Racial Profiling and the War on Terrorism

*By Nelson Lund**

Roger Clegg's encomium to the Justice Department's new position on racial profiling contains several perfectly valid points. But the Department's new policy is nowhere close to being "perfect." [See Mr. Clegg's June 19, 2003 article entitled *Perfect Profile* in National Review Online at http://www.nationalreview.com/clegg/clegg061903.asp]

Before 9/11, we had what looked like a clear national consensus against racial profiling in law enforcment. Although the issue had become controversial, the disputes were almost entirely concerned with whether the police were in fact commonly using forbidden racial stereotypes, especially when choosing which motorists to pull over for traffic violations that are so common that officers necessarily ignore them most of the time.

Then came the terrorist attacks. All of the hijackers who carried out the hijackings were Middle Eastern men, and commentators began arguing that racial profiling is an appropriate tool in the war on terrorism. Judge Robert Bork, for example, has neatly distinguished ordinary law enforcement from the new threat we face: "The stigma attached to profiling where it hardly exists has perversely carried over to an area where it should exist but does not: the war against terrorism."[1] The public seems to agree. Polls have showed strong majorities in favor of subjecting those of Arab descent to extra scrutiny at airports. Interestingly, blacks and Arab-Americans were even more likely than whites to favor such policies.[2]

The Bush Administration at first resisted the pressure to employ racial profiling.[3] The Department of Justice, however, has now reversed course and adopted Judge Bork's distinction between ordinary police work and anti-terrorism activities. In June, the Department's Civil Rights Division promulgated a new directive entitled "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." This document adopts two standards, one for "traditional law enforcement activities," and a very different one for certain other police activities.

The first standard is faithful to President Bush's pre-9/11 statement that racial profiling is "wrong and we will end it in America." Federal agencies are forbidden to consider race[4] in any "traditional" law enforcement decision, except where officials have trustworthy information linking someone of a specific race to a specific crime, as for example where a credible eyewitness has described a fleeing felon as a member of a particular race, or where a criminal organization is known to comprise members who are overwhelmingly of a given race. Because these exceptions do not entail racial profiling or stereotyping, the Justice Department has effectively imposed a total ban on that practice in traditional law enforcement activities.

A completely different standard is now applicable to federal activities involving threats to "national security or other catastrophic events (including the performance of duties related to air transportation security) or in enforcing laws protecting the integrity of the Nation's borders." According to the new Justice Department guidance, racial profiling may be used in these contexts whenever it is permitted by the Constitution. This is very close to giving federal officials *carte blanche* to select targets for investigation or especially intensive attention on the basis of racial stereotypes.

The applicable constitutional test is called "strict scrutiny." As the Justice Department acknowledges, applying this test is "a fact-intensive process." That is just another way of saying that there is no clearly defined constitutional line between permissible and impermissible uses of racial profiling. And because the Justice Department makes no effort to draw a line between what it regards as permissible and impermissible, security officials are effectively encouraged to err in the direction of using racial stereotypes whenever they might seem useful.

The only examples of forbidden behavior offered by the Justice Department are two very extreme cases. First, the Department rules out using racial criteria "as a mere pretext for invidious discrimination." This is something that nobody would ever admit to doing. Second, the Department says that a screener may not pick someone out for heightened scrutiny at a checkpoint "solely" because of his race "[i]n the absence of any threat warning." This situation cannot even arise, given that the whole nation is under a constant and continuing "threat warning" that is likely to remain in place for the foreseeable future; thus, the principal implication here is that screeners may indeed focus on individuals "solely" because of their race so long as any threat warning remains in place.

In addition to being inherently "fact intensive," the constitutional test will almost certainly be applied by the courts in a way that is extremely deferential to the discretionary judgments of federal officials. The leading case, *Korematsu v. United States*, upheld the mass internment of Japanese-Americans during World War II, even though the internment program was based entirely on a generalized and unsubstantiated mistrust of Japanese-Americans. Although this decision has frequently been criticized, it has not been overruled. Similarly, the Supreme Court has held that law enforcement decisions based on racial stereotypes do not violate the Fourth Amendment.[5] And, in its most recent decision on racial discrimination, the Court gave extreme deference to the discretionary judgments of government officials who used a form of racial profiling in admissions decisions to a state law school.[6] Because the government interests at stake in

this affirmative action case were clearly much less urgent than those involved in preventing terrorist attacks, one must infer that the Court has implicitly dictated a virtual hands-off policy with respect to judicial supervision of racial profiling in this context.

The Justice Department's guidance document, which encourages federal agencies involved in anti-terrorism and related activities to employ racial profiling to the full extent permitted by the Constitution, has several serious imperfections, including the following:

First, law enforcement officials now have an incentive to bring ordinary law enforcement activities under the rubric of "national security or other catastrophic events" in order to escape the very strict rules imposed by the Department for traditional law enforcement. If an agent at the DEA decides that the escape of a particular drug trafficker would be "catastrophic," the Justice Department's guidance does not clearly prohibit him from using racial stereotypes in his investigation. The same goes for many other activities that Congress has thought so threatening that they deserve to be made federal crimes.

Whether or not this bleeding of the categories occurs on a significant scale, the unbridled use of racial profiling as a tool in the war on terrorism and other "catastrophic events" could significantly undermine the unfulfilled national commitment to making citizens of all races equal under the law. Few events could have been more catastrophic than losing World War II, yet almost everyone now recognizes that massive racial profiling, albeit lawful, was a completely inappropriate and unnecessary means of preventing that catastrophe.

Finally, the Justice Department has neglected one of the most obvious and well-known pathologies of government bureaucracies. The new policy imposes virtually no controls on the use of racial stereotypes in an indeterminately large class of activities. This will encourage government officials to employ racial stereotypes, and it may foster the lazy use of such stereotypes. The actual effect could well be to impede the war on terrorism.

We have a recent example of this danger: the investigation (in which the Department of Justice participated) of the terroristic sniper attacks in the Washington, D.C. area in late 2002. Apparently relying on well-publicized "criminal profiles," according to which random snipers are almost always white males, the police focused their attention on suspects fitting this stereotype. Duly shocked to find that the investigation had been based on a false premise, the Washington police chief memorably remarked: "We were looking for a white van with white people, and we ended up with a blue car with black people."[7] Not the least of the shortcomings in the Justice Department's new policy guidance is that it makes no effort at all to erect safeguards against repetitions of this sort of dysfunctional bureaucratic behavior.

The report's racial profiling policy is, in short, hardly perfect.

* Nelson Lund is Patrick Henry Professor of Constitutional Law and the Second Amendment and Foundation Professor of Law, George Mason University School of Law.

Footnotes

1 Robert H. Bork, *Civil Liberties After 9/11*, Commentary, July-Aug. 2003, at 30.

2 Milton Heumann & Lance Cassak, *Afterword: September 11th and Racial Profiling*, 54 Rutgers Law Review 283, 286-87 (2001); Jason L. Riley, *'Racial Profiling' and Terrorism*, Wall Street Journal, Oct. 24, 2001, at A22.

3 *See*, *e.g.*, Michael Chertoff, Assistant Attorney General for the Criminal Division, Testimony Before the Senate Judiciary Committee Hearing on Preserving Freedoms While Defending Against Terrorism, Federal News Service, Nov. 28, 2001 [available at LEXIS, News Library, News Group File, A11].

4 Here, and throughout, I use "race" as a shorthand for "race or ethnicity."

5 *Whren v. United States*, 517 U.S. 806 (1996).

6 *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

7 Craig Whitlock & Josh White, *Police Checked Suspect's Plates At Least 10* Times, Washington Post, Oct. 26, 2002, at A1. For further detail, see Nelson Lund, *The Conservative Case against Racial Profiling in the War on Terrorism*, 66 Albany Law Review 329 (2003).