

# Security and Freedom in a Free Society

**O**n July 12 the Cato Institute held a Hill Briefing for congressional staff members in the Rayburn House Office Building. Cato senior fellow Robert A. Levy; Timothy Lynch, director of Cato's Project on Criminal Justice; and adjunct scholar Charlotte Twight, author of *Dependent on D.C.: The Rise of Federal Control over the Lives of Ordinary Americans, discussed racial profiling and national identification cards. Excerpts from their remarks follow.*

**Robert A. Levy:** Racial or ethnic profiling involves the selection by law enforcement officers of persons for investigation or some stronger action on the basis of race or nationality or ethnicity. To shed some light on the profiling question, let's examine whether it is hypocritical for African Americans to oppose profiling blacks in the war against crime but favor profiling Arabs in the war against terrorism. According to the Gallup organization, 71 percent of African Americans approve profiling Arabs to combat terrorism. By contrast, an overwhelming percentage of African Americans condemns racial profiling in the war against crime. Do those two seemingly contradictory positions suggest that there is some underlying hypocrisy? Not necessarily.

The legitimacy of profiling depends on the answers to three questions.

First, how important is the objective of the profile? The gain from a criminal profile can range from, at the low end, identifying a drug dealer, to, at the high end, capturing a serial murderer. The gain from a terrorist profile might reach from halting an airline hijacking that involves a couple of hundred people to preventing a madman from using a weapon of mass destruction.

The potential benefit of a criminal profile, which I don't mean to trivialize, extends at most to saving a small number of lives. That pales in comparison with the potential benefit of a terrorist profile, which can contribute to saving thousands, or hundreds of thousands, of lives. So it seems to me, on that ground alone, rational to scrutinize criminal profiling more rigor-

ously than terrorist profiling.

The second question is, how effective is a racial or ethnic profile likely to be in stopping crime or terrorism? Consider that all the 9/11 terrorists were reportedly of Middle Eastern descent. All criminals, obviously, are not African Americans.

Thus, other things being equal, the fit of a terrorist profile that includes ethnicity is likely to be tighter than the fit of a criminal profile that includes race. Despite that, we have airport screeners performing random searches on 80-year-old women, little kids, airline pilots with proper IDs, and even members of the president's security detail.

There have been eight major terrorist acts against the United States and its allies



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over the past 30 years. In 1972, 11 Israeli athletes were killed at the Munich Olympics. In 1979 the embassy in Iran was seized. In 1983 the Marine barracks in Beirut was blown up. In 1988 Pan Am Flight 103 was bombed. In 1993 the World Trade Center was bombed. In 1995 a federal office building in Oklahoma City was destroyed. In 1998 our embassies in Kenya and Tanzania were bombed. And on September 11 we lost the World Trade Center, part of the Pentagon, and 3,000 American lives. Seven of those eight acts were committed by Muslim male extremists, mostly between the ages of 17 and 40—not by elderly women, not by little kids, not by blacks or whites.

The third question is, what is the potential for abuse? There is no doubt that African-American anxiety about criminal profiling stems in part from our country's troubled history of racial discrimination. We have no comparable history of bias against Middle Easterners, nor have responsible persons suggested that airport searches, for example, are motivated by traditional bigotry toward Arabs or Muslims. The principal objection to profiling is that it can be exploited by officials who are animated by some deeper prejudice. I would argue that African Americans have more cause for concern than do Middle Easterners.

That is not to say that ethnicity by itself is sufficient justification for targeting a suspect. But sometimes ethnicity will add materially to the predictive power of a terrorist profile.

A vital consideration, of course, is the scope of the imposition on innocent people. We should not object, in my view, if law enforcement authorities use profiling simply to limit their investigations. Even the questioning of profiled suspects raises few concerns if the suspects are free not to answer and if they are free to leave. But subpoenas, custodial interrogations, extended detentions, and incarceration are quite another matter.

With that qualification in mind, I want to suggest one narrowly circumscribed example of justified terrorist profiling. The Justice Department recently announced a manhunt for Middle Eastern men who have

ignored deportation orders. Each of those 6,000 targeted individuals—of 300,000 who have been ordered to leave the United States—is from a country that has known al-Qaeda cells. Technically, the selection is based on nationality, but the correlation with ethnicity is obvious. Still, I think that kind of targeting makes sense and complies with the Constitution.

Profiling is objectionable when law enforcement authorities use race or ethnicity as a substitute for suspicious behavior or other credible evidence of wrongdoing as grounds for investigating, apprehending, and detaining suspects. But that is not what is happening in this instance.

## “We should be taking the battle to the terrorists, to their base camps, not transforming our society into a surveillance state.”

The men who are sought are not unidentified potential suspects. They are named lawbreakers. Their names appear in government records. They are not statistical artifacts; they are real people. And their wanted status was triggered by their conduct, not by their nationality. The vast majority of Middle Easterners have nothing to fear from the Justice Department’s campaign, which involves no more than allocating scarce law enforcement resources.

The Constitution, of course, guarantees equal protection to persons who are within U.S. jurisdiction. But there is no constitutional or statutory authority for a lawbreaker to escape punishment. When people break the law, some of their constitutional protections go away. To the extent that they still retain the right to equal protection, that right is not absolute. Government can treat persons unequally, even on the basis of ethnicity, if it has a compelling interest in doing so and adopts the least restrictive means of satisfying that interest.

In this case, the profile is narrowly tailored to cover a small number of individuals from a few selected countries—only persons who have already broken the law and have been ordered to leave the United States. And the government’s interest in preventing terrorist acts that could kill or injure a large number of Americans is, of course, palpable. If law enforcement resources are spread too thin, government is going to default on its foremost obligation—to protect the nation against loss of life, the most precious of our civil liberties.

Next, I want to change the facts slightly and discuss a real-world example of ethnic profiling that, in my view, even though directed at terrorism, is not justified. Under the Immigration and Nationality Act of 1952, the Justice Department recently proposed new regulations requiring that more than 100,000, largely Muslim and Middle Eastern, visa holders register with the government and be fingerprinted.

Students, workers, researchers, and tourists—everybody who is between the ages of 18 and 35, male, and from 20 designated countries—will be covered,



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except U.S. citizens and permanent resident aliens who hold green cards. The fingerprints will then be compared with those in a database of prints of suspected or known terrorists and wanted felons.

New arrivals to the United States will be fingerprinted at entry. From a policy perspective, that rule may be unwise or unnecessary, but it does not, in my view, raise constitutional concerns. Constitutional rights do not vest until a person has actually entered the country.

But the same regulations apply to non-permanent foreigners who are already here legally. To satisfy constitutional concerns, government has to show that its new regulations, when applied to Middle Eastern students and workers and tourists who are already here legally, are an effective and necessary answer to the systemic immigration problems that have compromised national security. That showing has not been made.

Essentially, there are four problems with our immigration system: applicants are not sufficiently screened, they are not monitored closely enough after they are here, they are allowed to overstay their visas with impunity, and no one tracks their departure. The new regulations purport to mitigate those problems. But anyone truly dangerous is not going to show up for registration or fingerprinting. Indeed, the most dangerous persons will likely have entered the country illegally.

And remember, the overwhelming number of targeted persons is going to be entirely innocent. The new regulations, because they apply to people from some but not all countries, raise equal protection as well as due process concerns. The selection of persons is based not on their misconduct but wholly on their nationality. That is a clear example of unrefined profiling that civil libertarians ought properly to condemn.

**Timothy Lynch:** After 9/11, it makes perfect sense for policymakers to review various laws and procedures with an eye to changes that would better protect us from similar attacks in the future. But we should not throw out our freedom and our privacy for any proposal that somebody claims will make us safer. We should not rush into anything.

The national ID card proposal would be a very bad deal for our society, because it would require some 250 million people to surrender some of their freedom, some of their privacy, for something that is not going to make us safe from terrorist attack. The national ID card proposal has been put forward in Washington many times before; in the wake of the September 11 attacks, it is now being packaged as a “security” measure.

Let me begin by dispelling the idea that the card will be a great security device that will make us safe from terrorists. There are several ways that terrorists will be able to get around a national ID card system. Terrorists are evil, but they are not stupid.

It does not take much imagination to see the weak spots in the national ID card system. If terrorists are determined to attack America, they can bribe the people who issue the cards or the people who check the cards. Terrorists will also be able to recruit people who have valid cards—U.S. citizens or lawful permanent residents.

We are told that we should look at countries in Europe, such as France, that already have national ID card systems. OK, let’s look. The people in those countries have surrendered their privacy and their liberty and yet they continue to experience

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# “Many Americans do not realize the virtual treasure trove of detailed data that the federal government requires banks, schools, employers, and now even doctors to collect about us.”

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terrorist attacks.

I also want to draw your attention to how a national ID card system will affect the Bill of Rights. The Fourth Amendment to our Constitution protects all of us against unreasonable searches and seizures. The quintessential “seizure” under the Fourth Amendment is to be arrested or detained by the police.

The police can seize or arrest a person when they have an arrest warrant or when they have probable cause to believe that the person has just committed a crime in their presence. But the police cannot stop us on the street and demand an ID, at least not under current law. They can *request* an ID. They can *request* that we answer their questions. But the key point is that we can decide whether or not we want to cooperate. The legal presumption right now is on the side of the individual citizen. We do not have to justify ourselves to the police or to the government. The government has to justify its interference with our liberty.

A national ID card system will turn that important legal principle upside down. After enactment of the system, pressure will begin to build to enact laws that will require citizens to produce an ID whenever a government official demands it. I know that is going to happen for two reasons. First, in the countries that already have national ID card systems, the police have acquired such powers.

Second, in this country there already are cases in which the police have arrested Americans for failure to produce IDs. Thus far our courts have rejected such arrests. But if Congress passes a law that says people must produce IDs, the courts may well yield on that point.

Op-eds about a national ID card by Alan Dershowitz at Harvard Law School or Larry Ellison from Oracle present the idea in the best possible light. They tell us that it will be a “voluntary” card and that you will have to present it only at airports. They say there will be no legal duty to produce an ID card.

But, over time, the amount of information on the card will expand. The number of places where you will have to pres-

ent your ID card will expand, and it will eventually become compulsory. And sooner or later a legal duty to produce an ID whenever a government official demands it will be created. I strongly recommend Charlotte Twight’s book, *Dependent on D.C.*, in which she details the ways government power creeps into our lives.

Secretary of Defense Donald Rumsfeld has already warned us to expect more terrorist attacks, so we will see more anti-terrorism proposals in Congress. Perhaps there will be an attack a year from now, and a limited national ID card will be proposed and enacted.

Maybe five years later we will be attacked again, people will die, and law enforcement will go to Congress and say, look, we have a national ID card, but the problem is that it is voluntary. Thus, by increments, we will get the full-blown national ID card system that we see in other countries. If somebody just proposed the same national ID card system that they have in Singapore or France, and we could have an up-or-down debate on that one proposal, then everybody would fully understand what we were going to give up in return for the card. But instead, time after time, we see the government expand in small, incremental steps.

It is very important that we not lose sight of what we are fighting for in the war on terrorism. Our goal should be to fight the terrorists within the framework of a free society. We should be taking the battle to the terrorists, to their base camps, and killing the terrorist leadership. We should not be transforming our society into a surveillance state.

**Charlotte Twight:** As part of the current push for new measures to increase our national security, some members of Congress are calling for computer chips to be put into our driver’s licenses or for other forms of a national ID card. With current technology, a key component of any nation-

al ID card will be a microchip containing biometric information and other data as well as links to a variety of databases.

As Simon Davies, an expert in privacy security and data protection, stated recently: “The modern ID card is no simple piece of plastic. It is the visible component of a web of interactive technology that fuses the most intimate characteristics of the individual with the machinery of the state,” creating a “national surveillance infrastructure.”

As Tim mentioned, legislators and others are likely to push incrementally for such an ID in order to minimize opposition at the outset. Consider what Rep. Jane Harman said in May: “We don’t automatically have to call it a national ID card. That’s a radioactive term. But we can cer-



**Susan Chamberlin, Cato’s director of government affairs, introduces Charlotte Twight, Timothy Lynch, and Robert Levy at a Capitol Hill Briefing.**

tainly think about smart cards for essential functions, and we need the database to support that.” As Steven Levy of *Newsweek* put it, “Translation: Show us your papers.”

A national ID card system unquestionably poses a threat to our privacy. The card would permit vast amounts of personal information about us to be linked. Many Americans do not realize the virtual treasure trove of detailed data that the federal government requires banks, schools, employers, and now even doctors, in addition to many federal agencies, to collect about law-abiding individuals in our country.

Think about something like the Bank

*An ideal textbook in public choice*

# Understanding Government Failure

That politicians frequently act in their own interests is not an earthshatteringly novel idea. The problem of ensuring that rulers serve the common good, rather than their own, which plagues disgruntled citizens everywhere, also plagued ancient philosophers and the authors of the *Federalist Papers*. Of more recent vintage, however, is the insight that the powerful formal tools of economic theory can be deployed to model the self-interested actions of legislators and bureaucrats as effectively as they model those of entrepreneurs in the market. In *Government Failure: A Primer in Public Choice*, a new Cato book, economists Gordon Tullock, Arthur Seldon, and Gordon L. Brady elaborate that insight, as presented in public choice theory, for the lay reader.

Academic work on public choice is somewhat technical, but Tullock, in the book's first section, presents the central concepts using clear language and vivid examples, which make *Government Failure* ideal for undergraduate classrooms as well as casual readers.

Secrecy Act that sailed through Congress in 1970. It required, and still requires, our banks to make copies of our checks and deposit slips, as well as records of other financial transactions. So there are all kinds of government-mandated databases out there, and they can be either embedded in or linked to a national ID card and the computer chip in it.

Moreover, government agencies already have contracted with private firms to purchase additional information about law-abiding American citizens. For example, the *Washington Post* recently reported that the Internal Revenue Service had purchased access to some 10 billion public records of housing, financial, and other personal information about individuals in our country. The same private company, ChoicePoint, Inc., also provides information to other government agencies, including the Federal Bureau of Investigation.

This sort of power inevitably grows. Recall the experience with Social Security numbers. In 1935 the public was promised by government officials that those num-

Tullock's analysis of logrolling—the trading of votes by legislators—for example, shows how democracies are subject to an inverted, destructive form of Adam Smith's invisible hand. Lawmakers, Tullock says, will seek to enrich their constituents through programs that impose a small cost on citizens of other states, even if the net cost of the program is larger than the benefit it provides to a narrow constituency. The aggregate effect of all such bills is often that each district is left worse off than if all had abstained from such rent seeking.

The theory summarized in the book's first part is put into practice in two subsequent sections, where the authors use the tools of public choice theory to analyze policies in the United States and Britain. They show how the dynamic between vote-hungry politicians, pressure groups, and bureaucratic agencies eager to expand their



scope and power drives regulatory decisionmaking. Brady reveals why American trade, environmental, and telecommunications policies are so dysfunctional and how Internet governance could become equally so. Seldon assesses welfare programs on the other side of the Atlantic and concludes that, though politically expedient, they have been socially disastrous. Both agree that even a flawed private sector would more effectively provide a wide array of services.

In the wake of the summer's many corporate scandals, there have been growing calls for government regulation to correct for so-called market failures. This book reminds us always to ask, "Failure? Compared with what?"

*Government Failure* can be purchased (\$18.95 cloth/\$9.95 paper) from Cato Institute Books at 1-800-767-1241 or from the Cato website, [www.cato.org](http://www.cato.org). ■

bers would never be used for anything other than identifying specific Social Security accounts.

But, of course, within just a few years, the government itself began mandating increased usage of Social Security numbers. As described in my book, *Dependent on D.C.*, year by year the government expanded the number of agencies and entities that were required to use Social Security numbers to identify us. And we have reached the point today, I think, where everybody takes it as a given that our Social Security numbers serve as de facto national ID numbers.

Another concern is that, with the new technology, adding additional information or linking additional information to a national ID card will be virtually invisible. How will a person know what's on that card or what it's linked to?

Past abuses of federal data collection power should give us pause about further expanding that authority. Just think about the FBI files in the Clinton White House, about the Nixon administration's abuses

of IRS and FBI files, and all the rest of that long history of abuse.

A national ID system would alter our nation at its very core. As a thought experiment, reread the U.S. Constitution and the Declaration of Independence and then imagine trying to explain a national ID system to the Founders, to James Madison and his fellows.

People will learn to tolerate national IDs if they are required, and that too jeopardizes liberty. Because future generations won't have any other experience, they will think it is the normal course of things to add more and more information to a national ID card.

Finally, I would urge, in considering a national ID card system, that we consider the emerging pattern and not focus our attention on just one piece at a time. In the past we built financial databases, education databases, labor databases, all the rest of it, and we looked at each little slice instead of at the whole picture. I would urge that we look at that whole emerging pattern and ask ourselves: What are we building? What are we becoming? ■