties in the name of national security. The New Press, 2006. Forward

¹⁴⁴ Cole & Dempsey. p 2

actions to support current policy. History has shown even when policies are legally justified they are not always morally or ethically sound decisions. Furthermore, the war against terrorism and Al Qaeda is a war that has no clear end. It has also been argued that the tactic of terrorism has existed for hundreds of years and is likely to threaten free societies for the foreseeable future.¹⁴⁵

Balance of Civil Liberties and National Security

Among those who vehemently support the US Government's counterterrorism policy and those who passionately dissent against it, there is a third school who acknowledge there is a civil liberties-national security continuum that must constantly be evaluated.¹⁴⁶ It must be used with caution because both schools of thought use this argument of balance to justify their position. It can be argued that civil liberties have been curtailed but only because the threat is so great. Or, civil liberties need to be protected because the threat is not as grave as the government says it is. John Yoo and others have used this argument in support of their position.¹⁴⁷ Supreme Court Justice Robert Jackson expressed support for the position of balance when in 1949 during the dissenting opinion of *Terminiello v. Chicago* of a free speech case he said that the Bill of Rights should not be made into a suicide pact.^{148 149} This is to mean, at times when there is a great threat to national security, civil liberties will often need to be curtailed and when the nation feels relatively safe liberties will take precedent. Richard Posner has outlined how the government and specifically the Judicial Branch have balanced civil liberties and national security at times of war and peace. There is an agreed upon need to

¹⁴⁵ Baker, 555

¹⁴⁶ Cole & Dempsey. p 2

¹⁴⁷ Yoo, 2008.

¹⁴⁸ Posner, Richard A. "Security versus civil liberties." *The Atlantic Monthly* 288 (2001): 46.

¹⁴⁹ *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

balance the scales depending on the threat to the nation, but much of the debate occurs on how far the government can go in the name of national security.¹⁵⁰ The US Government did have the foresight to include a sunset clause within the Patriot Act that shows that the Government acknowledges the need to balance civil liberties and national security in times of war and peace.

The prolific legal scholar Judge, Richard Posner, known for being a staunch libertarian in his writings, is a strong supporter of continually balancing civil liberties with the current national security threat environment. This may come to a surprise to some libertarian purists, and to them, even appear to be a violation of his intellectual commitment to libertarianism. But this position arises not from an abstract doctrinal commitment but from pragmatic considerations and has been coined the Pragmatic Authoritarian Libertarian. Bernard E. Harcourt, in his article analyzing why Judge Posner deviates from his traditional libertarian position, looks at what he calls a Pragmatic Authoritarian Libertarian position. He tries and explain why Judge Posner would take what is considered such a libertarian position in the *Edmond v. City of Indianapolis*, 183 F.3d 659 (7th Cir. 1999) and then write in post 9/11 articles supporting government policy restricting civil liberties.¹⁵¹ The pragmatic approach as described by Harcourt and Posner is when public safety is threatened so greatly, such as in times of imminent threat or attacks like 9/11, normal restraints on law enforcement and

¹⁵⁰ Posner, R. A. (2006). *Not a suicide pact: The Constitution in a time of national emergency* (p. 9). New York: Oxford University Press.

¹⁵¹ Harcourt, Bernard E., "Judge Richard Posner on Civil Liberties: Pragmatic Authoritarian Libertarian. *University of Chicago Law Review*, Vol. 74, 2007; *University of Chicago Law & Economics*, Olin Working Paper No. 331; *University of Chicago, Public Law Working Paper No. 152*. Available at SSRN: <http://ssrn.com/abstract=965578>

intelligence officials need to be loosened.¹⁵² Staunch libertarians would disagree with this position because they assert that when the government wants to curtail civil liberties and aggressively pursue security, this is when civil liberties and rights are needed most. Civil liberties are not as important in times when the government is not looking to abuse them. With this being said, the pragmatic authoritarian libertarian position supports a real evaluation of the threat environment be conducted against the real effect these policies have on civil liberties. What actions can be justified under this approach this year, month, or day may not be justified tomorrow. Further, the question could be asked is the sacrifice of civil liberties and civil rights worth it, or is doing nothing to combat the threat worth it? Does the possibility exist that doing nothing and sacrificing no freedom could result in a significant curtailment of freedom and security in the future? If the answer is yes, then Pragmatic Authoritarian Libertarian would suggest taking action at this time and continually recalculate the threat to ensure a proper balance of civil rights and civil liberties and security.¹⁵³ Much like its name, it is a pragmatic approach, evaluating and continually surveying and seeking to balance the security environment with civil liberties.

The Office for Civil Rights and Civil Liberties as a Pragmatic Authoritarian Libertarian

Of the three schools of thought, the Office for CRCL operates in line with the Pragmatic Authoritarian Libertarian position by balancing the need to protect civil liberties and civil rights while also protecting the homeland. The Office is in a unique position to weigh both interests because they have the ability to truly analyze the threat

¹⁵² Harcourt, 2007 and Posner, Richard A. Not a suicide pact: The Constitution in a time of national emergency. New York: Oxford University Press, 2006.

¹⁵³ Chertoff, Michael; Sutherland, Danieal, Teufel, Hugo, Swire, Peter P.; and Lanigan, Keven. "Homeland Security, Privacy and Civil Liberties: A Five Year Review" Heritage Lectures: The Heritage Foundation. June 26, 2008.

environment. They see the benefits of increased intelligence collection capabilities and the cost of reduced civil liberties protection incurred by citizens. For example, when Customs and Border Protection (CBP) conducts seizures of electronic information at ports of entry, the Office for CRCL knows the advantage law enforcement, and intelligence agencies get from this information, the impact it has on citizens' civil liberties, and the risk they run if they do not have this information.¹⁵⁴ Although the Office's main mission is to protect citizens' civil rights and civil liberties, they do that while also maintaining the Department of Homeland Security's ability to protect the homeland.¹⁵⁵

Neither libertarians nor conservatives will be completely satisfied with the performance of the Office for CRCL because they do not fully subscribe to protecting civil liberties and civil rights in all circumstances, nor do they support national security interests in all circumstances. In keeping tradition with the Pragmatic Authoritarian Libertarian position they weigh the costs and benefits of civil liberty sacrifices in the name of national security. Although the main mission of the Office for CRCL, as outlined in the Homeland Security Act of 2002, is to minimize the impact of DHS policy and activities on citizens' civil liberties and civil rights, their number one priority above all else is to ensure national security within the confines of the law. How grave the threat to national security is and how far civil liberties have been compromised continues to be discussed in American society.

Community Perspective on National Security vs Civil Liberties Discussion

¹⁵⁴ Redacted Report: Civil Liberties/Civil Rights Impact Assessment: Border Searches of Electronic Devices, 29, December 2011.

¹⁵⁵ Homeland Security Act of 2002, Section 103

The question of liberty in the face of security has been discussed extensively amongst think tanks since 9/11. The discussion has also risen up several times since, with the revelations of NSA warrantless surveillance around 2005 and then again with the Snowden NSA Leaks in 2013. Discussions have taken place not only debating both left and right positions, but they have explored how the balance between security and liberty should be struck and what questions need to be asked when evaluating the balance.¹⁵⁶

Although groups and scholars differ on where a balance should be struck, many do acknowledge a need to evaluate the cost of liberties and the extent of security received. Wittes, while writing for the center-left Brookings Institute, supports asking the important questions of whether security policies are really infringing on liberty, and if so whose liberty are the infringing on.¹⁵⁷ Is it the American people or foreigners abroad? Also, he suggests asking the question, could these security policies actually enhance liberty.¹⁵⁸ He suggests that without security you have no liberty and vice versa.¹⁵⁹ This idea is also supported from the conservative-right as can be seen in a Heritage Foundation paper published by Stimson and Grossman in which they suggest the United States has preserved security and liberty by creating policy that protects both. When they have failed to protect one, both security and liberty have suffered¹⁶⁰. The two principals are

¹⁵⁶ Bobbitt, Philip. *Terror and Consent: The Wars for the Twenty-First Century*. New York: Alfred A. Knopf, 2008, pg. 241.

¹⁵⁷ Wittes, Benjamin. "Against a Crude Balance: Platform Security and the Hostile Symbiosis Between Liberty and Security" Harvard Law School/The Brookings Institution: Project on Law and Security. September 21, 2011.

¹⁵⁸ Rosenzweig, Paul. "Principles for Civil Liberties in an Age of Terrorism." The Heritage Foundation. January 31 2003.

¹⁵⁹ Wittes, 2011 available at: <http://www.brookings.edu/research/papers/2011/09/21-platform-security-wittes>

¹⁶⁰ Stimson, Charles, and Andrew Grossman. "How Must America Balance Security and Liberty?." The Heritage Foundation, December 9 2011.

not mutually exclusive and cannot stand on their own.¹⁶¹ Thus, overall, a consensus on both the Left and the Right seems to advocate for transparency and a public discussion on security policies, but this open discussion is difficult to engage in while also sustaining the programs and policies as effective means to secure our nation.¹⁶² It has been suggested that if the three branches of government are able to agree on security policy then a balance has been struck between security and liberty because all branches of government have different interests to represent. Further, this form of agreement maintains the programs ability to be an effective means of security because of their closed-door discussions. Without diving deeply in to the discussion of congressional oversight of intelligence matters (another paper could be written on congressional oversight), it can simply be stated that it is difficult to have open debate on secret security issues.

Summary of National Security Civil Liberties Debate

The civil liberty versus national security debate is an increasingly important discussion to evaluate, especially during a time when government over reach can have such a strong consequence on personal liberty. When there are grave threats to national security, the balance of civil liberties and national security may need to be tilted towards national security. At times of peace, the opposite may be true. At all times, appropriate and effective oversight of national security activities needs to be conducted by both internal and external evaluators to ensure liberty is not traded for security in its

¹⁶¹ Stimson, Charles, and Andrew Grossman. "How Must America Balance Security and Liberty?." The Heritage Foundation, December 9 2011. Available at:

<http://www.heritage.org/research/reports/2011/12/how-must-america-balance-security-and-liberty>

¹⁶² Keiber, Jason. National Security and Civil Liberties. Center for Strategic and International Studies. December 6 2006. Available at: http://csis.org/files/media/csis/pubs/060210_sr_v2n3.pdf

entirety.¹⁶³ Evaluating the Department of Homeland Security Office for Civil Liberties and Civil Rights is one piece of oversight that will ensure the judicious handling of civil liberties and civil rights while protecting our nation.

Establishing a Base Line

While evaluating the DHS's Office of Civil Rights and Civil Liberties we need to establish a baseline of performance for the office. To establish this baseline we will look at the applicable statutes, regulations, executive orders, and directives that guide the day-to-day and overall operations of the Office of CRCL.¹⁶⁴ This will help in determining how the office was established, what they were designed to do, how they were designed to do it, and who was to head the organization. In 2004 the officer for CRCL, Daniel Sutherland, presented a one-year review for the office while speaking at The Heritage Foundation and outlined these objectives.¹⁶⁵ The below baseline will expand on what he had outlined.

Homeland Security Act of 2002

The Department of Homeland (DHS) was created out of the Homeland Security Act of 2002 establishing it as a department in the executive branch of the US Government.¹⁶⁶ It arose out of the Office of Homeland Security in the White House that was established 11 days after 9/11.¹⁶⁷ The first and foremost role of DHS is to prevent terrorist attacks from occurring within the United States.¹⁶⁸ Second, if a

¹⁶³ Kreimer, Seth F. "Watching the watchers: Surveillance, transparency, and political freedom in the war on terror." U. Pa. J. Const. L. 7 (2004): 133.

¹⁶⁴ The full list of legal authorities the CRCL operates under are listed on their Corporate Website at: <http://www.dhs.gov/legal-authorities-office-civil-rights-and-civil-liberties>

¹⁶⁵ Sutherland, Daniel W. "Homeland Security Office For Civil Rights and Civil Liberties: A One-Year Review." Heritage Lectures: The Heritage Foundation. (2003).

¹⁶⁶ Homeland Security Act of 2002, 6 USC 111.

¹⁶⁷ <http://www.dhs.gov/creation-department-homeland-security>

¹⁶⁸ Homeland Security Act of 2002, 6 USC 111.

terrorist attack were to happen the DHS is tasked with minimizing damage and assisting in the recovery of such a disaster. When the department was created there were a lot of issues swirling in Washington. Among policy makers there was a need to protect the homeland by increasing focus on preventing and responding to man made and natural disasters. Policy makers needed to strike a balance between going too far and creating a domestic intelligence agency, which even in the post 9/11 period did not have a lot of support, while still creating an effective countering terrorism and homeland security department.

Homeland Security Act of 2002, Section 103 (Officer of Civil Rights and Civil Liberties)

Within the HSA of 2002 Congress addressed the need to protect the homeland while preserving citizens' civil rights and civil liberties through the creation of the Office for Civil Rights and Civil Liberties in section 103.¹⁶⁹ The Officer would be charged with advising the Secretary of Homeland Security and minimizing the impact of homeland security on citizens' rights and liberties. The President, with consent and recommendation of Congress, appoints the Officer for CRCL who sits within the Office for Civil Rights and Civil Liberties.¹⁷⁰ The office is unique because it places an officer representing civil libertarian ideals and values within an arms reach of the Secretary of Homeland Security while directing, advising, and influencing policy.

The Officer for CRCL acts within several capacities as outlined in the Homeland Security Act and subsequent statutes and regulations. The mission statement for the office outlines several objectives. First, the office ensures the respect and protections of civil liberties and civil rights while policy is created and implemented by advising DHS

¹⁶⁹ Sutherland, 2004, and the Homeland Security Act of 2002

¹⁷⁰ Homeland Security Act of 2002, Section 103

leadership, employees, and state and local partners.¹⁷¹ Second, through outreach the office communicates with individuals and communities who may be affected by DHS policy and educates them on the policy, reasons for implementations, and avenues for redress.¹⁷² The office advertises redress avenues for citizens and investigates and resolves those complaints. Further, the office educates DHS employees on community concerns and acts as a liaison between communities and policy makers advocating and representing the interests of both the department and citizens they serve to protect.¹⁷³ Lastly, the office leads and promotes DHS's equal employment opportunity programs and promotes workforce diversity.¹⁷⁴

To accomplish these missions the office is divided into three divisions, the Equal Employment Opportunity and Diversity Division, the Programs and Compliance Division, and the Office of Accessible Systems and Technology (OAST).¹⁷⁵ The Programs and Compliance Division addresses and investigates allegations of civil rights and civil liberties abuses by the Department. The division also provides DHS senior leadership with civil liberties and civil rights advice on current issues and policy creation. In addition to providing senior leadership with guidance, the division engages communities to ensure that the department's activities are not negatively

¹⁷¹ U.S. Department of Homeland Security; About the Office for Civil Rights and Civil Liberties. Available at: <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

¹⁷² U.S. Department of Homeland Security; About the Office for Civil Rights and Civil Liberties. Available at: <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

¹⁷³ U.S. Department of Homeland Security; About the Office for Civil Rights and Civil Liberties. Available at: <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

¹⁷⁴ U.S. Department of Homeland Security; About the Office for Civil Rights and Civil Liberties. Available at: <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

¹⁷⁵ U.S. Department of Homeland Security; About the Office for Civil Rights and Civil Liberties. Available at: <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

effecting people of disabilities, and diverse racial or ethnicity among other groups.¹⁷⁶

For the purpose of this paper, we will focus primarily but not exclusively on the Programs and Compliance Division because of their most direct impact in protecting civil liberties and civil rights in the face of national security.

What has the Office for Civil Rights and Civil Liberties been doing?

Community Engagement Activities

The Office of Civil Rights and Civil Liberties (CRCL) claims they devote a significant amount of resources toward engaging communities within the United States that are affected by their policies and helps involve them in the homeland security plan.¹⁷⁷ Since 2005 the Office for CRCL has been conducting roundtable discussions with community groups and leaders. The goal of these community engagement events are to communicate with those that may possibly be affected by DHS policy and ensure that their civil liberties and civil rights are protected while also promoting security.¹⁷⁸ As of fiscal year 2012 the Office for CRCL reported in their annual report to Congress that they have established outreach endeavors in 15 cities around the nation working with all segments of the community including American Arabs, Muslims, Sikhs, South Asians, and Middle Eastern. They have expanded their community outreach in fiscal year 2012 to include outreach in Latino, Somali, and Asian/Asian Pacific Islander communities.¹⁷⁹

The Office for CRCL has outlined 4 goals they seek to accomplish through community roundtable events. First, the events serve to communicate reliable information

¹⁷⁶ U.S. Department of Homeland Security; About the Antidiscrimination Group. Available at: <http://www.dhs.gov/antidiscrimination-group>

¹⁷⁷ Written testimony of DHS Office of Civil Rights and Civil Liberties Acting Officer Tamara Kessler for a House Committee on Homeland Security, Subcommittee on Oversight and Management Efficiency hearing titled “Why Can't DHS Better Communicate with the American People?”

¹⁷⁸ US Department of Homeland Security, Office for Civil Rights and Civil Liberties, Fiscal Year 2012 Annual Report to Congress. July 25 2013. July 25, 2013

¹⁷⁹ US DHS Office of Civil Rights and Civil Liberties FY2013 Report to Congress, July 13 2013.

pertaining DHS policy and programs to the community including avenues that communities have for redress of issues.¹⁸⁰ Second, the round tables serve as a forum where DHS officials can receive information and concerns from communities as an on the ground collector engaging face to face.¹⁸¹ After they have met with communities and obtained information from them, it is also their responsibility to incorporate these lessons learned, and ideas back into the policy making process. Throughout the entire process it all serves to deepen the relationship of trust and communication between local communities, DHS, and the overall federal government.¹⁸²

The community engagement section of the Office for CRCL has participated in over 200 events and roundtables in FY12 and continues to expand the number of cities they reach out to.¹⁸³ In fiscal year 2012 the community outreach section was able to hold regular events in 15 cities. That is an increase from 6 regular meetings in urban areas as of fiscal year 2010 and up from 13 regular roundtable meetings in cities across the United States in Fiscal Year 2011.¹⁸⁴ Topics discussed during these roundtables often include immigration and naturalization policies, how communities can work with DHS and the federal government to counter violent extremism, roles and responsibilities for law enforcement, and even in FY10 the National Counter Terrorism Center (NCTC) was able to provide briefs at two roundtables on domestic violent extremism.¹⁸⁵ Although the FY10 report does not include details of this brief, it would be plausible that this brief included threats of violent religious extremism in addition to threats of violent domestic

¹⁸⁰ Office of Civil Rights and Civil Liberties FY2012 Report to Congress, July 13 2013. P 19

¹⁸¹ Office of Civil Rights and Civil Liberties FY2012 Report to Congress, July 13 2013. P 19

¹⁸² Office of Civil Rights and Civil Liberties FY2012 Report to Congress, July 13 2013. P 19

¹⁸³ Office of Civil Rights and Civil Liberties FY2012 Report to Congress, July 25th 2013 p19

¹⁸⁴ FY10, FY11, FY12 CRCL Reports to Congress. In late FY10 CRCL added an additional 3 cities to it regular meetings for a total of 9 regular meetings.

¹⁸⁵ FY10 CRCL report to congress p. 15.

terrorism such as violent white supremacists that may target minority communities. Further, it would be plausible if NCTC used this opportunity to educate communities on “signs and symptoms” of violent extremism and what to look out for. This would be in line with their countering violent extremism plan outlined by the President in the article entitled “Empowering Local Partners to Prevent Violent Extremism in the United States” released by the White House.¹⁸⁶ Within this article the President outlines the whole of government approach to countering violent extremism and how a well-informed and engaged citizenry, Federal, State, and Local government are the foundation to CVE.

Countering Violent Extremism (CVE) Activities

The Office for CRCL plays an important role in the national strategy for countering violent extremism and the engagement of local communities is at the forefront of this effort to prevent violent extremism. The office not only engages local communities in its effort to CVE but they also meet with delegations from foreign countries in its effort. In October of 2012 the Office for CRCL was able to visit Pakistan to meet with leaders, academics, and politicians to discuss The Office for CRCL policies and procedures, the importance of countering violent extremism, the role of community participation, and the value of civil liberties and civil rights.¹⁸⁷ Also, the Office for CRCL was able to hold a community round table in London, England to discuss the importance of CVE and its application to the Somali population in London.¹⁸⁸

Further, through the US Embassy in Copenhagen, Denmark DHS CRCL was able to meet with Danish Dignitaries to discuss the Department’s CVE program, and

¹⁸⁶ The White House. “Empowering Local Partners to Prevent Violent Extremism in the United States” August 2011. http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf

¹⁸⁷ CRCL Newsletter October 2012. P.2

¹⁸⁸ CRCL Newsletter October 2012. P.2

community engagement and integration efforts.¹⁸⁹ The Danish Government is recognized in the international community for its countering violent extremist programs that are focused on preventing crimes against minority and immigrant populations such as their large Somali population.¹⁹⁰ The delegation of Danish Diplomats was also able to attend an Office for CRCL community roundtable held in Columbus, Ohio where the United States has a large Somali immigrant population. The delegation and the other US Federal, State, and Local agencies were also able to meet face to face with local community leaders, where they claim the community engagement initiatives have resulted in reduced racial tensions.

Complaints/Redress

The avenues DHS provides citizens to file complaints and pursue redress have been another major initiative for the Office for Civil Rights and Civil Liberties.¹⁹¹ The Implementing Recommendations of the 9/11 Commission Act of 2007 assigned the responsibility and authority to DHS Office of CRCL to investigate complaints, in addition to reviewing DHS activities and programs for their effect on citizens' civil liberties and civil rights.¹⁹² The role and responsibility for investigating complaints and violations of civil liberties and civil rights is one task that is contradictory to the Office's primary roles of pro actively protecting citizens' civil liberties and civil rights. When the Office for CRCL receives a complaint they forward it to the Office of Inspector General (OIG). The OIG then conducts a preliminary review of the case and if they decline to investigate the complaint it is then forwarded back to the Office for CRCL. At this point

¹⁸⁹ CRCL Newsletter February 2013. Available at: <http://www.dhs.gov/crcl-hosts-denmark-delegation>

¹⁹⁰ CRCL Newsletter February 2013. Available at: <http://www.dhs.gov/crcl-hosts-denmark-delegation>

¹⁹¹ 6 U.S.C. § 345: Establishment of Officer for Civil Rights and Civil Liberties
<http://www.dhs.gov/establishment-officer-civil-rights-and-civil-liberties>

¹⁹² <https://www.dhs.gov/legal-authorities-office-civil-rights-and-civil-liberties>

the Office for CRCL makes a determination if they will investigate the complaint or forward it to a component agency. If CRCL determines they will investigate the complaint they will conduct their own fact-finding. If a case is referred to a component for investigation they will submit a Report of Investigation (ROI) back to CRCL when the factual investigation is completed. Subsequently, CRCL will provide any recommendation for improving policy, practices, or training and CRCL will notify the complainant of the results of the investigation. As of fiscal year 2010 CRCL now asks the components to concur or dissent with CRCL's recommendations and provide a plan of actions for implementing recommended changes.¹⁹³

Volume of CRCL Complaints

The Office of CRCL has increased the number of complaints they have received and the number of investigations they are involved in over the past five fiscal years. From fiscal year 2008 through fiscal year 2012 they received 157, 155, 195, 298, and 253 complaints respectively. They have also closed 142, 144, 118, 219, and 279 complaints from 2008 through 2012 respectively.¹⁹⁴ There has been an obvious increase in the number of complaints the Office of CRCL has been receiving, processing, investigating, and closing. This increase in complaints can be the result of many things, but we will analyze this trend further in the next section of this paper.

The Office For CRCL has placed significant effort in advertising avenues citizens have for redress. They have used the various community engagement events mentioned above to advertise and encourage citizens who have encountered issues whether it be discrimination at Transportation Security Administration (TSA) airport security check

¹⁹³ CRCL Report to Congress FY10, page 30

¹⁹⁴ Report to congress, 2009, 2010, 2011, 2012.

points, or during Immigration and Custom Enforcement (ICE) investigations, arrests, and detentions. In fiscal year 2010 the Office for CRCL implemented a fully online complaint form that persons can use to file complaints.¹⁹⁵ Further, in January of 2012 DHS, Office for CRCL created a social media presence on Facebook that informs and facilitates the public on the process for filing complaints and seeking redress for issues involving DHS and the Federal, State, and Local governments.¹⁹⁶

Proactive Policy Review

One of the unique roles the Office for Civil Rights and Civil Liberties plays within the Department of Homeland Security and National Security Sector of the Federal government is its proactive role in limiting national and homeland security policies' impact on citizens' civil liberties and civil rights. The Office for CRCL has the ability to influence and review policy that DHS leadership is developing before it is implemented.¹⁹⁷ By design the office, a self declared libertarian one, represents the interest of citizens' civil rights and civil liberties during the policy making process.

Very little information has been released about the substantive contributions the Office for Civil Rights and Civil Liberties adds to the policy making process. When they have been asked by the media, Freedom of Information Act (FOIA) requests, and Congress, among other inquiring groups to release information regarding the contributions they make in reviewing policy they have fought vigorously to keep deliberations and advice given to DHS private.¹⁹⁸ They have argued that the ability to

¹⁹⁵ Report to Congress 2010

¹⁹⁶ Report to Congress 2012

¹⁹⁷ Sutherland, Daniel W. "Homeland Security Office For Civil Rights and Civil Liberties: A One-Year Review. "Heritage Lectures: The Heritage Foundation. (2003).

¹⁹⁸ Chertoff, Michael; Sutherland, Danieal, Teufel, Hugo, Swire, Peter P.; and Lanigan, Keven. "Homeland Security, Privacy and Civil Liberties: A Five Year Review" Heritage Lectures: The Heritage Foundation. June 26, 2008.

have an open and continuous dialogue with members of the Department is built upon a foundation of trust. If they were to release information that disclosed essentially how the “sausage was made” they would not be included in policy discussion in the future. How could you work with someone to constructively build effective policy if what you tell him or her could be held against you or your Office in an OIG report, Congressional Hearing, or newspaper? They argue you cannot and thus have kept most information pertaining to policy review and discussions private.¹⁹⁹

Civil Liberties/Civil Rights Impact Assessments

One of the ways the Office for CRCL influences policy and programs within DHS is through Impact Assessments. These CRCL Impact Assessments are released to the public via DHS.gov, DHS’s public website, and is a more transparent way of disclosing DHS activities and their effects on citizens civil liberties and civil rights. Impact Assessments are initiated through requests from leadership, The Office for CRCL, or designated by law.²⁰⁰ The CRCL Impact Assessments reviews department policies, programs, and initiatives to determine their effect on civil liberties and civil rights. Impact assessments also include recommendations for program or policy in order to better safeguard civil liberties and civil rights while remaining effective means of ensuring homeland security.²⁰¹

Since fiscal year 2008, the Office for CRCL has conducted numerous Impact Assessments including several reviews of high profile DHS programs including two reviews of the national fusion center network in 2008 and early 2013, review of CBP’s border searches of electronic devices, and the Future Attribute Screening Technology

¹⁹⁹ Chertoff, & Sutherland 2008.

²⁰⁰ Report to Congress 2012

²⁰¹ Report to Congress, 2012

(FAST) used for screening passengers, among other assessments. What follows will be a cursory review of the substantive information included in these impact assessments by looking at their contents, analysis, and recommendations that result from the Office for CRCL conducting these impact assessments.

Within the 2013 “Civil Liberties/Civil Rights Impact Assessment: DHS Support to the National Network of Fusion Centers” the Office For CRCL included several recommendations that would better protect citizens’ civil liberties and civil rights. The first recommendation was that fusion centers that are using federally funded criminal intelligence databases abide by the federal regulations outlined in the Criminal Intelligence Systems Operating Policies (28 C.F.R. Part 23) which directs “law enforcement agencies on how to operate criminal intelligence information systems effectively while protecting individuals’ privacy and constitutional rights during the collection, storage, and dissemination of criminal intelligence information.”²⁰² Second, the assessment recommends the DHS Office of Intelligence and Analysis (I&A) (the principal office for directing fusion centers operations) assist fusion centers with writing implementing plans on privacy and civil rights/civil liberties.²⁰³ The third recommendation coming out of the 2013 review of fusion centers was that DHS, FEMA, CRCL, I&A, and Office Of Privacy update how grants are distributed to fusions centers. They recommended leveraging the grant issuing process to ensure that fusion centers are

²⁰² http://www.iir.com/WhatWeDo/Criminal_Justice_Training/28CFR/

Recommendation is found in: “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers” March 1 2013, Department of Homeland Security, Report to Congress.

²⁰³ “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers” March 1 2013, Department of Homeland Security, Report to Congress.

developing, implementing, and following civil rights, civil liberties, and privacy guidelines in addition to establishing steadfast policies.²⁰⁴

Completed in fiscal year 2012, the Office for CRCL conducted an Impact Assessment entitled “Border Searches of Electronic devices”. Of the numerous impact assessments conducted by the Office for CRCL, this impact assessment received the most public attention likely because of the controversial program it was reviewing. Border searches of electronic devices contest sharply with citizen’s 1st and 4th amendment rights and the impact assessment directly address these concerns.²⁰⁵ The Office for CRCL had five recommendations when assessing the program governing border searches. First, when Custom and Border Protection (CBP) Officers conduct searches they accurately record why they are conducting the search. Second, within their policy, expressly state that it is impermissible to conduct searches based on race or ethnicity, and thirdly institute a review process for ensuring certain groups are not unreasonably subjected to border searches. Further, if program data reveals that certain ethnicities or races are being subjected to abnormally high number of border searches, those ports of entry institute a supervisory review of border searches.²⁰⁶ Fifth, CBP as a whole needs to improve the mechanism they use to notify passengers when they were subjected to a border search and their avenues of redress (DHS TRIP²⁰⁷). Within the Impact Assessment released to the public the Office For CRCL redacted substantial portions of its legal reasoning and

²⁰⁴ “Civil Rights/Civil Liberties Impact Assessment: DHS Support to the National Network of Fusion Centers” March 1 2013, Department of Homeland Security, Report to Congress.

²⁰⁵ Several organizations have expressed their concerns with DHS CBP and ICE border searches including most notably the American Civil Liberties Union.
<https://www.aclu.org/blog/technology-and-liberty-immigrants-rights-national-security/dhs-releases-disappointing-civil>

²⁰⁶ Redacted Report: Civil Liberties/Civil Rights Impact Assessment: Border Searches of Electronic Devices, 29 December 2011.

²⁰⁷ Department of Homeland Security Traveler Redress Inquiry Program

justification pertaining to the programs legality and constitutional permissibility. The redacted Impact Assessment does release parts of its reasoning which generalizes CBP and ICE's longstanding legal authority recognized by both Congress and the Courts to conduct suspicion less border searches. Further, CBP and ICE's conduction of electronic searches are an extension of their authority and mission to prevent, deter, and apprehend contraband from entering the United States.²⁰⁸

Analysis/Findings

After performing an overview of select missions of the Office for CRCL, we have determined they are fulfilling their mission as outlined by the Homeland Security Act of 2002 (HSA), The Implementing Recommendations of the 9/11 Commission Act of 2007 and applicable regulations, executive orders, and directives. The HSA of 2002 ensured that with the establishment of DHS citizens' civil liberties and civil rights would not be diminished by creating an Officer for CRCL. The Office has grown to encompass many missions that are designed to review, investigate, and recommend changes that further the protection of civil liberties and civil rights while ensuring homeland security.

Overall Utility of the Office for Civil Liberties and Civil Rights

The premise for which the Office for CRCL was created was to be a proactive measure to ensure the DHS protected citizens' civil liberties and civil rights in its Homeland Security effort and it has succeeded in doing so. The Secretary of Homeland Security and the Officer for CRCL in speeches given at the Heritage Foundation argued that the Office for CRCL is one layer of protection in the system of oversight. There are multiple parts of the federal government and public that play a role in conducting

²⁰⁸ Redacted Report: Civil Liberties/Civil Rights Impact Assessment: Border Searches of Electronic Devices, 29 December 2011.

oversight including the Office for Inspector General, Congressional oversight committees, and the Press. These elements of oversight traditionally play an investigative and reactive role aimed at exposing issues after they have occurred. The unique nature of the Office for CRCL is, in its proactive role, getting in front of potential issues before they become larger issues affecting citizens. Upon reviewing the overall function of the Office for Civil Liberties and Civil Rights it can be determined that they play an effective role in overseeing and protecting citizens' civil liberties and civil rights by conducting impact assessments, investigating complaints, and conducting community engagement but could improve on the issues outline below.

Effectiveness of Community Engagement

Is this the best office within DHS to be involved in the countering violent extremism effort and are they doing an effective job in doing so? The Office, through its community engagement programs, plays a significant role in countering violent extremism in the United States but the impact these engagement events play in shaping policy is unclear. First, the federal government approaches countering violent extremism in a multifaceted way as outlined in both National Strategy and the Strategic Implementation plan for Countering Violent Extremism (CVE) released by the White House.²⁰⁹ Conducting and being involved in community meetings and engagements at the local level is an integral part of CVE. The fact that the Office for CRCL has increased the number of cities they are currently holding round table discussions in indicates that they feel there are benefits in continuing and expanding the role of

²⁰⁹ The White House “Strategic Implementation plan for empowering local partners to prevent violent extremism in the United States” December 2011 <http://www.whitehouse.gov/sites/default/files/sip-final.pdf>
The White House. “Empowering Local Partners to Prevent Violent Extremism in the United States” August 2011. http://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf

community engagements. In addition to increasing the geographic and demographic footprint of these community round tables, they are holding them more frequently which is giving citizens increased access to the federal government and the people making policy that effects them.

The Office needs to show better substantive evidence that it is using information gathered during engagement opportunities to better inform policy makers and adjusting existing policy to better protect citizen's civil liberties and civil rights. Creating a forum in which citizens can be heard is only one part of the process to ensure citizens' rights are protected. The DHS, Office for CRCL, and Federal Government as a whole, need to use this information and lessons learned from community events to implement policy that respects and protects citizens' civil liberties and civil rights. Additionally, the Office, across all its programs, has recommended that DHS increase avenues for redress. This includes advertising redress avenues at community engagement events and, as seen in the Impact Assessment for Electronic Border Searches, increase awareness among people subjected to searches. The Office claims that when they receive a complaint and conduct an investigation they provide a plan and course of action to remedy the issue, but there is little evidence provided in their publicly available reports to show how information received from citizens effects policy and on what scale.

Increase the publicity of community engagement events

The Office also needs to publicly announce in advance when community engagement events occur. The Office for CRCL releases a monthly news letter available on both its social media account (Facebook) and its public website summarizing past community events and round table discussions but it does not publicize its involvement in

community events prior to their occurrence. In researching this paper and in multiple visits to their website²¹⁰ it was impossible to find information on where the Office of CRCL was holding community round tables or engagement events despite their claims that they hold events in the Washington DC metropolitan area. In their monthly newsletter they provide summaries of events after they have occurred. The office may not publicize their community events in advance to limit the number of attendees and only engage a targeted audience that they are most interested in talking to.

Lack of Transparency in Policy/Product Review

The Office for CRCL lacks transparency in its role providing proactive policy review and recommendations to the Department of Homeland Security and its Secretary. One of the main missions of the Office is to provide advice, recommendations, and justifications for policy while it is being developed and worked to avoid issues and overreach after policy has been implemented. The Office argues that it needs to have the ability to provide legal advice and opinions to the Department, the Secretary, and his/her staff that will not be released to the public. If the advice and recommendations the Office provides were to be released to the public it is argued it would hinder their working relationship and their ability to have an open dialogue with the Department.²¹¹

The Secretary of DHS and the Officer for CRCL argue the Office works because of the various oversight mechanisms that review activities of the government. There are other offices that are responsible for investigating issues after the fact and revealing issues such as Congressional oversight committees, OIG, and the media as previously

²¹⁰ The Office for Civil Rights and Civil Liberties website can be accessed at <https://www.dhs.gov/office-civil-rights-and-civil-liberties>

²¹¹ Chertoff, Michael; Sutherland, Danieal, Teufel, Hugo, Swire, Peter P.; and Lanigan, Keven. "Homeland Security, Privacy and Civil Liberties: A Five Year Review" Heritage Lectures: The Heritage Foundation. June 26, 2008.

mentioned. The proactive nature of the Office was intended to be another layer of review and insurance rather than another mechanism to right scathing reports exposing abuse and misuse of authority, although the importance of that method of protection cannot be under valued.²¹²

The Office for Civil Rights and Civil Liberties should release metrics on the activities and volume of work that is done to proactively review policy, reports, and programs. The office could report metrics on how many reports they review, how much time they spend advising leadership, what types of reports they review (Intelligence/Policy), what types of advice is given, whether the report was cancelled, released with revisions, recommendations not incorporated, et cetera. Similar metrics are released for the Office's activities involving complaints and redress investigations that allow the public to evaluate the areas of issue with the department without releasing specific information about complaints or jeopardizing peoples privacy. Releasing metrics to inform the public would increase transparency for the Office's role in reviewing policy and internal reports without disclosing specific advice, legal reasoning, or internal proceedings that would jeopardize the Office's working relationship with the rest of the department.

Conclusion

The Office for Civil Liberties and Civil Rights within the Department of Homeland Security is a unique office within intelligence and law enforcement agencies that is designed to proactively protect citizens' civil liberties and civil rights before they are adversely impacted by government policy. The office is succeeding in playing an

²¹² Chertoff, Michael; Sutherland, Danieal, Teufel, Hugo, Swire, Peter P.; and Lanigan, Keven. "Homeland Security, Privacy and Civil Liberties: A Five Year Review" Heritage Lectures: The Heritage Foundation. June 26, 2008.

important role of oversight and fulfilling its mission by conducting impact assessments, conducting community engagement events, and investigating citizens' applications for redress. Within the national security versus civil liberties debate the Office plays an important and effective role as an oversight mechanism to ensure the balance between security and liberty is being evaluated on its merit. Although the office is fulfilling its missions as it is vaguely written it could improve on several of its core functions to provide more transparency.

This report was written in response to two lectures given at the Heritage Foundation in 2004 and 2008, which conducted a 1-year review and a 5-year review of the DHS and the Office for CRCL. Additionally this paper addresses concerns in Seth Kriemer's article "Watching the Watchers" which recommended more active analysis be conducted into whether internal surveillance mechanisms such as the Office for CRCL are effective, appropriately funded, and/or motivated to have "salutary impact" during the review of sensitive data and programs.²¹³ In response to these inquiries, and in an effort to continually analyze the balance between freedom and national security, the Office for CRCL is an effective piece of the overall system designed to conduct oversight on national security programs.

Further research could be conducted to identify the effectiveness of other agencies oversight mechanism and compare if similar pro-active review offices such as the Civil Liberties and Privacy Office (CLPO) within the Office of the Director of National Intelligence (ODNI) and the Office of Privacy within Terrorist Screen Center (TSC) are effectively protecting citizen's civil liberties, civil rights, and privacy. In addition to

²¹³ Kreimer, S. F. (2004). Watching the watchers: Surveillance, transparency, and political freedom in the war on terror. *U. Pa. J. Const. L.*, 7, 133.

looking at other similar offices, additional research could be conducted to discover and analyze additional information pertaining to the Office for CRCL proactive policy review program.

CONCLUSION

In conclusion, during the post 9/11 era of increased security and counter terrorism policies, the government has not responded by restricting citizens' freedom and has implemented effective means to balance civil rights, civil liberties, privacy and security.

First, conventional wisdom suggests that after a significant terrorist attack occurs in a country, governments respond by increasing security and decreasing citizens' freedom. Chapter one concludes that of the nine countries analyzed, there is no consistent observable relationship between the magnitude of a terrorist attack and a country's level of freedom after that point. For three of the nine countries studied, Turkey, Pakistan and Russia were the only countries to see a slight decrease in civil liberties after an increase in terrorism, albeit small. For the United States, Great Britain, and Egypt no relationship was observed between the level of freedom after an increase in the level of terrorism. For the remaining three countries studied, Spain, Georgia and Saudi Arabia saw slight increases in the level of freedom after increases in the level of terrorism within those countries.

The Freedom House publication and the START database were useful tools in determining a relationship between terrorism and freedom, although they had their limits and flaws. First, the seven-point freedom index limited the ability for small shifts in freedom to be observed. Further, an index that represented only civil liberties would be more sensitive to changes in government policies and actions. The Freedom House publication that maintained a 60-point civil liberties index was useful, although it only contained ten years of historical data. Second, a control for a country's predisposition to civil liberties would be beneficial in future research. A government's reaction to a

terrorist event is likely to be determined by its societies' tolerance to government control and risk of attack. The use of the START GTD database and the Freedom House index were advances in the analysis of the relationship between security and freedom.

Second, Fusion Centers combine traditional roles of law enforcement and intelligence officials that require extra scrutiny to ensure Fusion Centers do not infringe on citizens' freedom in their efforts to protect the homeland. There is no evidence found within the second chapter that suggests Fusion Centers reduce citizens' freedom, which concludes DHS has taken sufficient steps to ensure the protection of citizens' rights, liberties, and privacy while protecting the homeland. DHS has developed guidelines, reviews, and training for Fusion Centers to ensure protection of citizens' rights in their effort to protect the homeland. Further, DHS conducts an annual report to Congress that details the status of the National Fusion Center Program including metrics on the development of measures that protect civil liberties and privacy, such as publicly published privacy policies and the number of privacy officers.

The Fusion Center program is a complex network that operates in partnership with DHS but is owned and operated primarily by State or Local entities making DHS direction and guidance difficult to administer and enforce. Although DHS has been successful in developing guidelines, training, and creating standards in consultations with Fusion Centers, more could be done to ensure the protection of citizens' civil liberties, rights, and privacy amongst the network of Fusion Centers. First amongst those efforts is developing outreach efforts that engage communities Fusion Centers operate in to diminish the opaqueness of their activity. Additionally, officers within Fusion Centers that represent citizens' equities in relation to privacy and civil liberties should ensure that

their primary purpose is to review and protect citizens' civil rights, liberties, and privacy. DHS's 2012 report to congress identified that most officers who conduct oversight also have additional duties potentially creating a conflict of interest for the privacy officer. Overall, DHS is operating within its requirements to ensure civil rights and civil liberties are not diminished while protecting the homeland and enabling information sharing. No evidence was found to suggest negligent or systematic infringement of citizens' civil liberties, rights, or privacy. The National Network of Fusion Centers has increased measures to ensure the protection of citizens' and build trust amongst the community they serve, according to the DHS reports reviewed in this chapter.

Finally, the Office for Civil Rights and Civil Liberties has been an effective civil libertarian within DHS advocating for and proactively protecting citizens' civil rights and civil liberties while in pursuit of securing the homeland. The office plays an important role and is successful in proactively protecting citizens' by conducting training, impact assessments, community engagement events and investigating applications for redress submitted by citizens. The office is fulfilling its missions as defined by law although it could improve on several of its core functions.

The Office for Civil Rights and Civil Liberties could improve on its transparency related to upcoming public engagements, review of classified programs or products, and reporting of metrics on activities. Prior to community engagement events taking place the Office does not provide public advertisements for community events, despite their frequent engagements with the public. Events are often highlighted in their newsletter, or social media profiles after the fact. Further, little information is provided on their review of classified programs or products because of the necessity of a trusted confidential

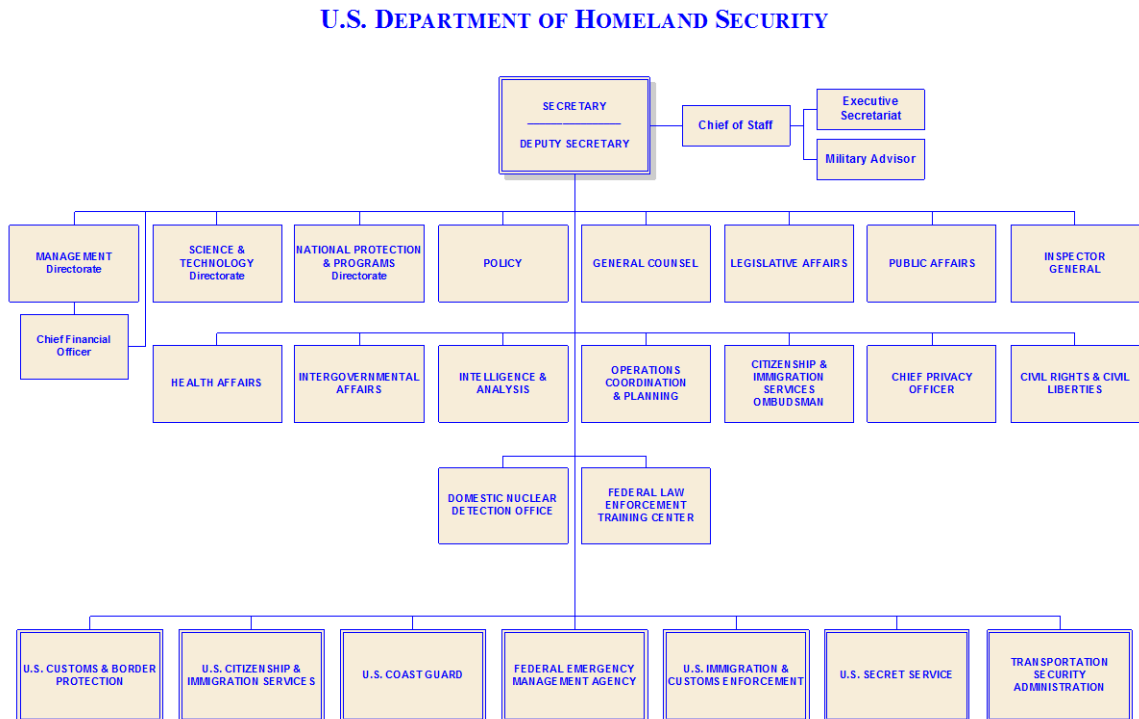
relationship claimed by DHS. Although this is may true, information such as metrics, type of review, or outcome could be publicized without jeopardizing client-advisor confidentiality. The Office provides a unique proactive role ensuring the protection of citizens' rights, and liberties in the effort to secure the homeland.

Further research could be done to conduct case studies to examine when programs that may intrude upon citizens' liberties or privacy are uncovered where the failure occurred allowing for the victims' rights to be intruded. Additionally, further research could examine events such as the NSA public disclosures, and determine whether laws and policy were broken or if the program represented poor policy that was against public sentiment.

In conclusion, government reaction to terrorism is not unbalanced intrusions on citizens' civil rights, civil liberties, or privacy and the government has implemented effective means to ensure the respect and protection of citizens' within their duty to protect the homeland against advisories. Thomas Hobbes argued in the *Levitarian* that citizens enter into a social contract in society giving up some autonomy and freedom in order to ensure security in their lives. DHS and the US Government has balanced protecting citizens' freedom and securing the homeland.

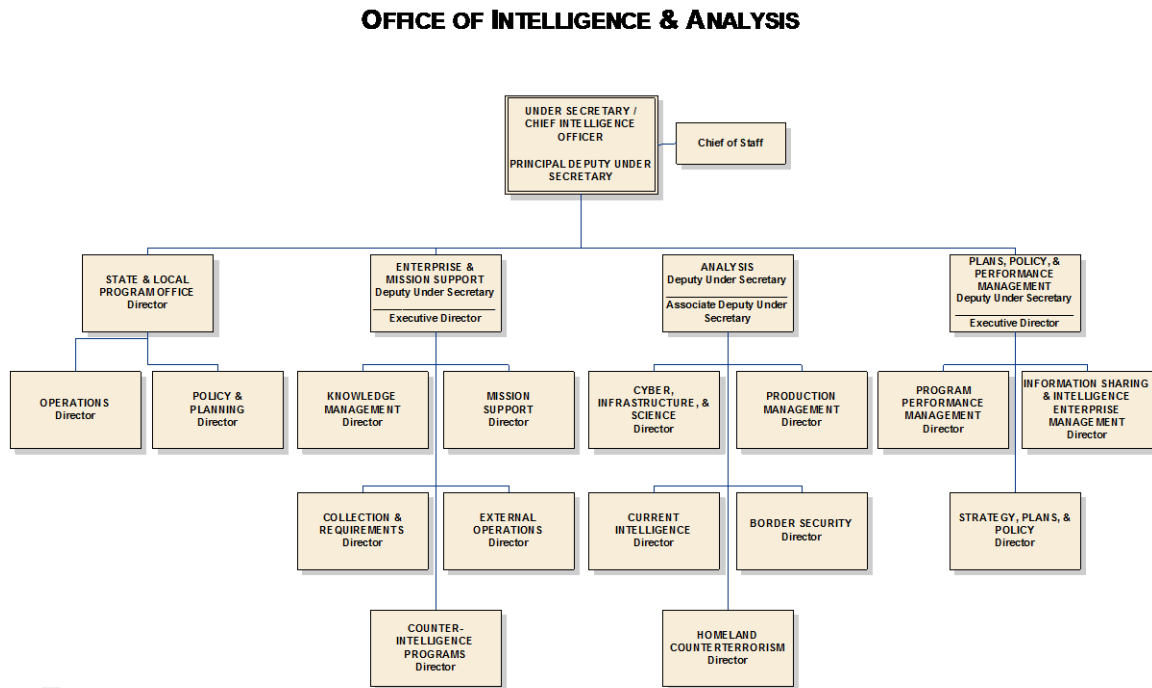
Appendix: A

Department of Homeland Security Organization Chart



Appendix B

Department of Homeland Security, Office of Intelligence and Analysis Organizational Chart



06/07/2011

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