ARTICLE

MEETING THE TWENTY-FIRST CENTURY TERRORIST THREAT WITHIN THE SCOPE OF TWENTIETH CENTURY CONSTITUTIONAL LAW

*Ronald J. Sievert**

TABLE OF CONTENTS

> [I]n times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability.... [I]n times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[1]

> "[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact."[2]

I. INTRODUCTION

The alarm bells have been sounded. The challenge facing the nation has been clearly summarized in the very first paragraph of the year 2000 Report to Congress by the National Commission on Terrorism.

> International terrorism poses an increasingly dangerous and difficult threat to America. This was underscored by the December 1999 arrests in Jordan and at the U.S./Canadian border of foreign nationals who were allegedly planning to attack crowded millennium celebrations. Today's terrorists seek to inflict mass casualties, and they are attempting to do so both overseas and on American soil.[3]

This report was preceded by an even more graphic description of the problem in the testimony of Frank Cilluffo of the Center for Strategic and International Studies to the House Subcommittee on National Security regarding the nuclear, radiological, biological, and chemical threat posed by terrorists.

> What makes a WMD [weapon of mass destruction] terrorist incident unique is that it can be a transforming event. A terrorist attack involving weapons of mass

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* Adjunct Professor, University of Texas School of Law, United States Law and National Security, Author, CASES AND MATERIALS ON UNITED STATES LAW AND NATIONAL SECURITY (William S. Hein and Rothman), J.D. 1977 University of Texas School of Law, B.A. 1970 St. Bonaventure University.

The following article represents the opinions of the Author and does not necessarily reflect the position of any United States government agency or department.

1. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (recognizing the historical precedent, despite its very limited legal application, of *Korematsu v. United States*, 323 U.S. 214 (1944)).

2. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) (discussing Congress's power to draft citizens into the military as part of the imperative obligation of citizenship).

3. NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM, H.R. DOC. NO. 106-250, at 8 (2000).

> destruction would have catastrophic effects on American society beyond the [many] deaths it might cause.... [I]t is important to put the current fears into perspective. For decades, terrorism experts have argued the likelihood of a major terrorist incident occurring on U.S. soil. They also argued over the possibility of terrorists using weapons of mass destruction. The debating ended abruptly with the February 26, 1993 World Trade Center bombing and the May 20, 1995 sarin gas attack of the Tokyo subway. Threat calibrations did a 180-degree turn, and our nation's planners have been running ever since to catch up with the change and back-fill shortfalls that had been allowed to grow during the debating years.[4]

Those who proclaim the need for caution in our response have also reacted with equal force. In the words of James Zogby, President of the Arab-American Institute, "'In the process of guaranteeing security, we cannot run roughshod over the basic rights of the Constitution which are the centerpiece of what the country is about.'"[5] The National Commission on Terrorism itself took the same position in the foreword to its report: "Some terrorists hope to provoke a response that undermines our Constitutional system of government. So U.S. leaders must find the appropriate balance by adopting counterterrorism policies which are effective but also respect the democratic traditions which are the bedrock of America's strength."[6]

It currently falls upon law enforcement officials and the courts, which are caught in the middle between the demand for security and demands for protection of individual rights, to make real and practical decisions that will strike "the appropriate balance."[7] This is not an easy task. The quandary that confronts law enforcement is perfectly summed up in the following excerpt from a recent Washington Post article:

> [The Federal Bureau of Investigation's activity] has raised constitutional questions among legal scholars ....
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> "The FBI is basically saying: 'Trust us. We're hunting down bad guys,'" said David Cole, a Georgetown University law professor .... "But they're going way overboard."

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4. *Combating Terrorism: Implementation and Status of the Dep't of Def. Domestic Preparedness Program: Hearing Before the Subcomm. on Nat'l Sec., Int'l Affairs, and Criminal Justice of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 50–51 (1998) (statement of Frank Cilluffo, Senior Analyst, Ctr. for Strategic and Int'l Studies).

5. Vernon Loeb, *U.S. is Urged to Preempt Terrorists*, WASH. POST, June 4, 2000, at A1.

6. H.R. DOC. NO. 106-250, at 6.

7. *Id.*

. . . .

> [A senior FBI official responded,] "Some of these people are not who they seem." . . . "We know that whenever we do something, people are going to call us jackbooted thugs. But if we do nothing, people are going to yell at us when something blows up."[8]

II. A HYPOTHETICAL THREAT AND QUESTIONS POSED

What ability do the police chief of a large city, the local FBI supervisor, and the FBI director have, under our current understanding of constitutional and criminal law, to meet the terrorist threat? Specifically, does the Constitution, as interpreted by the courts in the past century, permit sufficient flexibility for these officials to identify terrorists, obtain evidence and secure a conviction *before* an attack—without fear of either a *Bivens*[9] civil rights action or the exclusionary rule operating to suppress crucial evidence based on a judicial finding of an illegal roadblock,[10] an unconstitutional search without probable cause,[11] improper "profiling,"[12] an impermissible electronic interception,[13] a violation by the military of the principles of *posse comitatus*[14] or a breach of the restrictions imposed by *Miranda*?[15] Can anything be done to provide more legal guidance to officials in making the critical on-scene decisions that may be thrust upon them when faced with the possibility of a terrorist attack?

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8. John Mintz & Michael Grunwald, *FBI Terror Probe Focuses on U.S. Muslims: Expanded Investigations, New Tactics Stir Allegations of Persecution*, WASH. POST, Oct. 31, 1998, at A1.

9. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (holding that a violation of the Fourth Amendment's command against unreasonable searches and seizures gives rise to a cause of action for damages).

10. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 153–54 (1925) (arguing that travelers within the country "have a right to free passage without interruption or search" unless probable cause exists).

11. *See, e.g.*, United States v. Reid, 226 F.3d 1020, 1025 (9th Cir. 2000) (declaring that evidence is inadmissible if it is the fruit of a search deemed impermissible under the Fourth Amendment).

12. *See, e.g.*, United States v. Brito, 136 F.3d 397, 412 (5th Cir. 1998) (disapproving the use of profile testimony to prove substantive guilt based on similarities between defendants and the profile).

13. *See, e.g.*, United States v. Bianco, 998 F.2d 1112, 1120–21, 1124–25 (2d Cir. 1993) (interpreting the constitutionality of 18 U.S.C. § 2518(11)(a), and stating the congressional safeguards required under the statute to preserve its constitutionality).

14. *See, e.g.*, United States v. Mullin, 178 F.3d 334, 342–43 (5th Cir. 1999) (examining possible violations of the Posse Comitatus Act).

15. *See* Miranda v. Arizona, 384 U.S. 436, 467–79 (1966) (requiring a suspect to be apprised of his constitutional rights).

Consider the following hypothetical. It is fictional, of course, but, based on recent events, hardly farfetched:

> The FBI director receives general background informant information that a terrorist cell operating in Sudan may be planning to explode a small nuclear bomb or a "dirty" conventional bomb designed to spread radioactive particles in the center of a major United States city. The terrorist cell is composed primarily, but not exclusively, of Middle Eastern terrorists, some of whom have lived in the United States and obtained American citizenship. Acting on this information, the FBI and Central Intelligence Agency (CIA) enlist the cooperation of the Sudanese police in wiretapping the phones of the suspects and eventually raiding their apartments. Searches conducted during these raids reveal that plans have actually been made to smuggle a weapon into New York City during the months of July or August utilizing a Ryder or U-Haul truck. This intelligence information is conveyed to the local police chief and Special Agent in Charge.
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> The police chief decides to set up roadblocks throughout the city and at various entry points with the intention of stopping every rental truck operating in his jurisdiction. Officers are specifically instructed that they may stop every truck, despite the lack of articulable suspicion regarding any one vehicle. Officers are also given the discretion to search the trucks without conventional probable cause if they have any reason to believe the search would be prudent. In making a decision whether to search or in determining the degree of a search, the police may consider as a factor whether or not the driver and/or passengers appear to be of Middle Eastern ancestry. Finally, as there are not enough officers to cover the entire city, the military is called upon to assist in setting up the roadblocks and to provide technical expertise and aerial surveillance.
>
> Immediately after implementing this program the city comes under intense fire from the American Civil Liberties Union (ACLU), various anti-discrimination groups, and constitutional law scholars. Civil rights complaints are filed demanding that the police chief cease the operation and the courts are presented with requests for an immediate injunction. Within a week, officers discover a Ryder truck containing a high explosive bomb surrounded by plutonium. The driver states that his associates will be delivering another weapon in the near future but refuses to say anything more and demands a lawyer.

Did the FBI director act properly in conducting wire interceptions and raids in Sudan against American citizens and foreign nationals? Is the police chief justified in setting up the citywide roadblocks and conducting searches? Has the military crossed the line in its efforts to assist the civil authorities? Does the law permit these actions, or would critics of these methods be vindicated in the courts and would law enforcement officials be ordered to cease and desist their allegedly unconstitutional operations? What should the police chief and FBI agent in charge do when confronted by the terrorist's confession, threat, and refusal to say more? These issues and others will be explored in the following pages in an effort to determine if the law, as presently understood, is sufficient to protect the public and whether changes are necessary to meet the terrorist threat.

III. A NOTE ON RETALIATORY ACTION

One may ask, as a preliminary matter, Why focus on criminal procedure at all when trying to determine an appropriate response to terrorism? Our military has proven adept at retaliatory attacks against Libya,[16] Afghanistan, and the Sudan.[17] Would not the best solution to terrorism be simply to conduct highly effective "surgical" military strikes against terrorist leaders and their home base once they have been identified by whatever means possible and not worry about the technical legal application of United States domestic law? Although in this author's opinion there are clearly times when military force should be used, there are numerous problems with over-reliance on such a strategy.

First, it is doubtful whether such strikes are legal under international law. It is true that Article 51 of the United Nations Charter permits a nation to act in "self-defense,"[18] however, most scholars interpret this phrase to cover only those actions that are immediately necessary and proportional to insure the defense and security of the nation.[19] These scholars credibly argue that

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16. *See* George C. Wilson, *Qaddafi was a Target of U.S. Raid*, WASH. POST, Apr. 18, 1986, at A1 (describing the United States military attack on Qaddafi's compound in Libya in retaliation for the terrorist bombing of a discotheque in West Berlin).

17. *See* Barton Gellman & Dana Priest, *U.S. Strikes Terrorist-Linked Sites in Afghanistan, Factory in Sudan*, WASH. POST, Aug. 21, 1998, at A1 (describing the United States missile attacks on para-military training camps in Afghanistan and a pharmaceutical plant in Sudan in retaliation for terrorist bombings of United States embassies in Africa).

18. U.N. CHARTER art. 51.

19. *See* Leah M. Campbell, Comment, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1077,

the violation of sovereignty and the military destruction inherent in previous air and cruise missile attacks by the United States were neither necessary nor proportional.[20] Accordingly, the strikes were essentially reprisals that are

> illegal under international law because they are punitive, rather than legitimate, actions of self-defense. It would be difficult to conform [such] acts of reprisal with the overriding dictate in the [UN] Charter that all disputes must be settled by peaceful means. . . . To permit reprisals would thwart the very goal to which states have committed themselves by membership in these [international] bodies.[21]

There are also many practical problems associated with the use of military force. The "home base" of the terrorists is not always easily identified. The country which harbors the terrorists, and whose sovereignty is invaded, may not be aware of the terrorists' activities or be able to control them.[22] Despite the claims of government public relations officers, a stack of 2000-pound bombs is often not "surgical," and frequently can result in the death of innocents, while individuals like bin Laden, Saddam Hussein, and Qaddafi escape unscathed. Perhaps most troubling, disproportional air attacks may do nothing more than provoke another terrorist attack seeking to even the score.[23] Although we may never know, one must suspect that Libya's role in the destruction of Pan Am Flight 103[24] (possibly in cooperation with Iran) may have been, in part, a response to that country's perception that the bombing of Tripoli by F-111s was an

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1081 (2000) (pointing out that Daniel Webster's assertion that the "'necessity of . . . self-defense [be] instant, overwhelming, and leav[e] no choice of means, and no moment for deliberation'" remains the standard limitation for self-defense in customary international law); W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 19 (1999) (noting that the lawfulness of a unilateral action is determined by whether there was a right to act and whether the action was necessary and proportional); Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT'L L. 391, 403, 407 (1993) (discussing the proportionality requirement).

20. *See* Campbell, *supra* note 19, at 1080, 1091, 1096 (commenting that the attack on Libyan targets was widely condemned and arguing that the bombing raids in Afghanistan did not have the necessary elements present to be considered self-defense); Reisman, *supra* note 19, at 34, 39 (noting the United Nations' "unambiguous disapproval" of the United States's attack on Libya).

21. Campbell, *supra* note 19, at 1081 (footnote omitted).

22. Reisman, *supra* note 19, at 50 (noting that many governments are unable to control much of their territory).

23. *See, e.g.*, Nora Boustany, *Terrorists Kill 3 Britons in Lebanon: Deaths, Other Attacks Tied to British Backing of U.S. Raids on Libya*, WASH. POST, Apr. 18, 1986, at A1.

24. Reisman, *supra* note 19, at 22–23, 38–39 & n.144 (noting the United States' and the United Kingdom's attempts to prosecute two Libyans who allegedly participated in placing a bomb aboard Pan Am Flight 103).

overreaction to the terrorist bombing of a Berlin nightclub.[25] Professor Jordan Paust noted in 1986, "As spiraling violence and counter-violence continue in a given circumstance, it becomes even more necessary to apply" the customary restraints of international law on armed attacks.[26]

Scholars and political leaders alike are increasingly recognizing that terrorists who indiscriminately kill civilians are criminals and should be treated as such, regardless of their motivation.[27] One eventual solution may be to bring these terrorists before an International Criminal Court. It is questionable, however, whether acceptance of the jurisdiction of such a court will entail complete abandonment of the principles of the Fourth and Fifth Amendments as we have come to understand them. Nevertheless, at present there is no effective international judicial mechanism to deal with terrorists and one may not exist for some time.[28] As late as July of last year, the United States renewed its objections to an international tribunal because of fear that our own military and government officials could become the targets of politically motivated prosecution.[29] For the foreseeable future, therefore, terrorists who initiate an operation of the type described in the hypothetical will, in all likelihood, be confronted by authorities in accordance with the provisions of United States criminal law. It is this law upon which we will often have to rely, for good or ill, to identify, convict, and ultimately deter, those who intend to commit violence against our people and our institutions.

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25. *See id.* at 31–32 (discussing the April 4, 1986 (American time) bombing of a West Berlin nightclub and the United States' prompt response on April 14, 1986, in which United States planes bombed various Libyan facilities, killing between 45 and 100 civilians and causing substantial damage).

26. Jordan J. Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 725 (1986) (asserting that complying with proportionality and necessity principles avoids inhumane injury or suffering).

27. *See* Campbell, *supra* note 19, at 1086–88 ("A more effective response to terrorism is to treat terrorists as international criminals and submit them to an effective international criminal court."); *see also* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 355–56 (1996) (arguing for military tribunals and for treating terrorists as having committed war crimes).

28. Campbell, *supra* note 19, at 1086–87.

29. *Hill is Given Caution on International Court*, WASH. POST, July 27, 2000, at A4.

IV. EXTRATERRITORIAL SEARCH AND SEIZURE AND INTELLIGENCE INTERCEPTS

A. *Extraterritorial Search and Seizure*

> [T]he CIA would spot bin Laden operatives in foreign countries, then quietly enlist the local security service to arrest or deport them and allow the agency to sift through materials left in their apartments.
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> . . . [In Nairobi, the agency focused on] Wadih el Hage, a Lebanese who held American citizenship . . . . For several weeks Kenyan police, sometimes accompanied by visiting FBI agents, began paying visits to el Hage's Nairobi home, searching its rooms, [and] confiscating computer disks . . . .[30]

In analyzing our ability under current law to recognize terrorists before an attack, and to legally proceed in the manner of the authorities in the hypothetical, we need to first examine what we are permitted to do against terrorist cells overseas. As indicated in the hypothetical, and as demonstrated by the World Trade Center and bin Laden investigations, an investigation often involves working with the security forces of different nations and conducting operations against both terrorists who have obtained American citizenship and those who are foreign nationals.[31] The standards that must be applied to determine legality vary widely depending on exactly who is involved. If we want to convict and remove from circulation those individuals who threaten an attack, we must identify and comply with the appropriate standards. Otherwise, we could uncover a gold mine of incriminating information concerning the existence of an ongoing terrorist conspiracy directed at the United States, but it would be of intelligence value only and no concrete legal action could be taken against the perpetrators.

The law is fairly well settled that if a foreign country, on its own, decides to search the property of a potential suspect, United States law will not be applied even if the evidence is

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30. Douglas Waller, *Inside the Hunt for Osama*, TIME, Dec. 21, 1998, at 32, 34.

31. *Id.*

eventually introduced in our courts.[32] As the court in *United States v. Callaway*[33] stated:

> [W]e need not determine whether the Toronto police had probable cause to search the vehicles in question. This is because the challenged searches occurred in a foreign country, were conducted by foreign law enforcement officials who were not acting in connection or cooperation with domestic law enforcement authorities and the conduct involved was not the type that would shock the conscience of our courts. Accordingly, the exclusionary rule of the Fourth Amendment is not applicable to the present situation.[34]

What exactly would shock a court's conscience is, of course, case specific, but the courts have not hesitated to indicate that they would use either their supervisory power or due process concepts to refuse to admit evidence obtained in a "shocking" manner, regardless of the applicability of conventional principles of domestic constitutional law.[35] Although the government could argue that it was not a participant, many courts presumably would not be receptive to information gained through reliance on torture or similar physical abuse perpetrated by a foreign security service. A simple violation of foreign law by a foreign government, however, would not necessarily require the invocation of this limited exception.[36]

The more frequent problem, however, as can be readily observed from a reading of the above *Time* magazine quote, is determining whether a particular nation's officials have acted independently. Our courts have generally held that "if Federal agents [have] so substantially participated in the raids so as to

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32. For cases discussing the general rule and the two exceptions, see generally *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995) (arguing that the Fourth Amendment is simply inapplicable to foreign searches absent "very limited exceptions"); *United States v. LaChapelle*, 869 F.2d 488, 489–90 (9th Cir. 1989) (acknowledging the exceptions when American law enforcement officers participate in the foreign search or when foreign officials act as agents of the American authorities). The Court of Military Appeals, however, applied the Fourth Amendment to foreign searches against American servicemen overseas. United States v. Jordan, 1 M.J. 145, 149 (C.M.A. 1975).

33. 446 F.2d 753 (3d Cir. 1971).

34. *Id.* at 755.

35. *See* United States v. Toscanino, 500 F.2d 267, 275–76 (2d Cir. 1974) (discussing allegations that the government kidnapped the defendant in Uruguay and brought him to the United States); *see also* United States v. Noriega, 117 F.3d 1206, 1214 (11th Cir. 1997) (distinguishing the case from *Toscanino* because Noriega was not personally mistreated).

36. *See* United States v. Peterson, 812 F.2d 486, 491–92 (9th Cir. 1987) (noting that while Philippine law governed the reasonableness of the search, American laws governed whether the evidence should be admissible, and holding the seized evidence admissible as a "good faith exception to the exclusionary rule").

convert them into joint ventures between the United States and the foreign officials," then United States law and the exclusionary rule will apply.[37] "Substantial participation" can only be determined upon examination of all the facts.[38] If United States officials merely tip off a foreign government to violations of that nation's laws, and the foreign authorities turn over what they later discover to American agents, then there is a strong argument that United States law need not be implicated. This is true even if the United States minimally participates in the actual search of the target's property.[39] On the other hand, if the foreign authorities are acting only because of United States interest, American agents conduct the search, and the overall circumstances lead the court to conclude that our officers were utilizing the foreign authorities to violate the Constitution by "circuitous and indirect methods," then United States law will apply.[40] It is impossible to determine from the *Time* article the true facts behind the visits of the Kenyan police to el Hage's residence "sometimes accompanied by visiting FBI agents"[41] and the subsequent searches of that property. It is clear, however, that in any United States prosecution of el Hage, the evidence obtained would probably be the object of a motion to suppress, based on what would be alleged as the use of the Kenyan police to circumvent the United States Constitution.

The search of the apartments belonging to el Hage, an American citizen of Middle Eastern ancestry, and other bin Laden operatives[42] illustrates the second major factor that must be added to the equation in determining the legality of our initiatives in a foreign country. That is, are American citizens or foreign nationals the targets of the governmental action? For a

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37. Stonehill v. United States, 405 F.2d 738, 743 (9th Cir. 1968).

38. *Id.* at 745 (relying on *Byars v. United States*, 273 U.S. 28, 33 (1927)).

39. *See id.* at 743–46 (providing an extensive discussion regarding the amount of participation required to convert an action by a foreign official into a joint venture with the United States). *Stonehill* also referenced cases decided before the exclusionary rule was applied to state activity. *Id.* Those cases include *Birdsell v. United States*, 346 F.2d 775, 782 & n.10 (5th Cir. 1965) (arguing that the search of a stolen car in Mexico by Mexican police did not shock the conscience), and *Sloane v. United States*, 47 F.2d 889, 890 (10th Cir. 1931) (distinguishing a search by a state police officer, who was unassisted by federal officers, from the search in *Byars*, in which federal officers did participate).

40. *Byars*, 273 U.S. at 32 (stating that constitutional provisions such as the Fourth Amendment are to be given liberal construction); *see also* Lustig v. United States, 338 U.S. 74, 78–79 (1949) (looking to the totality of circumstances to determine federal involvement).

41. Waller, *supra* note 30, at 34.

42. *Id.* (describing the process by which FBI officials requested the assistance of Kenyan police to visit el Hage's home, "searching its rooms, confiscating computer disks and darkly warning him that he'd face more hassling if he remained in the country").

time, many believed that if United States agents were behind an extraterritorial search of a foreign national, and the consequence was imprisonment in an American institution, then the protections in the Bill of Rights must be applied.[43] However, in *United States v. Verdugo-Urquidez*,[44] the Supreme Court found that the Fourth Amendment was not relevant in evaluating the legality of a United States-directed search in Mexico of the residence of a Mexican citizen who had no substantial voluntary attachment to the United States, despite the fact that he was being prosecuted in our courts.[45] In Chief Justice Rehnquist's opinion, to find that the defendant could claim the protection of the Fourth Amendment would be impractical because American magistrates have no authority to issue warrants that are effective in a foreign territory.[46] Additionally, accepting the defendant's claim

> would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries.... [In] 'searches or seizures[,]' ... for the protection of American citizens or national security[,]... aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters.... [Such a finding] would plunge [the Government] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.[47]

Verdugo-Urquidez not only excluded aliens from the shelter of the Fourth Amendment in the course of foreign searches by United States authorities (and potentially during domestic searches), it also pointedly raised questions as to the degree of protection provided to American citizens abroad as well.[48]

> To support his all-encompassing view of the Fourth Amendment, respondent points to language from the plurality opinion in *Reid v. Covert*.... [In *Reid*, f]our justices "reject[ed] the idea that when the United States

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43. *See, e.g.*, Abraham Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, 31 VA. J. INT'L L. 151, 189 (1991) ("The suggestion that the courts are preempted from adjudicating the legality of an [extraterritorial search] as violative of the Bill of Rights merely because the accused is not a member of [the social compact of American citizenship] is absurd.").

44. 494 U.S. 259 (1990).

45. *Id.* at 274–75.

46. *Id.* at 274.

47. *Id.* at 273–74 (citations omitted).

48. *Id.* at 270, 275 (finding that the Court in *Reid* did not provide full constitutional protection to citizens abroad and that these protections could only be applied "by the political branches through diplomatic understanding, treaty, or legislation").

> acts *against citizens* abroad it can do so free of the Bill of Rights." . . . The concurrences by Justices Frankfurter and Harlan in *Reid* resolved the case on much narrower grounds than the plurality and declined even to hold that the United States citizens were entitled to the full range of constitutional protections[:] . . . "[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[49]

This citation by Judge Rehnquist certainly suggests that, at least in his opinion, American authorities may not always have to adhere to the Bill of Rights, as we understand their application in domestic cases, when conducting surveillance and search and seizure in a foreign land against a terrorist suspect who is an American citizen. Of course, United States agents are presented with a potential problem in all cases involving American citizens in a foreign jurisdiction because, as previously noted, United States magistrates do not have extraterritorial jurisdiction.[50] The Executive branch has attempted to meet this shortcoming for purely intelligence operations by including a provision in Executive Order 12,333 that delegates power to the Attorney General to approve the use of any technique against an American citizen abroad which, if pursued domestically, would require a warrant.[51] The Foreign Intelligence Surveillance Act (FISA), discussed below, also now has a physical search provision.[52] But what about an investigation that is, in part, intelligence related, yet has as its fundamental purpose the eventual criminal prosecution of terrorist perpetrators? *United States v. Barona*[53] is instructive of one approach to this problem under current law.

Barona involved a "joint venture" between United States, Danish, and Italian authorities to investigate an extensive international drug conspiracy.[54] At the request of the Drug Enforcement Agency (DEA), Danish police intercepted the phone

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49. *Id.* at 269–70 (citations omitted).

50. *Id.* at 274 (noting that warrants issued by a United States magistrate are ineffective outside the United States).

51. *See* Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 8, 1981). In each case, the Attorney General must first determine "that there is probable cause to believe that the technique is directed against a foreign power or an agent of a foreign power." *Id.* at 59,951.

52. 50 U.S.C. § 1822 (1994) (defining the Attorney General's power to grant a physical search in foreign countries without a court order).

53. 56 F.3d 1087 (9th Cir. 1995).

54. *Id.* at 1089, 1094, 1096.

calls of the main targets.[55] Transcripts of the intercepted calls were introduced at the defendants' trials in the United States.[56] The defense appealed, claiming an allegedly unconstitutional search and seizure was initiated by United States officials in conjunction with the foreign investigators.[57] In an opinion written by Chief Judge Wallace, the Ninth Circuit rejected the defense contention on the grounds that the interception was lawful under the Fourth Amendment if it was "'reasonable.'"[58] Reasonableness, in this context, would be achieved if the foreign authorities either followed their own law or the United States agents acted in the good faith belief that the interception was in compliance with foreign law.[59]

The majority in *Barona* further specifically stated that foreign searches against American citizens are not required to meet the conventional standard of "probable cause."[60] This was based in part on the fact that Chief Justice Rehnquist, in *Verdugo-Urquidez*, had declined to interpret *Reid* as holding that federal officials are constrained by the Fourth Amendment, as commonly understood in domestic cases, wherever they act against American citizens.[61] In addition, as the Fourth Amendment contains two independent clauses, one prohibiting "unreasonable" searches and the other stating that warrants may only be issued upon a finding of "probable cause," the court determined there was no requirement that searches without a warrant should always be based on "probable cause."[62] "Reasonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment."[63]

Judge Reinhardt wrote a strong dissent in *Barona*, stating that the practical result of the majority's decision would be that our Constitution has no influence on United States action against Americans abroad, as long as the government complied with the foreign law, whether it is the law of Iraq, Iran, Kuwait, Singapore, or China.[64] By requesting that Danish officials serve,

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55. *Id.* at 1094–96.

56. *Id.* at 1090.

57. *Id.* at 1093.

58. *Id.* at 1091, 1093–94.

59. *Id.* at 1091, 1093.

60. *Id.* at 1092 n.1 (asserting that nothing in the Fourth Amendment states that all searches must be based upon "probable cause").

61. *Id.* at 1093.

62. *Id.* at 1092 n.1.

63. *Id.*

64. *Id.* at 1100–01 (Reinhardt, J., dissenting) ("In fact, under the majority's rule, the Fourth Amendment provides *even less* protection than foreign law since . . . the Constitution does not even require foreign officials to comply with their own law; all that

in effect, as agents of the United States, the United States had exercised power over the defendants free of the restrictions and protections of the Bill of Rights.[65] Additionally, in interpreting the Fourth Amendment's prohibition against unreasonable search and seizure, with or without a warrant, "'the [Supreme] Court has insisted upon probable cause as a *minimum* requirement.'"[66] Finally, although United States warrants cannot be issued overseas, "there is *no* reason that, in a criminal case conducted in the United States, a federal judge cannot require a United States agent to explain after the fact why he initiated a search of one of our own citizens."[67]

The basic holding of *Barona* still stands as good law in the Ninth Circuit as of the time of this writing. It is impossible to predict, however, exactly how the Supreme Court would have ruled if they had granted certiorari. The majority opinion in *Barona* certainly appears to violate the social compact theory enunciated by the plurality opinion in *Reid*,[68] holding that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide... should not be stripped away just because he happens to be in another land."[69] It also contrasts with the theory of mutuality articulated by Justice Brennan in *Verdugo-Urquidez* to the effect that a citizen expected to obey United States law should be able to expect that the government would obey the Constitution in investigating his activities.[70] The case is, however, completely consistent with Justice Rehnquist's opinion in *Verdugo-Urquidez* and Justices Harlan and Frankfurter in *Reid*, who advocate providing citizens only what "process is 'due'" in the circumstances.[71] Additionally, *Barona* is consistent with the emerging flexible approach to probable cause

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is required is that American officials have a good faith belief that they did so.").

65. *Id.* at 1101 (Reinhardt, J., dissenting).

66. *Id.* at 1101 n.8 (Reinhardt, J., dissenting) (emphasis added by Judge Reinhardt) (quoting Chambers v. Maroney, 399 U.S. 42, 51 (1970)).

67. *Id.* at 1102 (Reinhardt, J., dissenting). Judge Reinhardt's argument was that probable cause has been dispensed with only in certain limited, narrowly defined cases such as *Terry* frisks and border, school, regulatory and administrative searches. *Id.* at 1102 n.8 (Reinhardt, J., dissenting).

68. *See* Reid v. Covert, 354 U.S. 1, 5–7 (1957) (discussing the rights and liberties of United States citizens as part of the Constitution, not just part of "custom and tradition").

69. *Id.* at 6.

70. United States v. Verdugo-Urquidez, 494 U.S. 259, 284 (1990) (Brennan, J., dissenting).

71. *See id.* at 270 (internal quotation marks omitted); *Reid*, 354 U.S. at 75 (Harlan, J., concurring in the result).

that will be discussed in the next section and later in this article.[72]

B. *The Foreign Intelligence Surveillance Act*

The hypothetical began by stating that the FBI had obtained general background information that a terrorist group may be planning to explode a bomb in a major United States city. This tip may have come from anyplace, but one excellent and common source of such background information is domestic or foreign intelligence intercepts conducted by the National Security Administration (NSA), CIA or FBI. An analysis of this aspect of the hypothetical requires a brief examination of the constitutional implications of the Foreign Intelligence Surveillance Act of 1977.[73]

During the Vietnam War, a group of protesters tried to blow up the local CIA recruiting office in Michigan and various other government buildings.[74] The government attempted to use evidence obtained during a domestic national security wire interception, secured without a formal court order, in the subsequent criminal prosecution of those responsible.[75] The Supreme Court, in *United States v. United States District Court*, held that the Government did not have unlimited power to conduct national security wiretaps and that it would be required in most circumstances to obtain the issuance of a warrant by the judiciary before utilizing this surveillance technique.[76] Nevertheless, utilizing reasoning that could have importance far beyond the narrow issue of wire interceptions, the Court stated:

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." . . .
>
> . . . As the Court said in *Camara v. Municipal Court*: "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . In determining whether a particular inspection is reasonable—and thus in determining whether there is

72. *See* Jennifer J. Dacey, Note, *U.S. Citizens' Fourth Amendment Rights: Do They Extend Only to the Waters' Edge?* United States v. Barona, 5 GEO. MASON L. REV. 761, 784–85 (1997).

73. *See* 50 U.S.C. §§ 1801–1829 (1994).

74. United States v. United States Dist. Court, 407 U.S. 297, 299 (1972).

75. *Id.* at 299–301.

76. *Id.* at 323–24.

> probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." It may be that Congress, for example, would judge that the application and affidavit showing probable cause [for security surveillance] need not follow the exact requirements of § 2518 [Title III for criminal cases] but should allege other circumstances more appropriate to domestic security cases . . . .[77]

Congress accepted the Court's invitation and passed FISA.[78] "FISA requires judicial approval before the government engages in an electronic surveillance for foreign intelligence purposes."[79] The application, however, need only state facts supplying probable cause to believe that "the target of the [intercept] is a foreign power or an agent of a foreign power" and certify "that the purpose of the surveillance is to obtain foreign intelligence information."[80] This contrasts dramatically with Title III of the Ominibus Crime Control and Safe Streets Act,[81] which generally requires in criminal investigations that the government must meet a strict standard of probable cause to believe that a particular crime is being committed by a specific individual using an identified phone or location.[82] Nevertheless, despite the comparatively lenient provisions of FISA and repeated constitutional attacks on its provisions, the appellate courts have continuously upheld the statute based on the Supreme Court's suggestion that national security surveillance need not meet the exact probable cause requirements of Title III.[83]

The obvious question is whether FISA, which naturally would be utilized to obtain "foreign intelligence" information regarding terrorists and spies, can be used to identify and

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77. *Id.* at 322–23 (citation omitted) (quoting Camara v. Mun. Court, 387 U.S. 523, 534–35 (1967)).

78. *See* 50 U.S.C. §§ 1801–1829.

79. United States v. Cavanagh, 807 F.2d 787, 788 (9th Cir. 1987).

80. 50 U.S.C. §§ 1804(a)(4)(A), 1804(a)(7)(B) (1994); *see also Cavanagh*, 807 F.2d at 789.

81. 18 U.S.C. §§ 2510–2522 (1994 & Supp. IV 1999).

82. 18 U.S.C. § 2518(3) (1994).

83. *See* United States v. Duggan, 743 F.2d 59, 72 (2d Cir. 1984) ("[T]he implication of [the Court's] discussion was that the warrant requirement is flexible and that different standards may be compatible with the Fourth Amendment in light of the different purposes and practical considerations of domestic national security surveillances."); *see also Cavanagh*, 807 F.2d at 790 ("[T]he showing necessary under the Fourth Amendment to justify a surveillance conducted for national security purposes is not necessarily analogous to the standard of probable cause applicable to criminal investigations."); United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987) ("The governmental interests in gathering foreign intelligence are of paramount importance to national security, and may differ substantially from those presented in the normal criminal investigation.").

criminally convict those same terrorists and spies. This is clearly a significant matter in evaluating whether our laws, as currently interpreted, are adequate to meet the terrorist threat because FISA surveillance can provide extremely useful information on individuals who are essentially criminals. It is very difficult during the early stages of an investigation of such criminals to obtain enough evidence to meet the strict standards of Title III regarding probable cause—that there is probable cause to believe that a particular individual will be using a specific communication device to further known criminal activity.[84] Furthermore, as with criminal search warrants, United States magistrates do not have the power to authorize electronic surveillance in criminal cases outside the boundaries of the United States.[85]

In 1980, the Fourth Circuit examined this issue in *United States v. Truong Dinh Hung*[86] and held that evidence obtained after the primary purpose of the investigation had shifted from securing intelligence information to accumulating evidence of a crime must be suppressed because of the failure to comply with the requirements of Title III.[87] Subsequent cases have distinguished *Truong*, however, on the grounds that the initial intelligence surveillance in that case was not obtained pursuant to a FISA warrant.[88] These courts, noting that FISA actually contains a statutory mechanism for the dissemination of criminal information obtained in an intelligence intercept, have held that when such evidence is discovered "incidentally" during a legitimate FISA intercept, it may be admitted in a subsequent criminal prosecution.[89] According to the Second Circuit, this includes those situations where "the government can anticipate that the fruits of such surveillance may later be used, as allowed by [the statute], as evidence in a criminal trial."[90]

In evaluating the potential usefulness of intelligence interceptions, it is important to understand that FISA requires

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84. Refer to note 82 *supra* and accompanying text (discussing the probable cause requirement under Title III of the Omnibus Crime Control and Safe Streets Act).

85. Refer to notes 49–51 *supra* and accompanying text.

86. 629 F.2d 908 (4th Cir. 1980).

87. *Id.* at 915–16.

88. *See, e.g.*, United States v. Falvey, 540 F. Supp. 1306, 1314 (E.D.N.Y. 1982).

89. *See* United States v. Cavanagh, 807 F.2d 787, 791 (9th Cir. 1987); *see also* United States v. Duggan, 743 F.2d 59, 73 n.5 (2d Cir. 1984) ("A fortiori we reject defendants' argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe that the target *has committed a crime*.").

90. *Duggan*, 743 F.2d at 78. The Fourth Circuit also accepts this proposition. *See* United States v. Pelton, 835 F.2d 1067, 1076 (4th Cir. 1987).

the government to obtain a foreign intelligence warrant from a court any time one of the targeted parties is located in the United States or an interceptee, wherever located, is an American citizen or resident alien.[91] These are the parameters chosen by Congress to comply with *Reid*'s extension of the Fourth Amendment (in whatever degree) to government action overseas.[92] At the same time, the statute imposes no FISA warrant requirement and contains no restrictions on intelligence surveillance outside the country against non-American persons.[93] Any information obtained during such an interception may be utilized in a United States court if necessary, depending on the government's willingness to expose its source and methods of interception.

The preceding review of recent case law demonstrates that, from a national security and law enforcement perspective, the United States has made considerable progress in the last fifteen years towards obtaining constitutional authority to conduct extraterritorial operations, which can protect the nation and lead to criminal convictions of those who conspire to commit terrorist acts. Civil libertarians, however, are naturally concerned about *Verdugo-Uriquidez*'s refusal to apply the Constitution to foreign searches, as well as any suggestion that the Bill of Rights would not safeguard Americans against government action overseas in exactly the same manner that it has been applied domestically.[94] As indicated by the cited cases, FISA's relaxed standards for intelligence surveillance are viewed suspiciously, and defendants have fought strenuously to prevent these intercepted communications from being utilized to further criminal investigations or to circumvent the tough mandates of Title III. A retrenchment along the lines suggested by the critics could, however, create serious obstacles for law enforcement and intelligence agencies in their increased efforts to identify terrorists, interdict their operations, and secure criminal convictions.

United States agents are currently confronted with the need to conduct inquiries into the criminal activities of individuals in a

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91. 50 U.S.C. § 1805(a)(3)(A), (5) (1994).

92. Reid v. Covert, 354 U.S. 1, 32–33 (1957) (noting that constitutional protections are not completely eliminated simply because an American citizen is overseas); *see also Duggan*, 743 F.2d at 72–73 (discussing the line of Supreme Court cases addressing the territorial limits of the Fourth Amendment out of which FISA was enacted).

93. *See* 50 U.S.C. § 1803 (1994) (lacking any restrictions on the government's ability to introduce evidence obtained via a surveillance that does not require prior judicial approval).

94. *See, e.g.*, Dacey, *supra* note 72, at 788–89 (sounding the alarm at the refusal of several federal courts of appeals to apply the Fourth Amendment to American citizens beyond United States borders).

foreign land when United States magistrates do not have jurisdiction to review and authorize their investigative techniques. Executive Order 12,333 allows the Attorney General to sanction various intrusive operations,[95] but he or she is still a member of the executive branch and this power is technically confined to purely intelligence matters.[96] *Barona*'s approach of deferring to the laws of the nation where the investigation takes place is workable[97] and makes sense when dealing with a country like Denmark, which has reasonable restrictions on the police and military. Serious questions, however, would be raised if the same rule were to be applied to nations that do not have the same concept of privacy rights.

Theoretically, the protection of individual rights could be advanced if a judicial officer was interposed between the government and international targets, especially when those targets are American citizens. In addition, a magistrate's authorization before international searches of American citizens might protect law enforcement officers from alleged violations of civil rights and provide some certainty that any evidence found would probably be admissible in court. This could be better than having to depend to such a large degree on the wide variety of approaches a particular appellate or district court might take in evaluating extraterritorial searches. The United States has, within the last twenty years, adopted a number of statutes that provide extraterritorial criminal jurisdiction over such matters as drug smuggling and export violations, as well as terrorist activity.[98] Congress could thus conceivably establish a court with jurisdiction over such investigations in foreign lands as it has for intelligence interceptions of American citizens that take place outside of our national boundaries.

The existence of such a court would, of course, still not quiet those who disagree with Chief Justice Rehnquist's opinion in *Verdugo-Urquidez* regarding foreign nationals, or his references to the limited scope of the Bill of Rights as applied to Americans overseas.[99] In addition, the critical question of what standard of

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95. Refer to notes 49–51 *supra* and accompanying text (discussing the purpose and limits of Executive Order 12,333).

96. Refer to notes 49–51 *supra* and accompanying text.

97. *See* United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (stating that the first step in determining whether a joint investigation between the United States and a foreign power was reasonable is to consult the law of the relevant foreign nation).

98. *See* Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 1901–1904 (1994); *see also* Export Administration Act, 50 U.S.C. §§ 2401–2414 (Supp. II 1994); Anti-Terrorism Act of 1990, 18 U.S.C. §§ 2331–2339A (1994 & Supp. IV 1999).

99. Refer to notes 44–49 *supra* and accompanying text (discussing Chief Justice Rehnquist's opinion).

probable cause should be applied by these courts would be a matter of serious contention. Should *Barona*'s rule of "reasonableness" as opposed to "probable cause" prevail,[100] or *United States v. United States District Court*'s expanded concept of probable cause in security cases,[101] or the traditional definition of probable cause, which requires substantial evidence that would convince a reasonable man that a crime is about to be committed and that the defendant is the one who will commit it, be utilized?[102] The appropriate standard and other matters will be explored in the following section.

V. DOMESTIC ROADBLOCKS AND VEHICLE SEARCHES

The hypothetical posited a situation in which the police chief felt compelled to initiate checkpoints and roadblocks throughout the city for up to two months and to authorize his officers to search vehicles without requiring that the officers have probable cause and based on their individual discretion. There are, of course, no court decisions ruling on the constitutionality of this specific response to a terrorist threat. There have, however, been a number of cases in the last decade which indicate how the courts would, or should, react to this kind and magnitude of governmental action and the inevitable challenges that would follow. These decisions not only provide guidance for the courts but also suggestions to the government as to the manner in which it should proceed in order to accommodate fundamental rights, protect the community, and comply with the Constitution.

In *Michigan Department of State Police v. Sitz*,[103] the Supreme Court set forth the basic test to evaluate the seizure inherent in roadblocks and the various degrees of search that usually accompany them.[104] Writing for the majority, Chief Justice Rehnquist stated that Michigan's policy of implementing sobriety checkpoints on public highways in an effort to curb the serious problem of driving while intoxicated should be upheld because the balance of the following: (1) the government's interest; (2) the extent to which this system can be said to

100. Refer to notes 53–67 *supra* and accompanying text (discussing the *Barona* holding that a search and seizure is constitutional if it is "reasonable" and that the conventional probable cause standard is not required).

101. Refer to notes 76–77 *supra* and accompanying text (discussing the Supreme Court's expansion of probable cause).

102. *See* Texas v. Brown, 460 U.S. 730, 742 (1983) ("[P]robable cause . . . requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief . . . .'").

103. 496 U.S. 444 (1990).

104. *Id.* at 455.

reasonably advance that interest; and (3) the degree of intrusion upon individual motorists strongly weighed in favor of the program.[105]

Formulating the test, however, proved much easier than applying it to other circumstances. Since the decision in *Sitz*, courts have faced appeals involving different kinds of governmental intrusion—from preventing travel in certain parts of the city, to narcotics dogs sniffing vehicles, to searches of containers for weapons—all in support of such announced government programs as preventing drive-by shootings, controlling the drug problem, and halting gang warfare.[106] The attempt to rule on the legality of these roadblocks has greatly divided the circuits, as well the judges within the appellate courts themselves.[107]

In *Edmond v. Goldsmith*,[108] an Indianapolis roadblock, accompanied by a five-minute delay while police looked inside the vehicle and led a drug-sniffing dog around it, was condemned because the government's purpose was "to catch drug offenders in the hope of incapacitating them," as opposed to initiating a general regulatory program.[109] The court found that

> the concern which lies behind the randomized or comprehensive systems of inspections or searches that have survived challenge under the Fourth Amendment is not primarily with catching crooks, but rather with securing the safety or efficiency of the activity in which the people who are searched are engaged. Consider [decisions upholding] employment drug tests for transport workers[,]. . . sobriety checkpoints, which are designed to protect other users of the road[,]. . . and the use of metal

105. *Id.*

106. *See* Norwood v. Bain, 166 F.3d 243, 245 (4th Cir. 1999) (per curiam) (upholding, by an equally divided vote, the search of motorcycle saddlebags for weapons), *cert. denied*, 527 U.S. 1005 (1999); United States v. Huguenin, 154 F.3d 547, 558–59 (6th Cir. 1998) (holding a vehicle checkpoint, allegedly designed to detect intoxicated drivers, unconstitutional because it was actually a "trap" set up to search for narcotics); Maxwell v. City of New York, 102 F.3d 664, 665–68 (2d Cir. 1996) (upholding the stopping of vehicles attempting to enter a "narcotics-ridden" area where four drive-by shootings had occurred); Merrett v. Moore, 58 F.3d 1547, 1548–49, 1553 (11th Cir. 1995) (upholding the constitutionality of a roadblock in which narcotics dogs sniffed vehicles while officers checked the driver's license and vehicle registration).

107. *See Norwood*, 166 F.3d at 245. *Compare Huguenin*, 154 F.3d at 558 (finding the vehicle checkpoints unreasonable under the Fourth Amendment), *with Merrett*, 58 F.3d at 1553 (finding the vehicle checkpoints constitutional).

108. 183 F.3d 659 (7th Cir. 1999), *aff'd sub nom.* City of Indianapolis v. Edmond, 121 S. Ct. 447 (2000). Refer to note 150 *infra*.

109. *Id.* at 661, 665.

> detectors and x-ray machines to screen entrants to government buildings and embarking air travelers.[110]

The dissent, referencing the Supreme Court's approval of the search for and subsequent prosecution of drunk drivers in *Sitz* and illegal aliens in *United States v. Martinez-Fuerte*,[111] stated, "Because both [of these] programs were designed to enforce the criminal laws, a simple criminal-regulatory distinction [as set forth by the majority] won't fly."[112] The dissent further cited the Supreme Court's acceptance of pretext stops in *Whren v. United States*[113] as additional proof of that Court's conclusion that the reasonableness inquiry under the Fourth Amendment "depends on what the police [actually] do, not on what they want or think."[114] "Where does 'purpose' come into the [F]ourth [A]mendment? Not from its text; reasonableness fairly screams an objective inquiry."[115]

The Second Circuit applied the same *Sitz* test in *Maxwell v. City of New York*[116] to find in favor of New York officials who had initiated roadblocks designed to deter drive-by shootings.[117] Under the program, every vehicle seeking to enter a cordoned-off area was stopped by police and the passengers interrogated.[118] They were allowed to drive into the neighborhood only if the officers determined that they had a "legitimate reason" for entry.[119] The majority found this to be a minimal intrusion with a valid purpose that was likely to be effective.[120]

The dissent, however, strongly objected to the discretion given to the police officers.[121]

> [E]ntrance to the frozen zone was left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion: the "legitimate reason to enter" . . . is another way of saying that the individual officer had total discretion. . . . In effect,

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110. *Id.* at 664.

111. 428 U.S. 543 (1976).

112. *Edmond*, 183 F.3d at 669 (Easterbrook, J., dissenting).

113. 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

114. *Edmond*, 183 F.3d at 667 (Easterbrook, J., dissenting).

115. *Id.* (Easterbrook, J., dissenting).

116. 102 F.3d 664 (2d Cir. 1996).

117. *Id.* at 667.

118. *Id.* at 666 (noting that officers sought to "ascertain the driver's connection to the neighborhood" before allowing the vehicle to proceed).

119. *Id.* at 666–67. Persons on foot could proceed into the neighborhood without being questioned. *Id.* at 666.

120. *Id.* at 667.

121. *Id.* at 669 (Oakes, J., dissenting).

> this leaves, in James Otis's phrase, "the liberty of every man in the hands of every petty officer."[122]

The recent case that perhaps best illustrates both the division of opinion and the numerous legal problems that can be encountered in ruling on the constitutionality of a roadblock and search is *Norwood v. Bain*.[123] Bain, the Director of Public Safety for the City of Spartanburg, North Carolina,[124] had received informant information that there might be a serious battle involving weapons between the notorious Pagan and Hell's Angels motorcycle gangs at a public festival and rally in his city.[125] Accordingly, he directed that all motorcycles be stopped at the entrance gate, and unworn clothing, saddlebags, and compartments searched for weapons before riders could proceed.[126] The plaintiff motorcycle riders filed a civil rights action, requesting damages.[127] The district court and a panel of the Fourth Circuit ruled that the search violated the Fourth Amendment.[128] Writing for the panel majority, Judge Phillips noted that the intrusions described in *Sitz* and *Martinez-Fuerte* were held to be minimal and that both opinions indicated that more extensive searches, such as the type conducted here, would require either individualized suspicion or probable cause.[129] Furthermore, the policy instituted by the City of Spartanburg was not equivalent to the entry-and-search programs which had been approved at courthouses and airports,[130] because the latter were "formally promulgated by responsible federal agencies for nationwide application under agency oversight," which limited individual officer discretion.[131] Finally, the reality and imminence of the violence threatened in this case was not a matter of documented public record, but was based on an anonymous informant's information.[132]

Bain was subsequently accepted by the Fourth Circuit for rehearing en banc.[133] The court upheld the checkpoint stops but

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122. *Id.* at 670–71 (Oakes, J., dissenting).

123. 166 F.3d 243 (4th Cir. 1999) (per curiam), *cert. denied*, 527 U.S. 1005 (1999).

124. *Id.* at 244.

125. Norwood v. Bain, 143 F.3d 843, 846 (4th Cir. 1998) (per curiam), *reh'g en banc*, 166 F.3d 243 (4th Cir. 1999).

126. *Norwood*, 166 F.3d at 246. Riders who parked their motorcycles and proceeded through the entrance were allowed to pass freely. *Id.*

127. *Id.* The plaintiffs also sought injunctive relief. *Id.*

128. *Norwood*, 143 F.3d at 848, 850.

129. *Id.* at 850–51.

130. *Id.* at 851, 854.

131. *Id.* at 852.

132. *Id.* at 853.

133. *Id.* at 843; Norwood v. Bain, 166 F.3d 243, 245 (4th Cir. 1999) (per curiam).

split, seven to seven, on the critical issue of the follow-up search of the clothing and motorcycle compartments.[134] Judge Wilkins, writing for those who supported the search, initially relied upon the Supreme Court's opinions in *Camara v. Municipal Court*[135] and *National Treasury Employees Union v. Von Raab*[136] to justify the additional intrusion without traditional probable cause.[137] *Camara* had found the "functional equivalent" of probable cause in authorizing area search warrants for housing safety inspectors, based on evaluating the importance of such inspections and the degree of intrusion involved, as opposed to the traditional method of analyzing the actual "probability" of finding evidence of wrongdoing.[138] *Von Raab* emphasized "reasonableness" as the touchstone of the Fourth Amendment[139] and, as the court in *Barona*,[140] suggested that "probable cause," however defined, was "peculiarly related to criminal investigations."[141]

Judge Wilkins further stated that the searches in this case were certainly "reasonable" because they met the balancing test of *Sitz*.[142] Spartanburg possessed a genuine need to safeguard the public based on a concrete, not hypothetical, danger[143] and the intrusion was not substantial.[144] The intrusiveness was lessened by the fact that all who attended the rally were informed that they would be subject to search if they entered the fairgrounds on a motorcycle.[145] In addition, as all who entered on motorcycles "were subjected to the [same] search; the decision to search was not left to the discretion of the officers."[146] Finally, in evaluating

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134. *Norwood*, 166 F.3d at 245.

135. 387 U.S. 523 (1967).

136. 489 U.S. 656 (1989).

137. *Norwood*, 166 F.3d at 246–47, 251 (Wilkins, J., writing separately).

138. *See Camara*, 387 U.S. at 534–39 (concluding that an area search is "reasonable" under the Fourth Amendment and that probable cause to issue a warrant exists where "a valid public interest justifies the intrusion contemplated"); *see also* Almeda-Sanchez v. United States, 413 U.S. 266, 270 (1973) ("In *Camara v. Municipal Court*, the Court held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations.") (citation omitted).

139. *Von Raab*, 489 U.S. at 665.

140. *See* United States v. Barona, 56 F.3d 1087, 1092 n.1 (9th Cir. 1995).

141. *Von Raab*, 489 U.S. at 667 (internal quotation marks omitted).

142. *Norwood*, 166 F.3d at 251 (Wilkins, J., writing separately) ("In sum, a genuine and substantial threat to public safety existed . . .; the method chosen . . . effectively advanced the public interest . . .; and the intrusion suffered . . . was minimal.").

143. *Id.* at 247–48 (Wilkins, J., writing separately).

144. *Id.* at 251 (Wilkins, J., writing separately).

145. *Id.* (Wilkins, J., writing separately).

146. *Id.* (Wilkins, J., writing separately).

the effectiveness of the program, *Sitz* had made clear that the evaluation was not dependent on the number of "hits" obtained by the police, but instead focused on the degree to which the program advanced the public interest.[147] In analyzing this factor, the courts were to leave "'the decision as to which reasonable alternative law enforcement techniques should be employed to deal with a serious public danger' to 'the governmental officials, who have a unique understanding of, a responsibility for, limited public resources.'"[148]

Applying the principles of these recent cases to the hypothetical, one would certainly expect that the courts would uphold the stop and search of all rental trucks in the city, simply because of the great need to protect the public from the danger of a weapon of mass destruction and the minimal intrusion of a vehicle search. Although it rejected roadblocks as a means of conducting drug searches, even the *Edmond* court stated:

> [W]e can imagine cases in which, although the police do not suspect anyone, a roadblock or other dragnet method of criminal law enforcement would be reasonable. We may assume that if the Indianapolis police had a credible tip that a car loaded with dynamite and driven by an unidentified terrorist was en route to downtown Indianapolis, they would not be violating the Constitution if they blocked all the roads to the downtown area.... [U]rgent considerations of the public safety require compromise with the normal principles constraining law enforcement....[149]

The Seventh Circuit in *Edmond* stopped just short of actually authorizing the follow-up search in its hypothetical,[150] but Judge Wilkins used the same example in *Norwood v. Bain* and stated:

> [U]nder these facts, an enormous danger to public safety would exist that could be averted only by intercepting the would-be bombers. The Constitution would permit law enforcement officers to stop all motorists... and conduct cursory searches of the interiors and trunks of the vehicles because the severity of the harm, the effectiveness of the

147. *Id.* at 250 (Wilkins, J., writing separately); *see also* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453–55 (1990).

148. *Norwood*, 166 F.3d at 250 (Wilkins, J., writing separately) (quoting *Sitz*, 496 U.S. at 453–54).

149. Edmond v. Goldsmith, 183 F.3d 659, 663 (7th Cir. 1999), *aff'd sub nom.* City of Indianapolis v. Edmond, 121 S. Ct. 447 (2000).

150. *Id.*

> proposed response, and the minimal intrusion to the individuals . . . weigh in favor of that conclusion.[151]

It should be noted that even if a court were to somehow find that the *Sitz* balancing test, constituting reasonableness under the Fourth Amendment,[152] did not authorize the roadblocks and searches to counter the terrorist threat, the expanded concept of "probable cause" to conduct area searches for public safety, as set forth in *Camara*,[153] would probably justify this government activity. As the Supreme Court stated in *United States v. United States District Court*,[154] "It may be that Congress . . . would judge that the application and affidavit showing probable cause [for security surveillance] need not follow the exact requirements of [Title 18] but should allege other circumstances more appropriate to domestic security cases . . . ."[155] *Camara*, *United States District Court* and *Sitz* all demonstrate great judicial deference to police action when confronted with a major threat to public safety.

Nevertheless, the cited cases do point out potential problem areas that could be clarified or avoided altogether by the government beforehand to insure that any searches conducted are constitutional and the results admissible as evidence. First, there is the need to obtain, document, and act upon concrete information. In *Norwood v. Bain*, seven judges apparently felt the information received indicated a credible threat, while the other seven felt it was merely speculative and hypothetical.[156] Additional evidence, if it could have been obtained, would have greatly aided the government's cause.

Securing relevant information and determining how to respond will always be extremely difficult. *Korematsu v. United*

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151. *Norwood*, 166 F.3d at 249–50 (Wilkins, J., writing separately). The above conclusion is supported by the recent Supreme Court opinion in *City of Indianapolis v. Edmond*, 121 S. Ct. 447 (2000). The Court agreed with the Seventh Circuit that a drug search roadblock program could not be upheld because the purpose was primarily to investigate crime, but that:

> there are circumstances that may justify a law enforcement checkpoint where the primary purpose would . . . , but for some emergency, relate to ordinary crime control. For example, . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by . . . a particular route

Id. at 455.

152. *See Sitz*, 496 U.S. at 455 (describing the test as balancing the State's interest, the degree to which the program advances that interest, and the level of individual intrusion).

153. *See* Camara v. Mun. Court, 387 U.S. 523, 538 (1967).

154. 407 U.S. 297 (1972).

155. *Id.* at 323.

156. *See* 166 F.3d 243, 245, 247–48 (4th Cir. 1999) (per curiam).

States[157] highlights how critical this intelligence is in making the right decision. In that famous, or infamous, case, the Supreme Court originally upheld the removal of Japanese citizens from the West Coast and the attendant violation of their civil rights[158] in reliance upon the United States Army's Dewitt report, citing sabotage, espionage, and illegal radio transmissions allegedly conducted by these citizens.[159] Forty years later, a United States District Court found, and the Justice Department confirmed, that the Dewitt report submitted to the Supreme Court was highly selective and contained material omissions which could have affected the Supreme Court's decision.[160] Korematsu's conviction was reversed[161] and the court agreed with the findings of an independent commission that *Korematsu* now "'lies overruled in the court of history.'"[162]

The second factor that must be addressed by the government before conducting a program of roadblocks and searches is the level of discretion delegated to the on-scene officers. This was of great concern to the dissenting judges in *Maxwell*[163] and *Sitz*[164] and it is clear Judge Wilkins and his six colleagues were positively influenced in *Bain* by the fact that the Spartanburg procedure gave little discretion as to who and what the officers would search.[165] Obviously, some flexibility must be permitted. Published guidelines cannot anticipate every contingency. Nevertheless, the likelihood of abuse is significantly curtailed when searches are conducted under programs formally and carefully promulgated by responsible agencies and implemented under strict agency oversight.

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157. 323 U.S. 214 (1944).

158. *Id.* at 217–19.

159. *Id.* at 238–39 (Murphy, J., dissenting); Korematsu v. United States, 584 F. Supp. 1406, 1418 (N.D. Cal. 1984).

160. *Korematsu*, 584 F. Supp. at 1416–20.

161. *Id.* at 1420.

162. *Id.* Congress created the Commission on Wartime Relocation and Internment of Civilians in 1980 to review the circumstances under which American citizens were relocated during the war. *Id.* at 1416.

163. *See* Maxwell v. City of New York, 102 F.3d 664, 670 (2d Cir. 1996) (Oakes, J., dissenting) ("I agree with plaintiff-appellee that entrance to the frozen zone was left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion . . . .").

164. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 458 (1990) (Brennan, J., dissenting) ("By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police.").

165. *See* Norwood v. Bain, 166 F.3d 243, 251, 254 (4th Cir. 1999) (per curiam) (Wilkins, J., writing separately) ("[T]he decision to search was not left to the discretion of the officers.").

The third factor that the government should consider in advance is the enhanced possibility that a particular program will withstand challenge if it is authorized by Congress. As Justice White, joined by Chief Justice Rehnquist and Justice Blackmun, stated in *Almeida-Sanchez*:

> The Court has been particularly sensitive to the [Fourth] Amendment's broad standard of "reasonableness" where . . . authorizing statutes permitted the challenged searches. We noted in *Colonnade* that "Congress has broad power to design such powers of inspection . . . as it deems necessary to meet the evils at hand," and in *Biswell*, we relied heavily upon the congressional judgment that the authorized inspection procedures played an important part in the regulatory system.[166]

Accordingly, Congress could, as part of its anti-terrorist legislation, include provisions that authorize governmental entities to meet the terrorist threat by conducting roadblocks and area searches when justified under the circumstances. Such legislation would probably guarantee the legality of the checkpoint-search scenario in the hypothetical and protect the officers who conducted the searches from civil rights suits. However, the legislation might also make possible additional searches necessary to protect the public safety beyond what is contemplated in the hypothetical and cited case law. For example, what if the search was instigated to locate a terrorist who was not in actual possession of a bomb and therefore did not present the immediate danger contemplated by *Sitz* and the above-quoted passages drawn from *Edmond* and *Bain*? What if the terrorist and/or the bomb were thought to be in a residence, which conveys a greater expectation of privacy than does an automobile? Would this search, which constitutes a much more significant intrusion, be permissible? It is doubtful that the *Sitz*, *Maxwell*, or *Bain* decisions would support a search for a terrorist without a bomb or a residential search for either. Specific congressional authorization, however, in accordance with the "area search" principles of *Camara*, might lead to a legitimate judicial finding of "reasonableness" that would constitutionally support a necessary government operation of this kind to preserve the public safety.

A complete examination of these latter questions is beyond the scope of this article. What is apparent is that the case law of the last ten years should authorize the roadblock and search

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166. Almeda-Sanchez v. United States, 413 U.S. 266, 290–91 (1973) (White, J., dissenting) (citation omitted).

described in the hypothetical, even without legislation. Furthermore, if a governmental entity initiates such a program, it should carefully document the intelligence information that prompted the action and closely monitor the level of discretion given to the implementing officers. Congress, in the meantime, could provide additional support to law enforcement and guidance to the courts by passing legislation demonstrating its intent that reasonable area searches may be conducted without the traditional probable cause requirement in significant terrorist investigations.

VI. RACIAL PROFILING

> "We have a problem with Islamic terrorism . . . . If we had a problem with Latvian terrorism, we'd focus on Latvians."[167]

Racial profiling is one of the most sensitive issues facing America today. It is not just African-Americans traveling the New Jersey turnpike who have filed complaints, but also Arab-Americans concerned about stereotyping and subsequent targeting by law enforcement.[168] As symptomatic of this inherent typecasting, this writer recalls the real anxiety expressed by some citizens in Washington, D.C. during the Gulf War regarding the presence of Arab-American parking garage attendants in government buildings. The FBI has been publicly chastised for interviewing Arab-Americans both during the Gulf War and in the years following.[169] In a common sense reply to critics, the FBI official quoted above responded by pointing out that the problem he confronted was Islamic, not Latvian terrorism.[170]

To listen to the spokesmen for some anti-discrimination groups, one would believe that the government could never take race into consideration when performing its law enforcement function.[171] Those at the other extreme might believe it is always

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167. Mintz & Grunwald, *supra* note 8 (internal quotation marks omitted) (discussing FBI "persecution" of American Muslims and quoting an FBI official).

168. Michael Higgins, *Looking the Part*, A.B.A. J., Nov. 1997, at 48, 49 (discussing law enforcement's use of race, both African-American and Arab-American, in criminal profiling).

169. James J. Zogby, *Yes: Stop the Intimidation*, A.B.A. J., Apr. 1991, at 44, 44 (criticizing the FBI for violating Arab-American's rights by "conducting harassing interviews" during the Gulf War).

170. Mintz & Grunwald, *supra* note 8.

171. *See* Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 712 (2000) (discussing, with disdain, law enforcement's use of racial profiling in making decisions, and stating, "How [law enforcement] can justify racial profiling is difficult to fathom."). Mr. Glasser is the Executive Director of the American Civil Liberties Union. *Id.* at 703.

a legitimate inquiry.[172] It is important to filter through the rhetoric and determine exactly what the courts have said concerning the value that the police may assign to the racial factor.

The hypothetical posed a situation in which the Chief of Police advised his officers that they could consider whether or not the passenger or drivers appeared to be of Middle Eastern origin to determine whether to conduct a thorough search of vehicles stopped at roadblocks. In analyzing this decision, one must start with the often-expressed position of the Supreme Court that any statute or official policy that expressly considers race must be subjected to "strict scrutiny."[173] Essentially, this means that the government must demonstrate a compelling state interest that would override the fundamental Fourteenth Amendment right guaranteeing equal protection of the laws.[174] It is a heavy burden that is seldom sustained.[175]

Police, alerted to be on the lookout for a burglar, drug dealer or terrorist, without further description, cannot legally target only Italians, African-Americans, Hispanics, Arab-Americans, or any other race.[176] As the Sixth Circuit stated in *United States v. Avery*, "If law enforcement adopts a policy, employs a practice, or in a given situation takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."[177] The Court, in *Avery*, was careful to note that the Fourteenth Amendment's guaranty of equal protection applies even at the pre-contact investigative stage because, unlike the Fourth Amendment, the Equal Protection Clause does not require a seizure in order to be invoked.[178]

Although aliens in this country are subject to exclusion and deportation under a plenary power doctrine,[179] once they have

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172. Bruce Fein, *No: The Charges are Overblown*, A.B.A. J., Apr. 1991, at 45, 45 (arguing that race should be considered by FBI officials investigating terrorists to "reflect a prudent deployment of limited law enforcement resources").

173. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222 (1995) (clarifying that all racial classifications must be analyzed under "strict scrutiny").

174. *Id.* at 235 (holding that the government must show a compelling interest when upholding racial classifications).

175. *See* Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984) (illustrating an exception to the general rule, and noting that only two modern cases have upheld the constitutionality of racial classifications).

176. United States v. Avery, 137 F.3d 343, 355 (6th Cir. 1997) (finding the Equal Protection Clause is violated by government actors who act based on race alone).

177. *Id.* at 355.

178. *See id.* at 352.

179. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (discussing the permissibly different

lawfully entered and reside in the country, they too are protected under the Fourth and Fourteenth Amendments against illegal search and violations of equal protection.[180] It is, however, intriguing to ask, in light of Chief Justice Rehnquist's comments in *Verdugo-Urquidez* regarding those who qualify as "the people" under the Fourth Amendment,[181] whether illegal aliens who have entered this country to commit terrorist acts should have any Fourth Amendment rights at all. The one court that was required to specifically rule on the rights of illegal aliens in light of the *Verdugo-Urquidez* decision has maintained the traditional view, based on the fact that Rehnquist's opinion represented only a plurality of the Court, that illegal aliens are also protected under the Constitution against arbitrary search and seizure.[182]

The above formulations prohibiting officers from relying on race alone in making law enforcement decisions are well understood. It must be noted, however, that the Supreme Court's recent holding in *Whren v. United States*[183]—that an officer's real motive in stopping or searching a vehicle is not relevant as long as he can articulate legitimate objective criteria, such as a traffic violation[184]—has caused great concern among civil rights advocates.[185] They fear that officers will consistently make decisions based upon race and then look for objective, race-neutral factors to construct a legitimate excuse for their actions.[186] This same complaint is echoed by Arab-American airline passengers who have repeatedly stated that they are singled out for disparate treatment by airlines and law enforcement, based on racial profiles.[187]

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treatment of aliens and citizens under plenary power doctrine).

180. Bridges v. Wixon, 326 U.S. 135, 161 (1945) (discussing the constitutional rights of aliens); *see also* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289, 303 (2000) (discussing the history of deportation law since *Bridges v. Wixon*).

181. United States v. Verdugo-Urquidez, 494 U.S. 259, 264–67 (1990) (indicating that not all aliens qualify as "'the people'" under the Fourth Amendment).

182. *See* United States v. Guitterez, 983 F. Supp. 905, 916 (N.D. Cal. 1998) (explaining why the court would not follow the Supreme Court's plurality opinion in *Verdugo-Urquidez*, and holding that aliens are protected by the Fourth Amendment), *rev'd*, 203 F.3d 833 (9th Cir. 1999).

183. 517 U.S. 806 (1996).

184. *Id.* at 812–13 (stating that the objective circumstances, not the officer's intent, "justify" the action).

185. *See* Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1002 & n.246 (1999) (citing several scholars who disagree with the Court's decision in *Whren*).

186. *Id.* at 1002, 1012.

187. Higgins, *supra* note 168, at 49.

The Supreme Court attempted to ease this concern in *Whren* by stating:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[188]

This leaves an open question as to whether the exclusionary rule adopted in Fourth Amendment cases would be applied if officers targeted, investigated, and pursued an individual solely because of race. Theoretically, officers could rely upon race as the justification for their investigation and still utilize the evidence gained by their actions.[189] The officers would, however, be subject to a *Bivens* civil rights action and that should discourage this type of activity.[190]

The law is clear as to the general prohibition against objective reliance solely upon race and ethnicity in law enforcement decisions, but this does not mean that race and ethnicity can never be overtly considered as a relevant factor. In *United States v. Brignoni-Ponce*,[191] the Supreme Court stated the likelihood that an individual of Mexican ancestry on the Southwest border was an alien was sufficiently high to make that ancestry a legitimate objective factor in the Border Patrol's decision to stop and interrogate the passengers in a vehicle.[192] The following year, in *United States v. Martinez–Fuerte*,[193] the Court stated that it perceived no constitutional violation in referring certain motorists to detailed secondary inspections at the San Clemente checkpoint "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry."[194]

No one in *Martinez-Fuerte* or *Brignoni-Ponce* seriously maintained that all those of Mexican ancestry crossing the

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188. *Whren*, 517 U.S. at 813.

189. *See* United States v. Avery, 137 F.3d 343, 358 (6th Cir. 1997) (Boggs, J., concurring) (evaluating a hypothetical in which race is a determining factor for following a suspect, but in which the evidence obtained is not suppressed).

190. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (finding that the plaintiff could recover damages for the violation of his civil rights).

191. 422 U.S. 873 (1975).

192. *Id.* at 886–87 (finding that "[t]he likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor").

193. 428 U.S. 543 (1976).

194. *Id.* at 563.

border were doing so illegally, or that the only people illegally crossing the border were individuals of Mexican ancestry. In fact, the statistics contained in footnote twelve of *Brignoni-Ponce*, to the extent they can be interpreted, strongly suggest that that Court understood that the vast majority of Hispanics crossing, living, and driving in the vicinity of the Southwest border were American citizens or individuals who had been legally admitted.[195] Yet the Court felt that the illegal alien problem involving individuals of Mexican ancestry was significant enough for officers to at least be able to consider race as a factor in their decisions.[196]

There may potentially be an analogy in terrorism investigations. If, for example, England, Iran, or Latvia were either to enter into a shooting war with the United States or to initiate a campaign of terrorism against our nation, no one would seriously contend that all individuals of English, Iranian, or Latvian ancestry were terrorists, or that all terrorists acting on behalf of those countries were from the homeland. This does not mean, however, that law enforcement officers would be engaging in illegal profiling or racism if they considered an individual's English, Iranian, or Latvian ancestry as one factor, among others, in deciding who to interview, stop, or search. In fact, it could be argued that officers were acting irresponsibly if they did not note a suspect's ancestry while attempting to protect the nation in the midst of such a violent conflict between the different societies.

Law enforcement officers as a class tend to be practical people unencumbered by the need to think, speak, and write in the terms of the political correctness that affects politicians and permeates the academic community. It would be folly to expect that, in searching for an unidentified terrorist today, the officers would not be influenced, rightly or wrongly,[197] by the litany of Islamic terrorist acts committed against American citizens in what has arguably constituted a continuous global conflict. *Whren* does not prevent officers from thinking in this manner, but it also does not necessarily allow them to express those thoughts.[198] "Currently, officers testifying in suppression hearings

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195. 422 U.S. at 886–87 n.12.

196. Refer to note 192 *supra* and accompanying text.

197. "Wrongly" of course is reflected by the immediate assumption that the Oklahoma City bombing was the work of Arab terrorists. The well-known litany, however, includes the acts of Abu Nidal, Omar Abduhl Rahman, Ramzi Ahmed Yousef, Ahmed Ressam, Osama bin Laden, Mohammed Salameh, Mohammed Ali Rezaq, and others.

198. Whren v. United States, 517 U.S. 806, 813 (1996) (finding that the constitutional reasonableness of a traffic stop does not depend on an officer's motivations,

consider any mention of race taboo."[199] Some authors have persuasively written that the better approach might be to permit officers to testify honestly and without fear as to all of the factors that affected their decisions, and accurately relate the incidents, statistics, observations, and personal knowledge that back up their conclusions.[200] The court could then openly "evaluate the evidence presented, the inferences argued from that evidence, . . . and determine whether sufficient constitutional criteria [in a particular case] existed to justify" the consideration of this element.[201]

Although the law concerning when race may be considered as a factor may not be completely settled, it is clear that if police actually receive a "tip" that suggests the race of a suspect, they are not illegally profiling by concentrating upon that race.[202] In the recent case of *Brown v. City of Oneonta*, the African-American residents of Oneonta sued the State Police, Sheriff's Office, and City Police after these officials attempted to stop, interrogate, and inspect the arms of virtually all two hundred black males in the area.[203] The police were searching for an individual who had robbed an elderly woman in the vicinity and had been described as an African-American with a cut on his arm.[204] The Court held that:

> Plaintiffs do not allege [or prove] that upon hearing that a violent crime had been committed, the police used an established profile of violent criminals to determine that the suspect must have been black. . . . [P]laintiffs' factual premise is incorrect: they were not questioned solely on the basis of their race. They were questioned on the altogether legitimate basis of a physical description given by the victim of a crime. Defendants' policy was race-neutral on its face; their policy was to investigate crimes by interviewing the victim, getting a description of the assailant, and seeking out persons who matched that description. . . . The

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but acknowledging that the "Constitution prohibits selective enforcement of the law based on . . . race").

199. Thompson, *supra* note 185, at 1007; *see also id.* at 999 (referring to the arguments of Dinesh D'Souza for "'rational discrimination'").

200. *See id.* at 1007.

201. *Id.*

202. Brown v. City of Oneonta, 195 F.3d 111, 115, 120 n.8 (2d Cir. 1999) (holding that law enforcement officials can act on a description of a suspect, even if it is primarily based on race, and acknowledging that when officers work off of a "tip" from an outside source regarding race, this is not an equal protection violation), *amended and superseded by* 221 F.3d 329 (2d Cir. 2000).

203. *Id.* at 116.

204. *Id.*

description is not a suspect classification, but rather a legitimate classification of suspects.[205]

The hypothetical presented a situation in which the initial information received related to a terrorist cell made up primarily, but not exclusively, of individuals from the Middle East. The existence of this cell and the danger it posed was confirmed by the Sudanese police search. In this circumstance, under the logic of the above cases,[206] the Police Chief did not engage in illegal profiling when he directed his officers to consider the ethnic background of the vehicle's passengers in determining when to conduct a thorough search. The entire problem, of course, could be avoided if the officers were given directions to search all vehicles equally so as to limit the officers' discretion. But, at the same time, it must be understood that law enforcement has limited resources and in such cases reasonable distinctions supported by the evidence must be made.

It is important for law enforcement officers and the public to understand that government officials have the right to occasionally consider ethnic background in making decisions and they are not being racists or acting illegally in doing so.[207] The solution to this problem is not necessarily in passing more laws, but in educating the officers, the courts, and the public as to the rational and legal basis of law enforcement's actions in protecting the public while confronting a terrorist threat.

VII. USE OF THE MILITARY IN DOMESTIC POLICE ACTIONS

The hypothetical presented a situation in which, because of a lack of resources, the local government called upon the military to assist in putting up roadblocks, conducting aerial surveillance, and providing technical support. The public perception, often heard during the analysis of the Branch Davidian standoff, is that such use of the military to aid law enforcement is an illegal violation of the principles of *posse comitatus*.[208] A review of both the statutory and case law reveals the source of much of the general belief that the utilization of the military is improper. In

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205. *Id.* at 119.

206. Refer to text accompanying notes 189–205 *supra* (analyzing cases in which racial profiling was not held unlawful).

207. Refer to text accompanying notes 189–205 *supra*.

208. *Posse comitatus* is the power or force of the country. "A group of citizens who are called together to assist the sheriff in keeping the peace." BLACK'S LAW DICTIONARY 1183 (7th ed. 1999). Current federal law prohibits the use of the Army or the Air Force as a *posse comitatus*. 18 U.S.C. § 1385 (Supp. I 1996).

Laird v. Tatum,[209] a case involving an Army intelligence database on civilian protesters during the Vietnam War, the Supreme Court stated:

> [There is] a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.... Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims [and provide remedies for] those asserting such injury....[210]

Reviewing the government's use of the military during the Wounded Knee standoff at the Pine Ridge reservation in South Dakota, the Eighth Circuit, in *Bissonette v. Haig*,[211] indicated that it had no doubt that the exclusionary rule was one of those remedies, saying, "We believe that the Constitution, certain acts of Congress, and the decisions of the Supreme Court embody certain limitations on the use of military personnel in enforcing the civil law, and that searches and seizures in circumstances which exceed those limits are unreasonable under the Fourth Amendment."[212]

The original federal statute on this matter was the Posse Comitatus Act of 1878,[213] which was designed to curtail martial law imposed by occupation troops in the Reconstruction era South.[214] Currently, the law states that:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[215]

There is no constitutional provision forbidding the use of the military in law enforcement, and examination of the above-cited

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209. 408 U.S. 1 (1972).

210. *Id.* at 15–16.

211. 776 F.2d 1384 (8th Cir. 1985).

212. *Id.* at 1386–87.

213. Act of June 18, 1878, ch. 263, § 15, 20 Stat. 152 (1879) (codified as amended at 18 U.S.C. § 1385 (Supp. I 1996)).

214. *See* Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948) (describing the origins and purpose behind the enactment of the Posse Comitatus Act of 1878).

215. 18 U.S.C. § 1385.

language also reveals that the statutory and case law does not create an absolute prohibition. On the contrary, the Constitution states that Congress shall have power to "[call] forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."[216] Congress has also passed a number of statutes, some quite recently, which provide for military assistance to state and local law enforcement. The Secretary of Defense has been directed to provide civilian authorities with intelligence that is "relevant to drug interdiction or other civilian law enforcement matters."[217] The Secretary of Defense can also provide state and local governments the opportunity to purchase "equipment suitable for counter-drug activities through the Department of Defense."[218] Congress has further instructed that the Attorney General may request that the Secretary of Defense provide support to Justice Department activities during an emergency involving a chemical or biological weapon of mass destruction.[219]

In practice, the actual limitations that have been imposed by the courts on military involvement are basically as follows: (1) it must not subject citizens to the exercise of regulatory, proscriptive, or compulsory military power; (2) it must not amount to direct active involvement in the execution of the laws; and (3) it must not pervade the activities of civilian authorities.[220] Applying these tests, the Eighth Circuit, in *United States v. Casper*[221] and *Bissonette v. Haig*,[222] held that the use of Air Force personnel to fly surveillance, the advice of military officers, and the furnishing of equipment and supplies did not constitute a violation of *posse comitatus*.[223]

As the Posse Comitatus Act was originally designed to prevent military intervention in domestic affairs, there is actually serious debate as to whether it even applies to law

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216. U.S. CONST. art. I, § 8, cl. 15.

217. 10 U.S.C. § 371(c) (1994).

218. 10 U.S.C. § 381(a) (1994).

219. 10 U.S.C. § 382 (Supp. II 1997) (authorizing this practice provided that "the Secretary of Defense and the Attorney General jointly determine that an emergency exists" and that the Secretary of Defense determines that United States military preparedness would not be adversely affected); 18 U.S.C. § 2332e (Supp. IV 1999).

220. *See generally* United States v. Yunis, 681 F. Supp. 891, 892 (D.D.C. 1988) (describing the three tests used to determine if United States military assistance to state and local law enforcement officials is illegal).

221. 541 F.2d 1275 (8th Cir. 1976).

222. 776 F.2d 1384 (8th Cir. 1985).

223. *Id.* at 1391 (citing *Casper* as authority that "aerial photographic and visual search and surveillance" did not violate the Posse Comitatus Act); *Casper*, 541 F.2d at 1278 (affirming the district court's finding that the use of Air Force personnel for aerial surveillance at Wounded Knee did not violate the Posse Comitatus Act).

enforcement activity outside the United States.[224] The courts have consistently refused to utilize its tenets to suppress evidence when the Navy physically stops vessels on the high seas.[225] This is based in part on the fact that the Coast Guard (a "civilian" law enforcement agency) actually boards and searches the target ships, but it is also a reflection of questions as to the extraterritorial reach of the Posse Comitatus Act.[226]

Although the military is generally limited to "assistance" on the domestic front,[227] the Constitution and statutes contemplate emergency situations where the armed forces would have a much broader role. As previously noted, the Constitution provides for calling forth the militia "to execute the Laws" in times of insurrection or invasion.[228] The President may call upon the military "to enforce the laws of the United States" when "unlawful obstructions, combinations, or assemblages" make it impracticable to govern without their assistance.[229] Furthermore, when the Attorney General requests military support, the armed forces shall not directly participate in arrest, search, or seizure *unless* "[t]he action is considered necessary for the immediate protection of human life, and civilian law enforcement officials are not capable of taking the action."[230]

Applying these principles to the hypothetical, it is obvious that it was not a violation of existing law for the military to assist in aerial surveillance and technical support. It would, however, be more problematic if troops actually manned the roadblocks, stopped vehicles, and conducted searches. But even these actions could potentially be justified as emergency actions under the congressional provisions providing the military with

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224. *See* Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948) (providing the historical foundation of the Posse Comitatus Act and determining that it had no extraterritorial application, thus holding that the Act did not apply to military activity in Germany).

225. *See* United States v. Kahn, 35 F.3d 426, 432 (9th Cir. 1994) (finding that, in this instance, the Navy was simply providing support to the Coast Guard); United States v. Mendoza-Cecelia, 963 F.2d 1467, 1477–78 (11th Cir. 1992) (determining that because the Posse Comitatus Act did not mention the Navy, it did not apply to the Navy, and that even if it did, in this case the Navy was under the control of the Coast Guard and thus would not violate the Act); United States v. Yunis, 924 F.2d 1086, 1093–94 (D.C. Cir. 1991) (declining to extend the Posse Comitatus Act to the Navy because the Act does not restrict Naval operations).

226. Refer to note 225 *supra* (explaining that these cases note that the Posse Comitatus Act does not mention or restrict the Navy).

227. Refer to note 220 *supra* and accompanying text (disclosing the limitations on military involvement in domestic affairs).

228. U.S. CONST. art. I, § 8, cl. 15.

229. 10 U.S.C. § 332 (1994).

230. 10 U.S.C. §§ 382(d)(2)(A)–(B)(i) (Supp. IV 1999).

authority to directly perform law enforcement functions when civilian officials are clearly incapable of doing so.

VIII. INTERROGATION

> "The driver of the truck states that his associates will be bringing another weapon of mass destruction in the near future but refuses to say more and demands to see a lawyer."

In this last part of the hypothetical, law enforcement officers are confronted with an uncooperative criminal witness who, if he would only talk, could potentially save millions of lives. This poses a dilemma for which there is virtually no direct legal precedent in our domestic law. A review of the legal literature reveals that it is a problem that few have wanted to openly address. Because any solution appears to involve such a blatant violation of constitutional rights, our collective attitude seems to be to simply ignore the issue and hope the FBI does whatever is "right" if, and when, the problem arises. What is "right" in the minds of some may mean doing nothing, while in the minds of others it may involve the forcible use of sodium pentothol or other methods to obtain the needed information.

Although there are no cases on point, there is some law on the edges that may be instructive in deciding what actions are proper in this situation. In *New York v. Quarles*,[231] the Supreme Court dealt with a case in which the police had pursued an armed suspect into a grocery store and found him inside without the weapon.[232] After the suspect was formally arrested, but before being advised of his *Miranda* rights, a police officer asked him where the gun was located.[233] The Court found that the suspect's answer, and the subsequently discovered weapon, could be admitted as evidence against the defendant based on a "'public safety'" exception to the Fifth Amendment protections of *Miranda*.[234] That is, as long as the firearm remained in the store, it presented a danger to the police and to the public because another individual could find it and make use of it.[235]

An exception to *Miranda* is quite different than forced testimony, but *Quarles* does demonstrate the Court's willingness

231. 467 U.S. 649 (1984).

232. *Id.* at 651–52.

233. *Id.* at 652.

234. *Id.* at 655–58 (declining to place police officers in the "untenable position" of having to determine if it best serves society to ask questions without giving *Miranda* warnings or to risk getting no answer after the warnings have been given to a suspect).

235. *Id.* at 657.

to limit a defendant's fundamental rights to protect the public. The Supreme Court's decision a few years before *Quarles*, in *Schmerber v. California*,[236] further suggests that the Court is not always completely adverse to compulsory bodily intrusions to satisfy a critical government need. In that case, the Court concluded that it was not unconstitutional to draw blood from a suspected drunk driver after an accident to determine the driver's blood-alcohol content.[237] Justice Brennan wrote for the majority:

> [W]e today reject the claim that the Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking [nontestimonial] evidence of crime.
>
> . . . [T]he means and procedures employed . . . [must] respect[] relevant Fourth Amendment standards of reasonableness.[238]

This balancing of the public's safety needs against the guaranties of individual liberty dominates our constitutional law cases, with the degree of the intrusion constantly being weighed against the magnitude of the state interest that led to the intrusion. Thus, the Supreme Court has recognized state restrictions on free speech[239] and freedom of the press,[240] as well as the government's ability to remove individuals from their homes[241] and draft its citizens into the armed forces to fight and potentially die in wars.[242] As Justice Black stated, when we are

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236. 384 U.S. 757 (1966).

237. *Id.* at 765 (finding that in the taking of blood from a suspected drunk driver, the suspect's "testimonial capacities were in no way implicated; indeed, his participation, except as donor, was irrelevant to the results of the [blood-alcohol] test").

238. *Id.* at 767–68.

239. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (authorizing states to regulate speech in cases where such speech is directed towards "inciting or producing imminent lawless action and is likely to incite or produce such action").

240. Near v. Minnesota, 283 U.S. 697, 716 (1931) (recognizing that restrictions on the press are appropriate to prevent, among other things, publication of military positions during wartime).

241. Korematsu v. United States, 323 U.S. 214, 219–20 (1944) (declaring that compulsory exclusion of large groups of citizens from their homes is proper only under circumstances of "direst emergency and peril" and must be "commensurate with the threatened danger").

242. Billings v. Truesdell, 321 U.S. 542, 556 (1944) ("We have no doubt of the power of Congress to enlist the manpower of the nation for prosecution of the war and to subject to military jurisdiction those who are unwilling, as well as those who are eager, to come to the defense of their nation in its hour of peril."); Arver v. United States, 245 U.S. 366, 377 (1918) (holding that the military's drafting of American citizens for war is a proper delegation of Congress's Article I, Section 8 power to "'raise and support armies'" and to "'make all laws which shall be necessary and proper for carrying into execution the foregoing powers'").

"threatened by hostile forces, the power to protect must be commensurate with the threatened danger."[243] Accordingly, it is at least conceivable that a court, when presented with the dilemma outlined in the hypothetical, might reasonably conclude that some type of physical intrusion used to obtain critical information pertaining to the mission of the terrorist's accomplice would be appropriate.

One writer who has thought and written on this subject has concluded that if the FBI acted without a court order, their conduct should nevertheless be excused.[244] In his article titled *The Ultimate Exigent Circumstance*, A.L. DeWitt asks:

> [W]hat if the situation were, as described, one where the rights of the individual were balanced against the lives of more than one million innocent human beings? Would the use of torture [or sodium pentothal] be considered an appropriate response? It is difficult to say, but perhaps the most compelling argument can be found in the [four elements of the] common law defense of necessity.... (1) The actor was faced with a choice of evils and chose the lesser evil; (2) The actor acted to prevent imminent harm; (3) The actor reasonably anticipated a direct causal relationship between his conduct and the harm to be averted; and (4) The actor had no legal alternatives to violating the law.[245]

This writer would first seek a court order. The evidence would probably never be admissible in trial against the defendant, even if information obtained through the use of sodium pentothal was found to be reliable by analogy to case law on the use of hypnosis.[246] This is because such information would be compelled and *Schmerber* made it clear that force could only be used to obtain "real" as opposed to "testimonial" evidence.[247] The goal here, though, is to obtain critical intelligence and if an order were issued, the agents would be fully protected from a

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243. *Korematsu*, 323 U.S. at 219–20.

244. A.L. DeWitt, *The Ultimate Exigent Circumstance*, 5 KAN. J.L. & PUB. POL'Y 169, 173–75 (1996) (justifying FBI activity without a court order under the doctrine of exigent circumstances and the common law defense of necessity).

245. *Id.* at 175 (citing Zal v. Steppe, 968 F.2d 924, 929 (9th Cir. 1992)).

246. *See* Sprynczynatyk v. Gen. Motors Corp., 771 F.2d 1112, 1122–23 (8th Cir. 1985) (adopting the rule that if evidence is obtained through hypnosis, a court must determine if the hypnosis procedures and their effects actually produced reliable testimony before making a decision on admissibility).

247. Schmerber v. California, 384 U.S. 757, 764 (1966) (analyzing the effects of the Fifth Amendment on fingerprinting, photographing, measuring, and similar physical evidence).

lawsuit in their efforts to secure the information. If not, it is possible that they might have to rely on a necessity defense.[248]

There have been reports that Israel and other nations faced with major terrorist threats have procedures that permit forced interrogation.[249] Perhaps now is the time to seek domestic legislation that would authorize federal agents to request permission from a federal judge to use such measures in unique, rare, and truly extraordinary circumstances involving a weapon of mass destruction. It does not serve the nation, or the law enforcement officials sworn to protect it, to ignore the issue and pretend that it may never arise even in what may be an absolutely critical situation.

IX. CONCLUSION

The National Commission on Terrorism has highlighted the problem and challenged the nation to meet it.[250] In the foreword to its report, the Commission included the following haunting quote from the foreword to Roberta Wohlsteller's book *Pearl Harbor; Warning and Decision*:

> Surprise, when it happens to a government, is likely to be a complicated, diffuse, bureaucratic thing.... It includes the contingencies that occur to no one, but also those that everyone assumes somebody else is taking care of. It includes straightforward procrastination, but also decisions protracted by internal disagreement. It includes, in addition, the inability of individual human beings to rise to the occasion until they are sure it *is* the occasion—which is usually too late. (Unlike movies, real life provides no musical background to tip us off to the [approaching] climax.)[251]

This Article is the author's attempt to anticipate the issues and set forth legal solutions. As a result of legislation, Supreme Court opinions, and lower court opinions, it appears that we are in a better position today than even twenty years ago to make legal arguments to support an effective response in a situation

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248. Refer to text accompanying note 245 *supra* (identifying the four elements of the common law defense of necessity).

249. DeWitt, *supra* note 244, at 174, 180 n.99 (identifying the Congo and Israeli state security forces as users of "'physical compulsion'" and torture to extract information from suspects).

250. Refer to note 3 *supra* and accompanying text (citing the first paragraph of the Commission's year 2000 report to Congress).

251. NAT'L COMM'N ON TERRORISM, COUNTERING THE CHANGING THREAT OF INTERNATIONAL TERRORISM, H.R. DOC. NO. 106-250, at 4 (2000) (internal quotation marks omitted).

similar to that presented in this article's hypothetical. Nevertheless, much still needs to be done. For example, Congress could pass legislation permitting *Camara*-type area searches in terrorist cases,[252] clarify procedures for extraterritorial search and seizure in criminal cases,[253] authorize the military to provide even greater assistance to law enforcement in an emergency,[254] and protect agents by addressing the extremely difficult issues related to interrogation and application of the Fifth and Sixth Amendments in cases involving a weapon of mass destruction.[255] These matters and others will need to be continuously addressed if we are to be prepared to meet the twenty-first century terrorist threat. Our greatest dangers, as indicated in the above quote, are complacency, failure to anticipate the contingencies, and the constant assumption that someone else must be taking care of the problem.

252. Refer to notes 135–46 *supra* and accompanying text (approving of the Supreme Court's decision in *Camara v. Municipal Court*, 387 U.S. 523 (1967), in which the Court authorized search warrants based on the importance of the inspections instead of based on the probability that something would be found).

253. Refer to notes 27–40 *supra* and accompanying text (explaining the current state of the law and the apparent need for United States law enforcement officials to have the power under United States law to carry out search and seizure warrants outside of the United States).

254. Refer to notes 209–30 *supra* and accompanying text (analyzing the Posse Comitatus Act and its consequences on the use of military aid to state and local law enforcement).

255. Refer to notes 231–49 *supra* and accompanying text (asserting that there are certainly instances when the use of physical persuasion to obtain critical information is justified).