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# CIVIL RIGHTS

## IN DEFENSE OF COMMON SENSE: THE CASE FOR TERRORIST (NOT RACIAL) PROFILING

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On September 11, 2001, 19 male Muslim fundamentalists of Arab descent murdered 3,000 people on American soil. Despite this mass murder, the debate over the use of so-called “racial profiling” in thwarting terrorism continues. One need only scan the media to find complaints about the government devoting too much attention to young Middle Eastern males.<sup>1</sup>

This article is adapted from Federalist Society-sponsored debates in which I have participated since September 11 and summarizes the arguments supporting the use of terrorist — not racial — profiling.

### 1. We Are At War

The United States is at war with terrorists and the countries that sponsor them. The United States did not start this war. This war violently and preemptively visited our shores on September 11, 2001. The United States can win this war by thwarting those who seek to destroy America. Steps must be taken to prevent future terrorist attacks, for unchecked terrorism poses a serious threat not only to the United States, but to civilization itself.

As President George W. Bush said, the war now being fought is unlike any fought before.<sup>2</sup> As seen on 9/11, terrorists show no respect for innocent civilian life or conventional rules of engagement. Thus, as the Department of Justice recently acknowledged, law enforcement must “use every legitimate tool to prevent futurist terrorist attacks, protect our Nation’s borders, and deter those who would cause devastating harm to our Nation, and its people through the use of biological or chemical weapons, other weapons of mass destruction, suicide hijackings, or any other means.”<sup>3</sup> One such legitimate tool helpful in thwarting future attacks is terrorist profiling.<sup>4</sup>

### 2. Terrorist Profiling — Not Racial Profiling

There should not be two sides to the debate over *so-called* racial profiling — especially in the context of protecting the country from terrorist or foreign threats. That law enforcement should be allowed to consider race, ethnicity, gender, eye color, height, weight, or any physical identifying characteristic that would allow them to prevent and solve terrorist acts is nothing more than common sense. There are too many hyperbolic claims about a practice that does not even exist. Indeed, the concept of “racial profiling” is at best ill-defined and at worst a politically-charged term coined by some seeking yet another excuse to claim victim status.<sup>5</sup> A more accurate description of the process whereby race may be considered to thwart terrorism is “terrorist” profiling. Law

enforcement should be permitted and *encouraged* to engage in terrorist profiling, for doing so better deploys scarce societal resources.

To illustrate, in the search to locate Osama bin Laden and his Al Qaeda network, it makes no sense for law enforcement to devote time and resources by raiding Saint Patrick’s Cathedral in New York, infiltrating black Baptist churches in the South, or sneaking around Hindu temples in California. We know for a fact that the individuals fitting the terrorist profile of bin Laden and his followers are not Catholic priests, not black Baptists, and not Hindus. They are, instead, male Muslim fundamentalists of Arab descent.<sup>6</sup>

Making this point does not translate into attacking all Arabs; instead, it simply acknowledges that it is logical to look at certain individuals within the Arab community in order to win the current war on terrorism.<sup>7</sup> If you want to thwart Al Qaeda and similar terrorist groups from killing us in the sky, then law enforcement should be permitted to consider whether an individual boarding an airplane is a male Muslim fundamentalist of Arab descent.<sup>8</sup> The Justice Department recognizes this reality. Its recently adopted Guidelines provide:

Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.<sup>9</sup>

When law enforcement fails to consider material facts in the name of political correctness, resources are utterly wasted and lives are placed at risk. For example, in December 2001 in Arizona, airport screeners wasted time investigating an eighty-six year old white man, General Joseph Foss. General Joseph Foss earned the Congressional Medal of Honor by shooting down twenty-six Japanese fighter planes over the Pacific in World War II. In December 2001, General Foss — former president of the American Football Conference and former Governor of South Dakota — was traveling from Arizona to visit the U.S. Military Academy at West Point. He brought his Congressional Medal of Honor to show the cadets. The Medal, which was encased, is in the shape of a star. The airport screeners in Arizona stopped and harassed General Foss for about an hour apparently because they were worried that this eighty-six year old white man might use the medal as a weapon, such as a Chinese throw-

ing star, to commandeer the plane.<sup>10</sup> Interrogating and harassing an eighty-six year old Congressional Medal of Honor recipient (who obviously did not fit any serious terrorist profile) was not a wise use of scarce resources and made no one safer. Though the result of the silly interrogation of General Foss may be defended as “no harm, no foul,” but if such decisions are repeated hundreds of times each day at airports across the nation, then huge amounts of critical resources needed in the war on terrorism will be utterly wasted.

The consideration of race or ethnicity is hardly new in terrorist or criminal profiling.<sup>11</sup> For example, to thwart the Italian mafia, law enforcement looks at Italian males. To thwart the Japanese crime organizations such as the Yakuza, law enforcement looks at Japanese males. To thwart a Jamaican drug posse, law enforcement considers Jamaicans. And to stop the Irish Republican Army, law enforcement considers white males with brogue accents. In each of these examples, race and ethnicity are critically important, but despite their consideration, these examples do not reflect “racial profiling.” Instead, the examples reflect criminal or terrorist profiling.

Using race, ethnicity, and other identifying traits to maintain the peace is hardly the sole province of politically conservative thinkers. In the 1960s, when terrorists of a different type – white supremacist terrorists – were rampaging through the South burning black churches and terrorizing the black community,<sup>12</sup> what did the Justice Department under Robert Kennedy, Attorney General at the time, do? He, together with the FBI, went out and investigated groups of white males.<sup>13</sup> They did not seek to thwart white terrorists by investigating blacks, Hindus, Arabs or Muslims. Of course, the FBI and Justice Department did not investigate all whites. Instead, they investigated white supremacist groups in the South. In determining whom to investigate, they obviously considered the race of the suspected domestic terrorists. As this example shows, political conservatives and honest liberals should in fact be able to agree that profiling is a useful tool in threatening crime and terrorism.<sup>14</sup>

Defending terrorist profiling should not be misconstrued as a suggestion that race alone justifies investigating somebody for a crime. Suggesting someone is guilty of something *solely* because of race is immoral, wrong, and should be outlawed.<sup>15</sup> For example, nothing justifies a highway patrolman searching specifically for minority drivers to stop and harass them when there is no reason for suspicion. However, an airport security guard is fully justified in asking a few additional questions of Arab males who are praying to Mecca before boarding a cross-country flight.

### 3. Muslim Fundamentalists of Arab Descent

Using race and ethnicity as factors in thwarting terrorism is appropriate. An airport screener who interrogates an Arab-looking man attempting to board a plane is not engaging in racism. Instead, the airport screener is engaging in rational and proactive terrorist profiling. Whether our soci-

ety is comfortable with it or not, there is a higher probability that an Arab man will attempt a suicide hijacking while traveling by plane than a randomly-selected white, black or Hispanic passenger doing the same.<sup>16</sup> Although some like to think we live in a world where there is no correlation between race, ethnicity, and modern-day terrorism, that notion does not comport with reality.

In the real world, the United States is at war with the Arab terrorists who killed thousands of people on September 11, 2001. In the real world, these terrorists have followers and supporters right here in the United States.<sup>17</sup> The search for bin Laden, Saddam Hussein, and Daniel Pearl’s murderers<sup>18</sup> show that we still lack necessary information about the terrorists who seek to destroy the United States in terms of where, or how, to find them. Thus, should we really ignore those few facts that we do know about these terrorist threats, *i.e.*, that they consist predominantly of Muslim fundamentalists of Arab descent who are males?<sup>19</sup>

To illustrate, consider the following:

In 1983, the United States Marine barracks in Beirut was blown up, killing 243 United States Marines.<sup>20</sup> By whom?

In 1985, the Achille Lauro cruise ship was hijacked and an elderly wheelchair-bound American was murdered.<sup>21</sup> By whom?

In 1988, Pan Am flight 103 was bombed killing 270 innocent people.<sup>22</sup> By whom?

In 1993, the World Trade Center was bombed.<sup>23</sup> By whom?

In 1995, the U.S. military barracks in Saudi Arabia were bombed killing 292 people.<sup>24</sup> By whom?

In 1997, American embassies in Kenya and Tanzania were bombed killing 243 people and injuring over 5000.<sup>25</sup> By whom?

In 2000, the naval ship USS Cole was bombed killing 17 American sailors.<sup>26</sup> By whom?

And on September 11, 2001, four airliners were hijacked, turned into missiles, aimed at the World Trade Center and the Pentagon,<sup>27</sup> and used to kill 3000 people. By whom?

These acts were committed by Arab males who were Muslim extremists, mostly between the ages of 17 and 40.<sup>28</sup> Should our nation’s law enforcement officers be asked to ignore these undeniable facts and this undeniable history when attempting to thwart terrorist attacks and save innocent lives? The correct answer — and the answer supported by the majority of Americans — is that these facts should be considered.<sup>29</sup>

#### 4. Conclusion

As a nation, we cannot afford to ignore hard facts. In reality, we live — and law enforcement serves — in a world where not all people love America. Law enforcement should not be forced to stick its head in the sands of political correctness. Banning reality and fact-based profiling will help no one except terrorists.

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#### Footnotes

<sup>1</sup> See, e.g., Eric Lichtblau and Adam Liptak, "Threats and Responses: On Terror, Spying and Guns, Ashcroft Expands Reach," *The New York Times*, March 15, 2003, p. A1 (quoting Ibrahim Hooper, Council on American-Islamic Relations, as stating "Since he's been in office, American Muslims have lost many of their civil rights . . . All Muslims are now suspects. We have to assume that every mosque in America is being bugged by the F.B.I., with the attitude that's prevalent today at the Justice Department.").

<sup>2</sup> President George Bush has stated "Americans should not expect one battle, but a lengthy campaign, unlike any other we have seen." *Bush Calls Nation to "War on Terror"*, L.A. TIMES, September 21, 2001. See also, Prepared Testimony of Andrew F. Krepinevich, Executive Director, Center for Strategic and Budgetary Assessments, before the House Committee on Government Reform Subcommittee on National Security, Emerging Threats, and International Relations, "Combating Terrorism: A Proliferation of Strategies," Federal News Service, March 3, 2003, available at [http://www.csbaonline.org/4Publications/Archive/T.20030303.Combating\\_Terroris/T.20030303.Combating\\_Terroris.htm](http://www.csbaonline.org/4Publications/Archive/T.20030303.Combating_Terroris/T.20030303.Combating_Terroris.htm) (last visited Mar. 3, 2003) (stating "Following the [September 11] attacks, the United States finds itself engaged in the first war of the 21<sup>st</sup> century. This war against international terrorist aggression . . . presents a very different set of challenges, and requires a wholly different response from the more traditional conflicts that have dominated America's recent history."). Dinesh D'Souza, *WHAT'S SO GREAT ABOUT AMERICA* 4-5 (2002) ("we find ourselves at war against the forces of terrorism . . . [T]his is a new kind of war against an enemy that refuses to identify himself.").

<sup>3</sup> See U.S. Department of Justice, Civil Rights Division, *Guidance Regarding The Use of Race By Federal Law Enforcement Agencies*, (June 2003) ("Justice Department Guidelines") at 9.

<sup>4</sup> In June 2003, the Justice Department issued guidelines articulating the correct view that federal law enforcement efforts may consider race and ethnicity in investigating past acts of terrorism as well as thwarting new ones. The Guidelines provide:

In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing law protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and the laws of the United States.

Justice Department Guidelines at 9.

<sup>5</sup> Some commentators observe that the concept of "racial profiling" has been defined by only "cop-bashers" and that "the police have never endorsed the term." See Heather MacDonald, *ARE COPS RACIST?* 165 (2003). See also Clayton Searle, *Profiling in Law Enforcement*, at <http://www.inia.org/whats-new-presidents.htm> (last visited Mar. 3, 2003) ("This nation has recently been in an emotional discussion concerning the use of profiles by law enforcement officers. Unfortunately, this debate has been entitled 'racial profiling'. There is a saying in debating, 'If you can define the terms, you win the contest'. Utilizing the term, 'racial profiling', ensures that the debate will be

negative in tone and divisive in nature.").

<sup>6</sup> "All 19 of the September 11 hijackers were young Arab men. The vast majority of Al Qaeda members and Taliban fighters are Afghan or Arab men. All 22 people on the FBI's most wanted terrorist list are Muslims and virtually all are Arab." Prof. Jonathan Turley, "Profiling Isn't Always Wrong," L.A. TIMES NEWS SERVICE, January 22, 2002. See also Krepinevich, *supra* note 3 (stating "The United States now confronts radical Islamic terrorist organizations . . .")

<sup>7</sup> Obviously, the "profile" of terrorists should change as warranted. For example, if a group of the Pennsylvania Amish or blonde-haired, blue-eyed women from Minnesota commence a series of coordinated suicide bombings against American targets, then the "profile" of those trying to destroy the United States should change to recognize these new facts.

<sup>8</sup> Terrorist profiling can save lives. In 1999, U.S. government officials were "on the look out for Middle Eastern men when they stopped Ahmed Ressam, an Algerian." Ressam had in his car bomb-making materials that prosecutors later alleged were intended for an attack on an American airport. See John Stossel, *Rethinking Racial Profiling*, October 4, 2001, available at [http://abcnews.go.com/sections/2020/2020/2020\\_011002\\_racialprofiling\\_stossel.html](http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html) (last visited Mar. 3, 2003).

<sup>9</sup> Justice Department Guidelines at 9.

<sup>10</sup> See Joyce Howard Price, *Medal of Honor Fails to Impress Airline Security*, WASHINGTON TIMES, Jan. 19, 2002. "I kept explaining that it was the highest medal you can receive from the military in this country, but nobody listened," General Foss said." *Id.* Of note, General Foss died in early 2003.

<sup>11</sup> *60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (Steve Kroft stated, "[U]sing race as a factor in criminal investigations is both commonplace and supported by the highest courts in the land.").

<sup>12</sup> Curtis Wilkie, *Miss. Whites Recall 1964 Church Fires, Decry Latest Wave*, THE BOSTON GLOBE, June 27, 1996, at 1.

<sup>13</sup> Athan G. Theobarris, *Political Counterintelligence, In SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN I* (Temple U. Press, 1978), available at [www.icdc.com/~paulwolf/cointelpro/theoharris.htm](http://www.icdc.com/~paulwolf/cointelpro/theoharris.htm) (last visited Jun. 17, 2003). In response to the spread of the Ku Klux Klan, Attorney General Robert Kennedy sent a team to Mississippi to help identify individuals involved in terrorism. *Id.*

<sup>14</sup> Another instance where the consideration of race should be completely uncontroversial arises when police respond to the report of a specific crime. In such instances, of course, the police should use any and all available facts to catch the criminal including the physical description of the perpetrator. The Justice Department explains: "[c]ommon sense dictates that when a victim describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race." See Justice Department Guidelines at 2.

<sup>15</sup> See *Herbert v. City of Saint Clair Shores*, 2003 U.S. App. LEXIS 4450 (6th Cir. March 11, 2003) (Krupansky, J., dissenting) (stating "The targeting of a criminal suspect solely by reference to the subject's race violates the constitution") (cites omitted); *60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (quoting Randy Means, attorney, who explained that singling out people for investigation solely on race is illegal, but noting that using race or ethnicity as one aspect of a criminal profile is legal and a valuable tool).

<sup>16</sup> Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, NATIONAL JOURNAL, September 22, 2001 ("Racial profiling of people boarding airliners . . . done politely and respectfully — may be an essential component (at least for now) of the effort to ensure that we see no more mass-murder-suicide hijackings."); Michael Kinsley, *Racial Profiling is Sometimes Appropriate — Now, For Example*, PITTSBURGH POST-GAZETTE, October 2, 2001, at A11 ("An Arab-looking man heading toward a plane is statistically more likely to be a terrorist. That likelihood is infinitesimal, but the whole airport rigmarole is based on infinitesimal chances."). See also *60 Minutes: That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001) (Floyd Abrahms stated, "[I]t would be crazy not to consider what people look like when

we're looking for people who may be involved in hijacking.”).

<sup>17</sup> Recent events, including the guilty plea of Faysal Galab (who was one of six men arrested in a Buffalo, New York suburb for allegedly having terror links to Al Qaeda), demonstrate that bin Laden's network still has connections within the United States. See John Riley, *Guilty Plea in Upstate Terror Case: Al-Qaeda Camp Attendee will Cooperate with Probe*, NEWSDAY (New York), Jan. 11, 2003, at A6. Galab, who was one of six young Yemeni-American men arrested for attending an Al Qaeda training camp in Afghanistan, admitted that he knew he was going to a “military training camp before leaving Buffalo in mid-2001 and knew that it was illegal, that he purchased a military uniform before going to camp, and that he performed ‘guard duty’ for Al-Qaeda while receiving terrorist training at the camp.” *Id.*; see also D’Souza, *supra* note 3, at 5 (“Our enemy is a terrorist regime that inhabits many countries, including the United States.”).

<sup>18</sup> Pearl was a Wall Street Journal reporter who was kidnapped and killed by Islamic militants in Pakistan in February 2002. *Tests Show Body Found in Karachi is Pearl’s*, WALL ST. J., July 22, 2002, at A12.

<sup>19</sup> Kinsley, *supra* note 17, at A11 (“[T]oday we’re at war with a terror network that just killed [3,000] innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact that we know about them? That may be asking too much.”).

<sup>20</sup> Max Boot, *The End of Appeasement: Bush’s Opportunity to Redeem America’s Past Failures in the Middle East*, THE WEEKLY STANDARD, February 10, 2003. On April 18, 1983, a Shiite suicide bomber killed 63 people including 17 Americans and on October 23, 1983, another Shiite suicide bomber attacked the U.S. Marine barracks in Beirut, killing 241 soldiers. *Id.* See also *Hezbollah Summit Presence Sends Signal?*, UNITED PRESS INTERNATIONAL, Oct. 19, 2002 (“Hezbollah, which supports Islam even over Arab nationalism ... claimed responsibility for the 1983 bombing of the Marine barracks that killed 241 Americans”); Walter Williams, *We Need To Profile*, at [www.townhall.com/columnists/walterwilliams/ww20020612.html](http://www.townhall.com/columnists/walterwilliams/ww20020612.html) (last visited June 12, 2003).

<sup>21</sup> See “Achille Lauro Hijacking, October 7, 1985,” at [www.terrorismvictims.org/terrorists/achille-lauro.html](http://www.terrorismvictims.org/terrorists/achille-lauro.html) (last visited Mar. 3, 2003).

<sup>22</sup> Radical Muslim terrorist groups blew up Pan Am Flight 103 over Lockerbie, Scotland. Ron Wheeler Albany, *Why No Protests When Americans are Killed?*, THE TIMES UNION (Albany, NY), March 31, 2003, at A6. In fact, “[o]ne Muslim terrorist was sentenced to life in a Scottish jail” and the “other was acquitted and returned to a hero’s welcome in Tripoli.” *Id.* See also Williams, *supra* note 21.

<sup>23</sup> *Timeline: Al Qaeda’s Global Context* (Public Broadcasting System), available at [www.pbs.org/wgbh/pages/frontline/shows/krew/etc/cron.html](http://www.pbs.org/wgbh/pages/frontline/shows/krew/etc/cron.html) (last visited Mar. 3, 2003). See also Williams, *supra* note 21.

<sup>24</sup> Hezbollah attacked a Saudi National Guard facility in Riyadh in 1995, killing five Americans. Boot, *supra* note 21.

<sup>25</sup> Radical Islamic terrorist groups bombed the U.S. embassies in Africa in 1998. See Krepinevich, *supra* note 3; Boot, *supra* note 21 (“Islamist operatives bombed ... two U.S. embassies in Africa in 1998.”).

<sup>26</sup> “Islamist operatives bombed . . . the USS Cole in 2000.” Boot, *supra* note 21.

<sup>27</sup> “All 19 of the September 11 hijackers were young Arab men.” Turley, *supra* note 7.

<sup>28</sup> See Williams, *supra* note 21. “Daniel Pipes estimates that even before the costliest terrorist strike in history occurred on September 11, 2001, Islamist violence directed at Americans had killed 800 people – ‘more than killed by any other enemy since the Vietnam War.’” Boot, *supra* note 21.

<sup>29</sup> See Ann Scales, *Polls Say Blacks Tend to Favor Checks*, BOSTON GLOBE, September 30, 2001, at A6; Pete DuPont, *Arab-Americans and Racial Profiling*, National Center for Policy Analysis, at <http://www.ncpa.org/edo/pd/fp2001/fp110601.html> (last visited Mar. 3, 2003). “71 percent of Blacks in a recent Gallup poll and 54 percent of Blacks in a Zogby poll said Arab-Americans should be singled out for extra security at airports.” Dennis Niemiec & Shawn Windsor, *Arab Americans Expect Scrutiny, Feel Sting of Bias*, DETROIT FREE PRESS, October 1, 2001. 60 percent of Arab-Americans in Detroit area said

“extra questioning or inspections” of Arab Americans is justified. *Id.*