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**CHAPTER 67**

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# Principled Prudence: Civil Liberties and the Homeland Security Practitioner

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## INTRODUCTION

One effect of 9/11 is renewed attention in America to questions of foreign affairs and domestic security. After the Cold War ended, certain academic and professional disciplines that had been developed to address it found themselves with no *raison d'être*. Since 9/11, the domestic security and foreign affairs sectors of government (and private industry) have experienced a renaissance, but with a focus different from the earlier sovietology and nuclear strategy. That new focus is expressed by the terms *homeland security*, *asymmetric threat* and *international terrorism*.

Consequently, as compared with the Cold War, the campaign to prevent and eliminate global terrorism today implies broader questions of domestic policy and constitutional law. Because the new homeland security professionals—FBI agents, homeland security intelligence analysts or customs officials, the CIA's counterterrorism specialists, corporate vendors—must necessarily work among and with the American people in tracking their targets, the whole constitutional superstructure of the way America protects itself within

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*Note:* Nothing in this chapter should be construed as endorsing any position counter to ACLU policy. This chapter is meant as an objective look at the general discourse on the subject.

its borders is being looked at anew. Some argue that the peculiar threat of terrorism—in which minimal personnel, using minimal materiel, can stage catastrophic attacks that can kill or injure thousands of Americans—justifies blanket revisions of basic constitutional norms and protections, especially the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. Others argue that the constant perception of threat in America, with the steady drumbeat of dire predictions about future attacks, is overwrought and unrealistic, and that there is no need for dramatic, expensive security initiatives. Both positions seem unwise. Thus the challenge for the new homeland security professional is to accommodate the two extremes. It is a challenge both practical, in terms of new federal initiatives, expenditures, and bureaucratic reorganization, and moral in that it requires FBI agents and CIA analysts to reconcile traditional concepts of liberty in America with the external pressures of the “threat matrix” faced by the United States.

It is also an unenviable pursuit; and as in many national security and law enforcement contexts, successes remain classified while failures are trumpeted. Moreover, politics intrude: homeland security experts must accommodate their operations to open government laws; constitutional guarantees of free speech, association, and religion; constitutional protections against the arbitrary application of government power; and the checks and balances that diffuse powers among the executive, legislative, and judicial branches.

How should a homeland security expert think about these abstract concerns? And how should they be applied in creating and implementing policy? This chapter attempts to address both questions so as to provide practical guidance for the homeland security practitioner in a subject that invariably strays into more philosophical territory. A security professional in government is going to face these constitutional issues in gritty, ambiguous, real-world situations. Nevertheless, understanding the larger constitutional and ethical framework is essential.

Accordingly, this chapter takes an inductive approach to the problem of how to protect civil liberties in the aftermath of 9/11, by presenting three case studies. The first case involves the proposal to create a national identification card. My intention is not—necessarily—to convince the reader of the propriety or impropriety of a national ID card but to provide a framework for thinking about the legal, ethical, practical, and constitutional issues of such a system.<sup>1</sup>

The second case applies this analysis to bioterrorism, allowing the reader to see the proposed test in action in an emergency. One can judge whether civil liberties work only by testing them on the margins; a hypothetical bioterror attack presents the opportunity for a stress test. The third case considers whether, when, and how a homeland security professional can take a person's faith or ethnic group into account when investigating terrorism (or other national security matters).

## THE DEBATE

The basic debate over civil liberties today centers on two general propositions. The argument in favor of abridging liberties through aggressive policing and intelligence collection is that the immediate, asymmetric threat—terrorism like that of al-Qaida—is so grave, and the potential harm so calamitous, that traditional constitutional presumptions in favor of the individual (versus the collective need) must be rethought. The intelligence chief at the Department of Homeland Security (DHS) expressed this argument in remarks at Harvard University in 2003:

What I'm about to say is very arrogant—arrogant to a fault. Set aside what the mass of people think. Some things are so bad for them that you cannot allow them to have them. One of them is war in the context of terrorism in the United States. Therefore, we have to abridge individual rights, change the societal conditions, and act in ways that heretofore were not in accordance with our values and traditions, like giving a police officer or security official the right to search you without a judicial finding of probable cause. Things are changing, and this change is happening because things can be brought to us that we cannot afford to absorb. We can't deal with them, so we're going to reach out and do something ahead of time to preclude them. Is that going to change your lives? It already has.<sup>2</sup>

The common response to such an argument is often expressed somewhat as follows:

The choice between security and liberty is a false one. Our history has shown us that insecurity threatens liberty. Yet if our liberties are curtailed, we lose the values that we are struggling to defend.<sup>3</sup>

Or, as is often asserted by the ACLU: "If we give up our freedoms, the terrorists win."

In practice, things are rarely as simple as either of these statements suggests. Still, security professionals should understand civil liberties principles so that their decisions can strike a balance between principle and prudence. The framework presented below resembles that put forward in the Constitution, where a balance is struck in the allocation of powers among the different branches, so as to create tension between expedience and caution and allow governmental functions—like commerce, foreign affairs, and domestic security—to serve, not oppress, individual liberty and prevent abuses.

## THE TEST

The 9/11 Commission struggled with this issue at length in its final report. Though it proposed broad expansions of federal authority, it also recognized the need for safeguards.<sup>4</sup> Some of the checks are direct, like the proposed creation of an independent civil liberties watchdog within the government (p. 395). Others are more functional, like the recommended declassification of the intelligence community's top-line budget figures (p. 416). Perhaps the most significant safeguard is the legalistic balancing test the commission formulated in response to the debate over proposals to expand the USA PATRIOT Act. Two commissioners testified that:

The test is a simple but important one. The burden of proof should be on the proponents of the measure to establish that the power or authority being sought would in fact materially enhance national security, *and* that there will be adequate supervision of the exercise of that power or authority to ensure the protection of civil liberties. If additional powers are granted, there must be adequate guidelines and oversight to properly confine their use.<sup>5</sup>

I propose an essentially similar test, but with two additional factors to consider in weighing the propriety of proposed actions (at the level of national policy or in the course of individual investigations). The first three elements of the test are normative and utilitarian. That is, they require the tester to apply certain societal value judgments about the relative importance of security and liberty, but also have a strong effectiveness component. The fourth element of the test is something that good homeland security practitioners should always be thinking about; it involves political and public

relations repercussions. This fourth test is often overlooked, but it can sink a program or initiative, even one that does not compromise civil liberties.

### Part 1 of the Test

Do the costs of liberty outweigh the potential benefits to public safety? If so, the security measure should probably be rejected and replaced with a less constitutionally suspect alternative.

For instance, we could strip-search every airline passenger and confiscate any implement that could possibly be used as a weapon. The security benefit would be high—indeed, terrorists would probably abandon hijacking altogether—and such a search could be considered a minor imposition, relative to the potential harm of a terrorist attack. But this measure would offend passengers' personal dignity and might violate the First Amendment, which has been interpreted to include the right to travel. Also, other quite effective measures are available (e.g., baggage matching, hardened cockpit doors, armed air marshals, and greater airport security). These are issues that the homeland security practitioner must struggle with.

### Part 2 of the Test

Will the measure call for, or result in, discrimination based on religion, ethnicity, race, or other group characteristics? This part of the test is perhaps the most controversial in the post-9/11 context. It requires some hard thinking about the nature of the threat facing America.

Many people contend that, to quote the comedian Bill Maher, "when you're color-blind, you're blind."<sup>6</sup> In other words, it is evident that the threat today is exclusively from the Muslim world; the personal representatives of this threat are all going to be Arabs, south Asians, or members of some other ethnic group with a large Muslim population; and therefore they should suffer added scrutiny. According to a more sophisticated version of this argument in favor of profiling, in certain limited circumstances, the threats to America—and to liberty—are so great that race, ethnicity, or other immutable characteristics should be taken into account. Paul Rosenzweig argues that "in *very limited* circumstances, the balance might change when the object of our activity is to prevent terrorism, and the use of

national origin data and characteristics is much more narrowly applied.”<sup>7</sup>

Others, such as the ACLU, would argue that this formulation of the problem proceeds from a false premise. Certainly, if the authorities know an individual suspect’s ethnicity or race, it can be used as one of several descriptors for investigators. But to subject all Muslims and Arabs to special scrutiny merely because of their ethnicity or religion, even in the context of counterterrorism, disregards the basic American moral and constitutional commitment to equality under the law. Moreover, it ignores the fact that terrorists belong to numerous different ethnic groups (they include European-looking Chechens, for instance, and Filipinos) and that many could easily pass as “ordinary” Americans. Whichever side one takes, it seems evident that this issue should be a consideration in creating and implementing homeland security policy.

### **Part 3 of the Test**

Is the measure properly tailored to the desired mission, or could it result in unintended and possibly abusive consequences?

The best examples of this concern involve broad delegations of investigative power to the executive branch without appropriate checks by the courts or congressional oversight. Historically, for instance, the executive branch had complete discretion to conduct electronic and physical surveillance of suspects in national security investigations. The rationale was that the president alone possessed secret knowledge and operational ability to fight the Cold War. The executive, however, extended this authority to domestic contexts, including the FBI’s counterintelligence program (COINTELPRO), which conducted covert operations against civil rights and antiwar activists; and the CIA’s Operation CHAOS, which spied on law-abiding American citizens in an eventually futile attempt to determine whether foreign agitators were behind the upheavals on college campuses during the late 1960s and early 1970s.<sup>8</sup>

This element of the test is particularly important in what is called the war on terrorism, because the enemy is largely undefined and because broad law enforcement or domestic intelligence authority could be used against lawful dissidents or opponents of the administration in power.

## Part 4 of the Test

How will the public probably react to the measure?

Homeland security practitioners, when dealing with sensitive civil liberties issues, sometimes ask themselves, “Would I be offended if someone did *x* or *y* to me?” But the proper question is how the program, initiative, or tactical operation is likely to be received by the community affected and the public at large. For instance, even if an overall policy is salutary, the specifics may be reminiscent of Big Brother, and in that case the initiative is going to be attacked. Time and money can be saved by thinking carefully about the political and public ramifications of homeland security operations.

## THE NATIONAL ID CARD

Proponents of a national identification (ID) card have suggested three general types. One is a plain card, issued by a centralized bureaucracy, which would serve no other purpose but to identify the holder. It would contain, at minimum, name, address, date of birth, a fingerprint or another biometric, a photograph, and a unique number. The second is a *de facto* national ID: a federally standardized driver’s license. It would look very much like the plain card but would also establish that the holder may operate a motor vehicle. The third card would be voluntary, but nonparticipants would be subject to heightened scrutiny at airports and other sensitive facilities. Let us consider arguments on both sides of this issue.

First, will the card be effective? This question turns on empirical limitations of technology in establishing identity. Even if a card is technologically infallible, can it also be infallible in the sense of absolutely ensuring that the holder is actually the person that the card identifies? Although there are arguments either way, experts tend to doubt that infallibility is possible.<sup>9</sup> The national ID card would have to be based on “breeder” documents already used by applicants to establish their identity: birth certificates, social security cards, passports, etc. These are notoriously easy to forge or acquire fraudulently. Even if the ID card itself were error-proof, there would still be a possibility of identity theft.<sup>10</sup> Until this problem is addressed, a national ID card, as a practical matter, cannot be an effective tool in establishing identity. In particular, a terrorist



organization like al-Qaida would expend considerable resources to obtain national ID cards for its operatives.

Another consideration regarding effectiveness is that the card could engender a false sense of security. Legislators and policy makers might use the existence of the national ID system to downsize other security measures, such as the additional security personnel stationed at airports since 9/11. The voluntary ID card might pose especially significant risks. What happens, for instance, if a potential terrorist acquires a card and consequently is subjected to fewer security checks at airports, government facilities, and other sensitive locations?

Second, will the card entail discrimination? Proponents of a national ID card frequently suggest that it would result in less discrimination based on race, ethnicity, or other similar characteristics. Alan Dershowitz of Harvard, for instance, argues that when student IDs began to be issued there, African-American students were less likely to be harassed by the campus police. Even though they were asked for their ID more frequently than other students (Dershowitz recognizes that this is unacceptable), they were able to present the card, and the encounter ended.<sup>11</sup> Dershowitz argues that the same would be true of Arab and Muslim Americans. Opponents of a national ID card are generally skeptical about this argument. Dershowitz seems to be asserting that the possession of a national ID card would establish one's authenticity as a member of society. At Harvard, the campus police stopped harassing African-American students because the card established the students' specific right to be on campus. But that would not necessarily hold true in an airport or government facility, where—even if people had national ID cards—security personnel might still continue the harassment just to “play it safe.” In addition, as Dershowitz admits, the national ID card would not stop the disproportionate singling out of Arabs and Muslims by security personnel. Arguably, there is also a danger that eventually the police would begin to use failure to carry one's card as a rationale for continuing and escalating law enforcement encounters.

Third, does the card serve a narrow purpose, and will it result in unintended consequences? Proponents argue that America in the information age cannot exist without a mechanism to prevent people from remaining anonymous. A national ID card is that mechanism. By its nature, a system of national identification would spill over into



many other sectors of government (taxation, the census, selective service, voter registration, etc.). Private industry might also begin to use one's card for purposes such as credit reporting and market research. And, to be effective at all these tasks, a national ID card would have to consolidate terabytes of information about Americans into a central data storage repository. Misuse or abuse of this information is a real possibility, especially if the personal identifiers on the card become linked somehow with highly sensitive information such as medical records or ethnic and religious affiliation.

This becomes troublesome as regards the census, which was misused to violate personal liberties during World War II, when the Census Bureau helped the War Department intern Japanese Americans.<sup>12</sup> In the summer of 2004, a request made under the Freedom of Information Act revealed that the Census Bureau had compiled statistics on large middle eastern populations around the country and had given the information to DHS.<sup>13</sup>

Proponents of the card often counter these concerns about efficacy, discrimination, and potential abuse with a difficult question: Wouldn't even an imperfect card at least make it more difficult for terrorists to operate? Perhaps the only way to answer this is to have Congress commission cost-benefit studies. Undoubtedly, the financial cost of the system would be high: some 300 million Americans would have to go to local "identity bureaus," present previous identity documentation, be processed, and then receive the card.<sup>14</sup> Human costs would be harder to calculate. Over time, many false positives would probably result from mistaken identity, technological limitations, and the necessary linkages between the identity system and the thousands of names currently in government terrorist and criminal watch lists; such errors, if retained in one's government identity record, could impede finding employment, opening a bank account, or accessing government services.

Fourth, what about public relations? Probably, the negative reaction to a national ID card in the United States would be significant. Americans have traditionally supported individual and privacy rights; also, there are strong institutional interests on both the left and the right that would vehemently oppose the card. Whether this is a compelling argument is a question for the policy makers, but it should surely be a factor in the discussion.

The debate over a national ID card is likely to continue. The threat of terrorism persists; the technology that would underpin

the card system continues to mature; and the potential government design and maintenance contracts for a national ID card present an appealing entrepreneurial opportunity for the private sector. Conversely, public mistrust of a national ID card, as well as organized opposition, is also likely to persist. I hope that the four-element test presented here provides a framework for debate that takes into account both principle and prudence.

## **THUGS AND BUGS—CIVIL LIBERTIES AND BIOTERRORISM**

Consider these facts, from the Centers for Disease Control and Prevention, about the smallpox virus. The last confirmed case of the smallpox virus appeared in Somalia almost 30 years ago. The disease last occurred naturally in the United States in 1949. Almost no Americans under the age of about 30 have been vaccinated against the virus, and vaccination is the only possible defense. The most common strain of smallpox kills almost one in three infected persons; other strains have even higher mortality rates. The disease itself is horrible. After about a week of incubation, infected persons begin to develop a severe fever and other flu-like symptoms. After a few days, they start to develop raised bumps all over their bodies, which harden into pustules, eventually scab over, and, if the person lives, fall away leaving extensive scarring. The most common strain spreads only through extensive personal interaction, especially the handling of blankets and clothing used by a victim. Hardier strains spread through airborne contact. The only two remaining samples of the disease are kept in tightly controlled laboratories in the United States and Russia. There is strong concern, however, that the breakup of the Soviet Union might have resulted in the creation or theft of some off-the-books samples of the virus.

Now suppose that some hypothetical terrorists have obtained a weaponized form of the virus. They release it in the middle of New York City. Since this particular strain of the disease has an approximately 30 percent mortality rate, hundreds of thousands will die. What can the government properly do to contain such an outbreak?

Bioterrorism, along with biotechnology, free speech and the Internet, and privacy in the information age, is an issue on the cutting edge of civil liberties. If certain viruses or other biological agents

were introduced into the global population, especially in developing countries, they could cause untold harm. However, containing an outbreak poses unique challenges to democratic governments, because it necessarily involves extraordinary emergency powers. Forced quarantine and forced inoculation are invasive abridgments of personal freedom.

Accordingly, smallpox represents a particularly illustrative civil liberties situation, because the only possible defense is vaccinating everybody within a certain radius of the initial outbreak. Vaccination is quite effective when delivered within three days after exposure; it helps lessen the severity of the symptoms if administered within seven days after exposure. Once the skin rash begins to form, however, palliative care is the best that medicine can offer.

From a civil liberties perspective, this is perhaps not an especially difficult case. The ACLU's general rule for deciding when extraordinary state measures are warranted is that the intrusiveness and duration of such measures must be proportional to the threat posed by the disease, and the emergency measures must be the least restrictive possible for civil liberties.<sup>15</sup> So, for instance, if a hemorrhagic fever, like the Ebola virus, were to start spreading, and health officials had evidence that the disease was airborne, quite stringent emergency actions could be taken. In the case of acquired immune deficiency syndrome (AIDS)—and the ACLU has policy to this effect—stringent emergency actions could not be taken. Actually, highly restrictive measures were often proposed when AIDS first emerged; this experience suggests why caution is necessary in allowing the government extraordinary powers (arrest, quarantine, etc.) in a medical emergency. In the case of smallpox, as long as they were the least restrictive measures possible, quarantine, compulsory testing, mandatory admission to hospitals, and the collection of private medical information to track the carriers of the disease could be acceptable. Though the general rule would have to be applied case by case (an urban outbreak would be assessed differently from a rural outbreak, for instance), the ACLU recognizes that emergency measures might have to be taken in extraordinary situations.

That said, the state takes on certain obligations once it exercises its emergency power. First, individuals affected by the medical emergency must have the option to elect any alternative treatment that is equally effective. Second, patients' privacy must be assiduously protected. Patients must retain control over their medical

records, and the doctor-patient privilege cannot be abridged. Third, the emergency measures must be subject to independent review, and the findings disseminated to the public. Fourth, extraordinary measures must never be applied in a discriminatory fashion. As mentioned, one need look no further than the early days of the AIDS virus, and the not infrequent calls for the quarantine of gay men, to see the danger. Fifth, effective due process protections should be in place to protect persons wrongly quarantined, and a fair compensation mechanism should be established for the appropriation or destruction of private property. These conditions would not detract from the containment of the bioterrorism attack but would ensure that fundamental notions of fairness and individual liberty were protected, even in the face of the panic engendered by bioterror.

Notice how this discussion of bioterrorism applies the four-element test. It is explicitly based on a rational cost-benefit analysis. It bars discrimination. It requires government officials to make their emergency conduct commensurate with the severity of the threat. And it requires the government to tailor its response narrowly to the actual extent of the threat, and to take steps to compensate individuals affected, increasing public confidence in the necessity and legitimacy of the containment measures. Indeed, one could apply this model response to many similar catastrophe scenarios, including the detonation of a radiological dispersion device or “dirty bomb,” the release of a chemical agent like VX or ricin, or even natural disasters.

## **PROFILING BASED ON RACE, ETHNICITY, OR SIMILAR CRITERIA**

In the context of counterterrorism since 9/11, whether race, ethnicity, national origin, or religion can be used to inform law enforcement activity and intelligence gathering is a vexing issue. Arguments for and against tend to revolve around one question: does the targeted group, in an absolute sense, have a proclivity toward the activities being investigated? For many on the left and the right, the question whether Arabs, Muslims, and south Asians are, in fact, more likely to be terrorists is simply answered “yes.” Briefly, here is the argument.

After 9/11, the FBI investigated hundreds of thousands of terrorist tips and ultimately picked up a mere 1,200 men, mostly illegal immigrants, for questioning. The government detained some for

weeks or sometimes months, checking out their backgrounds, before deporting or releasing them. The vast majority of the men were Muslim. And any investigation of Islamic terror cells worth its salt will turn up . . . Muslims! But so charged and distorted has the debate about policing and race become over the last decade that it is now professional suicide to say that, in hunting Islamic terrorists, one is going to look for and find Muslims.<sup>16</sup>

This statement seems to imply the following reasoning: all the terrorists on 9/11 were Muslims; therefore the target of terrorist investigations should be Muslims. Here again it is worth applying the four-part test. I will explore some of the arguments on either side, to suggest ways in which the homeland security practitioner should think about the issue of profiling based on nonbehavioral criteria such as race or religion.

First, is it effective to take such criteria into account when deciding how to allocate and focus investigative resources? The arguments in favor of such an approach include the contention that modern international terrorism is almost exclusively perpetrated by Islamic fundamentalists; thus it makes sense for counterterrorism to target Muslims. This argument is similar to defenses of domestic racial profiling of African-Americans and Latinos. George Will once wrote, "Felons are not evenly distributed across society's demographic groups. Many individuals and groups specialize in hurling accusations of racism, and police become vulnerable to such accusations when they concentrate their efforts where crime is."<sup>17</sup> The problem with this position, however, is that—if taken to heart by law enforcement—it becomes a self-fulfilling prophecy. Minorities are seen as more criminally inclined because they are arrested more often. Why are they arrested more often? Arguably, because law enforcement and the public begin to believe that they commit more crimes. How do law enforcers and the public know this? Because minorities are arrested more often.

There is some empirical evidence suggesting that criminal proclivities may be less linked to race or ethnicity than Will asserts. For instance, there have been studies done of the racial dynamics of cocaine and crack abuse. In 1991, during what was called a crack epidemic, a survey conducted by the National Institute on Drug Abuse (NIDA) found that 75 percent of users of powder cocaine and 52 percent of users of crack cocaine were white.<sup>18</sup> But although more whites use cocaine or crack, in absolute terms, African-Americans and

Latinos make up a disproportionately high number of felony arrests and convictions for cocaine and crack offenses. According to a report by the United States Sentencing Commission in 1995, 96.5 percent of federal crack offenders were persons of color (including Latinos). In 2000 the percentage was lower, but still greatly disproportionate: 84.7 percent.<sup>19</sup> The overrepresentation of blacks and Latinos in the federal and state criminal justice systems helps perpetuate the myth that persons of color commit more drug crimes.

The same problem recurs in the context of counterterrorism, but possibly with higher stakes in terms of American lives. If the government is using nonbehavioral profiles, terrorists will try to fool the profile. Consider the “black widows” in Russia, women who lose their husbands in the fighting and are recruited as suicide bombers; or the use of teenagers or women by Palestinian militants against Israel. An overemphasis on Muslims or Arabs also ignores the fact that, before 9/11, two of the three most significant terrorist attacks against civilians on American soil had been committed by American white male extremists: the bombings in Oklahoma City and at the Atlanta Olympics. (The third was the bombing at the World Trade Center in 1993.).

Furthermore, there is little evidence that the sweeps of the Arab and Muslim populations in America since 9/11 have borne much fruit. For instance, pursuant to the investigation in the aftermath of 9/11, more than 1,000 primarily Muslim and middle eastern men were detained under various rationales (e.g., some were held for minor immigration violations and others as material witnesses). Only one of the 762 detainees surveyed by the Justice Department’s inspector general in 2003 has been charged with a terrorism-related crime. That one case is Zacarias Moussaoui, and he was in custody before 9/11.<sup>20</sup>

Another practical concern about using nonbehavioral characteristics is exactly that: they are nonbehavioral. In November 2001, eight former FBI officials expressed concern that the new emphasis on dragnet tactics at the Justice Department under John Ashcroft was perhaps unwise. The former FBI director William H. Webster said that a policy of preemptive arrests and detentions “carries a lot of risk with it. You may interrupt something, but you may not be able to bring it down. You may not be able to stop what is going on.”<sup>21</sup>

The ethnic selectivity of the Justice Department’s response to 9/11, including what were described as voluntary interviews of

more than 5,000 middle eastern men throughout the country, additionally demonstrates the public relations pitfalls of racial or ethnic profiling. Webster touched on this as well: "We used good investigative techniques and lawful techniques. We did it without all the suggestions that we are going to jump all over the people's private lives, if that is what the current attorney general wants to do. I don't think we need to go that direction."

Generally, in considering race, ethnicity, religion, or national origin so as to make decisions about domestic security, the principle is that it is of course permissible to use such criteria to specifically describe a specific suspect. But the real issue is how central that criteria may be to the entire profile of a suspect. If race, ethnicity, religion, or national origin are the only bases for suspicion, the pool of suspects will be prohibitively large.

Here is another hypothetical situation. The National Security Agency intercepts a cell phone conversation in Morocco that provides two pieces of intelligence: (1) an al-Qaida group is planning an attack in a shopping center somewhere in the Midwest; (2) the perpetrator is a Yemeni. The alert is passed along to the FBI and DHS. How should their agents respond?

Simply detaining every Yemeni from Chicago to Detroit, aside from the obvious civil liberties implications, would probably be ineffective and would deflect resources from more promising investigative techniques. A better approach would be to try to collect more detailed information on the suspect, find out additional details about the actual attack, and increase security at midwestern shopping malls. The chances would then be better than even that the FBI and DHS would be able to add additional details to the suspect's description. The amount of work necessary to interdict the attack would be lessened, and the chance of success heightened.

In this hypothetical situation, would it (for the sake of argument) be acceptable to stop every brown-skinned Arab-looking person entering a midwestern mall? The liberty interests of the mall patrons would have to be balanced against the reliability and specificity of the intelligence, the possible unintended consequences of the overt profiling, and the chance that by stopping only brown-skinned possible Yemenis, the authorities might miss the actual terrorist, who looked different. The ACLU would say that race or ethnicity should never be used, absent other more specific behavioral indicators, as a justification for initiating a law enforcement encounter. Others would



argue that, in this case, the interests of security outweigh the individual rights of innocent Arab-looking men who would be subjected to heightened scrutiny. At the very least, I personally would counsel the homeland security practitioner to seek additional individual clues to or leads on the identity of the possible terrorist. This is especially important, again, because a policy of stopping and frisking every brown-skinned visitor to the malls would create a huge, unwieldy suspect pool.

There is no formula for addressing the problem of profiling in a constitutional democracy. The best plan is to use commonsense investigative tools to narrow the investigative focus. If the only thing an investigator can say about a suspect is that he (or she) is a Saudi, an Indonesian, or an Iranian, there is a serious problem, not just for civil liberties, but for the potential success of that investigation. If the investigator can instead say that the suspect is a Saudi, about 6 feet tall, with salt-and-pepper hair, traveling with a woman, the profile is approaching appropriateness and effectiveness. Given the vast reach and resources of the American homeland security establishment, and its high level of talent, we can focus on best practices that serve to identify specific suspects, not suspect groups or classifications.

I would also note the potential public relations problems that come with ethnic, religious, racial, or national origin profiling. One reason why homeland security is an unenviable vocation is that police power engenders mistrust in certain communities and demographics. For racial minorities and the American Arab and Muslim population, heavy-handedness can elicit an “us versus them” mentality and a consequent reluctance to cooperate with investigations or to come forward with tips or leads. A more appropriate approach to homeland security operations that involve sensitive questions of race or ethnicity is to focus, to the greatest extent practicable, on means and methods that seek to involve the community to allay its fears about arbitrary law enforcement or national security efforts. The best way to accomplish this is to focus on individual suspicion, based on behavioral characteristics and specific intelligence.

## CONCLUSION

Often, public pressure to do something about a particular threat pushes law enforcement professionals to adopt less particularized

investigation techniques. For instance, as former FBI director Webster noted, the Justice Department publicized several initiatives that targeted Arab and Muslim communities. The homeland security practitioner should equally be cognizant of this institutional and bureaucratic factor and, especially if pressure appears unwise or potentially ineffective, should resist it whenever possible.

## NOTES

1. However, the ACLU does oppose a national identification card, including a federally standardized driver's license. See Hearing on Driver's License Security Issues, 107th Congress, 2002 (statement of Katie Corrigan, ACLU legislative counsel). The ACLU also takes a position on the issues represented by the other two cases; but I will present the arguments pro and con.
2. Patrick M. Hughes, "Future Conditions: The Character and Conduct of War, 2010 to 2020," guest presentation for Program on Information Resources Policy (July 2003); see [http://pirp.harvard.edu/pubs\\_pdf/hughes%5Chughes-i03-1.pdf](http://pirp.harvard.edu/pubs_pdf/hughes%5Chughes-i03-1.pdf).
3. Justin Rood, "Homeland Intelligence Chief Hughes Warned Civil Rights Would Have to Be 'Abridged' to Prevent Another Terror Attack," *Congressional Quarterly* (28 October 2004).
4. *The Final Report of the National Commission on Terrorist Attacks upon the United States* (9/11 Commission Report) (2004), pp. 394–5. For subsequent quotations from this source, page numbers are given parenthetically).
5. Prepared Statement of Richard Ben-Veniste and Slade Gorton, National Commission on Terrorist Attacks upon the United States, before the Subcommittee on National Security, Emerging Threats, and International Relations of the House Committee on Government Reform, 108th Congress, 2004.
6. Bill Maher, *Victory Begins at Home*, HBO television broadcast (July 2003).
7. "Anti-Terrorism Efforts, Civil Liberties, and Civil Rights," testimony of Paul Rosenzweig, Senior Fellow at the Heritage Foundation, before the United States Commission on Civil Rights (19 March 2004); see [www.heritage.org/Research/LegalIssues/tst031904a.cfm](http://www.heritage.org/Research/LegalIssues/tst031904a.cfm).
8. See *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, S. Rep. 94-755, 94th Congress, 1976.
9. Testimony by Professor Ben Schneiderman, U.S. Public Policy Committee of the Association for Computing Machinery, to the House Subcommittee on Government Efficiency, Financial Management, and Intergovernmental Relations, 107th Congress, 2001; see: [www.acm.org/usacm/National.htm](http://www.acm.org/usacm/National.htm).
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