

**“VOLUNTARY” INTERVIEWS AND
AIRPORT SEARCHES OF MIDDLE
EASTERN MEN: THE FOURTH
AMENDMENT IN A TIME OF TERROR**

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INTRODUCTION

The tragic and horrible events of September 11, 2001 have changed the terms and direction of the debate regarding the use of race and ethnicity by law enforcement officers. Before the terrorist attacks on September 11, presidential and gubernatorial candidates were tripping over each other to condemn racial profiling by law enforcement officers.¹

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¹ Republican presidential candidate George W. Bush denounced racial profiling during a presidential debate, saying he could not “imagine what it would be like to be singled out because of race, and stopped and harassed. It’s just flat wrong, and that’s not what America is all about, and so we ought to do everything we can to end racial profiling.” *The Presidential Debate*, L.A. TIMES, Oct. 10, 2000, at A14. Likewise, Democratic presidential candidate Al Gore claimed to support a ban on racial profiling “whether it’s African Americans, Arab Americans, whatever.” Ceci Connolly & Mike Allen, *Gore Rips Bush Claims on Budget, Hate Crimes*, WASH. POST, Oct. 15, 2000, at A10. In New Jersey, Democratic and Republican gubernatorial candidates also spoke out against racial profiling during their campaigns. See Jonathan Schuppe, *Gubernatorial Candidates Offer Ways To Combat Racial Profiling*, STAR-LEDGER (Newark), Aug. 3, 2001, at 23 (noting Republican Bret Schundler’s plan to outlaw consent searches until the state police established court-ordered monitoring system over police practices as well as Democrat Jim McGreevey’s support for a racial profiling criminal statute). For a discussion of the definitional problems of “racial profiling,” see generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post September 11 World*, 40 AM. CRIM. L. REV. 1195, 1204 (2003). See also Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45,

Prior to September 11, many Americans believed that racial profiling was unacceptable police work and prejudicial to racial minorities.² Even a few law enforcement agencies and individual police officers conceded that racial profiling had fundamental defects.³

After September 11, public opinion on racial and ethnic profiling changed precipitously. After learning that nineteen Middle Eastern men were responsible for September 11, many Americans reconsidered their views on racial profil-

48 (2003) ("Generally speaking, racial profiling occurs when an officer's decision of whom to stop and question for suspected criminal activity proceeds from the individual's race or ethnicity itself. In such a case, it is the individual's race or ethnicity that attracts the officer's interest or suspicion. From that point of suspicion the officer may then be motivated to engage in pretextual behavior to justify the individual's stop or arrest."). For an excellent post-September 11 discussion of racial and ethnic profiling—when it should be permissible and impermissible and a critique of the constitutional doctrine related to the topic, see generally Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163. When it comes to defining racial profiling, Professor Alschuler notes that "opponents of racial profiling often have failed to define the term, and the definitions provided by legislatures and scholars have differed substantially." *Id.* at 168 (footnote omitted).

² Specifically, according to a December 1999 Gallup Poll, eighty-one percent of the public disapproved of racial profiling. See Florangela Davila, *ACLU Ads to Spotlight "Racial Profiling" Issue*, SEATTLE TIMES, Apr. 20, 2000, at B5. Of course, not everyone disapproved of racial profiling by police officers or believed that racial profiling had become a phenomenon dangerously out of control. See Samuel Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1422 n.38 (2002) (citing "conservative commentators" who defended racial profiling on practical grounds); Robert H. Bork, *Civil Liberties After 9/11*, FRONT PAGE MAGAZINE, July 4, 2003 (stating that "there is by and large no evidence that police have relied excessively on ethnic or racial profiling in conducting their normal investigations"), available at <http://www.frontpagemag.com/articles/Printable.asp?ID=8758>.

³ See, e.g., Peter Verniero & Paul H. Zoubek, Office of the Attorney Gen. of N.J., Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling 4 (1999) [hereinafter Interim Report] (explaining that "minority motorists have been treated differently than non-minority motorists during the course of traffic stops on the New Jersey Turnpike" and concluding that "the problem of disparate treatment is real—not imagined"); see also Albert W. Alschuler, *supra* note 1 (noting additional instances of government officials and judicial bodies criticizing racial profiling); James H. Burnett III, *Feingold Bill Would Ban Racial Profiling; Proposal Sent to Bush has Police Chiefs' Support*, MILWAUKEE JOURNAL-SENTINEL, June 19, 2001, at 3; Kate Grusich, *Lake County Police Develop Plan to Prevent Racial Profiling*, DAILY HERALD (Chicago), Jan. 13, 2001, at 5; Mark Mathis, *Local Police Condemn Racial Profiling*, AUGUSTA CHRONICLE, Mar. 4, 2000, at A7; David L. Teibel, *Napolitano Praised For Profiling Guidelines*, TUCSON CITIZEN, May 28, 2001, at 1C; Stephen Thompson, *Police Stand Against Racial Profiling*, TAMPA TRIBUNE, May 12, 2001, at 2.

ing.⁴ Profiling blacks or Latinos on the highways is still opposed by the average citizen, but profiling young, Middle Eastern or Islamic men at airports or other high-risk security venues is now favored by many Americans.⁵ Columnists Stuart Taylor and Charles Krauthammer, for example, have specifically urged the targeting of Middle Eastern airline passengers.⁶ Even Floyd Abrams, the nation's most prominent First Amendment lawyer and a zealous defender of the Bill of Rights, has endorsed giving airport officials the authority to consider the ethnicity of select non-citizens during security checks.⁷

⁴ See generally Joyce Purnick, *Last Week Profiling Was Wrong*, N.Y. TIMES, Sept. 15, 2001, at A8; Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling*, N.Y. TIMES, Sept. 23, 2001, at A1; see also DAVID COLE, *ENEMY ALIENS* 48 (2003) (noting that after September 11, "polls reported that nearly 60 percent of the American public favored ethnic profiling, at least as long as it was directed at Arabs and Muslims"); Alschuler, *supra* note 1, at 163-64 (describing the post-September 11 "shift in sentiment" towards racial profiling).

⁵ *But cf.* Alschuler, *supra* note 1, at 223-30 (criticizing arguments that distinguish profiling of blacks from profiling of Arabs and Muslims at airports); Ramirez, et al., *supra* note 1, at 1226-30 (offering several arguments why profiling of Arabs and Muslims at airports would be ineffective police work and counter-productive to deterring terrorism); Davis Harris, *Is this a Terrorist? (or Just a Mindset)*, BOSTON GLOBE, Feb. 10, 2002, at C2 (arguing against reliance on ethnicity when looking for terrorists).

⁶ Charles Krauthammer, *The Case for Profiling*, TIME, Mar. 18, 2002, at 104; Stuart Taylor, Jr., *Politically Incorrect Profiling: A Matter of Life or Death*, NAT'L J., Nov. 3, 2001, available at 2001 WL 25926324; see also Fedwa Malti-Douglas, *Let Them Profile Me*, N.Y. TIMES, Feb. 6, 2002, at A21.

[i]t is a fact that the particular terrorist group sworn to our destruction, Al Qaeda, is made up largely of Middle Easterners. It is not unreasonable to direct increased attention to passengers with some connection to the Middle East.

Arab-Americans like me want to be safe when we fly. Cooperating with security procedures, even when we suspect that we are getting more attention than our fellow citizens, makes sense. Does anyone really want a security official to hesitate before stopping a suspicious passenger out of fear of an accusation of bias?

Id.

⁷ According to Abrams, "[i]t would be crazy not to consider what people look like when we're looking for people who may be involved with hijackings. . . . It would be bizarre." *CBS News: 60 Minutes* (CBS television broadcast, Aug. 11, 2002), available at 2002 WL 8424881. Abrams found "a big difference between being interned and being searched a little more at an airport." *Id.* Abrams also noted that the country had "been attacked, and the one thing that the attackers [had] in common . . . [was] their national origin and their sex and their language." *Id.*; see also Floyd Abrams, *The First Amendment and the War*

High-ranking members of the Bush Administration have also subtly changed their positions on racial profiling. Within days of the September 11 attacks, Attorney General John Ashcroft stated that people at airports would not be considered terrorist “suspects based solely on their race and ethnic origin.”⁸ Similarly, Federal Bureau of Investigation Director Robert Mueller said, “[w]e do not, have not, [and] will not target people based solely on their ethnicity, period. . . .”⁹

Against Terrorism, 5 U. PA. J. CONST. L. 1, 4-5 (2002) (explaining recommendation submitted by civil liberties advisory committee to Vice President Gore that airport security officials be permitted to consider nationality of non-citizens: “It was preposterous, I thought, to tell airport officials not even to consider the citizenship of visitors from any, say, Iran or Libya when deciding whom to search with particular intensity.”); David Wallis, *Questions for Floyd Abrams*, N.Y. TIMES, Apr. 7, 2002, at 17 (“I’m afraid that I think that [privacy interests] should [yield to national security interests].”).

⁸ *Fox News: Fox News Sunday* (Fox television broadcast, Sept. 16, 2001), available at 2001 WL 7790874.

⁹ Eric Lichtblau & James Gerstenzang, *After the Attack*, L.A. TIMES, Sept. 18, 2001, at A3. On June 17, 2003, the Justice Department, responding to directions from President Bush, issued guidelines barring federal law enforcement officers from using race or ethnicity in routine police operations and investigations. *Justice Department Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 17, 2003, available at http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. The Guidelines state:

In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, federal law enforcement officers may *not* use race or ethnicity to any degree, except that officers may rely on race and ethnicity if a specific suspect description exists. This prohibition applies even where the use of race or ethnicity might otherwise be lawful.

Id. at 1. The Guidelines, however provide an exemption for investigations involving terrorism and national security or “preventing catastrophic events.” *Id.* at 8. In this category of cases, federal officers may consider “race, ethnicity and other relevant factors to the extent permitted by our laws and the Constitution.” *Id.* at 8; see also Eric Lichtblau, *Bush Issues Federal Ban on Racial Profiling*, N.Y. TIMES, June 18, 2003, at A1.

Even assuming that federal law enforcement officers in the field will comply with the President’s guidelines and heed the announcements of the Attorney General and FBI Director not to target individuals at airports “solely” on their ethnicity, this safeguard is unlikely to deter explicit ethnic profiling by agents in the field. As Professor Randall Kennedy has recognized,

[e]ven if race is only one of several factors behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor. In a close case, it is a person’s race which might make the difference between being stopped by the police or being permitted to go on about one’s business free from governmental intrusion.

RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 148-49 (1997). See also Alschuler, *supra* note 1, at 178 (noting case where a federal immigration supervisor “testified that, in making roving-patrol stops, his subordinates considered, in addition to Latino ethnicity, a ‘dirty, unkempt appearance,’ a ‘lean and hungry look,’ and wearing work clothes. When the government allows unkempt Anglos to proceed and detain unkempt Latinos, it employs an ethnic classification.”

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The crucial term used by the Attorney General and the FBI Director is “solely.” The Attorney General left no doubt that airport security personnel would be permitted to *consider* a person's ethnicity to determine whether to detain or search, but officials will not stop or search Arabs or Muslims based solely on ethnicity or national origin. The bottom line is that racial and ethnic profiling is no longer the evil concept it had been prior to September 11, 2001.

Although racial profiling has generated considerable public attention in recent years,¹⁰ the law enforcement use of race and ethnicity to target individuals for search or seizure predates the Constitution.¹¹ In the last few decades, the Supreme Court has tolerated racial and ethnic profiling and has asserted that the Fourth Amendment does not impose constitutional restraints against profiling. In two significant cases decided in the 1970s concerning border patrol operations, the Court not only signaled that race and ethnicity are not forbidden criteria to determine the reasonableness of a search or seizure, but it also expressly authorized ethnic-based seizures at border checkpoints and locations near the border.¹² More recently, a unanimous

(footnotes and citations omitted).

¹⁰ For a thorough critique of the usefulness of racial profiling and the harms it has caused, see DAVID A. HARRIS, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002).

¹¹ See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334-36 (1998); see generally SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* (2001); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning*, 602-1791, at 432-54 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

¹² See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In *Martinez-Fuerte*, the Court held that the Fourth Amendment allows the detention of vehicles at fixed checkpoints away from the border even in the absence of individualized suspicion that a vehicle contains illegal aliens. *Martinez-Fuerte*, 428 U.S. at 566-67. The Court also stated that border agents could rely on the appearance of Mexican ancestry as justification for the selective referral of a motorist to a “secondary inspection” area for interrogation. *Id.* at 563. *Brignoni-Ponce* invalidated the stop of a vehicle by border patrol agents solely on the basis of the occupants' Mexican ancestry. *Brignoni-Ponce*, 422 U.S. at 886-87. While the Court ruled that Mexican ancestry, standing alone, did not provide reasonable suspicion to justify a detention, the Court stated that the occupants' Mexican appearance is a relevant, but not dispositive, factor in the reasonable suspicion equation needed for a valid stop under the Fourth Amendment. *Id.* at 887. A student commentator has suggested that the Fourth Amendment doctrine announced in

Court in *Whren v. United States*¹³ held that pretextual traffic stops of black motorists do not implicate the Fourth Amendment's guarantee against unreasonable searches and seizures.¹⁴ *Whren* acknowledged that race-based enforcement of traffic laws might violate the Constitution; however, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."¹⁵ According to the Court, subjective intentions of law enforcement officials, including those based on racial stereotypes or bias, are irrelevant to Fourth Amendment analysis.¹⁶ Thus, if an officer has probable cause for a traffic stop, it is inconsequential if the officer's stop was motivated by racial or ethnic factors, rather than legitimate traffic safety concerns. Probable cause of a traffic violation, therefore, insulates a police stop from Fourth Amendment scrutiny.¹⁷

Martinez-Fuerte and *Brignoni-Ponce* "will offer little protection against [the] use of race as a factor in the search for terrorists." Liam Braber, Comment, *Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 476 (2002) (stating that the Court in "*Brignoni-Ponce* and *Martinez-Fuerte* indicated that the likelihood of an individual of certain ancestry being involved in a certain crime was enough to make that ancestry an 'objective criterion' to reasonable detention"); see also Davies, *supra* note 1, at 62 n.68 (noting that "although it may be in [*Brignoni-Ponce* and *Martinez-Fuerte*] that Hispanic appearance is 'logically relevant,' there are good reasons to question its 'legal relevance.' That is, even if the Hispanic appearance of a car passenger near the border between the United States and Mexico makes it minimally more likely that the car contains aliens illegally in the country than it would be without that piece of evidence, in a state boasting a sizeable Mexican-American population, the probative value of that ethnic information quickly diminishes to nearly zero."); HARRIS, *supra* note 10, at 132 ("The Supreme Court's pronouncements in this area, combined with the universal stereotype of illegal immigrants as Latino, all but guarantee that police will use ethnicity in its crudest form, whether or not [police] agencies have immigration-related responsibilities."). For a provocative discussion of *Brignoni-Ponce* and *Martinez-Fuerte*, and why border patrol agents should be free to consider ethnicity when looking for illegal aliens in areas near the southern border, see Alschuler, *supra* note 1, at 236-45.

¹³ 517 U.S. 806 (1996).

¹⁴ *Whren*, 517 U.S. at 819.

¹⁵ *Id.* at 813.

¹⁶ *Id.*

¹⁷ See David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 297 (1998) (noting that *Whren* "cordon[s] off an entire category of 'circumstances' that might ordinarily be thought pertinent to the reasonableness of an officer's actions [regarding a traffic stop], and make[s] them irrelevant as a matter of law"). Of course, it is

The upshot of the Court's Fourth Amendment doctrine is clear: government officials may consider race or ethnicity in deciding whether to make a seizure during border patrol operations. Defendants and civil rights plaintiffs, however, cannot rely on the Fourth Amendment for protection against race-based law enforcement practices. A critic might assert that this framework amounts to a "win-win" situation for the government. In other forums, I have criticized the Court's Fourth Amendment jurisprudence on issues pertaining to race.¹⁸ My previous views, however, were formulated prior to the horrific events of September 11, 2001. In this essay, I discuss two examples of ethnic-based policing following September 11 and articulate why these law enforcement practices are constitutionally impermissible.

First, I will discuss Attorney General John Ashcroft's memorandum ordering law enforcement officers to interview a list of five thousand young, alien men from mostly Middle Eastern countries. Part I of this essay contends that the federal government's list amounts to ethnic profiling. Furthermore, regardless of whether the government's list constitutes ethnic profiling, Part I argues that the men targeted for "interviews" most likely felt powerless to reject

easy to acquire "probable cause" for a traffic stop. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997).

In a world . . . where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing. Officers can arrest for a minor offense—everyone violates the traffic rules—in order to search or question a suspect on a major one. This allows arrests and searches of suspected drug dealers without any ex ante support for the suspicion, the very thing the probable cause standard is supposed to forbid.

Id.; see also David A. Harris, "Driving While Black" and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

In the most literal sense, no driver can avoid violating *some* traffic law during a short drive, even with the most careful attention. Fairly read, *Whren* says that any traffic violation can support a stop, no matter what the real reason for it is; this makes any citizen fair game for a stop, almost any time, anywhere, virtually at the whim of police.

Id.

¹⁸ See, e.g., Tracey Maclin, "Black and Blue Encounters" *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243 (1991); Maclin, *supra* note 11; Tracey Maclin, *Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271 (1998).

the government's request for a "voluntary" interview. Although the men targeted for interrogation probably felt coerced into submitting to interviews, these interrogation sessions are nonetheless considered consensual encounters under current Fourth Amendment jurisprudence.

The second example of ethnic profiling by law enforcement is not currently the law, nor a *de facto* policy acknowledged by government officials. Part II analyzes a proposal advocated by Stuart Taylor, Charles Krauthammer and others that would authorize airport security officials to select passengers for additional security checks based on national origin. Although Taylor and Krauthammer's proposal may appeal to our common sense and attempt to placate our fears of future terrorist attacks, their proposal relies on the same premise that justified the detention of Japanese Americans and Japanese aliens in federal concentration camps following the attack on Pearl Harbor. Just as some Americans in the 1940s believed that individuals of Japanese ancestry represented a threat to national security and could not be trusted to be loyal to the United States,¹⁹ today many believe that Middle Eastern and Muslim young men represent a threat as potential terrorists and must be targeted for special scrutiny at the nation's airports.

PART I: "VOLUNTARY" INTERVIEWS

A. *Was The Justice Department's "List" Ethnic Profiling?*

Within weeks of the September 11 attacks, Attorney General Ashcroft ordered federal Anti-Terrorism Task Force officers and other law enforcement agents to interview approximately five thousand young aliens. The men were primarily from Middle Eastern nations, between the ages of eighteen and thirty-three years old and had arrived in the United States sometime after January 1, 2000 on temporary student, tourist or business visas. The State Department registered and officially categorized these men as lawful

¹⁹ See GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 3 (2001) ("Japanese Americans were singled out from other 'enemy' groups such as Italian Americans and German Americans as innately untrustworthy on racial grounds.").

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residents of the United States.²⁰

Attorney General Ashcroft later explained the Justice Department's methodology for compiling the names of these five thousand men: "The list was generated by taking a population of individuals and applying to that population a set of generic parameters. . . . These individuals were selected for interviews because they fit the criteria of persons who might have knowledge of foreign-based terrorists."²¹ The Attorney General dismissed criticism that the federal government was engaged in racial or ethnic profiling. "[T]here is no place for ethnic or religious stereotyping in this plan, or in this nation's campaign against terrorism. Nor were these individuals selected because they are suspected of any criminal activity, and, absent any other indication that they are criminals, they should not be treated as such."²² The Attorney General further noted that "[t]hese

²⁰ Florangela Davila & Mike Carter, *Immigrants Urged to Exercise Rights*, SEATTLE TIMES, Nov. 21, 2001, at B1. On March 20, 2002, the Justice Department announced a second round of interrogations of three thousand alien men, ages eighteen to forty-six, who came to the United States between October 2001 and February 2002 from nations where al Qaeda was operating. *Id.* The Department conceded that the initial interview project questioned only half of the approximately five thousand men the Department targeted for interviews. See Philip Shenon, *Justice Dept. Wants to Query More Foreigners*, N.Y. TIMES, Mar. 21, 2002, at A19. Attorney General Ashcroft "acknowledged that the government's failure to find many of the men on the original list demonstrated 'serious flaws' in its ability to keep track of visitors to the United States." *Id.* He also noted that the initial interrogations had generated "a significant number of leads for investigators looking into the Sept. 11 attacks and other potential terrorist activities," but other Department officials conceded that the interrogations had produced no arrests involving the events of September 11 or terrorist activities. *Id.* Approximately twenty persons had been arrested for immigrations violations. *Id.*; see also *New Round of Interviews Planned with Foreigners*, WALL ST. J., Mar. 21, 2002, at 8; Jonathan Peterson, *U.S. Will Interview More Foreigners in Fight on Terrorism*, L.A. TIMES, Mar. 21, 2002, at A20.

²¹ Memorandum from the Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) [hereinafter Attorney General's Interview Memorandum], at <http://www.usdoj.gov/ag/readingroom/terrorism1.htm>.

²² *Id.*; see also Jodi Wilgoren, *A Nation Challenged: The Interviews; Prosecutors Begin Effort to Interview 5,000, but Basic Questions Remain*, N.Y. TIMES, Nov. 15, 2001, at B7. Later, the head of the Criminal Division of the Justice Department, Assistant Attorney General Michael Chertoff, told the Senate Judiciary Committee that the interviews were not ethnic profiling. Chertoff asserted, "We have emphatically rejected ethnic profiling. What we have looked to are characteristics like country of issuance of passport. . . ." *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism:*

individuals were not selected in order to single out a particular ethnic or religious group, or to suggest that one ethnic or religious group is more prone to terrorism than another. I emphatically reject that proposition. . . .²³

Following the release of the Attorney General's memorandum, FBI agents and local police officials received the following guidelines for conducting the interrogations:

Since the persons to be interviewed are not suspected of involvement in criminal activity, the interviews will be conducted on a consensual basis, and every interview subject ("individual") will be free to decline to answer questions. In approaching the individual, you should announce your name, title and law enforcement agency, clearly explain the purpose of the interview, and ask permission to speak with the individual. As these interviews will not be "custodial interrogations," there is no need to seek a waiver of Miranda rights.

Unless the individual prefers to conduct the interview away from his home, workplace or neighborhood, you should ordinarily not ask him to accompany you to the police station or the field office. A number of these individuals may have difficulty with the English language and little understanding of our criminal justice system, and we want them and the other members of their communities clearly to understand that they are not being taken into custody and that the interviews are being pursued on a consensual basis.²⁴

On November 12, 2001, Ralph Boyd, Jr., the Assistant Attorney General for Civil Rights, and Jeffrey Collins, the United States Attorney for the Eastern District of Michigan, held a news conference to discuss how the Justice Department would conduct the interrogations in Michigan. Due to the large number of Middle Eastern men located in the

Hearing Before the Senate Comm. on the Judiciary, 107th Cong. (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division).

²³ Attorney General's Interview Memorandum, *supra* note 21; *see also* Naftali Bendavid, *Interview Letters Go to 500 in Michigan*, CHI. TRIB., Nov. 27, 2001, at 1.

²⁴ Memorandum from the Attorney General, to all United States Attorneys and all Members of the Anti-Terrorism Task Forces (Nov. 9, 2001) [hereinafter Attorney General's Guideline Memorandum], *available at* <http://www.usdoj.gov/04foia/readingrooms/terrorism2.htm>. To highlight the consensual nature of the interviews, a spokeswoman for the Justice Department compared the questioning to a neighborhood canvass after a murder stating, "This is a preventive effort, focused on information gathering. . . . The instructions are clear. These are voluntary interviews, and anyone who doesn't want to answer questions doesn't have to." Wilgoren, *supra* note 22.

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state of Michigan, the Justice Department would send letters “inviting” these men to come to “voluntary” interviews, as opposed to having investigators knock on doors at the homes of Arab men. At the news conference, Collins read a portion of the letter which stated:

Your name was brought to our attention because, among other things, you came to Michigan on a visa from a country where there are groups that support, advocate, or finance international terrorism. . . .

While this interview is voluntary, it is crucial that the investigation be broad based and thorough, and the interview is important to achieve that goal. We need to hear from you as soon as possible—by December 4.²⁵

Boyd defended the interviews against criticism that the Justice Department was engaged in a dragnet interrogation process by explaining how the interviews were designed to assist the government's September 11 investigation: “You start out by casting your net broadly—overly broadly—and we narrow down to a group that is helpful.”²⁶ In an attempt to make the interviews as comfortable as possible, Collins asserted that persons receiving the Justice Department's letter were free to bring an interpreter or lawyer and could choose the location of the interview.²⁷ Boyd conceded that some of the men targeted for interviews may have violated immigration laws, but he nonetheless claimed that this remained consistent with the Attorney General's earlier statement that these men were not criminal suspects.²⁸

²⁵ Jim Schaefer, *U.S. Softens Tactics in Terror Questioning*, DETROIT FREE PRESS, Nov. 27, 2001, at 1A; see also Allan Lengel, *Arab Men in Detroit to Be Asked to See U.S. Attorney*, WASH. POST, Nov. 27, 2001, at A5.

²⁶ Micheline Maynard, *U.S. Officials Explain Interview Plans at a Community Forum*, N.Y. TIMES, Nov. 21, 2001, at B7.

²⁷ Lengel, *supra* note 25.

²⁸ David Shepardson, *Community Airs Hate Crime Fears at Forum*, DETROIT NEWS, Nov. 21, 2001, at 3A. Boyd maintained that the interviews were strictly “voluntary.” *Id.* (“Voluntary means voluntary. If someone doesn’t want to be interviewed and says no, that’s it.”). However, some local police officials’ comments may have signaled to the men on the list that the interviews were—for all intents and purposes—mandatory. For example, William Dwyer, the president of the Michigan Association of Chiefs of Police, suggested that Arab men could not simply fail to respond to the letter and expect to be off the hook. See Lengel, *supra* note 25 (noting Dwyer’s emphasis on “follow-up” for

Boyd and Collins's news conference was held a few days after an internal memorandum from the Immigration and Naturalization Service (INS) was leaked to the press, which suggested that the interviews were a potential vehicle to identify immigration violators and persons connected with the September 11 attacks.²⁹ The memo, written by an INS official, stated that immigration violators would be detained and held without bond.³⁰ According to the memo, requests by FBI agents "to detain immigration violators under 'no bond' should be honored and [would] be handled in the same manner as all prior cases with a direct nexus to the Sept. 11 investigation."³¹ A spokeswoman for the INS acknowledged the existence of the memo but claimed that Attorney General Ashcroft's original policy remained intact: "Our primary purpose here is not identifying immigration law violations . . . but at the same time, it is our job to uphold the law. If we come across violators, we will report them."³²

Arab-American groups, advocates for immigrants and even a few police chiefs protested that the Attorney General's order amounted to racial profiling. Some police officials who were asked to conduct the interviews publicly complained that the interviews violated their policies opposing racial profiling.³³ Some local police officials feared that the Justice Department's interrogations might violate civil liberties and create a false perception that the police were treating the

people who did not interview with authorities since "we're at war"). In Florida, the president of the International Association of Chiefs of Police was more blunt about how "voluntary" the interviews were: "Agreeing with federal authorities that the interviews are voluntary, [one police chief] said it's in the [alien's] best interest to cooperate. If they say I'm not telling you, then you know what, you're going back home." Megan O'Matz & Jeff Shields, *Federal Queries Worry Muslims*, SUN-SENTINEL (Ft. Lauderdale), Nov. 29, 2001, at 1A.

²⁹ *Memo Adds to Suspicion of Immigrants on Interviews*, N.Y. TIMES, Nov. 29, 2001, at B6.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See, e.g., Jodi Wilgoren, *University of Michigan Won't Cooperate in Federal Canvass*, N.Y. TIMES, Dec. 1, 2001, at B6 (citing police departments that refused to cooperate or objected to the Justice Department's program).

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interviewees as criminals,³⁴ while other police officials noted that the Justice Department had not explained how they had compiled the list of five thousand men.³⁵ Moreover, some police officials stated that they were confused about how to proceed with the interviews.³⁶ One deputy police chief in a Michigan suburb said, "We don't even know what we'd be looking for [when conducting the interviews.]"³⁷

After the controversy surrounding the interrogations faded from the forefront of the national news media, a few thoughtful legal commentators decided that the interviews did not raise the worst problems associated with racial or ethnic profiling. Professor Eric Muller, an expert on the internment of Japanese-American citizens in the aftermath of the Pearl Harbor attack, has concluded that the Justice Department's "program of interrogation, if it was ethnic profiling at all, was ethnic profiling with a decidedly light touch."³⁸ Muller acknowledges the difficulty in accepting the government's initial claim that the interrogation program was ethnically neutral.³⁹ "But on closer examination," Muller finds

³⁴ See Fox Butterfield, *Police Are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1 (quoting Detroit Police Chief Charles Wilson saying that "he did not want his officers to go out and treat people like criminals or even go out and find these people").

³⁵ *Id.*

³⁶ Jodi Wilgoren, *Michigan Officers Fear Pressure of U.S. Plan*, N.Y. TIMES, Nov. 17, 2001, at B1 (quoting Robert Stevenson, a deputy police chief in Livonia, Michigan).

³⁷ *Id.*

³⁸ Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 577 (2002).

³⁹ See *id.* at 575. Muller notes:

We might roll our eyes when our government today defends its interrogation program as ethnicity-neutral. After all, while the five thousand young men may not have been selected because they are Arab, we do know that they were selected because they arrived recently from countries where al Qaeda operates, and that certainly sounds like a pretext for anti-Arab discrimination.

Id.

that “the government's defense of its program is plausible.”⁴⁰ Muller contrasts the mildness of the Justice Department's interviews with the coercive and oppressive nature of the federal government's policies toward Japanese aliens and Japanese-American citizens sixty years ago.⁴¹

Professors Samuel Gross and Debra Livingston are undecided as to whether the interrogations constituted ethnic profiling.⁴² Gross and Livingston contend that “even assuming that ethnicity was a central factor in the selection of subjects,” it remains ambiguous whether this amounts to ethnic profiling.⁴³ According to Gross and Livingston, ethnic profiling does not occur if government officers “focus their attention on people of a given ethnicity because the police have information that the specific crime they are investigating was committed by someone of that ethnic group.”⁴⁴ According to their analysis, the interrogations did not amount to ethnic profiling “if the sole purpose for this interview program was to determine whether any of the thousands to be interviewed was involved in this conspiracy,

⁴⁰ *Id.* at 575-76. In reaching this conclusion, Muller notes that the number of Arab aliens selected for interrogation, five thousand, was a small percentage—just under three percent—of the total number of Arab aliens living in the United States, which was approximately 170,000. “[A] number so small [seems] to suggest that the government did in fact target people for questioning on the basis of criteria other than the raw fact of their origin in an Arab country.” *Id.* at 576. Muller also relies on the fact that “despite dire predictions that the supposedly information-gathering interviews would be mere pretext for coercive criminal interrogations, this turned out not to be so.” *Id.*

⁴¹ *See id.* at 591 (noting that the Bush Administration has not utilized extreme measures against aliens of Arab ancestry or Muslim faith but has “proceeded from a *premise of moderation*”).

⁴² Gross & Livingston, *supra* note 2. Gross and Livingston attempt to answer the question of whether the interviews constitute racial or ethnic profiling by considering five factors, *see id.* at 1418-30, which they insist are “often inextricably intertwined.” *Id.* at 1418.

⁴³ *Id.* at 1420.

⁴⁴ *Id.* Gross and Livingston later state that:

The Justice Department's interview program may not be expressly aimed at [Middle Eastern Muslim men], but it has this effect. It is explicitly aimed at individuals from Middle Eastern countries and other countries with an al Qaeda presence—and for good reason. Although other groups and individuals have committed terrorist acts in the United States, before September 11 and probably after, it is very likely true that al Qaeda, an organization that consists entirely of Muslim men, primarily from the Middle East, poses the greatest immediate threat of mass terrorist killings.

Id. at 1422-23.

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or had information that might lead to those who were.”⁴⁵
Gross and Livingston concede, however, that

the Justice Department's program *would* involve ethnic profiling if it was undertaken even in part based upon a general belief that Middle Eastern men are more likely to commit acts of terrorism than people of other ethnic groups—if it was based upon a global assumption about the criminal propensities of people of Middle Eastern descent.⁴⁶

In sum, Professors Gross and Livingston find it impossible to determine whether the Justice Department's interrogations constitute ethnic profiling: “The answer turns out to be a draw.”⁴⁷

Although reasonable minds might differ with Attorney General Ashcroft's assertion that the Justice Department compiled the list in an ethnically-neutral manner, there is no debate regarding one key aspect of the list. There was no evidence revealed to the public that the men targeted for interrogations had any connection with terrorism or the events of September 11. According to one police chief who was asked to conduct the interviews, neither the Justice Department nor the FBI provided any specific details on why the men were targeted for interrogation.⁴⁸ The Justice

⁴⁵ *Id.* at 1421.

⁴⁶ *Id.* Gross and Livingston acknowledge that “it is probably impossible” to draw the type of distinction they propose in a case like the September 11 investigation, which involves a “far-flung conspiracy.” *Id.*

⁴⁷ *Id.* at 1436. Gross and Livingston assert that the interview process is: ethnic profiling to the extent that the FBI is operating on a general assumption that Middle Eastern men are more likely than others to commit acts of terror; it is not to the extent that the agents are pursuing case-specific information about the September 11 attacks, albeit in a dragnet fashion. In practice, we cannot separate or distinguish between these two conditions.

Id.

⁴⁸ See Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7 (describing the complaint of the acting Police Chief of Portland, Oregon, that the FBI list “contained ‘no specifics’ about what crimes the 5,000 men might be involved with”); see also Butterfield, *supra* note 34 (noting concern of the executive director of the Police Executive Research Forum that local police departments that have been asked to conduct interviews were not told “why certain names were put on the list. All that has been said is that the men have legally traveled to the United States in the past two years from nations with suspected terrorist links.”).

Department lacked even a reasonable suspicion to believe that any of the men selected for interrogation had committed a crime or had a connection with known terrorists or the September 11 attacks.⁴⁹ The bottom line is that the Justice Department was engaged in a fishing expedition to find individuals who might know something about the horrific events of September 11.

In my view, the timing and criteria used to target the men for interrogation and the methods employed by the federal government indicate that the Justice Department's list is a clear example of ethnic profiling. Justice Department officials were responding to a national emergency while also trying to prevent future attacks. The nineteen terrorists who conducted the attacks on September 11 came from Middle Eastern countries. If the government was interested in gathering information about future terrorism, common sense indicates that the government should question individuals with similar backgrounds. As the special agent in charge of the Detroit FBI office conceded, this might be a form of profiling, but the government had little choice: "Terrorists aren't born. Terrorists have to recruit members. It doesn't make much sense to go to people in northern Canada and talk to them about it."⁵⁰

While the timing and release of the list appears logical—the nation had been recently attacked by a terrorist network devoted to the destruction of Americans—the list raised the fears of those selected for interrogation. Arabs and Muslims living in this country understood the need for an

⁴⁹ Butterfield, *supra* note 34.

⁵⁰ Jim Schaefer, *840 Face Anti-Terror Net Locally: Men with Mideast Ties to be Questioned*, DETROIT FREE PRESS, Nov. 15, 2001, at 1A (quoting special agent John Bell as "acknowledg[ing] that the interviews could be seen as profiling—all the men are Middle Eastern, all ages 18 to 33—but said the government has little choice. The effort aims to find anyone who may have had contact with bin Laden's al-Qaeda organization."); see also COLE, *supra* note 4, at 53 (noting that, "[i]n the immediate aftermath of the September 11 attacks, a reasonable argument could be made that the use of ethnic and immigrant identity as factors in the investigation of those attacks did not constitute ethnic profiling"). Cf. Steve Brill, *The FBI Gets Religion*, NEWSWEEK, Jan. 28, 2002, at 32. Brill argued that law enforcement officers,

like reporters, always have to question lots of people in hopes of finding someone who might know something or someone—or who might later hear about someone who knows someone. The only thing that has to be justified is the decision to target people coming from particular countries, and that kind of 'profiling' becomes a lot less controversial once the mind-set—and the articulated goal—has to do with getting information, not grilling suspects.

Id.

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investigation, but many critics of the Justice Department's interrogations viewed the list as a government investigation focused on ethnicity rather than on suspicious conduct.⁵¹ As the executive director of the American Arab Chamber of Commerce asserted, “[w]e've gone from an investigation into the attacks committed [on] Sept. 11 to investigating an entire race, and that's dangerous.”⁵² Many students from Middle Eastern countries, for example, were fully aware, like everyone else, that the September 11 attackers allegedly “plotted the attacks in Germany and England, and suspected ringleader Mohamed Atta traveled to Spain and the Czech Republic.”⁵³ Despite these connections to certain European nations, the Justice Department did not announce that foreign students from European countries were targeted for interviews. The director of international education at the University of Colorado summarized the views of many Middle Eastern students when he noted, “[t]he students are not sure what the purpose of the questions are [sic] . . . [b]ut they know that the government isn't interviewing any students from Germany.”⁵⁴

Moreover, the publicly announced criteria used to compile the list “certainly sounds like a pretext for anti-Arab discrimination.”⁵⁵ While Bush Administration officials insisted that the list was ethnically-neutral, the distinction drawn by these officials—that a classification based on

⁵¹ See Wilgoren, *supra* note 22 (noting that Arabs and Muslims living in the United States felt “the government is sanctioning suspicion based on background, not behavior”).

⁵² Geralda Miller, *Federal Plan to Interview Arab Men Called “Dangerous,”* GRAND RAPID PRESS, Nov. 21, 2001, at D6 (quoting Nasser Beydoun, executive director of the Arab Chamber of Commerce).

⁵³ Karen Gullo, *Investigators Questioning 5,000 Foreigners in U.S.*, SEATTLE TIMES, Nov. 14, 2001, at A5.

⁵⁴ Jacques Steinberg, *A Nation Challenged: The Students, U.S. Has Covered 200 Campuses to Check Up on Mideast Students*, N.Y. TIMES, Nov. 12, 2001, at A1 (quoting Larry Bell, Director of International Education of University of Colorado); see also COLE, *supra* note 4, at 49 (noting persons targeted for questioning were from countries “where support for Al Qaeda was believed to exist, but apparently did not include Great Britain, France, Spain, or Germany, even though Al Qaeda suspects from each of these countries have been captured”).

⁵⁵ Muller, *supra* note 38, at 575.

nationality is different from a classification based on ancestry or ethnicity—is often ambiguous. As Professor Mariano-Florentino Cuellar recently noted:

Race and national origin often correlate highly, can be observed in tandem, and are treated similarly in constitutional adjudication. Both kinds of profiling involve a probability judgment that a particular person is worth the attention of law enforcement, whether at the investigative, administrative enforcement, or prosecution stage.⁵⁶

Justice Brennan made a similar observation in *Saint Francis College v. Al-Khazraji*,⁵⁷ writing that “the line between discrimination based on ‘ancestry or ethnic characteristics,’ and discrimination based on ‘place or nation of . . . origin,’ is not a bright one.”⁵⁸ Classifications based on ethnicity and nationality can be two sides of the same coin. As Justice Brennan recognized, a person can be born into a nation whose “primary stock is one’s own ethnic group.”⁵⁹

Finally, when one combines the razor-thin distinction proffered by the Justice Department with the dragnet qualities of the interrogations, it becomes difficult to avoid the suspicion that the Department is trying to have it both ways. The Department vehemently denies that the list constitutes ethnic profiling, but simultaneously insists on the authority to conduct suspicionless interrogations of men from Middle Eastern countries that are dominated by persons of Arab ancestry. As Professor David Cole characterized the Department’s list, “[t]his is as close as you get to ethnic profiling without literally relying on ethnicity.”⁶⁰ While

⁵⁶ Mariano-Florentino Cuellar, *Choosing Anti-Terror Targets by National Origin and Race*, 6 HARV. LATINO L. REV. 9, 16 (2003).

⁵⁷ 481 U.S. 604 (1987).

⁵⁸ *Al-Khazraji*, 481 U.S. at 612 (Brennan, J., concurring) (citations omitted).

⁵⁹ *Id.* (conceding that ancestry and nation original are not always the same; “[o]ften, however, the two are identical as a factual matter: one was born in the nation whose primary stock is one’s own ethnic group”).

⁶⁰ Gullo, *supra* note 53; see also Lisa Biank Fasig, *ACLU Urges Police: Refuse to Help U.S. Government Detain Immigrants*, PROVIDENCE JOURNAL-BULLETIN, Dec. 3, 2001, at B3 (quoting executive director of Rhode Island ACLU, describing list as, “nothing but thinly disguised racial profiling”). In a subsequent detailed discussion of the topic, Professor Cole concludes that the government’s list of Arab and Muslim men selected for interviews and other policies that target only Arabs and Muslim aliens “look[s] like what a clever young lawyer would come up with if directed by his superiors to ‘develop a program for

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Department officials and others insist that the list is ethnic-neutral, the persuasiveness of this claim may depend on whether you are one of the men targeted on the government's list. Under the circumstances, the Justice Department's distinction between ethnicity and national origin is distinctly reminiscent of the claim that discrimination on the basis of pregnancy is not gender discrimination,⁶¹ and discrimination on the basis of Spanish language ability is not ethnic discrimination.⁶² The persuasiveness of those assertions may also turn on whether you are a woman or bilingual.⁶³

A few years ago, the traffic enforcement practices of the New Jersey State Police made national headlines due to allegations of racial profiling by individual troopers. Imagine if the commander of the State Police defended his troopers with the following reply:

We are not engaged in racial profiling of black drivers per se. Troopers do not target or stop black female drivers, nor do

targeting Arabs and Muslims but make sure we can deny that it is ethnic profiling." COLE, *supra* note 4, at 52. According to Cole:

[A]s the September 11 investigation turned into a more general war on terrorism of indefinite (and potentially infinite) duration, encompassing not a specific locality but the whole nation and indeed the entire world, and not a specific group but all "terrorists of global reach," the Justice Department's reliance on Arab and Muslim identity has come to look more and more like the Army's use of Japanese ancestry as a proxy for suspicion during World War II.

Id. at 54.

⁶¹ See *Geduldig v. Aiello*, 417 U.S. 484, 494-95 (1974) (holding that a state's insurance program that excluded disability protection for normal pregnancy and childbirth was not invidious discrimination against women under the Equal Protection Clause). Cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 264 (1993) (ruling that animus towards abortion did not constitute class-based animus towards women under federal civil rights statute).

⁶² See *Hernandez v. New York*, 500 U.S. 352, 360-62 (1991) (holding that prosecutor's use of peremptory challenges to exclude potential jurors who were bilingual is not forbidden ethnic discrimination under Equal Protection Clause).

⁶³ Justice Department officials might have been more credible if they had acknowledged that the men were included on the list because of their ethnicity, and that a national emergency justified the ethnic classification. See *Korematsu v. United States*, 323 U.S. 214, 219-20 (1944) (compelling governmental interest justified racial classification). Cf. William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31 ("To meet a terrorist emergency, of course some rules should be stretched and new laws passed. An ethnic dragnet rounding up visa-skippers or questioning foreign students, if short-term, is borderline tolerable.").

troopers target or stop older black drivers, whether male or female. Troopers only target young, male African-Americans, who drive new model vehicles or rental cars, which is only a small sub-set of all the black drivers who travel on the Turnpike.

I suspect that many would quickly dismiss this explanation of why New Jersey State troopers disproportionately stop young, black drivers as a sham. Yet Justice Department officials and others appear to offer a markedly similar analysis by insisting that targeting five thousand young aliens from Arab countries does not amount to ethnic profiling. The federal government claims that targeting these men from predominately Arab countries is not the equivalent of targeting Arabs per se. Yet if this explanation is sufficient to repel a charge of ethnic profiling, then the reply of my hypothetical commander of the New Jersey State Police is an equally plausible defense to charges of racial profiling.

Consider the reaction of police officials in a small, rural and predominately white town in upstate New York following the attack of a seventy-seven-year-old white woman. The woman said, "her attacker was a black man wielding a 'stiletto-style' knife whose arms and hands she cut fending them off."⁶⁴ Police officials then compiled a list of the black and Hispanic male students registered at the State University of New York College at Oneonta.⁶⁵ Police and campus police officers then used the list "to track down black and Hispanic students in their dormitories, at their jobs and in the shower. From each, the police demanded to know his whereabouts when the attack occurred; each had to show his arms and hands."⁶⁶ When no suspects were immediately apprehended, the police then "conducted a 'sweep' of Oneonta, stopping and questioning non-white persons on the streets and inspecting their hands for cuts."⁶⁷ Over two hundred individuals were questioned during a period of several days.⁶⁸

⁶⁴ Diana Jean Schemo, *College Town in Uproar Over "Black List" Search*, N.Y. TIMES, Sept. 27, 1992, at 33; see also *Brown v. City of Oneonta*, 221 F.3d 329, 334 (2d Cir. 2000).

⁶⁵ *Brown*, 221 F.3d at 334.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

A federal appeals court subsequently concluded that the police action in Oneonta did not amount to a racial classification under the Equal Protection Clause.⁶⁹ Compiling a list of black and Hispanic students and subjecting those individuals to interrogation (and possibly detention) was not “racial profiling” per se because police focused on “not only race, but also gender and age, as well as the possibility of a cut on the hand.”⁷⁰ Although the federal judiciary viewed the police practices in Oneonta as race-neutral, others disagreed with that assertion.⁷¹ While my objective is not to re-litigate the issue in *Brown v. City of Oneonta*, I mention the Oneonta “list” because, similar to the Justice Department “list,” deciding whether governmental action constitutes racial or ethnic profiling is sometimes a judgment call.⁷²

In my view, the distinction proffered by the Justice Department—classifying Arab aliens based on nationality versus classifying Arabs aliens based on ancestry or

⁶⁹ *Id.* at 337.

⁷⁰ *Id.*

⁷¹ See, e.g., Alschuler, *supra* note 1, at 181 (“Presumably the police [in Oneonta] did not classify by age or gender either, because they did consider race. In the magic land of Oneonta, police officers who classify on more than one basis classify on none. One plus one equals zero.”); Ramirez, et al., *supra* note 1, at 1219 (noting that the ruling “illustrates the folly of attempting to stop or question every person who fits a general description such as ‘young black male’ without relying on any more specific and readily identifiable characteristics. To do so allows police to focus almost exclusively on the racial element of the victim’s description.”); Bob Herbert, *In America: Breathing While Black*, N.Y. TIMES, Nov. 4, 1999, at A29 (asserting that the police response in Oneonta “went far beyond the problem of driving while black. People were being stopped in Oneonta for breathing while black.”). Cf. R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075 (2001) (criticizing the widely accepted distinction between racial profiling, which is generally condemned, and the use of a race-based perpetrator description, which is generally accepted as a permissible use of race by law enforcement officials).

⁷² Defining ethnic or racial profiling in this context is no easy task. Although I do not offer a bright line rule defining ethnic profiling, I do share the views expressed in a report issued by the New Jersey Attorney General’s Office on racial profiling in the context of traffic enforcement. The New Jersey Attorney General defined racial profiling broadly “to encompass any action taken by a state trooper during a traffic stop that is based upon racial or ethnic stereotypes and that has the effect of treating minority motorists differently than non-minority motorists.” Verniero & Zoubek, *supra* note 3, at 47. In other situations, determining whether a racial classification exists is easy. See *Korematsu v. United States*, 323 U.S. 214, 216-20 (1944).

ethnicity—is unpersuasive given the context. The government was responding to a national emergency and knew that all of the September 11 attackers came from a Middle Eastern nation. The government's objective was to locate others who might have aided the September 11 attacks or knew of future attacks. The Justice Department then proceeded to compile a list of young men from mostly Middle Eastern and Muslim nations, and subsequently targeted those men for “voluntary” interviews with federal Anti-Terrorism Task Force officers. Although conceding that none of the men on its list were criminal suspects, and lacking any reasonable suspicion that the men were connected specifically with the September 11 attacks or terrorist organizations, the government claimed that these men might have helpful information for law enforcement's September 11 investigation. In light of these circumstances, the government's investigative procedure following September 11 amounted to an ethnic-based fishing expedition.⁷³

*B. Were The Interviews “Seizures” Under
The Fourth Amendment?*

Whether the Justice Department's list amounts to ethnic or racial profiling is immaterial for determining the permissibility of the interviews under the Fourth Amendment. As previously noted, an officer's subjective intent or racial bias is irrelevant to ordinary police procedures according to *Whren*. The Fourth Amendment issue in *Whren* arose from a traffic stop, which obviously constitutes a seizure. The Department, of course, insists that the interviews were not “seizures” under the Fourth Amendment because they were consensual. To determine the validity of this assertion, it is inconsequential whether the judiciary believes that the list itself or the motivations behind the compilation of the list constituted racial or ethnic profiling. While it may seem illogical to the non-lawyer, the question of whether the interviews trigger Fourth Amendment protection is unrelated to determining if the government's decision to conduct the interviews was motivated by ethnic concerns.

The Justice Department maintained that the interrogation of young aliens did not implicate the Fourth

⁷³ Defending the interview process, the Justice Department's top civil rights official, Ralph Boyd, Jr., offered a polite description of the “dragnet” procedure employed by the Department: “You start out by casting your net broadly—overly broadly—and we narrow down to a group that is helpful.” Maynard, *supra* note 26.

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Amendment because the interviews were voluntary. On the other hand, opponents of the government's interview procedure contend that many of the men targeted for questioning felt they were in no position to resist the government's request. Someone unfamiliar with nuances of the Supreme Court's search and seizure doctrine might find the government's claim hard to swallow. The Department's position, however, is supported by the Court's precedent.⁷⁴ The Court has stated that police questioning typically does not trigger constitutional scrutiny.⁷⁵ A seizure occurs under the Fourth Amendment only when a person no longer feels free to leave a police-citizen encounter or does not feel free to avoid or terminate police contact.⁷⁶ Although police officials are permitted to question a person without cause or suspicion of criminality, *according to the law*, that person is equally free to ignore the police inquiry.⁷⁷ Moreover, a person's decision to leave the scene of a police encounter or refusal to cooperate with the police does not provide legal cause for police detention of the individual.⁷⁸

The Court's most recent decisions clarify the tactics that law enforcement officials may use to question individuals without raising constitutional concerns. *United States v. Drayton*⁷⁹ addressed the constitutionality of a "bus sweep" conducted by Tallahassee, Florida police officers.⁸⁰ Ten years earlier, in *Florida v. Bostick*, the Court ruled that bus sweeps were not a separate category of police-citizen encounters

⁷⁴ See *Florida v. Bostick*, 501 U.S. 429 (1991).

⁷⁵ *Bostick*, 501 U.S. at 434; *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion).

⁷⁶ *Bostick*, 501 U.S. at 434.

⁷⁷ *Id.* at 435-36

⁷⁸ See *Royer*, 460 U.S. at 497-98.

⁷⁹ 536 U.S. 194 (2002).

⁸⁰ *Drayton*, 536 U.S. at 203-04. During a bus sweep, police officers systematically or randomly question passengers about their itinerary and seek consent to search the passenger's person or luggage.

under the Fourth Amendment.⁸¹ *Bostick* held that a seizure does not occur simply because a police confrontation unfolds inside the cramped confines of a bus.⁸² *Bostick* explained that bus sweeps should be judged by the same standard applicable to other police-citizen encounters: considering “all the circumstances surrounding the encounter,” would a reasonable person feel free to terminate or avoid the encounter?⁸³

The issue in *Drayton* concerned “whether officers must advise bus passengers during these encounters of their right not to cooperate.”⁸⁴ *Drayton* involved the following facts: during a stop in Tallahassee, three police officers boarded a Greyhound bus en route from Fort Lauderdale, Florida to Detroit, Michigan.⁸⁵ After the driver left the bus, one officer sat on the driver's seat and watched the rear of the bus.⁸⁶ The other two officers, Lang and Blackburn, proceeded to the rear of the bus and began questioning passengers.⁸⁷ Lang approached Drayton and Brown, who were seated next to each other with Drayton sitting in the aisle seat. Lang identified himself as a police officer, put his face within twelve to eighteen inches of Drayton's face and said in a quiet tone: “I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction [sic], attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?”⁸⁸ Drayton and Brown pointed to a bag in the luggage rack, and Lang received their permission to search the bag.⁸⁹ After failing to find incriminating evidence in the bag, Lang asked if

⁸¹ *Bostick*, 501 U.S. at 439-40.

⁸² *Id.* at 439.

⁸³ *Id.*

⁸⁴ *Drayton*, 536 U.S. at 197.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 197-98.

⁸⁸ *Id.* at 198.

⁸⁹ *Id.*

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either man was carrying weapons or drugs on their persons.⁹⁰ Lang first requested and received permission to search Brown. Lang frisked Brown and discovered hard objects near Brown's thighs that he suspected were packages of drugs.⁹¹ Brown was subsequently arrested and removed from the bus.⁹² Lang then asked and obtained Drayton's permission to search his person.⁹³ A patdown of Drayton's thighs revealed similar hard objects.⁹⁴ Drayton was arrested and a later search of the men disclosed packages of powder cocaine taped between several pairs of boxer shorts.⁹⁵

Addressing the constitutional validity of the officers' encounter, the Court decided whether Drayton and Brown voluntarily consented to the search and if a seizure had occurred under the Fourth Amendment.⁹⁶ With regard to the issue of seizure, the Court first criticized the Eleventh Circuit for adopting "what [was] in effect a *per se* rule that evidence obtained during suspicionless drug interdiction efforts aboard buses must be suppressed unless the officers have advised passengers of their right not to cooperate and to refuse consent to a search."⁹⁷ Speaking for the majority, Justice Kennedy reiterated the Court's previous view that *per se* rules are inappropriate for determining if a police-citizen encounter constituted a seizure.⁹⁸ Applying the traditional

⁹⁰ *Id.* Apparently Officer Lang's suspicions were aroused because Drayton and Brown "were wearing heavy jackets and baggy pants despite the warm weather. In Lang's experience drug traffickers often use baggy clothing to conceal weapons or narcotics." *Id.* at 199.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 200 (explaining that Drayton and Brown "were not seized and their consent to search was voluntary").

⁹⁷ *Id.* at 202.

⁹⁸ *Id.* at 201.

“totality” test, Justice Kennedy found that a seizure had not occurred when the officers “boarded the bus and began questioning passengers.”⁹⁹ According to Justice Kennedy, the facts reflected an encounter that was cooperative and devoid of coercion or confrontation.¹⁰⁰ “There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice.”¹⁰¹

To bolster his conclusion, Justice Kennedy asserted, without proof or empirical support, that the surroundings of the bus may have enhanced a person's confidence during a police encounter: “[B]ecause many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.”¹⁰² Justice Kennedy also asserted—again without empirical support—that “bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them.”¹⁰³

In addressing whether Drayton and Brown voluntarily consented to the search, Justice Kennedy initially noted that, “where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.”¹⁰⁴ Once the Court coupled the seizure and

⁹⁹ *Id.* at 203.

¹⁰⁰ *Id.* at 203-04.

¹⁰¹ *Id.* at 204.

¹⁰² *Id.*

¹⁰³ *Id.* at 205. Justice Kennedy was unimpressed with the defendants' claims that Officer Lang's displaying of his badge, the position of the officer who sat in the driver's seat and Lang's testimony that very few passengers refuse to cooperate with his requests, supported their argument that a reasonable person would not feel free to resist Lang's inquiries. *Id.* at 204-05.

¹⁰⁴ *Id.* at 206. Justice Kennedy's analysis wrongly conflates the issues of “consent” and “seizure.” In *Drayton*, Justice Kennedy “implicitly adopted the same ‘free to refuse/terminate’ test for deciding voluntariness of consent to search that has been used since *Bostick* for deciding the seizure question.” Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 162. This is not the first time the Court has confused the issues of consent and seizure—the *Bostick* Court made a similar error. See 4 WAYNE R. LAFAVE, SEARCH & SEIZURE § 9.3(c), at 122 (3d ed. 1996) (noting that

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consent analyses, it became evident that the Court would ultimately hold that Drayton and Brown voluntarily consented to the search of their luggage and persons. The absence of police notification that the men had a constitutional right to refuse consent was inconsequential. "Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable."¹⁰⁵

Within one year of *Drayton*, the Court decided *Kaupp v. Texas*,¹⁰⁶ a unanimous per curiam ruling. *Kaupp* addressed whether seventeen-year-old Robert Kaupp had been seized when several police officers entered his home at approximately 3 a.m., awoke a sleeping Kaupp after his father

the *Bostick* Court remanded the issue to Florida courts to determine whether Bostick had consented to search of his luggage). Despite Justice Souter's observation that the issues of consent and seizure involve considering different criteria, *Drayton*, 536 U.S. at 208 n.1 (Souter, J., dissenting), Justice Kennedy refused to alter his assertion that "where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts." *Id.* at 206. Justice Kennedy's opinion may be signaling a change in the law. In *United States v. Mendenhall*, 446 U.S. 544 (1980), a majority of the Court adopted the "totality of the circumstances" standard announced in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for determining the voluntariness of a person's consent under the Fourth Amendment. Under *Schneckloth*, voluntariness for Fourth Amendment purposes considers "the characteristics of the accused," 412 U.S. at 226, "the nature of a person's subjective understanding" of the police confrontation, *id.* at 230, as well as all the objective facts surrounding the police-citizen encounter, *id.* at 233. In *Mendenhall*, a majority of the Court agreed that Mendenhall's race, gender and educational background were "not irrelevant" to the issue of whether Mendenhall had consented to accompany two white male federal Drug Enforcement Administration agents to an interrogation room. 446 U.S. at 558. Perhaps, Justice Kennedy's opinion in *Drayton* was meant to signal that when deciding consent questions, judges should no longer focus on the subjective considerations and perceptions of the police target but instead focus on the hypothetical "reasonable" individual.

¹⁰⁵ *Drayton*, 536 U.S. at 207. After this statement, Justice Kennedy added a curious paragraph:

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

Id.

¹⁰⁶ 123 S. Ct. 1843 (2003) (per curiam).

allowed the officers into the home and told Kaupp “we need to go and talk.”¹⁰⁷ Kaupp replied, “`Okay,” and was then handcuffed and escorted from his home “shoeless and dressed only in boxer shorts and a T-shirt” to a patrol car.¹⁰⁸ The police drove Kaupp to the location where the victim's body had been recovered, and later to the police station.¹⁰⁹ At the station, Kaupp was taken to an interrogation room, given his *Miranda* warnings and eventually confessed to his involvement in the murder of his half-sister.¹¹⁰

The Supreme Court quickly and easily reversed the Texas Court of Appeals conclusion that Kaupp had not been seized until after his confession. The Court explained that the facts “show[] beyond cavil” that Kaupp had been seized and arrested when the police escorted him from his home,¹¹¹ and there was no basis for concluding that Kaupp had voluntarily consented to leave his home with police.

Kaupp's “Okay” in response to [Detective] Pinkins's statement is no showing of consent under the circumstances. Pinkins offered Kaupp no choice, and a group of police officers rousing an adolescent out of bed in the middle of the night with the words “we need to go and talk” presents no option but “to go.” There is no reason to think Kaupp's answer was anything more than “a mere submission to a claim of lawful authority.”¹¹²

The nature of Kaupp's trip to the police station provided further evidence that police had seized Kaupp prior to his

¹⁰⁷ *Kaupp*, 123 St. Ct. at 1845.

¹⁰⁸ *Id.* The police suspected that Kaupp had been involved in the murder of his half-sister. *Id.* at 1844.

¹⁰⁹ *Id.* at 1845.

¹¹⁰ *Id.*

¹¹¹ The Court concluded that under a “straightforward application” of the reasonable person test, Kaupp had been seized. *Id.* at 1846.

A 17-year-old boy was awakened in his bedroom at three in the morning by at least three police officers, one of whom stated ‘we need to go and talk.’ He was taken out in handcuffs, without shoes, dressed only in his underwear in January, placed in a patrol car, driven to the scene of a crime and then to the sheriff's offices, where he was taken into an interrogation room and questioned.

Id. The Court asserted that “[t]his evidence points to arrest even more starkly than the facts in *Dunaway v. New York*, 442 U.S. 200, 212 (1979).” *Id.*

¹¹² *Id.* at 1847 (quoting *Florida v. Royer*, 460 U.S. 491, 496 (1983) (plurality opinion)).

confession. In the Court's view, "removal from one's house in handcuffs on a January night with nothing on but underwear for a trip to a crime scene on the way to an interview room at law enforcement headquarters" had all the earmarks of an arrest.¹¹³ Finally, the sheriff's department's practice of "routinely" transporting people in this manner for safety purposes, and Kaupp's failure to protest the police process, did not undermine the Court's judgment that a seizure had occurred.¹¹⁴

To the untrained eye, *Drayton* and *Kaupp* may appear to be polar opposites on a wide spectrum of police-citizen encounters: *Drayton* illustrates one end of the spectrum that allows police questioning without triggering constitutional safeguards; *Kaupp* depicts the other end representing those police practices that are not considered consensual encounters. For the vast middle ground between the two ends, police-citizen encounters are judged on a case-by-case basis according to a reasonable person standard. This interpretation of *Kaupp* and *Drayton* is erroneous. *Drayton* and *Kaupp* are not polar opposites but instead illustrate different legal principles. A police-citizen encounter is not considered a seizure, regardless of how coercive the encounter might be from an individual's perspective, *unless* the police engage in patently abusive and intimidating behavior.¹¹⁵ When properly understood, *Drayton* represents

¹¹³ *Id.*

¹¹⁴ *Id.* The Court explained that police "motivation of self-protection does not speak to how their actions would reasonably be understood" and "failure to struggle with a cohort of deputy sheriffs is not a waiver of Fourth Amendment protection, which does not require the perversity of resisting arrest or assaulting a police officer." *Id.*

¹¹⁵ See Nadler, *supra* note 104, at 163 (noting *Drayton* Court's "unstated concern—that the police be permitted to engage in suspicionless seizures and consentless searches so long as they avoid abusive or overly coercive tactics—is masked by its stated holding that citizens are not seized or involuntarily searched within the meaning of the Fourth Amendment if they feel free to refuse police requests"); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2170 n.102 (2002) (asserting that no one considers the Court's definition of "seizure" serious "since hardly anyone feels free to walk away from a police officer without the officer's permission. The actual (though unarticulated) definition is more like this: One is seized when a police officer behaves with a higher level of coercion than is ordinarily and reasonable in a brief street encounter."); see, e.g., *Bostick*, 501 U.S. at 437 (expressing doubt that a seizure had occurred during a bus sweep, majority notes that "officers did not point guns at [the passenger] or otherwise threaten him").

the enormous discretion and power of police to accost and interrogate persons without constitutional safeguards. *Kaupp*, on the other hand, illustrates the rarely invoked exception.¹¹⁶ In sum, *Drayton* and *Kaupp* symbolize the very narrow protection the Fourth Amendment provides against coercive police encounters.

When the constitutional validity of the Justice Department's voluntary interviews project are measured by standards reaffirmed in *Drayton* and *Kaupp*, it is highly unlikely that any court will find that the interrogation sessions constituted seizures under the Fourth Amendment. Evidence regarding the conduct of investigators during the interviews is sporadic and anecdotal and comes primarily from press reports. Newspaper stories suggest that the interviews never approached conditions that would trigger constitutional safeguards.¹¹⁷ There have been no reports of the type of police conduct that provoked the Court to reverse the judgment in *Kaupp*. No examples have surfaced involving the application of physical force, intimidating movements, overwhelming displays of force, brandishing of weapons, blocking of exits, threats, commands or use of authoritative tone of voice.¹¹⁸ Media accounts generally indicate that the interrogation sessions were consensual encounters under the Fourth Amendment. Even one of the more outrageous incidents described by the press fell far short of the conduct condemned in *Kaupp*.¹¹⁹

¹¹⁶ Cf. *Hayes v. Florida*, 470 U.S. 811, 815 (1985) (forcibly removing suspect from his home or other place, transporting him to the police station and detaining him at the station for investigative purposes is sufficiently like arrest to require probable cause).

¹¹⁷ See Brill, *supra* note 50, at 33 ("According to lawyers who sat in on 220 interviews across the country and nine people who were interviewed without lawyers, the sessions were polite, even solicitous. Gone were the grillings about prayer habits or votes cast. The agents asked the young immigrants 21 relatively benign questions from a script."); Niraj Warikoo, *Interviews of Arab Men Are Finished*, DETROIT FREE PRESS, Feb. 7, 2002, at 1B (noting that "two months and 300-plus interviews later, Arab-American leaders say the process in Michigan wasn't as bad as they expected").

¹¹⁸ See *Drayton*, 536 U.S. at 204 (listing criteria that might invoke Fourth Amendment protection).

¹¹⁹ Columnist Steven Brill described Ali Erikenoglu's encounter with FBI agents:

At about 10:30 on the night of Sept. 20, [2001,] Ali Erikenoglu heard rustling in the bushes below his bedroom in the small, three-family home he owns in Paterson, N.J. He got up, leaned out the window and saw, he says, "four or five men with flashlights" in his

In light of *Drayton*, it is very unlikely that any judge would find that the interviews constituted seizures. Although prevailing constitutional standards support the Justice Department's contention that the interrogation sessions were consensual, the soundness of that conclusion is tenuous at best. From both an objective and subjective perspective, it is difficult to imagine that a young Arab alien would feel free to refuse or ignore the federal government's request for an interview.¹²⁰ After the initial announcement of the Justice

backyard. The men identified themselves as the FBI and told him they needed to ask him some questions.

Erikenoglu says that while two agents roamed the apartment (except for the bedroom, where his wife remained sleeping) examining books, videos, religious plaques and papers, two others made him produce his license and passport, and his wife's passport. They spent about an hour asking a series of questions about how often he prays, what tourist sites he had visited, how often he had traveled abroad, "what kind of American are you" and "what is it about your religion that allows people like these terrorists to do what they did?"

Erikenoglu says the agents finally told him that someone from one of the construction jobs he had worked on had called and said that he had expressed sympathy for the terrorists after the bombing of the USS Cole. "I told them I never said anything like that," says Erikenoglu. "I complained that this is like McCarthyism—some anonymous person calls up, or maybe doesn't call up, but you have a Muslim name and there's the knock on the door asking who you voted for."

On the way out, Erikenoglu claims, one agent promised: "We'll be back to take you in cuffs if we find that one thing you told us is a lie, or if we find that any of your phone numbers got a call to or from a terrorist."

Brill, *supra* note 50, at 32-33.

¹²⁰ See *Morning Edition: Lawyers Speak Out About Immigration Charges Brought Against Foreigners in the US* (National Public Radio, Dec. 5, 2001). Karen Pennington, a Texas lawyer who has represented individuals targeted for interviews, stated that the "FBI has a great deal of control over these men's lives and that they may be putting themselves at risk should they fail to cooperate." *Id.* Pennington further asserted that once these men are approached, the interviews "become not voluntary but rather something that they will be compelled to participate in." *Id.* Mr. Omar Mahmood, a PhD student and American citizen who spent time studying in Yemen, agreed to meet with FBI officials with an attorney present. *Morning Edition: How Individual Rights Faring Under Law Enforcement's New Powers in the War on Terror's Domestic Front* (National Public Radio, Sept. 5, 2002). Mr. Mahmood found the interviews to be "[a] little daunting at first, but then after having gone through it, I felt that it wasn't that bad. It just felt like two guys were trying to do their job." *Id.* Mahmood, however, articulated the fears of other Arab-Americans: "It's easy to say you have nothing to hide, you should welcome these types of investigations when your house has already been raided, when your computer has never been confiscated, when your personal recordings have not been erased and taken away." *Id.* Twice in 2002, the FBI raided the home of Mahmood's father-in-law, even though he had not been charged. *Id.*

Department's interview procedures, press reports indicated that some Arab students experienced a great deal of anxiety. First, these students feared the power of the federal government. One Syrian student described his fear when he met two FBI agents on campus. The morning before the interview, the agents had gone to his home and told his mother that they wanted to ask him some questions.¹²¹ The power and reputation of the FBI does not require an extended explanation,¹²² and many young aliens in this country understand that a request from a FBI agent or federal prosecutor for an interview should not be ignored.¹²³

¹²¹ Greg Winter, *F.B.I. Visits Provoke Waves of Worry in Middle Eastern Men*, N.Y. TIMES, Nov. 16, 2001, at B1.

¹²² See, e.g., DIARMUID JEFFREYS, *THE BUREAU: INSIDE THE MODERN FBI* 7 (1995). The author quotes an FBI agent with twenty years of experience:

Nobody here talks much about [former FBI Director J. Edgar] Hoover anymore, nobody even thinks about him much. But his spirit is still with us. He's still the best director we ever had. Sure he did some dreadful things and he made some big, big mistakes, and I for one will tell you that that makes me ashamed. But there's this other side that is always ignored. He built an organization that couldn't be intimidated by anyone. To this day people think twice before they take on the FBI, and for good reason. Let me tell you, every time I go out there on the streets I give thanks that he did so.

Id.

¹²³ See Todd Richissin, *Critics Seek Limit to Terror Inquiries*, BALT. SUN, Dec. 22, 2001, at 1A. After *Drayton*, in some settings, the legal analysis used to determine whether an alien was "seized" will be the same analysis used to determine whether the alien "consented" to a police search or seizure. *Drayton*, 536 U.S. at 206 ("In circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts."); Nadler, *supra* note 104, at 162 (noting that seizure and consent issues "have essentially merged in *Bostick* and *Drayton*"). Prior to *Drayton*, some courts held that an alien's background is relevant in determining whether a seizure occurred. See, e.g., *United States v. Grant*, 920 F.2d 376, 382, 383 (6th Cir. 1990) (explaining that "the characteristics of a particular defendant" were relevant to the issue of whether a seizure had occurred, and concluding that "[d]ue to his ignorance of police practices in the United States and his status as an alien, [the defendant] most likely felt compelled to answer the agents' questions and to submit to their demands"). The analysis in *Grant* is inconsistent with the Court's repeated instructions, prior to *Drayton*, that the seizure issue should be determined from the perspective of the objective, "reasonable" person. See *Bostick*, 501 U.S. at 438 (seizure analysis presupposes reasonable, innocent person); *Mendenhall*, 446 U.S. at 554 (plurality opinion). Thus, "characteristics of a particular defendant," *Grant*, 920 F.2d at 382, would seem to be irrelevant to the seizure issue. On the other hand, a person's status as an alien should be relevant to the question of consent because "the characteristics of the accused" and "the nature of a person's subjective understanding," *Schneckloth*, 412 U.S. at 226, 230, are relevant to the issue of consent. Accordingly, courts may properly consider a person's alien status when determining the voluntariness of consent under the Fourth Amendment. For example, see the result in *People v. Valenzuela*, 33 Cal. Rptr. 802 (Ct. App. 4th Dist. 1994), where the California Court of Appeals found the alien-defendant's

For some Arab aliens, a stigma is directly attached to the interviews. A law student at Washington University in St. Louis compared the process to a round up of Arabs. “We want to see the perpetrators brought to justice, but this sort of sweeping investigation really carries with it the potential of marginalizing an entire demographic” population.¹²⁴ If members of an ethnic group feel marginalized or targeted for suspicion by the most powerful law enforcement agency in the country, it is difficult to imagine these same individuals exercising their right to say “no” when agents or prosecutors request a “voluntary” interview. Furthermore, many lawful resident aliens from Arab countries described another reaction—one that many Americans might not experience upon receiving a request for an interview from law enforcement officials. For instance, one Arab student noted his fear that, in light of the interview process, “Arab-Americans [would] try to hide their origins.”¹²⁵ Other Arab individuals living in the United States worried that they might be suspected of sympathizing with terrorists if they

consent to a search was involuntary because, among other reasons:

An American of normal intelligence might well be presumed to know his or her rights. The mere fact of an arrest would not necessarily affect an American defendant's knowledge of his or her rights. A foreigner may not be so well informed, however. To an alien, who is present in the country on sufferance and whose privilege to be here can be revoked, a request made by an official of the host (foreign) government may well not, in fact, imply a right to refuse such an official request. The risk of refusal may be too great. A person's experiences with authority figures may also reasonably indicate that compliance is mandatory. In addition, depending on the cultural customs and mores of the alien's home country, he or she may not appreciate the subtlety—assumed in this culture—that making a request implies a right to refuse.

Valenzuela, 33 Cal. Rptr. at 811-12 (footnote omitted). As noted earlier, *see supra* note 104, perhaps *Drayton* signals a change in the law regarding consent and whether a person's subjective characteristics are relevant to the issue of consent. There is no uncertainty, however, that *Drayton* reaffirmed the “reasonable person” test for determining whether a seizure has occurred. *See Drayton*, 536 U.S. at 202 (“The proper inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.”) (quoting *Bostick*, 501 U.S. at 436).

¹²⁴ Wilgoren, *supra* note 22.

¹²⁵ Danny Hakim, *Inquiries Put Mideast Men in Spotlight*, N.Y. TIMES, Nov. 16, 2001, at B10.

criticized United States policy in the Middle East.¹²⁶

In addition to these subjective fears, other practical reasons exist as to why Arab and Muslim aliens might feel compelled to acquiesce to the government's request for an interview. Some persons targeted for interviews had violated immigration restrictions or had expired visas.¹²⁷ The interviewees were not given *Miranda* warnings, because the Justice Department adamantly maintained that the interviews were not custodial interrogations.¹²⁸ Is it reasonable, however, for an alien who has violated United States immigration laws to believe he has the right to decline the government's request for an interview?¹²⁹ The government's refusal to articulate the consequences of declining an interview did not inspire confidence that such a person would remain unscathed. Although the Department repeatedly asserted that the interviews were voluntary, it never clarified what would happen if an alien refused to meet with police officials or if an alien exercised his Fifth Amendment right to remain silent during questioning. Moreover, how would an individual know he even had a right to remain silent if *Miranda* warnings were not given at the outset of the interview session?

These factors suggest that many, if not most, Arab aliens would have had difficulty refusing the federal government's request for a "voluntary" interview. Several weeks following the announcement of the interrogation sessions, President Bush stated that America was "at war" with foreign terrorists.¹³⁰ The President also asserted that foreign "guests" in our country should provide FBI agents with any information they might have about terrorists.¹³¹ At the same time that the President was sending this message, top Justice Department officials acknowledged their aggressive efforts to

¹²⁶ Mae Ghalwash, *Strangers in Their Own Country; Muslim Citizens May Not Agree with U.S. Policy but Love America*, HOU. CHRON., Dec. 16, 2001, at A.

¹²⁷ Attorney General's Guideline Memorandum, *supra* note 24.

¹²⁸ *Id.*

¹²⁹ In *Bostick*, the Court stated that the reasonable person test "presupposes an innocent person." 501 U.S. at 438.

¹³⁰ Remarks to U.S. Attorneys Conference, 2001 Pub. Papers II, 1459, 1462 (Nov. 29, 2001).

¹³¹ *Id.* at 1461.

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locate terrorists in the United States.¹³² Faced with such public admissions by the federal government and confronted with daily pressures of ethnic profiling and discrimination, it is highly unlikely that lawful resident aliens from Arab countries would have felt free to ignore a FBI request to talk about terrorism.¹³³ If most Americans feel compelled to talk to police officers during typical police encounters, why should we believe that resident aliens from Middle Eastern and Muslim countries would not have felt similarly compelled to talk with FBI agents about the events of September 11?

In the final analysis, few people sincerely believe that the Justice Department's interrogation program was truly "voluntary." Public statements by law enforcement officials were consistent with legal rules governing consensual police-citizen encounters. Moreover, press reports suggest that the procedures employed by FBI agents and other law enforcement officers during the interviews were consistent with controlling legal precedents. Thus, the Attorney General and other high-ranking officials could confidently assert that the interrogation sessions did not violate any constitutional liberties.¹³⁴ The significant point, however, is that the constitutional standard the federal government relied upon is "a sham."¹³⁵ The "reasonable person" test remains a hoax because it was never intended to measure the reality of police-citizen encounters. For over two decades, the Court has

¹³² Attorney General John Ashcroft, Attorney General Ashcroft Announces Responsible Cooperators Program (Nov. 29, 2001) (transcript available at http://www.usdoj.gov/ag/speeches/2001/agcrisisremarks11_29.htm) (last accessed Feb. 27, 2004).

¹³³ See generally Matthew Brezezinski, *Hady Hassan Omar's Detention*, N.Y. TIMES MAGAZINE, Oct. 27, 2002, § 6 (Magazine), at 50 (describing a seventy-three day detention in solitary confinement of an Egyptian, lawful resident alien).

¹³⁴ For example, George Tenet, Director of the CIA, told a reporter: [A]s the attorney general has noted in the last month, the FBI has conducted nearly 10,000 interviews with current and former Iraqi citizens residing here in the United States. All of these interviews were voluntary, and all were conducted within the strict confines of the Constitution. And they were conducted with the full respect to the rights and the dignity of those who were contacted by our agents. *Operation Iraqi Freedom* (MSNBC television broadcast, Apr. 17, 2003).

¹³⁵ Nadler, *supra* note 104, at 214 (explaining that under "the current state of the law, the [Supreme] Court's stated definitions of seizure and voluntary search are a sham.").

taken the position that a person approached and questioned by police officials will feel free to disregard the officials, ignore their inquiries or terminate the encounter. This conclusion—originally stated in *United States v. Mendenhall*¹³⁶—has never been supported by empirical evidence. Instead, the Court's judgment was a “prescriptive statement masquerading as a descriptive observation.”¹³⁷ Since *Mendenhall*, the Court has adhered to the reasonable person standard and *Drayton* continues this misguided approach despite extensive academic criticism.¹³⁸ The Court's conclusion in *Drayton* that no seizure occurred was not supported by empirical data; in fact, empirical data suggests that most people would not feel free to terminate a police encounter under the circumstances described in *Drayton*.¹³⁹ When the Court decides that a bus passenger feels free to ignore or decline cooperation with a police officer who places his face within inches of the passenger, the Justices are simply “using only intuitive reflections o[f] their own experience and . . . the imagined experience of other citizens.”¹⁴⁰

The outcome of *Drayton* reaffirms that the Court is not interested in a realistic assessment of the voluntary nature of police-citizen encounters. Like earlier precedents, *Drayton* “lends itself to a rather chilling interpretation: that lower courts are expected not to interfere with bus sweep procedures.”¹⁴¹ If *Drayton* sends the message that the judiciary should not inject a dose of “reality” into the bus sweep scenario, it is fair to assume that the judiciary and

¹³⁶ 446 U.S. 544, 555 (1980) (plurality opinion). Although the “reasonable person” test was announced by a plurality opinion in *Mendenhall*, a majority of the Court has reaffirmed that standard in subsequent cases. See *Florida v. Bostick*, 501 U.S. 429 (1991).

¹³⁷ James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 630 n.154 (1985).

¹³⁸ See e.g., Stuntz, *supra* note 17; Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1301 n.205 (1990) (listing academic criticism of the Court's analysis).

¹³⁹ See Nadler, *supra* note 104, at 165-93 (describing social science data on related issues).

¹⁴⁰ *Id.* at 165.

¹⁴¹ Wayne R. LaFare, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment Seizures*, 1991 U. ILL. L. REV. 729, 752 (1991).

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other legal actors will exercise a jaundiced eye when assessing the constitutionality of the Justice Department interrogation sessions. If the *Drayton* majority could casually assert that “bus passengers answer officers’ questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them,”¹⁴² then federal judges will also be inclined to accept the claim that Arab resident aliens cooperated with FBI agents not because of coercion but because they believed that answering questions would enhance their own safety, as well as the nation’s security against future terrorist attacks. Furthermore, since the threat of terrorism pervades the mindset of most Americans in the debate over law enforcement procedures, federal judges may be more sympathetic to the same government arguments that might have triggered skepticism from the judiciary prior to September 11.¹⁴³

Under current legal norms, a challenge to the Justice Department’s interrogation sessions will not succeed unless FBI agents employed drastic and oppressive measures to ensure compliance with their “requests” for “voluntary” interviews. FBI agents and other police officers, however, will rarely need to utilize such methods to achieve their objectives. To the average person, an agent’s “request” is the

¹⁴² *Drayton*, 536 U.S. at 205. In his dissent, Justice Souter criticizes the majority’s contention regarding the consent of travelers to baggage searches:

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court’s explanation that bus passengers consent to searches of their luggage to “enhance] their own safety and the safety of those around them.”

Id. at 208 (Souter, J., dissenting) (citation omitted).

¹⁴³ *Cf. Nadler*, *supra* note 104, at 221.

It may be the case that, on balance, it is desirable to permit police to board intercity buses and pose questions to passengers and, in some circumstances, conduct searches of baggage and persons, especially with the current need to be vigilant about potential risks of terrorism. In this way, it is understandable that the *Drayton* Court scrupulously avoided announcing rules in drug cases that would restrict the ability of police to investigate terrorism and other serious threats to public security.

Id.

equivalent of a legal command or order.¹⁴⁴ “For example, citizens generally do not interpret ‘Can I please see your license and registration?’ as spoken by a police officer as a genuine request; it is a command, and everyone understands this.”¹⁴⁵ The tactics described in *Drayton* that might trigger Fourth Amendment scrutiny—physical force, intimidating movements, overwhelming show of authority, brandishing of weapons, blocking of exits, threats, commands or authoritative tones of voices—are not necessary for federal law enforcement.¹⁴⁶ Unless FBI agents employed the severe methods seen in *Kaupp*—removing a person from his home or location, transporting him to the police station and subjecting the person to an interrogation or other investigative procedure—a Fourth Amendment challenge to the Justice Department’s interrogation sessions will not succeed. Therefore, unless an Arab resident alien was subjected to the functional equivalent of an arrest, constitutional jurisprudence will consider his decision to participate in an interview with FBI agents to have been consensual.

PART II: PROFILING AIRLINE PASSENGERS

The second example of law enforcement’s use of ethnicity is not yet the law, nor is it a *de facto* policy acknowledged by government officials. Instead, it is a proposal advocated by

¹⁴⁴ See Nadler, *supra* note 104, at 188 (“Because authorities such as police officers direct the actions of others, the listener is likely to conclude that an utterance is in fact a directive, or an order to be followed.” (footnote omitted)).

¹⁴⁵ *Id.*

¹⁴⁶ Relying on social science studies, Professor Nadler also observes that: [A]uthority figures do not need to employ highly face-threatening language to achieve their goal. In fact, a polite request is usually perceived by the listener as being face-maintaining because the listener understands that coercion may be used. Thus, a police officer who says, “Do you mind if I search your bags?” is perceived as being more face-sensitive than one who says, “I am going to search your bags”; at the same time, the listener in both situations realizes he or she must comply with the message. Thus, because a police officer is perceived as an authority, he need not rely on coercive statements to achieve a goal—his role is adequate, and a polite request can increase face-sensitivity without reducing coercive power Because people perceive discourse originating from an authority to be coercive regardless of assertive linguistic cues, authority figures need not use highly face-threatening language—part of that burden is carried by the badge and gun.

Id. at 188-89 (footnotes omitted).

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Stuart Taylor, Charles Krauthammer and others¹⁴⁷ that airport security officials select passengers—presumably citizens and non-citizens alike—on the basis of national origin for additional security. Stuart Taylor, for example, calls for a “well-designed profiling system” that “would factor in suspicious behavior, along with national origin, gender, and age. It could spread the burden by selecting at least one white (or black, or Asian) passenger to be searched for every Middle Easterner so selected.”¹⁴⁸ According to Taylor, the “only real protection [against future terrorism in the sky] is to make national origin a key factor in choosing [which] bags [to search].”¹⁴⁹ Taylor denies that he is suggesting that all Middle Easterners are terrorists. “The logic of profiling is to identify for more-careful screening those small groups who, based on historical experience, *seem more likely than others* to include suicide bombers (or just bombers). History tells us that all 19 of the September 11 suicide bombers, and most or all other terrorists known to have murdered planeloads of people, have been Middle Eastern men.”¹⁵⁰

Anticipating constitutional and political objections that American citizens could not or should not be subjected to explicit ethnic-based searches, Taylor confidently claims that “[m]illions of Arab-Americans would not fit the profile because their American roots would be apparent—from their accents and speech patterns—to trained security

¹⁴⁷ See Alschuler, *supra* note 1, at 227 n.253 (citing sources). In August 2002, the head of the Transportation Security Administration, James M. Loy, was reported to have said that profiling airline passengers “whose behavior or background raise red flags, should be seriously considered.” Mac Daniel, *Loy Sees Potential for Profiling*, BOSTON GLOBE, Aug. 6, 2002, at B4.

¹⁴⁸ Taylor, *supra* note 6. Taylor begins his proposal with an emotional appeal to our survival instincts:

What would happen if another 19 well-trained Al Qaeda terrorists, this time with 19 bombs in their bags, tried to board 19 airliners over the next 19 months? Many would probably succeed, blowing up lots of planes and thousands of people, if the forces of head-in-the sand political correctness prevail—as they did before September 11—in blocking use of national origin as a factor in deciding which passengers’ bag to search with extra care.

Id.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (emphasis added).

screeners.¹⁵¹ Taylor also asserts there is a logical stopping point to his proposal. He contends that racial profiling of blacks and Hispanics on the highways is not cost-effective.¹⁵² “Stopping people for ‘driving while Arab’ would be similarly unwarranted. [However,] [f]lying while Middle Eastern poses a dramatically different cost-benefit calculus.”¹⁵³

Similarly, Charles Krauthammer agrees with Taylor that searching the bags of little old ladies is nothing more than “political correctness.”¹⁵⁴ Krauthammer concedes that no system will catch every terrorist, however, he contends that America’s current airport security system “is designed to catch no one because we are spending 90% of our time scrutinizing people everyone knows are no threat.”¹⁵⁵ Finally, Krauthammer asserts that “We all would rather not make any

¹⁵¹ *Id.* In an earlier column, Taylor proposed targeting “Arab-looking people” at the nation’s airports for extra searches and screening. See Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports* NAT’L J., Sept. 22, 2001, available at <http://www.theatlantic.com/politics/nj/taylor2001-09-25.htm> (last visited Feb. 27, 2004). In that proposal, Taylor asserted that ethnic profiling of Arabs at airports satisfied constitutional norms:

[T]he mathematical probability that a randomly chosen Arab passenger might attempt to a mass-murder-suicide hijacking—while tiny—is considerably higher than the probability that a randomly chosen white, black, Hispanic, or Asian passenger might do the same. In constitutional-law parlance, while racial profiling may be presumptively unconstitutional, that presumption is overcome in the case of airline passengers, because the government has a compelling interest in preventing mass-murder-suicide hijackings, and because close scrutiny of Arab-looking people is narrowly tailored to protect that interest.

Id.

¹⁵² Taylor, *supra* note 6. Of course, not everyone agrees with Taylor that racial profiling of blacks on the highways is not cost-effective. See, e.g., Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 53-57 (comments of police officials on why officers profile); Dan Herbeck, *Transit-Site Drug Arrests Spur Racism Allegations*, BUFFALO NEWS, Jan. 30, 1994, at 1 (quoting Depew, New York Police Chief John Maccarone: “We’re dealing with either blacks, Hispanics, Dominicans or Haitians. These are the couriers. We lean on them heavily here. . . . Unfortunately, that’s who the couriers are . . . I don’t believe it’s unfair. We have to do everything we can do to stop drugs from coming in. The honest, upright citizen—black or white—knows that what we are doing is fair.”); cf. Jodi Wilgoren, *Police Profiling Debate Hinges on Issue of Experience of U.S. Bias*, N.Y. TIMES, Apr. 9, 1999, at B7 (quoting former New York City police commissioner William J. Bratton: “Cops are profiling all the time, your good cops; unfortunately, now that’s developing a bad name Whether they call it profiling, or street smarts, awareness—whatever the names might be—profiling is essential.”).

¹⁵³ Taylor, *supra* note 6.

¹⁵⁴ Krauthammer, *supra* note 6.

¹⁵⁵ *Id.*

calculations based on ethnicity, religion, gender or physical characteristics—except that on airplanes our lives are at stake.”¹⁵⁶

Taylor, Krauthammer and many legal scholars offer blunt, gut-wrenching and practical arguments as to why airport security officials should be permitted to “profile” individuals of Arab ancestry.¹⁵⁷ The terrorists of September 11 were all young Middle Eastern men who killed many innocent people. Government officials warn of future terrorist attacks, and our survival instincts tell us that the government's prediction that the next round of terrorism will come from a Middle Eastern nation is probably correct.¹⁵⁸ Although Taylor and Krauthammer's arguments may appeal to our common sense

¹⁵⁶ *Id.* Krauthammer closes his essay with an emotional, yet practical, appeal to common sense and public safety:

Airport security is not permitted to “racially” profile, but every passenger—white or black, male or female, Muslim or Christian—does. We scan the waiting room, scrutinizing other passengers not just for nervousness and shiftiness but also for the demographic characteristics of al-Qaeda. We do it privately. We do it quietly. But we do it. Airport officials, however, may not. This is crazy. So crazy that it is only a matter of time before the public finally demands that our first priority be real security, not political appearances—and puts an end to this charade.

Id.

¹⁵⁷ See Malti-Douglas, *supra* note 6 (“Arab-Americans like me want to be safe when we fly. Cooperating with security procedures, even when we suspect that we are getting more attention than our fellow citizens, makes sense. Does anyone really want a security official to hesitate before stopping a suspicious passenger out of fear of an accusation of bias?”). *Cf.* Stuntz, *supra* note 115, at 2179. Professor Stunts asserts that “racial and ethnic profiling is a fact of life that the legal system probably cannot change.” Moreover, Stuntz doubts that “an optimal regime” would bar racial profiling. *Id.* He explains, “The inefficiency of treating all airplane travelers the same—should airport security officials really regard travels with Danish visas and travelers with Yemeni visas as equally risky?—is both great and obvious. Reasonable people can differ about the balance, but one could plausibly conclude that the efficiency gains from profiling outweigh the harm from the ethnic tax that post-September 11 policing is imposing on young men of Middle Eastern origin.” *Id.* For a thoughtful and persuasive reply to Stuntz's commentary on racial and ethnic profiling in a post-September 11 world, see Davies, *supra* note 1, at 81-94.

¹⁵⁸ “Sometimes the information [on potential terrorists] is very general—vague talk, bragging about future attacks. Sometimes the information is more specific, as in a recent case when an al Qaeda detainee said attacks were planned against financial institutions [W]e now know that thousands of trained killers are plotting to attack us, and this terrible knowledge requires us to act differently.” *Overriding and Urgent Mission for New Agency*, WASH. POST, June 7, 2002, at A19 (containing transcript of President George W. Bush's speech on homeland security delivered June 6, 2002).

and understandable desire for greater national security, I am still inclined to reject their proposals for the following reasons.

First, Taylor and Krauthammer's assessment of current airline security policies, which require the searching of everyone's luggage, as "political correctness," falsely characterizes the constitutional issue at stake. The requirement that airport officials search all luggage directly promotes values central to the Fourth Amendment.¹⁵⁹ A system that requires universal examination of luggage (or individuals) forces airport officials to be neutral, which protects the rights of all citizens under the Fourth Amendment. Under such a system, particular passengers are not subject to search based on "the discretion of the official in the field."¹⁶⁰ By following neutral rules that apply to everyone, officials are not given the discretion to arbitrarily select Arab or Muslim passengers for search or detention.¹⁶¹ As Professor Alschuler has observed, "[b]urden sharing demonstrates to people of Arab ethnicity and others that the hassles to which they are subjected do not flow from suspicion of their appearance or other invidious motives."¹⁶²

Second, I do not see a principled basis for limiting ethnic-

¹⁵⁹ Cf. *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) ("To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers.").

¹⁶⁰ LAFAVE, *supra* note 104, § 10.6(c), at 632 (quoting *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973)). As Professor LaFave observes, under a system that requires universal screening of all passengers, "all citizens who wish to use the [airport] are subject to the same screening procedures," and they do not encounter "social stigma . . . public ridicule or suspicion." *Id.* at § 10.6(e) at 639 (quoting *People v. Hyde*, 524 P.2d 830, 843 (Cal. 1974)). Cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 809 (1994) ("A broader search is sometimes better—fairer, more regular, more constitutionally reasonable—if it reduces the opportunities for official arbitrariness, discretion, and discrimination The broader, more evenhanded search is sometimes more constitutionally reasonable even if the probabilities are lower for each citizen searched." (footnote omitted)).

¹⁶¹ See *Delaware v. Prouse*, 440 U.S. 648, 655 (1979) (invalidating random stops of automobiles for purpose of checking license and registration because, *inter alia*, random stops pose a risk that officers will abuse their discretion).

¹⁶² Alschuler, *supra* note 1, at 230.

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based intrusions to the nation's airports.¹⁶³ A biological or chemical weapons attack at a major sporting event—for example, at a future Egg Bowl between the Ole Miss Rebels and Mississippi State,¹⁶⁴ at a University of Tennessee football game in Knoxville¹⁶⁵ or at the Superbowl¹⁶⁶ could kill many more innocent people than the approximately 3,000 that died on September 11.¹⁶⁷ If the nation intends to make a serious commitment to prevent future terrorism, the logic of Taylor and Krauthammer suggests that government officials should target Middle Eastern and Muslim men in and around any event or activity with extraordinarily large groups of individuals. The release of a biological or chemical agent in the middle of Times Square could also kill thousands of

¹⁶³ In his earlier article, Stuart Taylor acknowledged the threats and “dangers of terrorists smuggling bombs or guns or box cutters onto buses or trains or subways or bridges, or into tunnels or crowded stadiums or office buildings or schools or the Capitol or Disneyland.” Taylor, *supra* note 151. While conceding that these “dangers are real,” Taylor speculates that “in such settings, [the dangers] are as likely to be presented by domestic terrorists such as Timothy McVeigh as by people of Arab descent.” *Id.* Taylor wants us to believe that Arab terrorists will insist on using airplanes to commit future acts of terrorism. “Only by crashing airliners can terrorists commit mass murder with weapons as easily concealed as box cutters and plastic knives. And only would-be mass murderers bent on suicide—the vast majority of them extremist Islamic fanatics craving martyrdom—would crash an airliner.” *Id.*

¹⁶⁴ Attendance of 60,245 at the Egg Bowl game between the University of Mississippi and Mississippi State University on November 28, 2002, was the largest for an on-campus game in the 99-year history of the series and the fourth-largest ever at the time. Rusty Hampton, *Bowl-Bound Rebs Finish Strong, Dump Dogs 24-12*, CLARION-LEDGER (Jackson, MS), Nov. 29, 2002, at A1.

¹⁶⁵ The attendance record for Neyland Stadium, home to University of Tennessee football, is 108,768, which was set in 2000 against Florida. *SEC Report*, THE ARKANSAS DEMOCRAT-GAZETTE (Little Rock, AR), Sept. 4, 2003, at 28.

¹⁶⁶ The attendance record for the Super Bowl is 103,985, which was set at Super Bowl XIV at the Rose Bowl in Pasadena, California, in 1980. *Super Bowl Facts and Figures*, VENTURA COUNTY STAR, Jan. 23, 2001, at C2.

¹⁶⁷ Because of the attacks on September 11, 2001, of the World Trade Center site in New York City, 2,792 people died. *Nation in Brief*, WASH. POST, Mar. 14, 2003, at A28. Additionally, forty victims died during the plane crash in Shanksville, Pennsylvania. Phil Hirschhorn, *New York Adjusts Death Toll Downward*, available at <http://www.cnn.com/2002/US/08/22/911.toll/index.html> (Aug. 22, 2002). At the Pentagon, 184 victims died during the September 11 attack. *Id.*

people.¹⁶⁸ To prevent or reduce the chances of such a horrific attack, should police officers stop and search all Middle Eastern men in and around Times Square on New Year's Eve?¹⁶⁹ Likewise, should police officials stop and search all Middle Eastern men in and around the federal buildings and historic landmarks in Washington, D.C.?

Consider the damage to both people and infrastructure if a bomb or biological weapon detonated on one of the bridges or tunnels leading into New York City. Applying Stuart Taylor's "cost-benefit" analysis, many individuals might favor stopping and searching the vehicles of all Middle Easterners to prevent such an attack. A biological or chemical attack on New York or Chicago's subway system would also cause enormous damage.¹⁷⁰ Why not, on random days or during a high-security alert period, separate Middle Easterners from other passengers for extra screening at all subway entry points? According to the "cost-benefit" analysis advocated by Stuart Taylor, detaining and searching individuals "driving while Arab" "commuting while Arab" or even "vacationing while Arab" is a sound policy if the nation wants to take maximum steps to protect itself against the next round of terrorist attacks.

The attack on Pearl Harbor on December 7, 1941, also caused enormous death and destruction.¹⁷¹ In the aftermath of that tragedy, government officials, including the President of the United States, initiated a horrid race-based policy of detaining, searching and eventually forcibly removing and transporting thousands of Japanese aliens and Japanese-American citizens from their homes on the West Coast to prison barracks surrounded by barbed wire and armed guards who shot at and, in some cases, killed individuals who tried to

¹⁶⁸ See generally Barry Kellman, *Biological Terrorism: Legal Measures for Preventing Catastrophe*, 24 HARV. J.L. & PUB. POL'Y 417 (2001).

¹⁶⁹ Over 750,000 revelers attended the 2002-2003 New Year's Eve celebration in Times Square of New York City. *Party's Over, Cleanup Begins*, ATLANTA J.-CONST., Jan. 2, 2003, at A8.

¹⁷⁰ In Japan, a sarin gas attack in the Tokyo subway system killed twelve people and left 5500 people ill. See Jun Sato Yomiuri Shimtun, *Sarin Cleanup Remembered*, THE DAILY YOMIURI (Tokyo), Mar. 17, 2003, at 3 (reflecting on the attack during its eight-year anniversary).

¹⁷¹ In the attack on Pearl Harbor, 2,390 Americans died. Scott Fornek, *Bush: We Have Seen First War of Century*, CHI. SUN-TIMES, Oct. 4, 2001, Extra Edition at New Special Edition 2.

escape.¹⁷² In the most disgraceful decisions rendered by the Court since *Dred Scott v. Sandford*,¹⁷³ the Court sustained these racist policies.¹⁷⁴ *Hirabayashi v. United States*¹⁷⁵ upheld the conviction of an American citizen who violated a curfew order that applied to all persons of Japanese ancestry living in certain areas of the West Coast. Although *Hirabayashi* may have been intended as a narrow ruling,¹⁷⁶ one year later in *Korematsu v. United States*,¹⁷⁷ the Court upheld the conviction of another American citizen for violating an exclusion order that applied only to individuals of Japanese ancestry.

¹⁷² See generally ROBINSON, *supra* note 29; see also Muller, *supra* note 38, at 577-78. Professor Muller notes that the federal government "chose to ditch the Fourth Amendment entirely in framing its search-and-seizure program" regarding Japanese Americans and Japanese aliens in the aftermath of Pearl Harbor. *Id.* at 577. Muller also observes that by the autumn of 1942, the federal government had transported both Japanese Americans and Japanese aliens by train to permanent camps in the Mountain West. "The euphemism for these facilities was 'relocation centers,' but everyone called them concentration camps. [Individuals of Japanese ancestry] lived with neither comfort nor privacy in tarpaper barracks, surrounded by barbed wire and guarded by U.S. Army sentries in guard towers around the perimeter." *Id.* at 578.

¹⁷³ 60 U.S. 393 (1856).

¹⁷⁴ See *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). Professor Muller has fittingly observed that: [T]he Court has not overruled *Korematsu* primarily because it has not needed to. But more importantly, to the extent that *Korematsu* stands at all today, it stands as a deeply discredited decision. Eight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing *Korematsu* as an error—even as spectacular an error as the Court's *Dred Scott* decision. Muller, *supra* note 38, at 586 (footnotes omitted).

¹⁷⁵ 320 U.S. 81 (1943).

¹⁷⁶ Dennis J. Hutchinson, "The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases, 2002 SUP. CT. REV. 455, 465-67 (explaining how Court in *Hirabayashi* wanted to decide the constitutionality of the curfew order on narrow grounds).

¹⁷⁷ 323 U.S. 214 (1944). On the same day *Korematsu* was decided, the Court also decided *Ex Parte Endo*, 323 U.S. 283 (1944). *Ex Parte Endo* ruled that the petitioner, an American citizen, was entitled to release from a government detention program that was established by the War Relocation Authority. *Ex Parte Endo* was decided on statutory grounds; the Court did not reach the constitutionality of holding detaining persons of Japanese ancestry. *Id.* at 299. For excellent legal critiques of the cases, see PETER IRONS, JUSTICE AT WAR (1983); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

Speaking for a majority of the Court, Justice Black insisted that Korematsu was excluded not because of racial prejudice, but because the country was at war with the government of Japan.¹⁷⁸ Deferring to military authorities, Justice Black further explained that military officials feared an invasion of the West Coast and had decided that military urgency “demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily.”¹⁷⁹ Justice Black asserted that there was “evidence of disloyalty on the part of some,” and that military officials felt “the need for action was great” and the “time was short.”¹⁸⁰

While Justice Black insisted that the government's race-based exclusion order was not generated by racial or ethnic hostility, there were good reasons to doubt this conclusion. Even a cursory review of the events and evidence available to the Court in 1944 revealed that racial bias permeated the government's actions toward individuals of Japanese ancestry. For example, prior to the attack on Pearl Harbor, President Roosevelt had already received reports confirming the loyalty of Japanese American citizens on the West Coast.¹⁸¹ After the attack, however, high-ranking government officials (and eventually President Roosevelt) rejected loyalty hearings for people of Japanese ancestry because it was impossible to determine loyal Japanese from disloyal ones.¹⁸²

¹⁷⁸ *Korematsu*, 323 U.S. at 223.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 223-24.

¹⁸¹ ROBINSON, *supra* note 19, at 67-68. Prior to war with Japan, President Roosevelt:

had received FBI reports about the nature of the local Japanese community in Hawaii, and he had his own secret intelligence network report on the loyalty of West Coast Japanese Americans. He was again assured by the FBI and his special investigators after Pearl Harbor that Japanese Americans were loyal and that there was no evidence of sabotage in Hawaii. However, he chose not to accept such findings.

Id. at 114.

¹⁸² *Id.* at 120 (“[President] Roosevelt's words and actions both before and after Pearl Harbor, when taken in their entirety, point to his acceptance of the idea that Japanese Americans, whether citizens or longtime resident aliens, were still Japanese at the core. He regarded them as presumptively dangerous and disloyal on racial grounds.”); *id.* at 161 (noting different approach of Roosevelt Administration regarding loyalty hearings for German and Italian *aliens* on East Coast and its approach to loyalty hearings for Japanese American *citizens*: military officials on West Coast rejected hearings for Japanese Americans because “[n]ot only would such hearings be too time-consuming but, as one

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Similar discriminatory treatment was evident when

military authorities imposed dusk-to-dawn curfews on American citizens of Japanese ancestry living in a wide swath of territory along the West Coast, and also forbade them from traveling more than five miles from their homes without permission. No such restrictions were imposed on American citizens of German or Italian ancestry anywhere in the United States.¹⁸³

Along the same lines, President Roosevelt rejected a military request to remove West Coast Italian and German aliens en masse, and he specifically refused to permit any evacuation of Italian or German aliens living on the East Coast despite the greater number of submarine sinkings on the East Coast than the West Coast.¹⁸⁴ On January 31, 1944, eleven months *before* the Court decided *Korematsu*, the army re-instituted selective service on Japanese Americans.¹⁸⁵ At the same time the army was drafting some Japanese Americans to fight in the war, military officials were also ordering the imprisonment of other Japanese American citizens in concentration camps.¹⁸⁶ Finally, the military commander responsible for implementing the exclusion order revealed the most persuasive evidence available to support the contention that the exclusion order in *Korematsu* was based on racial antagonism. On April 13, 1943, Lieutenant General John L. DeWitt told Congress the following:

I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. . . . It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is

military lawyer stated, they would undermine the basis of the evacuation—that is was impossible to distinguish between loyal and disloyal Japanese Americans”).

¹⁸³ Muller, *supra* note 38, at 577.

¹⁸⁴ ROBINSON, *supra* note 19, at 111-12.

¹⁸⁵ *Id.* at 209.

¹⁸⁶ *Id.*

allowed in this area. . . .¹⁸⁷

I fully recognize that *up until now*, most Arab Americans and lawful resident aliens from Arab and Muslim countries have not been subjected to the same scale of human rights abuses that our government imposed on Japanese aliens and Japanese Americans in the 1940s.¹⁸⁸ A plausible argument can

¹⁸⁷ *Korematsu*, 323 U.S. at 236 n.2 (Murphy, J., dissenting) (quoting *Hearing Before the House Naval Affairs Subcommittee to Investigate Congested Areas*, 78th Cong. 739-40 (1943) (testimony of Lt. Gen. John L. DeWitt)). Although Justice Murphy does not include General DeWitt's other comments in his dissent, General DeWitt's testimony to Congress also included the following statement, which was made available to the Court: "A Jap is a Jap. It makes no difference whether he is an American citizen or not." Brief of Amicus Curiae Japanese Americans Citizens League at 198, *Korematsu v. United States*, 323 U.S. 214 (1944), reprinted in 42 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 309-530 (Philip B. Kurland & Gerhard Casper eds., 1975). See also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 288 ("General John L. DeWitt, the West Coast military commander, was a racist who simply assumed, without evidence, that Japanese Americans posed a threat of sabotage and espionage."). History would reveal that government officials deliberately manipulated the evidence that was given to the Supreme Court. See *Korematsu v. United States*, 584 F. Supp. 1406, 1417-19 (N.D. Cal. 1994). For example, in the original version of his *Final Report* on the evacuation and exclusion of Japanese persons from the West Coast, General DeWitt explained that his racially-based implementation of the exclusion order was "because it was impossible to distinguish loyal from disloyal Japanese Americans and that lack of time for hearings had not been a factor in his decision." ROBINSON, *supra* note 19, at 184-85. After Assistant Secretary of War John McCloy received General DeWitt's report, he ordered all copies of the report be "destroyed, and he forced DeWitt to write a revised version adopting the more defensible position" on the justifications for the exclusion order. *Id.* at 185. For a detailed discussion on how high-ranking government officials manipulated the publication and release of DeWitt's report, with an eye toward influencing the results in the Japanese internment cases, see IRONS, *supra* note 177, at 206-18.

¹⁸⁸ See Muller, *supra* note 38, at 581 (acknowledging "very real indignities, and in some cases the very real terror and violence, that Arab and Muslim Americans have actually endured. . . . But the fact is that the past five months [since September 11, 2001] do not match the scale of the civil rights tragedy that followed Pearl Harbor."). While there has not been the type of wide-scale civil liberties abuse against the *entire* Arab-American or Arab-alien communities, there has been deliberate effort to target aliens from Arab and Muslim countries, and there have been many abuses of civil liberties against individuals from Arab and Muslim nations. See generally COLE, *supra* note 5. Relying on government records, Professor Cole reports that as of May 2003, approximately 5,000 persons from Arab and Muslim nations had been permanently detained by the federal government. Professor Cole observes that of the more than 5000 people detained,

not one has been charged with any involvement in the crimes of September 11. The only person actually charged with the September 11 attacks, Zacarias Moussaoui, was arrested before September 11, and therefore is not part of the roundup. Only five detainees (three noncitizens from the initial wave and two citizens picked up later as material witnesses) have been charged with any terrorist-related crime. Of those five, one has been convicted of conspiracy to support terrorism;

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be made that the Bush administration “has not seen fit to lead with extreme assertions” in the aftermath of September 11.¹⁸⁹

Moreover, reasonable persons can debate whether the federal government “has proceeded from a *premise* of moderation, and has not had to be forced to that position by the pressure of public protest.”¹⁹⁰ However, if government officials authorize the detention and search of Middle Eastern men based on ethnicity, they act under the same premise that motivated the detention of Japanese Americans and aliens and defy the same constitutional principle that was violated in the 1940s. As one historian of the Japanese internment era noted, “Japanese Americans were singled out from other ‘enemy’ groups such as Italian Americans and German Americans as innately untrustworthy on racial grounds.”¹⁹¹

If government officials implement Taylor and Krauthammer's proposal to target people of Arab ancestry for search and seizure at the nation's airports, the nation should be candid about our actions. These tactics stem from a belief that young Middle Eastern men will perpetrate future

two were acquitted on all terrorism charges; the government dropped all terrorism charges against the fourth when he pleaded guilty to a minor infraction; and the fifth is awaiting trial. . . . Thus, by the government's own account, nearly all the thousands it has detained in the war on terrorism have turned out to have nothing to do with terrorism.

Id. at 25-26 (footnote omitted); *see also* Brzezinski, *supra* note 133 (describing seventy-three day detention of Egyptian alien). *See also* Davies, *supra* note 1, at 49-50 (“Despite the government assurances, however, fear for the rights of Arab-Americans grew as the soothing words of these public officials began to collide with information that federal agents had in fact begun to round up persons of Middle-Eastern descent and place them under arrest. In a little over a month, the number of people taken into federal custody mushroomed from dozens, to hundreds, to over one thousand.” (footnotes omitted)). Davies notes that Middle Eastern descent was the “most common denominator among those arrested or subjected to questioning.” *Id.* at 50 n.24.

¹⁸⁹ Muller, *supra* note 38, at 591. Professor Muller notes:

In the terror and panic of mid-September, the administration might have proposed all manner of restrictions on aliens from Arab and Muslim countries, or even on American citizens of Arab ancestry or Muslim faith. The mind boggles at the possibilities: prohibitions on piloting or traveling on airplanes, bans on crossing bridges or entering skyscrapers, residential curfews, forced relocation or deportation, wholesale detention and interrogation of all aliens from particular nations.

Id.

¹⁹⁰ *Id.*

¹⁹¹ ROBINSON, *supra* note 19, at 3.

terrorist attacks on our country. To prevent future attacks, therefore, airport security officials should detain and search *all* Middle Eastern men or those who appear to be Middle Eastern, Arab, or Muslim. The bottom line is that Middle Easterners and Arabs cannot be trusted. These persons are a threat to our safety not because of legitimate evidence of ties to terrorist networks or a particularized suspicion that an individual poses a threat as a terrorist but solely because of their nationality.

The government's internment of Japanese Americans in the 1940s stemmed from a similar logic. The Germans and Italians did not attack Pearl Harbor, the nation of Japan did. Some government officials genuinely feared that the Japanese would follow with an attack on the West Coast. It was imperative that the government take steps to eliminate or diminish the enemy's opportunities for future attacks. Federal officials believed that Japanese aliens and Japanese Americans were the logical source of assistance to the nation of Japan. After all, Japan had attacked Pearl Harbor. Therefore, government officials erroneously assumed, and the Court subsequently affirmed, that persons of Japanese ancestry in this country—to paraphrase Stuart Taylor's words—“seem much more likely than others”¹⁹² to assist in future attacks.

This method of assessing potential threats to national security was wrong in the 1940s, and it is wrong today. More importantly, it violates constitutional principles embodied in the Fourth Amendment. The Fourth Amendment guarantees everyone a right to be free from unreasonable searches and seizures. When the government subjects individuals to search and seizure based on their national origin rather than objective, incriminating evidence, the government acts unreasonably.¹⁹³ If our government continues to authorize interrogations, and eventually orders searches and seizures,

¹⁹² Taylor, *supra* note 6. As Eugene Rostow has noted, in *Korematsu* the Court “solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society.” Rostow, *supra* note 177, at 504.

¹⁹³ In recent years, there has been an enormous (and enlightening) amount of legal scholarship explaining why racial and ethnic factors should not play a role in an officer's decision to seize or search a person. See, e.g., HARRIS, *supra* note 10; Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999); Harris, *supra* note 17; David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

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based on Arab or Middle Eastern ancestry, many persons of Arab descent will adopt the attitude of many black Americans who believe that the Fourth Amendment rarely protects them from arbitrary and selective law enforcement tactics. Blacks typically perceive their status vis-à-vis the police as a “second-class” citizenship.¹⁹⁴ If this happens to Arab Americans or legal aliens of Arab descent, our nation may feel slightly safer, but our constitutional freedoms will pay the price.

CONCLUSION

The horrible events of September 11, 2001 have confronted the nation with many difficult issues. This essay discussed two situations regarding the use of ethnicity to investigate and prevent future terrorism. The Bush Administration's decision to interview 5000 Arab aliens living in the United States was ethnic profiling. Although the selection process relied primarily on ethnicity, administration officials had legal support for their procedures. Regrettably, the Supreme Court's Fourth Amendment jurisprudence has tolerated racial and ethnic profiling by law enforcement officials, and it is unlikely that any judge would find that the “voluntary” interviews constituted seizures under the Constitution.

In contrast to Bush Administration officials, Stuart Taylor and Charles Krauthammer candidly admit that their proposal for searching Middle Eastern men at the nation's airports is focused on ethnicity, pure and simple. In Taylor's words, Arab and other Middle Eastern males should be targeted for search because, “based on historical experience, [they] seem more likely than others to include suicide bombers (or just bombers).”¹⁹⁵ Taylor and Krauthammer's proposal should be resisted for many reasons, not the least of which is that it undermines a central value of the Fourth Amendment: deterring the discretion of officers in the field. Although they

¹⁹⁴ As *New York Times* editorial writer Brent Staples puts it: “With reason, African-Americans tend to grow up believing that the law is the enemy, because those who are sworn to uphold the law so often enforce it in a biased way.” Brent Staples, *Editorial Notebook: Growing Up to Fear the Law*, N.Y. TIMES, Mar. 28, 1991, at A24.

¹⁹⁵ Taylor, *supra* note 6.

denied it, Taylor and Krauthammer's proposal also has no limiting principle; if the goal of ethnic profiling in airports is to save as many lives as possible, then their proposal should extend to major entertainment events, other public transportation facilities and any venue in which large numbers of people congregate.

Although many reasonable persons might resist the charge, this essay has endeavored to show that the Bush Administration's interviews of Middle Eastern aliens, and Taylor and Krauthammer's proposal for ethnic profiling in airports, proceed along the same premise that motivated the detention of Japanese Americans and aliens in the 1940s. Just as persons of Japanese ancestry were deemed untrustworthy after the Pearl Harbor attack, young men of Middle Eastern and Arab ancestry are presumed untrustworthy today. In my view, ethnic profiling was wrong then, and it is wrong now.