Enemy at the Gate: Emerging Security, Economic, and Legal Challenges to Airport Security

Event Details

CLE Panel
American Bar Association Young Lawyers Division
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Sponsored by the ABA YLD Homeland and National Security Committee
Cosponsored by the ABA YLD Air and Space Law Committee

Friday, October 21, 2016
11:30 am – 12:30 pm
The Westin Book Cadillac Hotel
1114 Washington Blvd.
Detroit, MI 48226

PANELISTS:
Brigadier General Michael C.H. McDaniel, Western Michigan University Cooley Law School
Lena F. Masri, Esq., Council on American-Islamic Relations, Michigan
Kevin G. Houlihan, Esq., Assistant Chief Counsel, Litigation, Office of Chief Counsel, Transportation Security Administration

MODERATOR:
Dayan M. Hochman, Eckert Seamans, Cherin & Merlott, LLC

BIOGRAPHIES:

Panelist: Mr. Kevin G. Houlihan, Esq.

Kevin Houlihan serves as Assistant Chief Counsel for Transportation Security Litigation in the Office of Chief Counsel for the Transportation Security Administration, U.S. Department of Homeland Security. Kevin served as Senior Counsel and lead TSA attorney for In re September 11th Litigation, the consolidated tort litigation involving claims arising out of the terrorist-related aircraft crashes of September 11, 2001. Kevin has also served as Special Legal Assistant to the Chief Counsel and Attorney-Advisor in TSA’s Enforcement Division. Prior to joining TSA, Kevin was as a manager for the Center for Economic Organizing working with the Office of the
Election Officer appointed by the U.S. District Court for the Southern District of New York to ensure free and fair elections for the International Brotherhood of Teamsters. Kevin attended Queen Mary, University of London, as a Drapers’ Scholar and earned an LL.M. in Comparative Law. He obtained his J.D. from the College of William & Mary, and has M.A. and B.A. degrees in English Literature from George Mason University.

Panelist: Brigadier General Michael C.H. McDaniel

Brigadier General Michael C.H. McDaniel joined the Cooley Law School full-time faculty as a professor in the Constitutional Law Department in 2010. He will be responsible for developing an LL.M. program in Homeland Security Law.

McDaniel most recently served as the Deputy Assistant Secretary for Homeland Defense Strategy, Prevention and Mission Assurance. His responsibilities included supervision of the Department of Defense Critical Infrastructure Protection Program and Global Anti-Terrorism/Force Protection Policy.

McDaniel was appointed by Michigan Gov. Jennifer Granholm as her Homeland Security Advisor in 2003 and served in that capacity until July 2009. At the same time, he also served as the Assistant Adjutant General for Homeland Security, Michigan National Guard.

He served as the liaison between the governor's office in Michigan and all federal, state and local agencies on homeland security with responsibility for developing statewide policy on homeland security preparedness. His duties included coordinating efforts to protect the state and its critical infrastructure from terrorist attacks.

McDaniel served as a member of the National Governors Association’s Homeland Security Advisors Council where he was elected to the Executive Committee in 2006 and 2008. He was named by the Office of Infrastructure Protection, Department of Homeland Security, as Chair of the State, Local, Tribal, and Territorial Government Coordinating council in 2007.

McDaniel was promoted to Brigadier General in 2007 and has been a member of the Michigan National Guard for over 26 years, previously serving as a military judge. He was formerly the Assistant Attorney General for Litigation in the executive division of the Michigan Department of Attorney General.

He received the Zimbardo Award, given to the Center for Homeland Defense and Security graduate who best embodies high academic achievement, outstanding leadership, and innovation in homeland security thinking.

Panelist: Lena F. Masri, Esq.

Lena F. Masri, Esq., Senior Staff Attorney for the Council on American-Islamic Relations, Michigan (CAIR-MI), focuses her practice in the area of civil rights litigation.
She is licensed to practice law in Michigan, New York, and Washington, D.C. She has been admitted to practice in the Michigan Supreme Court, the New York Court of Appeals, the District of Columbia Court of Appeals, the 6th Circuit Court of Appeals, the U.S. District Court for the District of Columbia, the U.S. District Court for the Eastern District of Michigan, and the U.S. District Court for the Western District of Michigan. She holds a Juris Doctorate degree from Indiana University - Indianapolis, School of Law, where she focused her studies in International & Comparative Law and International Human Rights Law. She received her Bachelor of Arts degree in Political Science and Near Eastern Studies from the University of Michigan.

In 2014, she was awarded the RARE Everyday Hero Award by Winning Futures for her “extraordinary commitment, integrity, selflessness and courage to changing lives and inspiring others.” She has also been honored by the U.S. District Court for the Eastern District of Michigan in 2013 and 2014 for her pro bono work on behalf of poor and indigent clients. She was awarded the Norman Lefstein Award of Excellence as a Gold Level Participant in the Pro Bono program and a Certificate of Recognition for United Nations Human Rights Reporting Initiative & Advocacy. She has also been recognized by several community organizations, including the Syrian American Medical Society, Syrian Expatriates, the American Muslim Diversity Association, among others, for her civil rights and humanitarian work and empowering the youth.

Prior to joining CAIR-MI, she worked in different areas pertaining to national security, and international human rights, including ethnic cleansing, genocide, enforced disappearances, arbitrary detentions, torture, use of child soldiers, money laundering, and sex trafficking. She holds a Certificate from the University of Oxford in Investigating, Monitoring, and Reporting on Human Rights Violations. In 2008, she principally authored and presented a shadow report to the United Nations Committee on the Elimination of Racial Discrimination and delivered a speech before the United Nations Special Rapporteur on Contemporary Forms of Racism, concerning U.S. violations related to arbitrary arrests and detentions, use of secret evidence in closed proceedings, secret detentions, refoulement, and proxy torture.

She has worked with the Center for Justice & Accountability in San Francisco, California; Akeel & Valentine, PLC, in Birmingham, Michigan; the Neighborhood Christian Legal Clinic in Indianapolis, Indiana; and the Oakland County Circuit Court in Pontiac, Michigan.

She has lectured across the United States on issues related to human rights, civil rights, and Islam. She was featured in several documentaries and on major media outlets including Michigan Lawyers Weekly, Huffington Post, HBO, FOX, CBS, Al Jazeera, the Associated Press, National Public Radio, WWJ Radio, the Detroit Free Press, the Detroit News, and HuffPost Live.

In addition to her work with CAIR-MI, she serves as a volunteer attorney for the Family Law Assistance Project, the Legal Aid Defender Association, and Lakeshore Legal Aid, representing poor and indigent clients and victims of domestic violence.
Moderator: Dayan M. Hochman

Dayan M. Hochman is an associate at the Washington DC office of Eckert Seamans, Cherin & Merkolltt, LLC practicing in the firm's aviation regulatory group. She is a 2015 graduate of the Master's in Law program at the McGill University Institute of Air & Space Law in Montreal, Canada specializing in aviation safety and security issues. She is also a former Chair of the American Bar Association Young Lawyers Division Air & Space Law Committee and YLD Scholar. Dayan is currently licensed to practice law in the State of New Mexico and is pending admission to the District of Columbia.
AMERICAN BAR ASSOCIATION
YOUNG LAWYERS DIVISION
2016 FALL CONFERENCE
DETROIT, MICHIGAN

CONTINUING LEGAL EDUCATION PROGRAM

“ENEMY AT THE GATE: EMERGING SECURITY, ECONOMIC, AND LEGAL CHALLENGES TO AIRPORT SECURITY”
Friday, October 21, 2016, 11:30am-12:30pm
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CO-SPONSORED BY THE ABA YLD AIR AND SPACE LAW COMMITTEE

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Considering the impact of the Brussels and Istanbul attacks directed at airports prior to embarkation, combined with the recent surge in wait times in airport security lines with the TSA, the goals, methods, and legal mandates for airport security have come under recent scrutiny. As the United States leads the globe in air transit, carrying 798,230,000 air passengers in 2015 (World Bank), the vital international infrastructure of airports requires new focus to promote secure travel from the pre-security concourse to the destination baggage claim. The difficult legal prospect is to promote equitable treatment and efficiency while maintaining security best practices.

Detroit Metropolitan Wayne County Airport is one of the major international air hubs for the United States. Also noteworthy for the Greater Detroit and Michigan area are the Michigan community of Middle Eastern recent immigrants and descendants, with an eye towards anti-discrimination issues, and the arrest and trial in federal court in Michigan of the Eastern District of Michigan of Umar Farouk Abdulmutallab, the attempted airline bomber apprehended on Christmas Day, 2009.
Program General Topic Outline and Potential Points for Discussion

Recent Terrorist Attacks Directed At Airports

- Brussels, Belgium Airport Bombing Terrorist Attack, March 22, 2016
- Istanbul, Turkey Ataturk International Airport Terrorist Attack, June 28, 2016
- Are the similarities between these incidents indicative of a common strategy by terrorist organizations?
- What is the interplay between airport security, intelligence gathering challenges, and major geopolitical security conflicts?
- What has changed in the outlook of airport security in response to these sorts of attacks?
- Do these attacks realign the commitment to in-air versus in-airport targets for security?
- The Istanbul airport has twice as many the security checkpoints than the typical U.S. airport (once before entry to the concourse, once before entry to the terminal), yet the attacks were able to occur. Is the security layout a solution to attacks targeting airports?

Airports as Infrastructural Security Challenges

- Airports are just one visible and important part of the national infrastructure, but persistently prove to be a target of terrorism.
- What about civil aviation infrastructure consistently attracts targeting of terrorist attacks?
How do airports fit into the overall Homeland Security approach to protection of the national transportation infrastructure?

What operational and legal hurdles exist in coordinating a panoply of federal, state, and local agencies in ensuring effective response to security challenges in transportation infrastructure?

Airport Security Malaise: Government Funding Economics, Spring 2016 Spike in Airport Security Line Wait Times

- April and May 2016 saw heavily increased waiting times in the pre-departure airport security line in some of the major airports around the United States.
- The heavily increased waiting times have significantly subsided in the intervening months.
- At the height of the congestion, much was attributed to gradual budgetary constraints and increased numbers of airline passengers.
- Various studies continue to show the ability of various prohibited items to pass through airport security screening undetected.
- Is such a sudden burst of delay at airports conceivably explainable by a gradual increase in ridership or delays in funding?
- What are the long-term solutions to ensure that the TSA maintains adequate labor levels to handle the expected increases in airline passengers?
- Are operational changes, such as TSA Pre-Check or a waiver of airline baggage fees, effective to reduce the wait times? And do these changes have an impact on the effectiveness of the screening process?
What are the pros and cons of privatization of airport security? What are the legal hurdles, if any, to such implementation? Would privatization have any noticeable impact on the effectiveness of the security itself (arguably improving or deteriorating effectiveness)?

What technological improvements might improve the effectiveness of the screening process? What technologies may increase the speed of processing passengers?

**Criminal Enforcement Countering Terrorism in the Air: the Prosecution of Umar Farouk Abdulmutallab in the Eastern District of Michigan**

- Umar Farouk Abdulmutallab attempted to detonate an explosive while aboard Northwest Airlines Flight 253 from Amsterdam, Netherlands to Detroit Metropolitan Wayne County Airport on December 25, 2009.
- His prosecution ultimately resulted in a plea of guilty to 8 charges related to the incident. Abdulmutallab was sentenced to life imprisonment. The guilty plea was affirmed by the United States Court of Appeals for the Sixth Circuit in 2014.
- What are the difficulties in securing effective criminal prosecution in terrorism cases?
- What are the implications of jury selection and effective jury choice where terrorism is charged?
- What are the contours of criminal jurisdiction with respect to international airline flights? Could the Netherlands have charged this case?
- What are the ramifications for life sentences where, like the Abdulmutallab case, the defendant did not actually cause, but only attempted injury?
- If brought to trial instead of plea bargaining, what would have been trial practice challenges in securing a conviction?
Civil Liberties and Airport Security Profiling: Allegations and Challenges for Persons of Muslim Faith and Arab Descent, Questions of the Effectiveness of Behavior-Based Profiling, and the Intrusiveness of Airport Security

- What are the legal remedies available for individuals who claim they have been treated discriminatorily at the airport because of their appearance, dress, ethnicity, faith, etc. This has continued to be an issue within the Muslim community in the United States.
- What are the internal policies within government or private security agencies to ensure effective training and best practices by agents?
- What is the effectiveness of behavior-based profiling, where the Terry stop indicia of suspicious activity is the primary analysis for subjecting persons to additional screening?
- Are the full body imaging sensors employed at many airports overly intrusive to personal privacy concerns?
- What balance, if any, should be made when considering the effectiveness of profiling versus security considerations?
The Situation on the Ground: Current Events, Facts, and Analysis of the Threats and Administrative Challenges to the Airport Infrastructural System


• How the Instabul Attack is Different from Paris and Brussels, July 2, 2016.
  http://gokicker.com/2016/07/02/istanbul-attack-different-paris-brussels/


• Carry On Convenience, August 1, 2016.

• Integrating Security, July 1, 2016.

• Airport Security Could Suffer from Brexit, June 22, 2016.

• A simple solution to the TSA breakdown, May 26, 2016.

• TSA Screening Partnership Program.  https://www.tsa.gov/for-industry/screening-partnerships

• TSA Disqualifying Offenses.  https://www.tsa.gov/disqualifying-offenses-factors

• How airports are addressing long lines and “woefully understaffed” TSA, April 13, 2016.
• Lawsuit targets U.S. program on suspicious behavior at airports, March 19, 2015.
  http://www.reuters.com/article/us-usa-security-airports-idUSKBN0MF1PE20150319

• Detroit Metropolitan Wayne County Airport General Info.
  http://www.metroairport.com/TravelerInfo/GeneralInfo.aspx


• It’s time for airlines to stop ejecting passengers for looking or acting Muslim, April 18, 2016. http://www.latimes.com/business/hiltzik/la-fi-airlines-muslims-20160417-snap-htmlstory.html

• Screening Tests for Terrorism – Does the TSA’s latest procedure make us safer?, Winter 2012-2013.

• FAA Security Background Check Rule Explained.
MATERIALS FROM SELECTED LEGAL EFFORTS RELATING TO AIRPORT SECURITY
FOR IMMEDIATE RELEASE  
Thursday, February 16, 2012

Umar Farouk Abdulmutallab Sentenced to Life in Prison for Attempted Bombing of Flight 253 on Christmas Day 2009

WASHINGTON – Umar Farouk Abdulmutallab, the so-called “underwear bomber,” was sentenced today to life in prison as a result of his guilty plea to all eight counts of a federal indictment charging him for his role in the attempted Christmas Day 2009 bombing of Northwest Airlines flight 253.

The sentence, handed down by U.S. District Court Judge Nancy G. Edmunds in Detroit, was announced by Attorney General Eric Holder; Barbara L. McQuade, U.S. Attorney for the Eastern District of Michigan; Andrew G. Arena, Special Agent in Charge of the FBI’s Detroit Field Office; and Brian M. Moskowitz, Special Agent in Charge of U.S. Immigration and Customs Enforcement’s (ICE) Homeland Security Investigations (HSI) in Detroit.

Abdulmutallab, 25, of Kaduna, Nigeria, pleaded guilty on Oct. 12, 2011, to conspiracy to commit an act of terrorism transcending national boundaries; attempted murder within the special aircraft jurisdiction of the United States; willfully placing a destructive device on an aircraft, which was likely to have endangered the safety of the aircraft; attempted use of a weapon of mass destruction; willfully attempting to destroy and wreck a civil aircraft; and three counts of possession of a destructive device in furtherance of a crime of violence.

“As this investigation and prosecution have shown, Umar Farouk Abdulmutallab is a remorseless terrorist who believes it is his duty to kill Americans. For attempting to take the lives of 289 innocent people, he has been appropriately sentenced to serve every day of the rest of his life in prison,” said Attorney General Holder. “Today’s sentence once again underscores the effectiveness of the criminal justice system in both incapacitating terrorists and gathering valuable intelligence from them.”

“But on behalf of the victims, we are gratified that this al-Qaeda terrorist has been defeated and will spend the rest of his life in prison, where he can never hurt innocent civilians again,” U.S. Attorney McQuade said. “I am very proud of the work of our prosecutors and agents in Detroit. Their work shows that the civilian court system is a valuable mechanism for obtaining intelligence and convicting terrorists with the legal certainty and transparency that instills public confidence in American justice.”
“The case against Abdulmutallab was a combination of the hard work and dedication of FBI personnel as well as multiple federal, state and local agencies. Those individuals who experienced Christmas Day 2009 first hand should be rest assured that justice has been done,” said FBI Special Agent in Charge Arena.

“When it counted most, under pressure and in the heat of the moment, the metro Detroit law enforcement community responded as one and acted decisively,” said HSI Special Agent in Charge Moskowitz. “Their collective actions epitomized the concept of ‘one team, one fight’ and showed the power of collaboration in the protection of our homeland.”

According to the indictment filed in this case, in August 2009, Abdulmutallab traveled to Yemen for the purpose of becoming involved in violent “jihad” on behalf of al-Qaeda. There, he conspired with other al-Qaeda members to bomb a U.S. aircraft over U.S. soil and received an explosive device for that purpose. Abdulmutallab traveled with the bomb concealed in his underwear from Yemen to Africa and then to Amsterdam, the Netherlands, where he boarded Flight 253 on Christmas Day 2009. The bomb contained PETN and TATP, two high explosives, and was designed to be detonated with a syringe containing other chemicals.

Abdulmutallab’s purpose in taking the bomb on board Flight 253 was to detonate it during flight, causing the plane to crash and killing the 290 passengers and crew members on board. As Flight 253 was on descent into Detroit Metropolitan Airport, the defendant detonated the bomb, which resulted in a fire, but otherwise did not fully explode. Passengers and flight attendants tackled the defendant and extinguished the fire.

This investigation was conducted by the Detroit Joint Terrorism Task Force, which is led by the FBI and includes U.S. Customs and Border Protection, HSI, the Federal Air Marshal Service and other law enforcement agencies. Additional assistance has been provided by the Transportation Security Administration, the State Department’s Bureau of Diplomatic Security, the Wayne County Airport police, as well as international law enforcement partners.

This case is being prosecuted by Assistant U.S. Attorneys Jonathan Tukel, Cathleen M. Corken and Michael C. Martin of the U.S. Attorney's Office for the Eastern District of Michigan, with assistance from the Counterterrorism Section of the Justice Department’s National Security Division.

To view or download the government video exhibit introduced in court during today’s sentencing hearing, visit: http://www.justice.gov/usvabdulmutallab-200.html.

12-227
OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR CHANGE OF VENUE [57]

At a hearing held on September 14, 2011, this matter came before the Court on Defendant's motion for change of venue. Defendant argues that this Court may be unable to seat an impartial jury because of prejudicial pretrial publicity and/or an inflamed community atmosphere. The Supreme Court has drawn a distinction between presumed and actual prejudice for pretrial publicity. Murphy v. Florida, 421 U.S. 794 (1975). For the reasons stated below and on the record at the September 14th hearing, prejudice cannot be presumed in this matter. Moreover, because the extensive jury questionnaire and follow-up individual voir dire fashioned by the Court in this matter will probe each prospective juror's exposure to any pretrial publicity, a change of venue is not warranted at this time. Accordingly, Defendant's motion is DENIED as to presumed prejudice and DENIED AS PREMATURE as to actual prejudice.

I. Analysis

The Sixth Amendment affords a criminal defendant the right to a trial by an impartial jury. Moreover, the United States Constitution establishes that trials are to be held in the district where the offense occurred. See U.S. Const., Art. III, § 2, cl. 3 ("The trial of all crimes . . . shall be held in the State where the said crimes shall have been committed"); U.S. Const., Amend. VI (observing that all criminal trials are to be conducted "by an impartial jury of the State and district wherein the crime shall have been committed."). These constitutional mandates yield only "if extraordinary local prejudice will prevent a fair trial." Skilling v. United States, _ U.S. _, 130 S. Ct. 2896, 2913 (2010).

Fed. R. Crim. P. 21 governs venue transfers in federal court. That rule instructs that:

(a) For Prejudice. Upon the defendant's motion, the court must transfer the proceeding against that defendant to another court if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there.

Fed. R. Crim. P. 21(a) (emphasis added).

The decision to grant a change of venue motion is committed to the trial court's discretion. United States v. Chambers, 944 F.2d 1253, 1262 (6th Cir. 1991) (superseded by statute on other grounds).

A. Presumed Prejudice

The Supreme Court has drawn a distinction between presumed and actual prejudice from pretrial publicity. Murphy v. Florida, 421 U.S. 794 (1975). "Presumptive prejudice from pretrial publicity occurs where an inflammatory, circus-like atmosphere pervades both the courthouse and the surrounding community." Foley v. Parker, 488 F.3d 377, 387 (6th Cir. 2007). "Where
pretrial publicity cannot be presumed prejudicial, the trial court must then determine whether it rises to the level of actual prejudice. The primary tool for discerning actual prejudice is a searching voir dire of prospective jurors." Id. at 387 (internal citation omitted).

Here, Defendant asks the Court to presume prejudice from pretrial publicity. A presumption of prejudice, however, "attends only the extreme case." Skilling, 103 S. Ct. at 2915. Defendant bears an "extremely heavy" burden to show that pretrial publicity will deprive him of an impartial jury. Coleman v. Kemp, 778 F.2d 1487, 1537 (11th Cir. 1985). Reflecting the high bar Defendant must hurdle "[p]rejudice from pretrial publicity is rarely presumed." Foley, 488 F.3d at 387.

Defendant's "presumed prejudice" argument rests entirely on the raw number of news articles and television broadcasts that discuss Defendant's charges. This is insufficient. As the Supreme Court explained in Skilling:

Prominence does not necessarily produce prejudice, and jury impartiality, we have reiterated does not require ignorance.

Skilling, 103 S.Ct. at 2914-15 (italics in original) (citing and quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("Jurors are not required to be 'totally ignorant of the facts and issues involved;' 'scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.'"); and Reynolds v. United States, 98 U.S. 145, 155-56 (1878) ("'[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who had not some impression or some opinion in respect to its merits.'").

When considering whether to presume juror prejudice, courts look beyond the sheer amount of pretrial publicity. Rather, a number of factors are considered, including the following.

1. Large Size and Diversity of Jury Pool

Courts have considered the "size and characteristics of the community in which the crime occurred." Skilling, 130 S. Ct. at 2915. In Skilling, a former Enron Chief Executive Officer was charged with offenses related to deceiving investors and others about Enron's performance before its collapse in bankruptcy. Skilling's trial took place in Houston, where Enron is based and where 4.5 million individuals eligible for jury duty resided. The Skilling Court concluded that "[g]iven this large, diverse pool of potential jurors, the suggestion that 12 impartial individuals could not be empaneled is hard to sustain." Id. The same is true here.

Other cases have similarly found that the size of the area from which the venire was drawn reduced the likelihood of prejudice. See Mu'Min v. Virginia, 500 U.S. 415, 429 (1991) (observing that the size of the metropolitan Washington, D.C. area, with a population of over 3 million, mitigated the potential for prejudice); Gentile v. States Bar of Nev., 501 U.S. 1030, 1044 (1991) (plurality opinion) (finding the likelihood of prejudice diminished where the pool of eligible jurors was over 600,000 individuals).
According to the U.S. Census Bureau data, the population of Detroit and its surrounding suburbs is nearly 4.3 million individuals. See http://www.census.gov/2010census. Detroit is the eighteenth largest city in the nation. As in Skilling, the defense contention that an impartial jury cannot be found from such a large pool is untenable and is thus rejected.

2. Content of Media Reports

When determining whether prejudice should be presumed, the courts also consider whether news reports contained a "confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight." Skilling, 130 S. Ct. at 2916. Consideration of this factor here also weighs against a change in venue.

The publicity in this case has been largely impartial reporting on the public court proceedings and motions. As in United States v. Johnson, much of the publicity in this case has been "primarily descriptive of the indictment . . . and related proceedings." 584 F.2d 148, 154 (6th Cir. 1978). Similar to Skilling then, it is thus distinguishable from Rideau v. Louisiana, 373 U.S. 723 (1963), where the defendant's broadcast confession "was likely imprinted indelibly in the mind of anyone who watched it." Skilling, 130 S. Ct. at 2916.

3. Time Lapse Between Precipitating Event and Trial

In weighing whether to apply a presumption of prejudice, the courts also consider the time of the pretrial publicity and whether "trial swiftly followed a widely reported crime." Skilling, 103 S. Ct. at 2916. In Skilling, the Supreme Court observed that four years had elapsed between Enron's bankruptcy and Skilling's trial. Although there was news coverage throughout this period, "the decibel level of media attention diminished somewhat in the years following Enron's collapse." Id. The same is true here where the trial will occur almost two years after the crimes charged occurred. A review of the press coverage of this case shows a peak at the time of the precipitating event and a tapering off, with coverage occurring sporadically when there was a court appearance or filing. For example, as the government points out, there have been a total of 285 printed media reports in the Eastern District of Michigan; 161 of those reports - more than half - occurred in the month following the incident on December 25, 2009.

4. Impact on Community

Defendant makes unsupported claims about the impact of this case on the community in urging the Court to presume prejudice. For instance, Defendant contends that "many residents of the State of Michigan are enraged that such an alleged incident occurred not just in their country, but in their home state, near their home city, at the airport that they frequent." (Def.'s Mot. at 3.) In Skilling, the defendant's victims were numerous and the community impact of his crimes widespread. Skilling, 103 S. Ct. at 2917. Nonetheless, the Supreme Court found that the jury questionnaire and follow-up voir dire were "well-suited" to identifying jurors' connections to Enron. The same measures are being employed here to identify juror prejudices or biases.

Consideration of the above factors convinces the Court that juror prejudice cannot be presumed. Similar venue transfer requests have been denied in other cases "involving substantial pretrial
publicity and community impact . . . ." Skilling, 103 U.S. at 2913, n.11 (citing the 1993 World Trade Center bombing case, United States v. Salameh, No. S5 93 Cr. 180(KTD) (S.D. NY Sept. 15, 1993)). See also, terrorism cases, United States v. Yousef, No. S12 93 r. 180(KTD) (S.D. NY July 18, 1997), aff'd, 327 F.3d 64, 155 (2d Cir. 2003); United States v. Lindh, 212 F. Supp. 2d 541, 549-551 (E.D. Va. 2002); United States v. Moussaoui, Crim. No. 01-455-A, Doc. Entry 6/25/02 (E.D. Va.). The circumstances present here are markedly different than those in which the Supreme Court has presumed prejudice from pretrial publicity. See Skilling, 103 U.S. at 2913-1915 (distinguishing Rideau; Estes v. Texas, 381 U.S. 532 (1965); and Sheppard v. Maxwell, 384 U.S. 333 (1966)).

B. Actual Prejudice - Defendant's Motion is Premature

The Court must also consider whether pretrial publicity rises to the level of actual prejudice. Foley, 488 F.3d at 387. Voir dire is the primary vehicle for ascertaining actual prejudice. Id. As the Sixth Circuit observed in Johnson,

The merit of a change of venue motion is most likely to be revealed at voir dire of the potential jurors. Through proper questioning the court can determine the extent of the veniremen's exposure to the publicity and the effect it has had upon them. Exposure to publicity alone does not presumptively deprive the defendant of his right to fair and impartial jurors. Rather, the test is whether any potential juror who has been exposed to publicity can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

584 F.2d at 154 (internal quotation marks and citations omitted).

Here, the Court has fashioned an extensive written questionnaire that will probe each prospective juror's exposure to any pretrial publicity. In addition, each juror will be subject to individual voir dire during which follow-up questions relating to pretrial publicity can be further probed. Through these measures, the Court can determine whether jurors have seen or heard anything about this case, whether they have been affected by it, and whether they can lay aside any preconceived impressions or opinions that they may have formulated. Because the jury questionnaire and voir dire will fully expose any prejudice from pretrial publicity, a change of venue is not warranted at this time.

II. Conclusion
For the above-stated reasons, Defendant's motion for change of venue is DENIED.

Nancy G. Edmunds

United States District Judge
I hereby certify that a copy of the foregoing document was served upon counsel of record on September 14, 2011, by electronic and/or ordinary mail.

Carol A. Hemeyer
Case Manager
Peter Siggins

Earl Warren, 14th Chief Justice of the United States, has become an icon to generations of Americans who believe in the gains for civil rights and personal freedom that were the hallmark of his tenure on the Supreme Court. In 1940, Earl Warren was the attorney general of California, and he delivered a speech where he cautioned against bigotry based upon national origin. He said,

It should be remembered that practically all aliens have come to this country because they like our land and our institutions better than those from whence they came. They have attached themselves to the life of this country in a manner that they would hate to change and the vast majority of them will, if given a chance, remain the same good neighbors that they have been in the past regardless of what difficulties our nation may have with the country of their birth. History proves this to be true . . . . We must see to it that no race prejudices develop and that there are no petty persecutions of law-abiding people.

Then, in the wake of the attack on Pearl Harbor, by January and February 1942, Attorney General Warren directed the preparation of maps showing all Japanese-owned lands in California, called upon the state's district attorneys to enforce the Alien Land Law against Japanese landowners, and said the presence of Japanese in California provided the opportunity for a repetition of Pearl Harbor. And by March he advocated the exclusion of all Japanese from within 200 miles of the California coast.

Following the attack on Pearl Harbor, the interest in preserving the safety and security of the nation was put in direct conflict with the American democratic ideal of racial equality. The noble cause of equality in that circumstance yielded to our concern for security. Subsequent experience shows that exclusion to be one of the great injustices of WWII visited upon American residents. Congress has since passed laws ordering reparations from those American residents separated from their homes, businesses and
lands. Although the Supreme Court's holding in Korematsu, that the Government in time of war had justified racial discrimination in the name of national security is still the law of the land, many lower courts have recognized the injustice wrought by the Japanese internment and we should not forget it.

It is against this historical backdrop that we encounter post-9/11 efforts to combat terrorist acts on American soil, and examine the role that race should play in an effective effort to deter future attacks. But before assessing whether our government's response to the events of 9/11 betray a pattern of racial profiling, I first want to identify what it is.

In 1968, the Supreme Court decided the landmark case of Terry v. Ohio. Then Chief Justice Warren, joined by seven other members of the Court, held that it is not a violation of the Fourth Amendment for an officer to detain and search a man's person for a weapon in absence of a search warrant, so long as the officer acts upon a reasonable belief based upon objective factors that the man is armed and dangerous. The Court's decision in Terry has been interpreted by lower courts countless times over the years to allow the brief detention and search of persons by law enforcement officials when officers are acting upon reasonable suspicion that criminality is afoot. The lexicon of the criminal justice community now refers very casually to such stop and frisk encounters as "Terry" stops, and over the years these brief detentions have been relied upon by officers with ever increasing frequency to stop and investigate suspicious characters. In 1996 in Whren v. United States, amid growing concern over the use of Terry stops as a prophylactic law enforcement tool, the Supreme Court reiterated the objective nature of the inquiry into a law officer's basis for a Terry stop. The Court held that an officer's subjective motivation has no part to play in the Fourth Amendment analysis of justification for a stop and search when the officer can articulate objective reasons.

Out of the Terry line of cases, as fortified by the Court's decision in Whren, law enforcement agencies all over the country advocated pre-textual stops and encounters with citizens as good proactive policing. The practices are most often deployed through a casual traffic stop occasioned by a burned out taillight or some other minor vehicle code violation. But in recent years, at first anecdotally, then more empirically, it has been demonstrated that the Terry procedure has been used disparately to detain and interrogate black or brown people. In late 1999, the New Jersey state police became the first major law enforcement agency to admit to the stop and detention of disproportionate numbers of black men. Since then, state legislatures all over the country have wrestled with legislation aimed at banning racial profiling, and there has been tremendous outcry to study its effect and occurrence among major law
enforcement agencies. For example, the LAPD has been required as part of a consent 
decree with the USDOJ to collect data that may reveal patterns of racial profiling by 
officers in traffic stops. Just this year Governor Davis vetoed a bill designed to require 
local police agencies to report statistics on traffic stops in order to detect patterns of 
racial profiling. After litigation was field by the ACLU over the veto of this bill, the 
Governor and Highway Patrol have instituted the program by executive order. As 
recently as March 2001, Attorney General Ashcroft condemned racial profiling as "[A]n 
unconstitutional deprivation of equal protection under our Constitution."

So, racial profiling as the term has been employed in recent public debate, refers to 
government activity directed at a suspect or group of suspects because of their race, 
whether intentional or because of the disproportionate numbers of contacts based upon 
other pre-textual reasons. Under Fourth Amendment analysis, objective factors 
measure whether law enforcement action is constitutional, and under the Fourteenth 
Amendment challenges to the practice are assessed under the customary strict scrutiny 
test for racial classifications. It is against this historical and legal backdrop that we 
should take a look at our law enforcement and internal domestic security response to 
the horrific acts of September 11th.

In the weeks following September 11, federal, state and local law enforcement officials 
worked feverishly to investigate those responsible for the most reprehensible crime on 
American Soil and to assess our state of vulnerability to further acts of terrorism. As part 
of those efforts conclusions about the ethnicity and national origin of the prime suspects 
was inescapable. This crime was committed by a group of foreign nationals of middle 
eastern descent.

Immediately law enforcement officials focused special investigative efforts upon foreign 
nationals from middle eastern countries, often in disregard of any other factors 
warranting suspicion. In December, federal investigators began voluntary interviews 
with more than 5,000 young middle eastern men who entered the United States within 
the last two years from countries that were linked to terrorism. Federal officials have 
contacted administrators at more than two hundred colleges and universities to gain 
information about students from middle eastern countries. What are their majors? 
Where do they live? How often do they miss class? They have followed up these efforts 
with unannounced visits and interviews with the students. Some local police chiefs who 
have worked hard to rebut concerns over racial profiling have resisted cooperation with 
these federal efforts on the ground that the interviews appear to violate departmental 
policy or state and local laws.
In California, by September 25, 2001, the governor and attorney general along with the Highway Patrol and the Office of Emergency Services formed the California Anti-Terrorism Information Center. The Center is created to analyze and process the thousands of tips and leads of suspicious activity that began pouring into state law enforcement agencies in the days following September 11th. The effort has been to separate the wheat from the chaff and disseminate to law enforcement information that truly reflects suspicious activity or reliably warrants concern. In just January and February of this year, 1,615 subjects were reported to the database. Two Hundred and twenty eight of them had criminal histories and 330 were the subjects of ongoing investigations. The center services an average of 56 law enforcement agencies per week, and monitors 40 open anti-terrorist investigations.

Significant information continues to be received by the Center every day reporting the conduct of males of apparent middle east extraction that hardly qualifies for the designation of suspicious or dangerous activity. The job of responsible law enforcement officials is to cull form the many innocuous reports received by the center, those that combine ethnic or national origin with a multiple of indicators to reveal persons who may be a concern or possible threat.

The U.S. Congress, in the days following September 11th, passed The USA Patriot Act, an omnibus bill containing numerous reforms to federal criminal procedure, laws relating to foreign intelligence surveillance, wiretaps and interception of electronic communications, laws relating to the gathering of documentary evidence, and DNA and immigration laws. In a very general sense, the Act makes it easier for federal investigative agencies to obtain wiretaps on multiple electronic devices, and procure electronic and documentary evidence from sources like internet service providers and cable and telephone companies. It also relaxes prohibitions on the sharing of information obtained in investigations by different federal agencies. While the latitude afforded law enforcement activities under the act and relaxed standards for information sharing may give rise to concern for the protection of civil liberties, the provisions most relevant to our discussion today are in the area of immigration and naturalization.

Section 412 of the Patriot Act permits the attorney general of the United States to detain aliens he certifies as threats to national security for up to seven days without bringing charges. The standard to establish grounds for detention is the familiar reasonable suspicion standard enunciated by the Supreme Court in Terry. The certification by the attorney general must set forth that he has "reasonable grounds to believe" the person being detained will commit espionage or sabotage, try to overthrow the government, commit terrorist acts, or otherwise engage in acts that would endanger national security.
At the conclusion of seven days, the detention may continue in the event the alien is charged with a crime or violation of visa conditions. But if circumstances prohibit the repatriation of a person for an immigration offense, the detention may continue indefinitely so long as certified by the attorney general every six months. Under the USA Patriot Act, the prospect exists that a person who is confined for a violation of conditions of entry into the US, but cannot be deported to his or her country of origin, may be indefinitely confined here without criminal charges ever filed against them.

Thurgood Marshall wrote that, "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." Recent surveys indicate that 66% of whites and 71% of African-Americans support the ethnic profiling of people who look to be of middle-eastern descent. But we also know that hate motivated violence against middle eastern people and members of California’s sikh community, often mistakenly thought to be Arabs, spiked in the weeks after the September 11th attack. There are currently 150 open federal hate crime investigations for incidents following the September 11th attack.

The mission of responsible law enforcement officials in combating domestic terrorism is to take what they know to be true about the ethnic identity of the September 11th assailants, and combine it with other factors developed through investigation and analysis to focus investigative efforts and avoid casting a net too wide. Have the subjects passed bad checks? Do they multiple forms of identification with different names? Do they live in groups with no visible means of support? Does a subject use credit cards with different names on them? Ethnicity alone is not enough. If ethnic profiling of middle eastern men is enough to warrant disparate treatment, we accept that all or most middle eastern men have a proclivity for terrorism, just as during World War II all resident Japanese had a proclivity for espionage.

The Israeli airline El Al has a policy of singling out young Arabs for extensive search procedures, but is quick to point out that, in spite of ongoing war in the middle east, it has not had a hijacking in over thirty years. Perhaps there is a need to adjust our expectations in a time of national emergency. Con. Richard Gephardt has said of post-September 11th America that, "We’re in a new world where we have to rebalance freedom and security." And Sen. Trent Lott said that, "When you’re in this type of conflict, when you’re at war, civil liberties are treated differently." The real question for us is how differently and whether differently for all or only a select few.

I agree with the sentiments of Walter Dellinger, former Acting Solicitor General during the Clinton Administration, "I am more willing to entertain restrictions that affect all of us
like identity cards and more intrusive X-ray procedures at airports - and am somewhat more skeptical of restrictions that affect only some of us, like those that focus on immigrants or single out people by nationality. "It will be impossible to physically protect every location that could be the subject of a terrorist attack. Protection is going to have to be accomplished through infiltration and surveillance, so all of us have to get used to new levels of government intrusion.

Chief Deputy Attorney General for the State of California Peter Siggins presented this talk for a Markkula Center for Applied Ethics forum March 12, 2002, co-sponsored by the SCU School of Law.

Mar 12, 2002
McKEAGUE, Circuit Judge. Defendant-Appellant Umar Abdulmutallab challenges his life sentence for attempting to detonate an explosive device on Northwest Airlines Flight 253. Abdulmutallab challenges his conviction with the following claims:

1. 

* The Honorable Curtis L. Collier, United States District Judge for the Eastern District of Tennessee, sitting by designation.
(1) the district court erred by ordering him to stand trial and accept a guilty plea despite doubts as to Abdulmutallab’s competency; (2) the district court erred by allowing Abdulmutallab to represent himself at trial despite doubts as to his competency; (3) the district court erred by admitting incriminating statements Abdulmutallab made while authorities questioned him without a *Miranda* warning; (4) 18 U.S.C. § 924(c) is unconstitutional because Congress lacked the power to enact the statute under the Commerce Clause; (5) Abdulmutallab’s life sentence is cruel and unusual in violation of the Eighth Amendment as well as substantively unreasonable under the Sentencing Guidelines. We conclude that none of these claims have merit and therefore AFFIRM the district court.

I.

Umar Farouk Abdulmutallab (“Abdulmutallab”), known nationally as the “underwear bomber,” attempted to detonate an explosive device in his underwear on Christmas Day in 2009. Abdulmutallab’s chosen path towards radicalization began in August 2009 when he traveled to Yemen for the purpose of becoming involved in a violent jihadist group associated with Al Qaeda, a designated terrorist organization pursuant to 18 U.S.C. § 2339B(a)(1) and 8 U.S.C. § 1189(a). During his time in Yemen, Abdulmutallab received training at an Al Qaeda camp under the direction of the radical Imam Anwar Awlaki and agreed to carry out a suicide attack by bombing a United States air carrier over the United States. The bomb given to Abdulmutallab was built into a pair of underwear and Abdulmutallab was assured that the bomb would defy airport security because it contained no metal parts.

On Christmas Day, Abdulmutallab boarded the flight from Amsterdam, Netherlands to Detroit, Michigan to execute his martyrdom mission. The flight carried 289 passengers. When the flight was close to landing in Detroit, Abdulmutallab went to the bathroom to prepare to detonate the bomb. Upon returning to his seat, Abdulmutallab told the passenger in the seat next to him that he was not feeling well, pulled a blanket up to his head, and pushed the button to detonate the bomb. The result was a single, loud pop, which other passengers described as sounding like a firecracker.
The explosive device did not work as intended, and caused only a large fireball around Abdulmutallab and then a fire coming out of Abdulmutallab’s pants, igniting the carpeting, walls, and seat. A number of passengers restrained Abdulmutallab and attempted to put the fire out. As a result of the emergency, the pilot brought Flight 253 into a deep descent, landing approximately four minutes later. Once the plane landed, Abdulmutallab was taken to the University of Michigan Hospital for medical treatment.

The superseding indictment charged Abdulmutallab with eight counts:

5. Willfully Placing a Destructive Device in, upon, and in Proximity to a Civil Aircraft Which was Used and Operated in Interstate, Overseas and Foreign Air Commerce, which was Likely to Have Endangered the Safety of Such Aircraft in violation of 18 U.S.C. § 32(a)(2).
8. Willful Attempt to Destroy and Wreck a Civil Aircraft in violation of 18 U.S.C. §§ 32(a)(8) and 32(a)(1).

R. 28, First Superseding Indictment at 1–10, PageID # 86–95.

Abdulmutallab’s Initial Appearance occurred on December 26, 2009. At that time, the district court explained to Abdulmutallab his right to counsel. Abdulmutallab stated that he did not have sufficient funds to hire his own counsel and agreed to the appointment of the Federal Public Defender’s Office.
Abdulmutallab continued to be represented by the Federal Public Defender’s Office until he stated at a pretrial conference on September 13, 2010 that he wanted to represent himself because he believed that any representation appointed by the district court would not be in his best interests. The district court explained that the attorneys representing him were experienced lawyers who had dedicated their careers to defending those accused of wrongdoing. The district court then advised Abdulmutallab of the following:

THE COURT: Mr. Abdulmutallab, I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You’re not familiar with the law, you are not familiar with court procedure, you’re not familiar with the rules of evidence, and I would strongly urge you not to try to represent yourself.

Now, in light of the penalty that you might suffer if you are found guilty, and in light of all the difficulties of representing yourself, is it still your desire to go forward and represent yourself without giving another try to having an attorney represent you, just even over the next month or two, to see if perhaps we can appoint an attorney who would have what you believe to be your best interests in mind?

THE DEFENDANT: Yeah, I don’t want that, no.

THE COURT: You don’t want another attorney?

THE DEFENDANT: No.

THE COURT: Is your decision entirely voluntary on your part?

THE DEFENDANT: Yeah.

THE COURT: All right. I find that the defendant has knowingly and voluntarily waived his right to counsel, and I will permit him to represent himself. However, I am going to appoint standby counsel, which I would always do in the case of trial, but I believe this case demands that we have standby counsel available for you to consult with for any questions that you might have as you prepare to represent yourself at the trial in this matter.


The district court appointed standby counsel, Anthony Chambers (“Chambers”), to assist Abdulmutallab with his defense. A number of pretrial conferences were held
in the course of 2010 and 2011 to ensure that the relationship between Chambers and Abdulmutallab was working. At each pretrial conference, Abdulmutallab confirmed that standby counsel was effectively assisting him with his defense.

On August 5, 2011, Chambers filed a motion to suppress statements given by Abdulmutallab at the University of Michigan Hospital and a motion for a competency hearing under seal. The district court held a hearing on the motion for a competency hearing on August 17, 2011. Chambers’ motion stated that he questioned Abdulmutallab’s “psychological well-being,” as Abdulmutallab had begun exhibiting “spontaneously erratic behavior” which is why he believed that a mental examination was necessary. Chambers clarified that he was asking the district court to simply make a determination of whether a full competency hearing was necessary. The district court then placed Abdulmutallab under oath and the following exchange occurred:

THE COURT: Okay. You understand—have you gone over the indictment in this case on your own and with standby counsel, Mr. Chambers?

THE DEFENDANT: Yes.

THE COURT: Do you understand the counts that are filed against you and the nature of the charges that you’re facing in this case?

THE DEFENDANT: Yes.

THE COURT: And you’ve discussed the charges and the possible penalties with Mr. Chambers?

THE DEFENDANT: Yes.

. . .

THE COURT: I’ve asked you on prior occasions and will ask you again now, are you satisfied with your relationship with Mr. Chambers and the assistance he’s been able to give you in preparing for the trial in this matter?

THE DEFENDANT: Well, certainly it’s—it’s certainly—I feel it’s a more—I have a more decent standby counsel. I wouldn’t say that I’m 100 percent satisfied, but I think that’s just the way it’s going to go.

THE COURT: And are you comfortable that you understand my role in this case and what function I will play as this trial goes forward?
THE DEFENDANT: Yes.

THE COURT: And you’re aware of the role being played by the United States—assistant United States attorneys in this case?

THE DEFENDANT: Yes.

THE COURT: All right. Can you tell me in your own words what kind of penalties you are facing if you were to be convicted of all of the counts in this complaint—or indictment rather?

THE DEFENDANT: Life charges.

THE COURT: So you know that if you were to be convicted of the charges in this indictment that there would be a possibility of life in prison?

THE DEFENDANT: Yes.

THE COURT: Is there any matter in which you feel that you have questions that have not been adequately addressed or answered or in which you are confused or puzzled by procedure?

THE DEFENDANT: No.

... 

THE COURT: All right. I have to say, Mr. Chambers, that I’ve had the opportunity to interact with Mr. Abdulmutallab on a number of prior occasions in court, that I’ve not had any sense that he does not understand the charges against him or that he is not able to assist you with this matter.

I understand that it’s stressful for any defendant moving toward a criminal trial in which he faces the kind of penalties that Mr. Abdulmutallab is facing, but I have not had any reason to question his competence to move forward in this case, nor to represent himself.

He—I would have to characterize this as somewhat of a hybrid representation in that he has sought your assistance on a number of matters even though he prefers to represent himself, and I’m comfortable with that, as well.

Let me ask you one additional question, Mr. Abdulmutallab. You understand that Mr. Chambers has asked that you be examined for competency to go forward in this case?

THE DEFENDANT: Yes, I understand that.

THE COURT: And what’s your position on that?

THE DEFENDANT: I guess, simply, I believe I’m competent to proceed
by myself and I do not wish to have the examination.

THE COURT: And if I were to order the examination, would you cooperate with it?

THE DEFENDANT: Well, one thing was, as I—as he, Mr. Chambers said when—because when we discussed about the motion is initially my idea was perhaps I would even—that would be a good thing to prove my competency to proceed standby, but then when he put it to me that, you know, the kind of—the reasons why, or the arguments that have to be put forward before even someone has that type of examination, and I said that’s counter productive to what I even want, so I don’t want the examination.

THE COURT: All right. I’m satisfied that Mr. Abdulmutallab is in fact competent to proceed in this matter, and I have no reason to believe that he is not, and I think that there needs to be more of a showing than was set forth in the motion that was filed in this case to order a competency exam. I’m going to deny the motion without prejudice.

If something arises that makes you feel it important to renew that motion, then by all means please do so.

R. 116, 08-17-11 Motions Hearing Tr. at 11–16, PageID # 758–63.

On September 14, 2011, the district court considered testimony from three witnesses regarding the motion to suppress statements Abdulmutallab made at the University of Michigan Hospital. Abdulmutallab claimed that the statements should be suppressed because he was not given a Miranda warning prior to making the statements and because he was under the influence of the pain-relief medication Fentanyl when he was questioned. The district court heard testimony and denied Abdulmutallab’s motion to suppress, finding that (1) Abdulmutallab’s statements were voluntary, and (2) the circumstances present at the time of Abdulmutallab’s questioning fell within the public safety exception to Miranda recognized in New York v. Quarles, 467 U.S. 649 (1984).

Abdulmutallab’s trial began on October 11, 2011 with Abdulmutallab informing the district court that he did not want to contest the charges. However, after a discussion with Chambers, standby counsel announced to the district court that Abdulmutallab would proceed to trial. The Government called its first witness, a passenger on Flight 253 who was sitting near Abdulmutallab and witnessed Abdulmutallab’s attempt to detonate the bomb on the flight.
The next day, Chambers indicated to the district court that Abdulmutallab intended to plead guilty. Because the Government had not offered Abdulmutallab a plea agreement, Abdulmutallab pled to the indictment. The district court began the plea colloquy by asking standby counsel whether he believed Abdulmutallab was competent to proceed in this matter, to which standby counsel agreed. Following the lengthy plea colloquy in which Abdulmutallab was informed of the rights he was waiving and the nature of the plea he was entering, the district court found that Abdulmutallab was competent and capable of entering the plea and accepted his plea.

The district court sentenced Abdulmutallab to 240 months of imprisonment on Counts 3, 5, and 8, to be served concurrently; imprisonment for life on Count 7 to run concurrently with the other three counts; imprisonment for life on Count 1 to run consecutively to all other counts; 30 years of imprisonment on Count 2 to run consecutively to all other counts; imprisonment for life on Count 4 to run consecutively to all other counts; and imprisonment for life on Count 6 to run consecutively to all other counts. The sentence was the maximum penalty permitted on each of the eight counts. This appeal followed.

II.

A. Competency to Enter Guilty Plea

Abdulmutallab argues that the district court erred in not conducting a competency hearing prior to accepting his guilty plea. Abdulmutallab contends that the district court should have ordered a competency examination when standby counsel filed a motion which raised a doubt as to his competency. The Government responds by stating that the district court did not abuse its discretion, as the district court had no reason to question Abdulmutallab’s competency to stand trial, as neither Abdulmutallab’s behavior in court nor standby counsel’s motion for a competency hearing raised suspicions as to Abdulmutallab’s competency.

A criminal defendant may not plead guilty unless he does so competently and intelligently. *Godinez v. Moran*, 509 U.S. 389, 396 (1993). A criminal defendant’s due-process right to a fair trial is violated by a court’s failure to hold a proper competency
The standards for competency to stand trial are codified in 18 U.S.C. § 4241, which provides:

(a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him.  

(b) Psychiatric or psychological examination and report.—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

The test for competency to stand trial is whether the defendant has (1) sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding, and (2) a rational and factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402 (1960) (per curiam); Godinez v. Moran, 509 U.S. at 399 (stating that the Dusky standard applies to defendants who plead guilty).

On appeal, we review under an abuse of discretion standard a district court’s determination whether there is “reasonable cause” to believe that a defendant is incompetent and whether to hold a competency hearing. United States v. Jones, 495 F.3d 274, 277 (6th Cir. 2007) (citation omitted). In order for a court to determine whether a competency hearing was required, the court should consider “evidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial . . . .” Drope v. Missouri, 420 U.S. 162, 180 (1975). No one factor is determinative of whether further inquiry into a defendant’s competency is warranted, “but . . . even one of these factors standing alone, may, in some circumstances,” be sufficient to warrant further inquiry. Id.

We find that the district court did not err in not holding a competency hearing prior to allowing Abdulmutallab to proceed to trial and ultimately enter a guilty plea. To begin, this is not a case where the defendant’s behavior in the courtroom raised the district court’s suspicions of incompetency. The defendants in Drope and Pate exhibited irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial . . . .
behavior both in the courtroom and outside the courtroom which would make a reasonable judge question their competency to stand trial. See *Drope*, 420 U.S. at 180; *Pate*, 383 U.S. at 385. In stark contrast to the defendants in *Drope* and *Pate*, Abdulmutallab did not exhibit irrational behavior in the courtroom that raised suspicions as to his competency. Rather, Abdulmutallab was an active participant in the proceedings, filing and arguing motions, and assisting Chambers in preparing his defense. Abdulmutallab directly and articulately addressed the district judge on multiple occasions and demonstrated his ability to make comprehensible legal arguments and his clear understanding of the nature of the proceedings. *Godinez*, 509 U.S. at 399 (stating the one factor to determine whether a defendant is competent is whether he can make comprehensible legal arguments). Abdulmutallab is not a defendant who had a long

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2 In *Drope*, the defendant’s counsel filed a motion for a continuance so the defendant could see a psychiatrist and receive treatment. *Drope*, 420 U.S. at 164. Attached to the motion was a psychiatrist’s report. *Id.* The trial judge dismissed the motion because it was not filed in the proper form. *Id.* at 165. During the trial, the defendant’s wife testified against him and stated her belief that her husband needed psychiatric care and that the day before the trial, the defendant tried to choke and kill her. *Id.* at 166. The defendant later attempted suicide during trial to avoid prosecution. *Id.* at 166–67. The Supreme Court held that the trial court failed “to give proper weight to the information suggesting incompetence which came to light during trial.” *Id.* at 179. The Court stated that the defendant’s attempted murder of his wife and attempted suicide “hardly could be regarded as rational conduct” and “created a sufficient doubt of his competence to stand trial.” *Id.* at 179–80.

3 In *Pate*, the defendant’s counsel admitted that the defendant had murdered his second wife, but counsel alleged that the defendant was insane at the time of the murder. *Pate*, 383 U.S. at 376. The defense introduced the uncontradicted testimony of four witnesses who showed that the defendant had a long history of disturbed behavior. *Id.* at 378. The defendant had several erratic episodes: he believed someone was trying to shoot him or come after him; he heard voices; and he threw all of his first wife’s clothes in the yard after she had fled the house due to his erratic behavior. *Id.* at 378–81. The defendant was also previously hospitalized in a psychiatric facility and had served a four-year prison sentence for the murder of his infant son. *Id.* at 381. Immediately after murdering his son, the defendant also attempted suicide several times. *Id.* The Supreme Court held that in light of the defense testimony and the defense counsel’s insistence throughout the proceedings that his client’s sanity was an issue, the defendant was entitled to a competency hearing. *Id.* at 384–85. Depriving him of this hearing was a violation of his constitutional right to a fair trial. *Id.* at 385. The Court noted that “it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have the court determine his capacity to stand trial.” *Id.* at 384 (internal quotation marks and citation omitted). The Court also recognized that while a defendant’s “demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.” *Id.* at 386.

4 An example of this understanding is at a motions hearing before trial when Abdulmutallab responded to a Government motion seeking to preclude his reliance on a duress defense. The following exchange occurred:

THE COURT: Now, we have quite a few motions, some of which do not seem to be contested, but some obviously are. The first is the Government’s motion to preclude expert testimony on the defendant’s mental condition and to preclude the defense of duress. I don’t think that’s a contested issue, is it, Mr. Chambers?

MR. CHAMBERS: I believe that Mr. Abdulmutallab is going to address these motions, all of them, is my understanding.
THE COURT: All of them. All right. Mr. Abdulmutallab.

THE DEFENDANT: Yeah, with regards to that motion, I do not intend to use those defenses, but I also feel it’s not for the Government to say what I can and can’t do during trial.

THE COURT: No, it’s for me to say what you can and can’t do during trial, but the Government needs to be able to, and they are able to, raise these issues ahead of time so that we don’t have mistrial, we don’t have things presented in front of the jury that are inappropriate. So if you’re telling me now that you do not intend to raise the defense of duress or your mental condition at the time as a defense, then I’ll grant the Government’s motion and I will instruct you that you are not to raise those issues in front of the jury. If something comes up, you need to bring it to my attention before anything happens with the jury in the courtroom.

THE DEFENDANT: Yeah, understood.


history of psychological problems but rather exhibited an ability to adequately conduct his defense. But see Drope, 420 U.S. at 169; Pate, 383 U.S. at 378; Indiana v. Edwards, 554 U.S. 164, 169 (2008) (identifying a defendant’s significant history of mental illness as the common denominator in Supreme Court cases where the Court found error for failing to hold a competency hearing).

Furthermore, Chambers’ motion requesting a competency hearing contained scant allegations of behavior that would cause a court to question Abdulmutallab’s competency. Chambers stated that Abdulmutallab had begun exhibiting “spontaneously erratic behavior,” namely that he would be “engaged and cooperative then minutes later the Defendant will become disengaged, irrational, and uncooperative.” R. 60, Mot. Requesting Competency Examination, Sealed Dist. Ct. Docs. at 2. At times, Abdulmutallab worried about “mounting a defense” and then later within the same meeting would indicate that he had no desire to prepare a defense. Id. Chambers stated that Abdulmutallab’s behavior had risen to “unprecedented levels,” but provided no suggestion as to what “level” he was referring. Chambers motion did not provide sufficient factual details that would cause the district court to question Abdulmutallab’s competency. Furthermore, Abdulmutallab’s apparent waiver between desiring to mount a defense and pleading guilty is not indicative of incompetence, but is indicative of the complicated decision of trial strategy of a defendant proceeding pro se.
The facts before the court show that Abdulmutallab is an educated and adept individual. See R. 114, 10-12-11 Guilty Plea Tr. at 8, PageID # 677. In order for Abdulmutallab to accomplish his goal of blowing up an aircraft over United States soil, Abdulmutallab had to make numerous calculated decisions. A brief overview of the steps that Abdulmutallab took in preparation for his mission is instructive:

- Abdulmutallab studied the teachings of the radical Imam Anwar Awlaki, which prompted his decision to travel to Yemen for the purpose of meeting Awlaki.
- While in Yemen, Abdulmutallab agreed to carry out the martyrdom mission.
- In order to conceal his time in Yemen, Abdulmutallab decided to travel to Ghana before departing to Amsterdam.
- Abdulmutallab had to come up with clever reasons for traveling to the United States when an airport screener in Amsterdam questioned his reasons for travel.

These actions show the deliberate, conscious, and complicated path Abdulmutallab chose to pursue in the name of martyrdom. Unlike the defendants in *Pate* and *Drope*, Abdulmutallab not only acted rationally, but was (nearly) able to execute a complex martyrdom mission. The complexity behind Abdulmutallab’s mission indicates the exact opposite of incompetence.

Although Abdulmutallab raised some uncognizable arguments (for example that the United States had no jurisdiction to prosecute him because he is a Muslim), this

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5 Abdulmutallab makes much of the fact that when the district court asked him questions on his position regarding a competency hearing, he stated both that he believed that he was competent, but also expressed that he thought it would be a good idea to “prove” his competency. R. 116, 08-17-11 Motions Hearing Tr. at 15–16, PageID # 762–63. When asked by the trial court whether he would comply with a competency hearing, Abdulmutallab responded by saying:

THE DEFENDANT: Well, one thing was, as I—as he, Mr. Chambers said when—because when we discussed about the motion is initially my idea was perhaps I would even—that would be a good thing to prove my competency to proceed standby, but then when he put it to me that, you know, the kind of—the reasons why, or the arguments that have to be put forward before even someone has that type of examination, and I said that’s counter productive to what I even want, so I don’t want the examination.

*Id.*

To the contrary, Abdulmutallab’s statements to the court do not constitute “rambling” but rather constitute a coherent statement regarding his attitude toward a competency hearing. As the Government states, Abdulmutallab was explaining that at first he was willing to have the examination because he wanted to demonstrate the ability to represent himself, but when he understood the threshold for ordering
behavior alone does not indicate that the district court abused its discretion regarding Abdulmutallab’s competency. Accordingly, the district court did not err in not holding a competency hearing. 

B. Competency to Proceed Pro Se

Abdulmutallab asserts the same facts mentioned above to claim that the district court should have questioned his competency to proceed pro se. See supra, II.A. The Government rebuts this contention, noting that while Abdulmutallab waived his right to counsel, he had the assistance of standby counsel at all times and was therefore “represented” throughout the proceedings.

The Sixth Amendment guarantees criminal defendants the right to counsel. U.S. Const. Amend. VI. It is undisputed that criminal defendants also have a constitutional right to waive the right to counsel and choose self-representation, even when a court believes that self-representation is not advisable. Faretta v. California, 422 U.S. 806, 807 (1975). Any waiver of the right to counsel must be knowingly, voluntarily, and intelligently made. Iowa v. Tovar, 541 U.S. 77, 87–88 (2004). When there is reason for a court to doubt a defendant’s competency, a court should “make a competency determination before finding the waiver [of the right to counsel] to be valid.” United States v. Ross, 703 F.3d 856, 867 (6th Cir. 2012) (internal quotation marks omitted). This court reviews under an abuse of discretion standard the question of whether there was reasonable cause to question a defendant’s competence before the district court accepted waiver of counsel. Id.

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6 Abdulmutallab argues in his reply brief that other actions indicated that he was not competent to stand trial. Abdulmutallab argues that his demeanor at trial was not “normal and respectful,” and cites a portion of the sentencing hearing where he shouted “Allahu Akbar” or “God is great” a few times. R. 139, 02-16-12 Sent. Tr. at 40, PageID # 1244. However, as other courts have had defendants who shout religious incantations in court and found them to be competent, we hold that Abdulmutallab’s shouting “Allahu Akbar” signifies only his religious beliefs and is not indicative of his incompetency. See, e.g., United States v. Mitchell, 706 F. Supp. 2d 1148, 1195 (D. Utah 2010) (district court who handled the habeas petition of Elizabeth Smart’s kidnapper found that he was competent to stand trial despite the fact that he sang religious hymns in the courtroom).
We hold that the district court did not err in refusing to conduct a competency hearing prior to allowing Abdulmutallab to proceed pro se. As detailed above, neither Abdulmutallab’s behavior in the courtroom nor standby counsel’s motion for a competency examination raised sufficient doubt as to Abdulmutallab’s competency. See supra II.A. There was simply no cause to question Abdulmutallab’s competence at the time he waived his right to counsel and asked the district court to allow him to represent himself. Abdulmutallab was represented by the Federal Public Defender’s Office from December 26, 2009 until September 13, 2010, when he asserted his right to represent himself. None of the lawyers who had been representing Abdulmutallab for the nine months preceding his request to proceed pro se expressed any doubt about his competence. It was not until August 5, 2011, when Chambers filed his motion requesting a competency hearing, that Abdulmutallab’s competency was put into question.

Abdulmutallab may have waived his right to counsel, but he did not prepare his defense alone. The district court insisted that Abdulmutallab be represented by standby counsel for the entire proceeding. Standby counsel actually undertook a majority of the representation, as evidenced by the fact that he wrote and filed most motions, examined all witnesses at the suppression hearing, and questioned all but one of the prospective jurors. Thus, while Abdulmutallab proceeded pro se, he was represented by legal counsel throughout the proceedings. See United States v. Ross, 703 F.3d 856, 871–73 (6th Cir. 2012) (finding that if standby counsel provided “meaningful adversarial testing” then defendant was not deprived of counsel).

Ultimately, the district court observed Abdulmutallab’s behavior throughout the proceedings and did not find that his behavior brought his competency into question. R.

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7 Abdulmutallab argues that the district court should have inquired about his competency when he chose to represent himself in a case where he was facing a mandatory life sentence even though he had never studied law, and had essentially no legal knowledge. However, this argument fails. In United States v. Back, this court addressed “defendant’s contention that seeking to proceed pro se, especially when confronted with serious charges, inherently raises the question of competency. As the Supreme Court has made clear, while a criminal defendant who proceeds pro se may, like any other pro se litigant, have a fool for a client, that does not mean that he or she is presumptively incompetent.” 307 F. App’x 876, 879 (6th Cir. 2008) (citing Godinez, 509 U.S. at 401 n.13). “While defendant’s decision may have been ill-advised, the district court did enough to ascertain that defendant was capable of understanding the consequences of his course of action.” Id.
116, 08-17-11 Mot. Tr. at 14, PageID # 761 (“I have to say, Mr. Chambers, that I’ve had the opportunity to interact with Mr. Abdulmutallab on a number of prior occasions in district court, that I’ve not had any sense that he does not understand the charges against him or that he is not able to assist you with this matter.”). The district court even stated that it recognized the pressures on Abdulmutallab as the case came closer to trial. Id. (“I understand that it’s stressful for any defendant moving toward a criminal trial in which he faces the kind of penalties that Mr. Abdulmutallab is facing, but I have not had any reason to question his competence to move forward in this case, nor to represent himself.”). Ultimately, the district court oversaw the progression of the case and observed Abdulmutallab on numerous occasions, and yet found no reasonable basis on which to order a competency hearing.

There is simply no evidence to suggest that the district court should have questioned Abdulmutallab’s understanding of the consequences of his course of action. The district court did not err in not ordering a competency exam prior to allowing Abdulmutallab to waive his right to counsel.

C. Suppression of Statements from University of Michigan Hospital

Abdulmutallab argues that the district court erred in failing to suppress the statements he made during his time at the University of Michigan Hospital. Abdulmutallab states that his testimony at the hospital was compelled and therefore the Fifth Amendment prohibited the use of that testimony in trial.

We will not address the merits of Abdulmutallab’s argument, as he waived any right to challenge the suppression of his statements when he entered the guilty plea. When a criminal defendant pleads guilty, “he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards [for effective assistance of counsel].” Tollett v. Henderson, 411 U.S. 258, 267 (1973). This court has held that a defendant who pleaded guilty may not appeal an adverse ruling on a pre-plea motion to suppress evidence “unless he has preserved the
right to do so by entering a conditional plea of guilty in compliance with Rule 11(a)(2). 8 United States v. Bell, 350 F.3d 534, 535 (6th Cir. 2003) (citation and internal quotations omitted).

The facts are quite clear: Abdulmutallab pled guilty without a plea agreement, and without preserving his right to appeal the ruling on his suppression motion under Rule 11(a)(2). He did not seek the consent of the district court or the Government to preserve his right to appeal the ruling on his suppression motion. Accordingly, pursuant to Tollett v. Henderson and United States v. Bell, Abdulmutallab waived his right to raise this issue.

D. Constitutionality of 18 U.S.C. § 924(c)

Abdulmutallab argues that his convictions on Counts Two, Four, and Six must be reversed because, as applied to the facts of this case, Congress lacked authority under the Commerce Clause to enact 18 U.S.C. § 924(c). Abdulmutallab argues that the statute is unconstitutional, because there is no requirement that the “use and carrying,” “possession,” or “crime of violence” be connected in any way to interstate commerce.

This court reviews challenges to a claim that Congress exceeded its constitutional power in enacting a statute de novo. United States v. Rose, 522 F.3d 710, 716–17 (6th Cir. 2008). An as-applied challenge consists of a challenge to the statute’s application with respect to the party before the court. Amelkin v. McClure, 205 F.3d 293, 296 (6th Cir. 2000). At issue in this case is Section 924(c), which regulates activity involving the “use and carrying” and “possession” of a “destructive device” in connection with a “crime of violence.” The “crime of violence” must be one “for which the person may be prosecuted in a court of the United States.” 18 U.S.C. § 924(c)(1)(A).

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8 Federal Rule of Criminal Procedure 11(a)(2) (2012) provides:

With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
Title 18 U.S.C. § 924(c)\(^9\) is constitutional as-applied to the facts of this case. The Sixth Circuit dealt with an as-applied Commerce Clause challenge in *United States v. Ricketts*, 317 F.3d 540 (6th Cir. 2003). In *Ricketts*, this Court held that analysis of whether § 924(c) is a proper exercise of congressional power under the Commerce Clause must not focus on § 924(c) as a “free standing statute[,]” but rather must focus on the underlying crime that § 924(c) punishes. *Id.* at 543. In *Ricketts*, the underlying crime was a “drug conspiracy [which] d[id] substantially affect interstate commerce.” *Id.* This Court upheld the conviction on the basis that § 924(c) was constitutional based on the underlying crime, a drug conspiracy, which was properly within Congress’s power to regulate. Accordingly, the test for whether 924(c) is constitutional is whether the underlying crime substantially affects interstate commerce. 18 U.S.C. § 924(c).

All of Abdulmutallab’s 18 U.S.C. § 924(c)’s charges substantially affect interstate commerce. Count Two, the first § 924(c) charge, was tied to Count One, which charged conspiracy to commit an act of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(1) and 2332b(a)(2). 18 U.S.C. §§ 2332b(a)(1) includes the element of *use of a facility of interstate or foreign commerce*. The Supreme Court has made clear that statutes are valid where they regulate the instrumentalities of commerce, in this case, protecting civil aircraft of the United States. *See Perez v. United States*, 402 U.S. 146, 150 (1971).

Count Four, the second § 924(c) charge, was tied to Count Three, which charged attempted murder within the special aircraft jurisdiction of the United States, in violation of 18 U.S.C. § 1113 and 49 U.S.C. § 46506. Sections 1113 and 46506 involve a *civil aircraft of the United States*. The Supreme Court has upheld the regulation of vehicles used in interstate commerce, as well as the regulation of instrumentalities and channels of interstate commerce. *See Southern R. Co. v. United States*, 222 U.S. 20, 26–27 (1911); *see also United States v. Lopez*, 514 U.S. 549, 558 (1995).

\(^9\) Section 924(c) is a penalty provision, requiring enhanced punishment for offenses involving firearms and destructive devices in furtherance of a crime of violence. Section 924(c) therefore must be tied to a crime of violence, in order for the enhanced punishments to take effect. In this case, there are three charges tied to 18 U.S.C. § 924(c).
Count Six, the final charge under § 924(c), was tied to Count Five, which charged willfully placing a destructive device upon and in proximity to a civil aircraft which was used and operated in interstate, overseas, and foreign air commerce, in violation of 18 U.S.C. § 32(a)(2). Section 32(a)(2) also involves a civil aircraft of the United States. The Supreme Court in Perez v. United States, explicitly mentioned this statute as falling within Congress’s Commerce Clause authority. 402 U.S. at 150 (“The Commerce Clause reaches, in the main, three categories of problems . . . . Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce.”).

All of the underlying offenses for which Abdulmutallab was convicted are constitutional under the Commerce Clause. Accordingly, we conclude that all three charges under 18 U.S.C. § 924(c) were constitutionally enacted by Congress.

E. Constitutionality of Abdulmutallab’s Life Sentence Under the Eighth Amendment

Abdulmutallab argues that the “evolving standards of decency” prohibit the imposition of four sentences of life imprisonment where no one (other than himself) was physically injured and where most passengers believed that the detonation was the result of firecrackers. The Government responds by citing the simple fact that Abdulmutallab attempted to blow up an airplane with 289 passengers on behalf of Al Qaeda.

The Eighth Amendment to the United States Constitution states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. An Eighth Amendment challenge to a sentence is a question of law, reviewed de novo. United States v. Jones, 569 F.3d 569, 573 (6th Cir. 2009). A court, when reviewing a sentence, must give “substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as the discretion that trial courts possess in sentencing convicted criminals.” Solem v. Helm, 463 U.S. 277, 290 (1983). The Supreme Court has identified three factors to consider whether a sentence was so grossly disproportionate that it violated the Eighth Amendment: (1) “the gravity of the
offense and the harshness of the penalty”; (2) “the sentences imposed on other criminals in the same jurisdiction”; and (3) “the sentences imposed for commission of the same crime in other jurisdictions.” *Id.* at 292. However, a court does not need to reach the second and third factors in all cases, that analysis is “appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.” *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring). When evaluating the gravity of the offense, a court may consider the “harm caused or threatened to the victim or society, and the culpability of the offender.” *Solem*, 463 U.S. at 292.

In *Harmelin v. Michigan*, 501 U.S. at 996–1009, Justice Kennedy, in a concurrence, articulated a “narrow proportionality principle.” The Sixth Circuit has adopted this principle. *Jones*, 569 F.3d at 573. Under this approach, “there is no requirement of strict proportionality; the eighth amendment is offended only by an extreme disparity between crime and sentence.” *Id.* (internal quotations and citations omitted).

Abdulmutallab’s sentence does not constitute “cruel and unusual” punishment in violation of the Eighth Amendment. The indictment charged three violations of 18 U.S.C. § 924(c): Counts Two, Four, and Six. Because of the statutory framework, Counts Four and Six carried mandatory sentences for life imprisonment. See 18 U.S.C. § 924(c)(1)(C)(ii) (“In the case of a second . . . conviction under this subsection, the person shall—if the firearm involved is a . . . destructive device . . . be sentenced to imprisonment for life.”). Count One (conspiracy to commit an act of terrorism transcending national boundaries) and Count Seven (attempted use of a weapon of mass destruction) each was punishable by a maximum sentence of life imprisonment, which the district court, in its discretion, imposed. On appeal, Abdulmutallab challenges both the mandatory and discretionary sentences as being “cruel and unusual” within the meaning of the Eighth Amendment.

The facts of this case are not ones in which comparison of the penalty of the crime to the punishment raises a question that the punishment is “grossly
disproportionate.” As the district court stated on the record at Abdulmutallab’s sentencing:

[T]he nature and circumstances of the offenses are not in dispute. Defendant attempted to blow up an airplane with 289 people on board and he failed to accomplish this objective only because of a technical problem with the bomb. Defendant, by his own statements, was deeply committed to his mission, seeking out and finding al Qaeda and Anwar Al-Awlaki, volunteering for a martyrdom mission and then becoming involved in planning and training for a significant amount of time.

R. 139, 02-16-12 Sent. Tr. at 51–52, PageID # 1255–56.

The district court also found Abdulmutallab to be a threat to society. Id. at 54, PageID # 1258.

Thus, by his own words, defendant has shown that he continues to desire to harm the United States and its citizens, and that he views it as his religious obligation to do so. I believe that the defendant has stated and it is clear that he has enormous motivation to carry out another terrorist attack but that he lacks the capability of doing that because of his incarceration. This Court has no ability to control the defendant’s motivation, which does appear to be unchanged. However, I can control defendant’s opportunity to act on those intentions [by imposing life sentence].

Id. at 54–55, PageID # 1258–59.

The “evolving standards of decency” do not require a lesser sentence. The district court’s conclusions were correct. The discretionary life sentences (Counts One and Seven) are constitutional, as they are fully proportional with the crimes, especially in light of the fact of Abdulmutallab’s desire to engage in future terrorist activity. Furthermore, this court has held that an Eighth Amendment challenge must fail if a defendant receives a sentence within the guideline range, when the guideline range contemplates the gravity of the offense, which is what the district court imposed in this case. United States v. Herrick, 512 F. App’x 534, 538–39 (6th Cir. 2013). The mandatory life sentences (Counts Four and Six) are also constitutional. The analysis in
Abdulmutallab attempted to detonate a bomb on a plane with 289 passengers. He may have been the only person harmed, but that is only because his bomb failed to properly work. These facts, and the fact that Abdulmutallab’s sentence was within the guideline range and proportional, inform this Court that his sentence is not “cruel and unusual” punishment.

F. Substantive Reasonableness of the Sentence under the Sentencing Guidelines

Abdulmutallab argues that his life sentence is substantively unreasonable in light of the nature and circumstances of his offense, namely that his offense resulted in no physical harm to anyone other than himself and that a sentence of life imprisonment for a young man in his early twenties is a harsh punishment for someone with no criminal history. Considering the fact that Abdulmutallab committed an act of terrorism, the Government argues that the district court properly considered the factors in 18 U.S.C. § 3553(a)(1).

This court reviews criminal sentences for both procedural and substantive reasonableness. Gall v. United States, 552 U.S. 38, 51 (2007). Sentences are reviewed under the deferential abuse of discretion standard. Id. When the sentence is within the range suggested by the Sentencing Guidelines, this court may apply a rebuttable presumption of substantive reasonableness. United States v. Anderson, 695 F.3d 390, 402 (6th Cir. 2012).

A sentence is substantively unreasonable when the district court selects a sentence arbitrarily, bases the sentence on impermissible factors, or gives an unreasonable amount of weight to any pertinent factor. United States v. Cochrane, 702 F.3d 334, 345 (6th Cir. 2012) (internal quotations and citation omitted). Review for substantive reasonableness focuses on whether a sentence is adequate, but not “greater than necessary” to accomplish the sentencing goals identified by Congress in 18 U.S.C. 3553(a). Id. (internal quotations and citation omitted). The substantive reasonableness

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inquiry “take[s] into account the totality of the circumstances, including the extent of any variance from the Guidelines range.” *Id.* (internal quotations and citation omitted). However, a statutorily required sentence is presumptively reasonable. *United States v. Penney*, 576 F.3d 297, 317 (6th Cir. 2009).

We conclude that Abdulmutallab’s sentence is substantively reasonable under the Sentencing Guidelines. As the sentencing transcript makes clear, the district court considered all of the factors set forth in 18 U.S.C. 3553(a). The district court properly considered the nature and circumstances of the offense, the need for the sentence to reflect the seriousness of the offense, and the need to protect the public from further crimes. After weighing all of these factors, particularly the fact that Abdulmutallab committed an act of terrorism and communicated a desire to partake in future acts of terrorism should he not be imprisoned, the district court properly imposed life sentences. Abdulmutallab has not rebutted the presumption of substantive reasonableness by showing that the district court improperly weighed the factors set forth in 18 U.S.C. § 3553(a).

III.

For the reasons set forth above, we **AFFIRM** the district court’s rulings.
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION;
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,

Defendant.

COMPLAINT FOR
INJUNCTIVE RELIEF

Civil Action No.

Introduction

1. This Freedom of Information Act lawsuit seeks the release from the Transportation Security Administration (“TSA”) of records concerning its “behavior detection” programs, including the Screening Passengers by Observation Techniques (“SPOT”) program—a program that government auditors, members of Congress, and independent experts have criticized as discriminatory, ineffective, pseudo-scientific, and wasteful of taxpayer money. The approximately 1.8 million travelers passing through our nation’s airports every day—including people traveling for business, students going home for the holidays, and families on their way to vacation—are potentially subjected to this highly questionable program, in addition to now-routine security procedures that include producing identification, passing through imaging machines, and allowing x-ray screening of carry-on items. Although the TSA has been using behavior detection techniques in some form since 2003, there is no known instance in which these techniques were responsible for apprehending someone who posed a security threat.
2. According to the TSA, “behavior detection” techniques can be used to observe the behavior of passengers in an attempt to identify individuals who may pose a potential transportation security risk. The TSA trains and deploys “behavior detection officers,” who observe individual passengers in airport screening areas for specific behaviors that the TSA associates with stress, fear, or deception. When the officers perceive clusters of such behaviors in an individual, they refer that person for secondary inspection and questioning. During the secondary inspection process, if the officers perceive certain additional behaviors, they can refer the individual to law enforcement officers for further questioning, detention, and possibly arrest. Passengers, as well as behavior detection officers themselves, have complained that this process results in subjecting people of Middle Eastern descent or appearance, African Americans, Hispanics, and other minorities to additional questioning and screening solely on the basis of their race.

3. Internal government auditors, members of Congress, and independent experts have criticized the TSA’s behavior detection programs as ineffective, wasteful of taxpayer funds, and lacking a valid scientific basis. Auditors have also found that the TSA failed to assess the effectiveness of the SPOT program or implement a comprehensive training plan for behavior detection officers. The TSA has spent over $1 billion on the SPOT program since 2007.

4. Additional information pertaining to the TSA’s use of behavior detection techniques is vital to the public’s understanding of whether the TSA can effectively use such techniques to screen for threats to aviation security, whether behavior detection programs can be implemented at all without incurring an unacceptable risk of unlawful
profiling, and whether the TSA has put in place mechanisms to monitor and eliminate biased and unlawful profiling.

5. On October 1, 2014, Plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (together, “ACLU”) submitted a Freedom of Information Act (“FOIA”) request (“Request”) to the TSA seeking the release of records related to behavior detection programs, including any scientific basis for the programs, the policies governing them, the training and professionalism of those who implement them, their efficacy, and the extent to which they disproportionally impact minorities. The TSA has not produced the requested records. Plaintiffs now file suit under FOIA, 5 U.S.C. § 552, for injunctive and other appropriate relief.

6. The public interest in the release of these documents is manifest, but the TSA has refused Plaintiffs’ requests for expedited processing and a waiver of processing fees. Plaintiffs are entitled to immediate processing of the Request and timely release of the records.

Jurisdiction and Venue


Parties

8. The American Civil Liberties Union is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the constitutional principles of
liberty and equality. The ACLU is committed to ensuring that the U.S. Government complies with the Constitution and laws, including its international treaty obligations, in matters that affect civil liberties and human rights. The ACLU is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in civil liberties and human rights matters.

9. The American Civil Liberties Union Foundation (“ACLUF”) is a separate 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties.


**Factual Background**

11. The TSA has used what it describes as behavior detection techniques to screen passengers for flights at U.S. airports since 2003. SPOT, the TSA’s primary behavior detection program, began in 2007. However, the public knows little about the scope, effectiveness, or purported scientific basis for these programs.

12. Government auditors have repeatedly questioned the basic premise underlying the TSA’s behavior detection programs: that human behaviors reflecting deception or ill-intent can be detected reliably and objectively.

13. The Government Accountability Office (“GAO”) concluded in May 2010 that the “TSA deployed SPOT nationwide before first determining whether there was a scientifically valid basis for using behavior detection and appearance indicators as a
means for reliably identifying passengers as potential threats in airports.” GAO, Efforts to Validate TSA’s Passenger Screening Behavior Detection Program Underway, but Opportunities Exist to Strengthen Validation and Address Operational Challenges, GAO-10-763 (May 2010), at 14.

14. The DHS Inspector General’s Office made similarly critical findings regarding the SPOT program in May 2013, when it determined that the “TSA cannot ensure that passengers at United States airports are screened objectively, show that the program is cost-effective, or reasonably justify the program’s expansion.” DHS Office of Inspector General, Transportation Security Administration’s Screening of Passengers by Observation Techniques, OIG-13-91 (May 2013), at 1.

15. The Government Accountability Office reexamined the SPOT program in November 2013 and found that “available evidence does not support whether behavioral indicators can be used to identify aviation security threats.” GAO, TSA Should Limit Future Funding for Behavior Detection Activities, GAO-14-159 (Nov. 2013), at 15. Behavior detection officers reported to the GAO that some of the indicators they were instructed to detect are subjective, and the GAO determined that rates of referral of passengers for additional screening varied significantly between airports, issues which, according to the GAO, “raise questions about the continued use of behavior indicators for detecting passengers who might pose a risk to aviation security.” Id. at 47.

17. The audits also prompted congressional hearings on the SPOT program, during which members of Congress and expert witnesses questioned the basic premise and effectiveness of the program. See *TSA’s SPOT Program and Initial Lessons From the LAX Shooting: Hearing on Homeland Sec. Before the H. Subcomm. on Transp. Sec.*, 113th Cong. 4 (2013) (statement of Richard Hudson, Chairman, H. Subcomm. on Transp. Sec.) (“To my knowledge, there has not been a single instance where a behavior detection officer has referred someone to a law enforcement officer and that individual turned out
to be a terrorist.”); (statement of Michael McCaul, Chairman, H. Comm. Homeland Sec.) (“I am concerned that TSA will continue to spin its wheels with this program instead of developing a more effective and efficient approach.”). See also Behavioral Science and Security: Evaluating TSA’s SPOT Program: Hearing Before the Subcomm. on Invest. & Oversight, H. Comm. on Science, Space, and Tech, 112th Cong. 71 (2011) (statement of Maria Hartwig, Associate Professor, Department of Psychology, John Jay College of Criminal Justice) (“In brief, the accumulated body of scientific work on behavioral cues to deception does not provide support for the premise of the SPOT program.”).

18. The TSA’s use of behavior detection techniques has given rise to numerous allegations of racial and religious profiling. Such allegations have come not only from passengers, but also from behavior detection officers themselves, who have reported witnessing other officers subjecting people of Middle Eastern descent or appearance, African Americans, Hispanics, and other minorities to additional questioning and screening solely on the basis of their race. See Michael S. Schmidt and Eric Lichtblau, Racial Profiling Rife at Airport, U.S. Officers Say, N.Y. Times, Aug. 11, 2012, http://nyti.ms/1GsuvBV. In August 2012, 32 behavior detection officers alleged that such profiling was rampant at Boston Logan International Airport. Id. Similar allegations have been leveled at behavior detection officers working at Newark Liberty International Airport and Honolulu International Airport. See TSA Should Limit Future Funding, GAO-14-159 at 57.

19. As with the government audits of the SPOT program, the allegations of racial and religious profiling generated significant media attention. See, e.g., Katie Johnston, Racial Profiling Controversy Still Roiling Logan, Boston Globe, Nov. 15,

20. The TSA has investigated allegations of unlawful profiling related to behavior detection, including allegations leveled by TSA personnel, but it has not made public the results and consequences of those investigations.

**The ACLU’s FOIA Request**

21. On October 1, 2014, the ACLU submitted a FOIA request to the TSA seeking the release of records concerning the scientific basis for the TSA’s behavior detection programs; policies, procedures, and guidance pertaining to the programs and their
implementation; training and course materials for employees involved in behavior
detection activities; records concerning the analysis or assessment of behavior detection
programs and their implementation; data regarding referrals for additional screening and
subsequent arrests; records related to the SPOT database; records concerning
investigations of, or disciplinary actions related to, the work of behavior detection
officers; and records related to allegations of racial, ethnic, religious, or national origin
profiling related to behavior detection activities.

22. Plaintiffs sought expedited processing of the Request on the grounds that there
is a “compelling need” for the records because they are urgently needed by an
organization “primarily engaged in disseminating information” in order to “inform the
public about actual or alleged federal government activity.”

23. Plaintiffs sought a waiver of document search, review, and duplication fees on
the grounds that disclosure of the requested records is in the public interest because it is
likely to contribute significantly to public understanding of the operations or activities of
the government and is not in the ACLU’s commercial interest. The ACLU also sought a
waiver of fees because it qualifies as a representative of the news media, and the records
are not sought for commercial use.

**Agency Response and Appeal**

24. By letter dated October 10, 2014, the TSA denied the ACLU’s request for
expedited processing and a waiver of fees. The letter stated that the ACLU had “failed to
demonstrate a particular urgency to inform the public about the government activity
involved in the request.” The letter offered no specific reason for denying the fee waiver
request, other than to state that the plaintiffs had “failed to satisfy each of the required factors.”

25. By letter dated December 8, 2014, the ACLU administratively appealed the TSA’s denial of their requests for expedited processing and a waiver of fees. The TSA has not provided the ACLU with a determination of its administrative appeal within the statutorily required time period. The ACLU therefore has exhausted its administrative remedies.

26. To date, the TSA has not disclosed any record in response to the ACLU’s Request nor stated which records, if any, it intends to disclose.

27. The TSA is improperly withholding the records sought in the ACLU’s Request.

**Plaintiffs’ Entitlement to Expedited Processing**

28. Plaintiffs are entitled to expedited processing of their Request.

29. The FOIA provides that each agency shall provide for expedited processing of FOIA requests where the requester demonstrates “a compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(i)(I).

30. Under the FOIA and corresponding regulations promulgated by DHS, there is a “compelling need” for expedited processing where the records at issue are urgently needed by an organization “primarily engaged in disseminating information” in order to “inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(ii); 6 C.F.R. § 5.5(d)(1)(ii).

31. Plaintiffs’ Request addresses a matter of urgent public concern; namely, the scope and implementation of the TSA’s behavior detection programs, which implicate
core discrimination and privacy concerns, but about which the public knows little. The public lacks information about the basis for the programs, the training and professionalism of those who implement them, their efficacy, and the extent to which they disproportionately impact minorities. Such information is of significant and urgent value to millions of Americans who travel by air each year. Without disclosure of the records sought, members of the public will not be able to assess for themselves whether the programs are necessary, effective, or subject to sufficient limits and oversight.

32. The ACLU is “primarily engaged in disseminating information” to the public within the meaning of the statute and regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 6 C.F.R. § 5.5(d)(1)(ii). Dissemination of information to the public is a critical and substantial component of the ACLU’s mission and work. As the leading defender of freedom, equality, privacy, and due process rights in the United States, the ACLU has sought information and educated the public about various government security practices utilized and expanded since the 9/11 terrorist attacks. The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. These materials—including materials based on information obtained through the FOIA—are widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students, and faculty for no cost or for a nominal fee through its public education department. The ACLU also disseminates information through its website, www.aclu.org, and through an electronic newsletter, which is distributed to subscribers by e-mail. In addition to the national ACLU offices, there are 53 ACLU affiliate and national chapter offices located throughout the United States and Puerto Rico. These
offices further disseminate ACLU material to local residents, schools, and organizations through a variety of means, including their own websites, publications, and newsletters.

33. The ACLU has also been a primary disseminator of information about government surveillance, security policies, and travel-related security screening measures. For example, based on documents it obtained through the FOIA, the ACLU has published reports, analyses, and explanatory materials on issues related to targeted killing, the use of drones, torture and interrogation practices, FBI surveillance and intelligence-gathering activities, the use of National Security Letters, and the National Security Agency’s warrantless surveillance activity, among others.

34. The ACLU will likewise disseminate any information obtained through this Request to the public through the publications and channels described above.

**Plaintiffs’ Entitlement to a Waiver or Limitation of Processing Fees**

35. The ACLU is entitled to a waiver of document search, review, and duplication fees because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); see also 6 C.F.R. § 5.11(k)(1)(i)-(ii).

36. As alleged above, numerous news accounts reflect the considerable public interest in the records Plaintiffs seek. Given the dearth of public information about the TSA’s behavior detection programs, the intense news and congressional interest in what little information that has been made public, the sharp criticism of the SPOT program by the Government Accountability Office, and the fact that allegations of racial and religious profiling have arisen repeatedly in connection with the SPOT program, the records
sought in the Request will significantly contribute to public understanding of the TSA’s behavior detection activities.

37. Disclosure is not in the ACLU’s commercial interest. As described above, any information disclosed by the ACLU as a result of the Request will be available to the public at no cost.

38. The ACLU is also entitled to a waiver of fees because it qualifies as a “representative of the news media,” and the records are not sought for commercial use. See 5 U.S.C. § 552(a)(4)(A)(ii)(II); 6 C.F.R. § 5.11(d)(1).

39. The ACLU is a representative of the news media for the purposes of FOIA because it is an entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.

40. Plaintiffs do not seek the requested information for commercial reasons. The ACLU summarizes, explains, and disseminates the information it gathers through FOIA at no cost to the public.

**Causes of Action**

41. Defendant’s failure to make a reasonable effort to search for records responsive to the Plaintiffs’ Request violates the FOIA, 5 U.S.C. § 552(a)(3)(C), and the corresponding DHS regulations.

42. Defendant’s failure to promptly make available the records sought in the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(A), and the corresponding DHS regulations.
43. Defendant’s failure to grant Plaintiffs’ request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and the corresponding DHS regulations. Defendant’s failure to grant plaintiffs’ request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and the corresponding DHS regulations.

**Requested Relief**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Order the TSA immediately to process and release all the requested records;

2. Enjoin the TSA from charging Plaintiffs search, review, or duplication fees for the processing of the Request;

3. Award Plaintiffs their costs and reasonable attorneys’ fees incurred in this action;

   and

4. Grant such other relief as the Court may deem just and proper.

March 19, 2015
Respectfully submitted,

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Muslim Profiles Post 9/11: 
Is Racial Profiling an Effective Counterterrorist Measure and 
Does It Violate the Right to Be Free from Discrimination?

Bernard E. Harcourt

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

March 2006
MUSLIM PROFILES POST 9/11:

Is Racial Profiling an Effective Counterterrorist Measure and Does It Violate the Right to be Free from Discrimination?

BERNARD E. HARCOURT
University of Chicago

Paper Presented at the Oxford Colloquium on Security and Human Rights at Oxford University
March 17, 2006
Muslim Profiles Post 9/11

Bernard E. Harcourt

ABSTRACT

Racial profiling as a defensive counterterrorism measure necessarily implicates a rights trade-off: if effective, racial profiling limits the right of young Muslim men to be free from discrimination in order to promote the security and well-being of others. Proponents of racial profiling argue that it is based on simple statistical fact and represents “just smart law enforcement.” Opponents of racial profiling, like New York City police commissioner Raymond Kelly, say that it is dangerous and “just nuts.”

As a theoretical matter, both sides are partly right. Racial profiling in the context of counterterrorism measures may increase the detection of terrorist attacks in the short term, but create the possibility of dangerous substitutions in the long run. Defensive counterterrorism measures are notoriously tricky and can easily backfire. The installation of metal detectors in airports in 1973, for instance, produced a dramatic reduction in the number of airplane hijackings, but also resulted in a proportionally larger increase in bombings, assassinations, and hostage-taking incidents. Target hardening of U.S. embassies and missions abroad produced a transitory reduction in attacks on those sites, but an increase in assassinations. The evidence shows that some defensive counterterrorism measures do not work and others increase the likelihood of terrorist acts.

As a practical matter, then, both sides are essentially wrong: racial profiling is neither “just” smart, nor “just” nuts. The truth is, we simply have no idea whether racial profiling would be an effective counterterrorism measure or would lead instead to more terrorist attacks. There is absolutely no empirical evidence on its effectiveness, nor any solid theoretical reason why it would be effective overall. As a result, there is no good reason to make the rights trade-off implicated by a policy of racial profiling in the counterterrorism context.
Muslim Profiles Post 9/11
Bernard E. Harcourt

INTRODUCTION

In the aftermath of the London bombings in July 2005, Paul Sperry of the Hoover Institution, a well-respected public policy institute at Stanford University, defended the police profiling of young Muslim men in New York City subways as a matter of simple common sense. Writing in the pages of the New York Times, Sperry argued that any future terrorist offender is likely to be young, male, and Muslim: “Young Muslim men bombed the London tube, and young Muslim men attacked New York with planes in 2001. From everything we know about the terrorists who may be taking aim at our transportation system, they are most likely to be young Muslim men.” It makes no sense, Sperry contends, to search old ladies or children. Instead, the police should target the high-risk population. Profiling, Sperry writes, is “based on statistics. Insurance companies profile policyholders based on probability of risk. That's just smart business. Likewise, profiling passengers based on proven security risk is just smart law enforcement.”

A similar column appeared in the Washington Post the next day, arguing that “politically correct screenings won’t catch Jihadists:” “It is a simple statistical fact. Yes, you have your shoe-bomber, a mixed-race Muslim convert, who would not fit the profile. But the overwhelming odds are that the guy bent on blowing up your train traces his origins to the Islamic belt stretching from Mauritania to Indonesia.” Using random bag searches in the New York subways, the column concludes, “is simply nuts.”

1 Professor of Law, University of Chicago. Special thanks for excellent research assistance to Zac Callen and Ellen Fitzgerald.
New York City police commissioner Raymond Kelly couldn’t disagree more. “Look at the 9/11 hijackers,” Kelly exclaims. “They came here. They shaved. They went to topless bars. They wanted to blend in. They wanted to look like they were part of the American dream. These are not dumb people. Could a terrorist dress up as a Hasidic Jew and walk into the subway, and not be profiled? Yes. I think profiling is just nuts.”

Racial profiling is, in Kelly’s words, “ineffective” because it assumes that terrorists are not going to adapt to changing circumstances, and, as a result, puts the police one step behind the enemy. Racial profiling focuses on an “unstable” trait—a trait that can easily be switched—which, as Malcolm Gladwell explains, is precisely “what the jihads seemed to have done in London, when they switched to East Africans because the scrutiny of young Arab and Pakistani men grew too intense.” Plus, Kelly adds, in New York City it’s simply impracticable. “If you look at the London bombings, you have three British citizens of Pakistani descent. You have Germaine Lindsay [the fourth London suicide bomber], who is Jamaican. You have the next crew [in London], on July 21st, who are East African. You have a Chechen woman in Moscow in early 2004 who blows herself up in the subway station. So whom do you profile? Look at New York City. Forty percent of New Yorkers are born outside the country. Look at the diversity here. Who am I supposed to profile?”

So, is racial profiling post 9/11 “just smart law enforcement” or is it “just nuts”? Moreover, does profiling young Muslim men violate the principle of non-discrimination embedded in international human rights and domestic civil rights jurisprudence?

These two questions, I argue, are inextricably linked, and the answer to the first resolves the second: there is no reliable empirical evidence that racial profiling is an effective counterterrorism measure and no solid theoretical reason why it would be. The possibility of recruiting outside the profiled group and of substituting different modes of attack renders racial profiling in the counterterrorism context suspect.

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5 Id.
6 Id.
The fact is, defensive counterterrorism measures are notoriously tricky. The spotty empirical evidence tends to show a strong potential for substitution effects. The installation of metal detectors in airports in 1973, for instance, produced a dramatic reduction in the number and rate of airplane hijackings across the globe, but also resulted in a sharp and proportionally larger increase in bombings, assassinations, and hostage-taking incidents. Target hardening of U.S. embassies and missions abroad produced a transitory reduction in attacks on those sites, but an increase in assassinations. Retaliatory strikes produce a spike in short-term terrorist attacks that later level off to the earlier mean. In addition, anecdotal evidence suggests that suicide bombers in Israel tended to be young militant Muslim men at first, but now include more secular Palestinians, women and teenage girls. A recent and thorough review of the empirical literature, using an approved Campbell Collaboration protocol, concludes that “some evaluated [defensive counterterrorism] interventions either didn’t work or sometimes increased the likelihood of terrorism and terrorism-related harm.” In sum, counterterrorism measures are potentially double-edged swords.

There is no empirical evidence whatsoever, nor a solid theoretical reason why racial profiling would be an effective measure—rather than a counterproductive step resulting in detrimental substitutions and increased terrorist attacks. As a result, racial profiling is neither “just” smart law enforcement, nor “just” nuts. It’s an unknown

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9 Enders and Sandler 1993: 842; see also Cauley and Im 1988: 30.
10 Enders and Sandler 1993: 835.
12 The Campbell Collaboration is a non-profit organization that promotes evidence-based policy making by supporting empirical evaluations of the existing empirical literature in different policy arenas, including crime and security through its Crime and Justice Coordinating Group. The study in question here—Lum, Kennedy, and Sherley 2006: 5—had its review protocol approved by the Crime and Justice Coordinating Group. For information about the Campbell Collaboration, see http://www.campbellcollaboration.org/index.asp
quantity. And precisely for that reason, there is no justification for making the human rights and civil rights trade-offs associated with racial profiling.

**Thorny Questions**

Those potential trade-offs would raise a myriad of thorny issues. The first is whether the very use of race, color, nationality or ethnic identity is a form of impermissible discrimination in a situation where there is solid evidence of disparate offending between racial or ethnic groups. A number of economists in the United States and Great Britain draw a distinction between what they term “statistical discrimination” and racial bigotry: the first uses group traits to promote more efficient policing and extends only to the point where law enforcement has maximized the efficiency of their interventions—as evidenced, for instance, in the equalizing of search success rates between members of different racial groups. At that point, these economists suggest, law enforcement has achieved the best allocation of resources in a non-discriminatory manner. It is only when law enforcement uses group traits beyond the point of efficiency that their use of race or ethnicity becomes invidious. Economist Vani Borooah suggests, for instance, in his article *Racial Bias in Police Stops and Searches: An Economic Analysis*, that “statistical discrimination [business necessity], untainted by bigotry, is optimal from a policing perspective because it maximizes the number of arrests consequent upon a given number of persons stopped.” In other words, the very definition of racial profiling is a hotly contested issue.

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16 See generally Harcourt, *Rethinking Racial Profiling* at 1276 n.2.
A second definitional controversy involves the judicial distinction between, on the one hand, the use of race or ethnic origin as part of a multi-pronged profile and, on the other hand, the use of race exclusively as the sole factor in a profile. In the United States, for instance, the Supreme Court drew precisely this legal distinction in its notorious decision *Whren v. United States*\(^\text{17}\) in 1996—as well as in several earlier decisions involving U.S. Border Patrol searches at the Mexican-American border in the mid-1970s.\(^\text{18}\) The Court in *Whren* expressly condoned the use of race as one factor among others, as long as there exist other independent justifications for police intervention—in that case, youth, demeanor, and gender were also important traits in the profile. The result is that, in American jurisprudence today, there is an operative distinction between using race exclusively and using race as one among other factors: the first is unanimously condemned, the second is practically always permitted.\(^\text{19}\) In international law as well there is ambiguity surrounding the distinction. The International Covenant on Civil and Political Rights, for instance, provides that in times of public emergency, states may derogate certain rights on condition that the measures “do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”\(^\text{20}\) Here too, the reference is to the exclusive use of race, not to the use of race as one among other factors.

Assuming that the use of race automatically violates the principle of non-discrimination, a third thorny issue arises: is the nondiscrimination principle absolute or can it be limited in the case of counterterrorism? This has both philosophical and legal doctrinal dimensions. At the philosophical level, the question is whether violations of rights in the present can be excused in order to prevent future rights violations—especially where those future rights violations are assumed to be more harmful in the aggregate. A significant body of literature explores the question of intergenerational rights transfers and would be applicable here: John Rawls’ discussion of “the problem of

\(^{17}\) 517 US 806 (1996).


\(^{19}\) See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L Rev 1075, 1086–87 n 47 (2001) (“The consensus view seems to be that race may be considered as one of many factors, but may not be the only factor in an officer’s decision to stop an individual.”). For a lengthy treatment of this, see Harcourt, *Rethinking Racial Profiling* at 1338—1342.

\(^{20}\) ICCPR, Article 4 (emphasis added).
justice between generations,” as well as Joel Feinberg’s discussion of the rights of unborn generations, chart out some avenues of analysis and offer guidance. Another body of literature addresses shorter-term trade-offs. The leading hypothetical here is whether torture may be permitted in the extreme case of the ticking time-bomb—but there are many others, some less hypothetical than others. The use of the atomic bomb at Hiroshima comes to mind. Many remarkable philosophical texts address these puzzles of moral reasoning under a variety of different rubrics, ranging from Jean-Paul Sartre’s and Michael Walzer’s discussion of “dirty hands” to Martha Nussbaum’s writings on “tragic predicaments.”

At the legal doctrinal level, there are human rights and domestic civil rights issues to contend with as well. In the international context, the main question is whether the right to be free from discrimination is derogable. In their thorough paper on counterterrorism measures and human rights compliance, Alex Conte and Boaz Ganor set forth in detail the doctrinal structure for an analysis of this question, marshalling the principle human rights texts that address racial discrimination and profiling—including recent reports on racial profiling and counterterrorism from the United Nations Committee on the Elimination of Racial Discrimination (CERD) and the Inter-American Commission on Human Rights. The CERD has repeatedly maintained that counterterrorism measures may not discriminate on the grounds of race or national or ethnic origin. For their part, Conte and Ganor point to disagreement within the human

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23 Eric Posner and Adrian Vermeule offer a useful review of the landscape here in discussing the moral limits on coercive interrogation in their article *Should Coercive Interrogation Be Legal?*, 104 Michigan Law Review 671, 676—682 (February 2006).
rights community and conclude that the principle of non-discrimination is indeed a derogable right.

Finally, in the civil rights context, there are difficult questions. Under equal protection jurisprudence in the United States, for instance, the anti-discrimination principle is only violated if there is intentional discrimination with proven malice. The Supreme Court’s decisions in *McCleskey v Kemp*\(^\text{27}\) and *United States v Armstrong*\(^\text{28}\)—which extend the *Washington v Davis*\(^\text{29}\) requirement of intent to the criminal justice sphere—provide that a successful equal protection challenge must rest on evidence of intentional discrimination, rather than on inference from unexplained disparate treatment. If the police are engaging in statistical discrimination to promote police efficiency, it is not clear whether individual intent would be present. Moreover, the intentional use of race may be permitted if there is a compelling governmental interest. Fighting terrorism—actually reducing the incidence of terrorist acts—would undoubtedly qualify as a compelling state interest.\(^\text{30}\) The key question, for purposes of equal protection, then, is whether the use of race in profiling would be *narrowly tailored* to serve this interest, given that the intentional use of race as a factor in policing would trigger strict scrutiny.\(^\text{31}\) The requirement of narrow tailoring would preclude policing techniques that are ineffective, or that have unacceptable collateral consequences on the profiled population; but that determination, naturally, would fall on the courts.

**No Need for a Trade-Off**

These are all admittedly fascinating questions that deserve our attention. But they only arise if racial profiling is an effective defensive counterterrorism measure. And on that score, there is no reliable evidence, nor a good theoretical reason to believe that

\(^{27}\) 481 US 279 (1987). In *McCleskey*, the Court rejected an Equal Protection claim for lack of a showing of actual discriminatory intent, where petitioner produced evidence that murderers of white victims are 4.3 times more likely to be sentenced to death than murderers of African-American victims. Id at 287, 291–99.


\(^{29}\) 426 US 229 (1976). In *Davis*, the Court articulated the principle that the Equal Protection Clause bars only intentional discrimination. Id at 239–41.

\(^{30}\) Though some question this conclusion, I have no doubt that post–*Grutter v Bollinger*, 539 US 306 (2003), which deemed promoting a diverse student body a compelling state interest, see id at 332–33, fighting crime most probably would as well. See generally Harcourt, *Rethinking Racial Profiling* at 1349—1350.

\(^{31}\) See, for example, *Gratz v Bollinger*, 539 US 244, 268–75 (2003) (applying strict scrutiny to a University of Michigan admissions policy favoring minority applicants).
profiling would be effective. As an empirical matter, we do not know whether the profiling of young Muslim men in New York City, London, Paris, or other major cities would reduce the incidence of domestic acts of international terrorism or cause more and different attacks.

Profiling is a statistical method that draws, methodologically, on an actuarial approach first developed in the insurance industry. But unlike early insurance applications, which were relatively static, profiling in the policing context involves a dynamic form of prediction: the profiling itself alters the behaviors of those persons who are both profiled and not profiled. As a result, the success of profiling will depend on two factors: first, in terms of detecting and preventing terrorist acts, it will depend on identifying a stable group trait that correlates with higher offending—or at least a group trait that is stable enough to serve as a predictive factor during the next period of profiling. And second, in terms of deterring and preventing terrorist acts, it will depend on how responsive different groups are to the targeted policing and whether they engage in forms of substitution. Both of these turn on what we call the comparative elasticity to policing of the two groups—in other words, on how responsive the different groups are to increased police surveillance. Taking a long-term view, profiling will only succeed if young, male, Muslims are more or equally responsive to the increased risk of detection associated with police profiling than the non-profiled group members, and thus are not able to recruit non-profiled persons, nor substitute with more harmful terrorist acts.

The effectiveness of profiling thus turns on the relative elasticity of the different groups—the profiled group of young, male, Muslims on the one hand, and the non-profiled groups of other persons who might be recruited to commit the terrorist acts in the face of profiling. But on this central question, we have absolutely no reliable data. As an empirical matter, we do not know whether profiling will work in the counterterrorism context or on the contrary cause more terrorist attacks. As a result, there is no need to address the difficult trade-offs that are presented by human rights conventions and civil rights laws intended to eliminate racial discrimination. The important point here, though,

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32 It is fair to say that this is changing in the insurance area, and that the field is becoming increasingly dynamic insofar as actuarial prediction is becoming more and more individualized, to the point where the determination of individual insurance premiums will increasingly affect individual behavior. This wasn’t true of early insurance practices.
is that the issue turns on an empirical and theoretical analysis of the effectiveness of racial profiling, not on a legal or doctrinal review of human rights or civil rights law.

In this paper, I evaluate the empirical case for racial profiling. I explore both the short-term and long-term implications. Surprisingly, although international terrorism is by no means a new phenomenon, there is extremely little reliable empirical research on the effectiveness of defensive counterterrorist measures, and there is no reliable empirical research whatsoever on the use of racial profiling. I argue that this is problematic because, like any other police method, there is a strong potential that a defensive policing technique may backfire—that the use of profiling will actually *increase* rather than *decrease* the long-term incidence of the targeted offense. This potential arises from a phenomenon called “substitution”—from the possibility that, in response to profiling, terrorist organizations will either (1) recruit more individuals from non-profiled groups, thereby expanding the overall pool of potential terrorists, or (2) substitute different types of terrorist attacks that are more immune to profiling and yet more devastating in terms of deaths and injuries. And it raises a host of technical empirical questions that are at present entirely unresolved.

Before proceeding, though, it is important to identify precisely the type of measure in question. Broadly speaking, there are two types of counterterrorist initiatives. The first are called defensive or deterrence-based counterterrorist policies. These are policies that aim to prevent or block the success of a terrorist attack and reduce the likelihood that an attack will cause injuries. This type of defensive policy includes the development and deployment of technology-based measures, such as metal or explosives detectors at airports and the hardening of potential targets like embassies and foreign missions. In contrast, proactive or preemptive policies aim to dismantle terrorist organizations by means of infiltration, preemptive strikes, or invasion of supportive states. Profiling can be used in either case. The profiling of young Muslim men in the New York City subways exemplifies the former—a defensive counterterrorism measure. But profiling can also be used in preemptive or proactive strategies, as when, for

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example, the F.B.I. engages in targeted interviews of Muslim and Arab Americans in order to collect intelligence.\textsuperscript{34} In this paper, I address only racial profiling by the police in defensive counterterrorism operations.

EVALUATING THE EMPIRICAL CASE FOR RACIAL PROFILING

I. Profiling and Immediate Detection

As a theoretical matter, there is no doubt whatsoever that the probability of detecting a terrorist attack increases in the \textit{immediate} aftermath of the implementation of a criminal profiling method. This is simply an inexorable product of the laws of probability: if the police dedicate more resources to investigating and searching members of a higher-offending group, they will inevitably increase the detection of terrorist activities within the profiled group and in society as a whole \textit{in the immediate aftermath}.

This reflects, theoretically speaking, an iron law of probabilities—and it is precisely what gives rise to the claim, among proponents of profiling, that it is “based on statistics”\textsuperscript{35} and that “It is a simple statistical fact.”\textsuperscript{36} These claims are correct in the narrow time period following the implementation of a profiling method. The basic intuition is that policing is like sampling in the social sciences: when law enforcement agencies profile members of a higher-offending group, they are essentially sampling more from that higher-offending group. As such, they will detect more offenders with the same resources because, by necessity, those searches are more likely to detect offending.

Thus, profiling on a group trait that correlates with higher offending will necessarily increase the likelihood of detection \textit{in the very first iteration}. This will have significant benefits along at least two dimensions: first, in preventing the specific terrorist act that is detected, and second, in incapacitating the apprehended terrorist from committing any future acts of terrorism.

As a practical matter—and still within the context of the \textit{immediate} aftermath of implementing a profiling measure—the likelihood of realizing any tangible benefits from

\textsuperscript{35} Sperry 2005.
\textsuperscript{36} Krauthammer 2005.
racial profiling will depend entirely on the frequency of the profiled event. The higher the frequency of the event, the more likely that profiling will immediately detect more of those events. A good illustration is mandatory screening at airports—an initiative that, to be sure, does not involve profiling, but does involve increased sampling. Implemented in 1973, mandatory screening in the United States detected 4,783 firearms and 46,318 knives in 1975, and, according to the FAA, prevented approximately 35 potential hijackers that year. To put that number in perspective, that same year there were 6 domestic hijackings in the U.S.\footnote{Landes 1978: 24 (n.41) and 3 (Table 1).}

Low base-rate events, however, are far more difficult to predict,\footnote{Albert Rosen, “Detection of Suicidal Patients: An Example of Some Limitations of the Prediction of Infrequent Events,” \textit{Journal of Consulting Psychology}, 18: 397—403 (1954).} and as a result much harder to detect for several reasons. First, it is extremely hard to predict where, when, or how the low base-rate offense will occur. Second, low frequency affords more time to adjust to any counterterrorism measure. A terrorist attack in the New York City subway qualifies as a low base-rate event—fortunately, there have not been any such attacks—but as a result, there is a lot of time between events and opportunity for a terrorist organization to adjust to the profiling. In the case of low frequency events, the central question is whether the increased likelihood of detection associated with the immediate implementation of a profiling measure will result in the actual detection of planned terrorist activity or instead in the rapid substitution of persons who do not meet the profile or alternative acts that are not as easily profiled.

II. \textbf{Long-term Effects on the Frequency and Extent of Terrorist Attacks}

Immediate detection is extremely important, especially to the potential victims and their families, friends, and communities who would suffer the greatest harm. Those potential benefits cannot be minimized. But they need to be considered in light of the long-term effects on terrorist attacks and the likelihood of future deaths, injuries, and destruction. The central question here is whether racial profiling is likely to prevent future terrorist acts.
A. **An Economic Model of Profiling**

A number of able economists have turned their attention to racial profiling and argue that the use of profiling may amount to more efficient policing. They contend that profiling on a group trait associated with higher offending rates—what they call “statistical discrimination”—may in fact be the most efficient way to allocate police resources. Drawing on Gary Becker’s groundbreaking work on tastes for discrimination,\(^{39}\) a group of U.S. economists—notably John Knowles, Nicola Persico, and Petra Todd at the University of Pennsylvania, and Jeff Dominitz at Carnegie Mellon University—have developed economic models of racial profiling. Similar analyses are taking place in Great Britain.\(^{40}\) Although these economic models are being developed in the specific context of racial profiling on highways and city streets, the models apply equally to profiling as a defensive counterterrorist measure.

The logic of the racial profiling models rests on the central assumption of the economic theory of crime, namely that any rational individual is less likely to engage in an activity if the cost of the activity increases. This is what is called, in more technical jargon, the “elasticity of offending to policing”—or “elasticity” for short. The elasticity of offending to policing is the degree to which changes in policing affect changes in offending. Assuming that potential offenders respond rationally to the probability of detection and punishment, then targeting law enforcement on members of a higher-offending population will not only increase the amount of crime detected, but more importantly decrease the offending rate among those members of the targeted group because of the increased cost. In its purest form, the economic model of crime suggests that law enforcement should target higher-offending populations until the point where their offending rates have fallen to the same level as the general population. At that point, the government maximizes the effectiveness of its law enforcement resources.

I have set forth in great detail the logic of these economic models both in the broad context of criminal profiling in my book *Against Prediction*,\(^{41}\) and in the specific

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\(^{40}\) See, e.g. Borooah 2001; Borooah 2002; Chakravarty 2002.

context of racial profiling on the highways in my article *Rethinking Racial Profiling*.\(^{42}\) and I refer the technical reader to those more elaborate treatments. For present purposes, I offer a more streamlined description of the analysis and modify the models to address the specific context of counterterrorism profiling.

The central assumption, of course, is that there are two different groups with different offending rates. The profiled group consists of young Muslim men, which, for purposes of the agent on the street translates into young men of apparent Arab descent, young men who look Middle-Eastern, South-East Asian, North African or African, or, more generally, young men of color (excluding young men from East Asia). The non-profiled group consists of all women, older men, and young white or East Asian men.

As a factual matter, this first assumption is probably correct, at least in the United States. Of the total population in the U.S., there are extremely few persons of European, American, African-American or East Asian descent who have or are seemingly prepared to engage in suicide bombing or similar mass terrorist acts against Americans. Richard Reid, the “shoe bomber,” who was traveling to the United States on a British passport, and Jose Padilla, a Hispanic-American arrested at Chicago’s O’Hare airport and accused of plotting a terrorist attack, are the two people who immediately come to mind—out of a population of about 200 million (excluding children, the elderly, and young men of color). In contrast, the number of young men of Arab descent who have engaged in terrorist activities on American soil is larger and includes the nineteen men who participated in the 9/11 terrorist attacks, as well as those who engaged in the earlier car bombing of the World Trade Center on February 26, 1993. In addition, the denominator is much smaller: according to the 2000 United States Census, there are 1,189,731 persons living in the United States who have one or more Arab ancestors and approximately 10 percent of those (or about 120,000) are young men between the ages of 15 and 30.\(^{43}\) Naturally, the appearance of being of Arab descent encompasses many more young men of color, so the denominator is probably higher. But even if we assume that it is one hundred or more times bigger, there is still an offending differential in the range of at


least 1:100 for non-profiled versus profiled group members. It would be crucial to get a better handle on this first quantity of interest—but there is, in all likelihood, a significant offending differential.

I will incorporate here, for simplicity, one graph that visually explains the rational choice argument. The graph shows the relationship between the internal rate of searches conducted within each of the two groups and the offending rate of these different groups. At Time 1, the counterterrorism agents are not engaged in profiling of any sort: the police are searching both groups at the same internal search rate of 10 percent. The graph reflects the basic assumption of non-spurious profiling, namely that young Muslim men are offending at a slightly higher rate than white men and all women—let’s suppose 1.5 versus 1 per 100 million—resulting in higher successful search rates for the searches of young Muslim men.

Given the higher marginal success rate for searches of young Muslim men, the police may begin to search that group more than their share of the available population, and, as the proportion of searches targeting young Muslim men increases, the offending rate of that group decreases. This is the fundamental assumption of rational choice, namely that as the cost of offending increases, the rate decreases. The police continue to search marginally more young Muslim men until Time 2 when their offending rate is equal to that of white men and women—1.3 per 100 million. Now the police are using the profile in their decision to search: the police are searching about 18 percent of the available young Muslim men and about 5 percent of the available white men and women, resulting in a hypothetical total distribution of searches of, say, 60 percent young males of color and 40 percent whites. At that distribution of searches, the offending rates are similar—and, one can infer, so are the hit rates. At that distribution, the efficient police officer has no reason to change the distribution of searches: the officer has no incentive to search more young Muslim men than the 60/40 total distribution, which produces these different internal group search rates. At Time 2, even though the police are not allocating any more resources to the enterprise, the number of successful searches has increased and the total societal level of offending has decreased from where it stood at Time 1.\(^{44}\)

\(^{44}\) This is a mathematical property of the model that I discuss in greater technical detail in Harcourt 2004 and 2006.
If the police are, in fact, searching more young Muslim men and getting to Time 3, where the offending rate of young Muslim men is lower than that of whites—1.3 versus 1.7 per 100 million—then the police must be bigoted: the only reason that a police officer would search more young Muslim men than at the Time 2 equilibrium—that is, would search, say, 80 percent young Muslim men and 20 percent whites, instead of the Time 2 distribution of 60/40—is if the officer had a taste for discrimination resulting in higher utility even though less young Muslim men are offending and thus less searches are successful.45

The three hypothetical distributions of searches between young Muslim men and all others—at Times 1, 2, and 3—correspond to three different sets of internal group search rates. These three scenarios also correspond to the three equilibrium points for the color-blind, efficient, and bigoted policing. The three time points are represented in the following graph:

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45 As evidenced here, the model relies principally on Gary Becker’s seminal work on tastes for discrimination. See generally Becker 1996.
GRAPH: The Economic Model of Profiling

Y-Axis: Group Offending Rate (Number of Offenses per 1,000,000)

X-Axis: Internal Group Rate of Searches (Percent of Searches Conducted Within Group)

Time 1: Color-Blind Policing
Time 2: Police Profiling
Time 3: Bigoted Policing

Young Muslim Men
Non-Muslim Men and Women
In sum, the economic model suggests that profiling will increase the success rate of police investigations and reduce the overall societal level of offending with the same police resources. Naturally, additional judicial resources would be needed to process the increased detection of terrorist activities, though one would expect that those costs would be offset by the harm that would have been prevented.

B. Elasticity Among the Non-Profiled and Possible Substitution Effects

According to the economic model, members of the profiled group are not the only ones who will respond to the change in policing. Members of the non-profiled group are also going to change their behavior as a result of the decreased cost of crime—but in their case, by increasing their offending. So, for instance, if the United States taxing authorities target drywall contractors and car dealers for audits of their tax returns—as they did in the mid-1990s—we can expect that there will be less tax evasion by drywall contractors and car dealers because their cost of tax evasion has increased. But at the same time, we can expect that, say, accountants and bankers will realize that they are less likely to be audited, and may therefore cheat a bit more on their taxes. Similarly, if the highway patrol target African-American motorists for stops and searches—again, there is evidence for this in several states—then we can expect African-American motorists to respond by offending less. But by the same token, white motorists may begin to offend more as they begin to feel increasingly immune from investigation and prosecution.

This is true in the terrorism context where we have witnessed similar substitution effects. It happened in Israel, for instance, starting in 2002 when young girls and women became suicide bombers. As Jonathan Tucker, a counterterrorism expert explains, “At first, suicide terrorists [in Israel] were all religious, militant young men recruited from Palestinian universities or mosques. In early 2002, however, the profile began to change as secular Palestinians, women, and even teenage girls volunteered for suicide missions. On March 29 2002, Ayat Akhars, an 18-year-old Palestinian girl from Bethlehem who looked European and spoke Hebrew, blew herself up in a West Jerusalem supermarket, killing two Israelis. Suicide bombers have also sought to foil profiling efforts by shaving
their beards, dyeing their hair blond, and wearing Israeli uniforms or even the traditional clothing of orthodox Jews.”

In this sense, the opponents of racial profiling are also correct—and, also, as a matter of “statistical fact.” If we assume elasticity among rational actors, then profiling will increase offending among member of the non-profiled group. This has led many counterterrorism experts to question or deny outright the effectiveness of profiling. As Bruce Hoffman suggests, “profiling of suicide bombers is no longer effective. Suicide attacks can be young or old, male or female, religious or secular.” It has led other counterterrorism experts and practitioners—such as New York City police commissioner Raymond Kelly—to avoid profiling on traits that can substitute easily. As Malcolm Gladwell explains, “It doesn’t work to generalize about a relationship between a category and a trait when that relationship isn’t stable—or when the act of generalizing may itself change the basis of the generalization.” To avoid these “unstable” traits, police chief Kelly does not rely on race, but instead on traits like nervousness and inconsistency—traits that are more permanently associated with criminal offending and that do not lend themselves to substitution.

C. The Central Theoretical Puzzle

The fact that there may be elasticity and thus substitution among the non-profiled, however, does not end the debate. It does not mean that profiling is ineffective. Some substitution is inevitable. The real question is, how much substitution can we expect and will it outweigh the benefits of profiling? The central theoretical question is, in other words, how do the elasticities of the two groups compare? How does the elasticity of the profiled group compare to that of the non-profiled group?

The trouble with the economic model is that it assumes both groups are equally elastic to policing. (This is reflected in the earlier graph by the parallel shape of the two offending curves). But this assumes away the central theoretical question. What matters

47 Bruce Hoffman, “Defending America Against Suicide Terrorism,” page 22, in David Aaron, ed., Three Years After: Next Steps in the War on Terror, RAND Corporation (2005).
48 Gladwell 2006.
most for the effectiveness of racial profiling is precisely the *comparative elasticity* of the two groups. If the targeted group members have lower elasticity of offending to policing—if their offending is less responsive to policing than other groups—then targeting them for enforcement efforts will increase the overall amount of crime in society because the increase in crime by members of the non-profiled group will exceed the decrease in crime by members of the profiled group. In raw numbers, the effect of the profiling will be greater on the more elastic non-profiled group and smaller on the less elastic profiled group.

Again, this is true as well in the terrorism context. The central question here is how responsive young Muslim men are to policing and whether they are less elastic than non-Muslim men and women. If they are less responsive overall, then targeted policing may actually increase total incidents of terrorism by encouraging the non-profiled group members to engage in terrorist acts—since the price to them has decreased. This would enable terrorist organizations to recruit more heavily from outside the profiled group—women, white men, and others who do not look like young Muslim men.

It is precisely the *comparative* elasticities of offending to policing that determines whether and how much substitution there is between members of the profiled and non-profiled groups. This is the central puzzle, but at this theoretical level, there is no good reason to assume that the higher-offending group is as responsive or more responsive to policing than members of the non-profiled groups. After all, we are assuming that the two groups have different offending rates. Whether it is due to different socio-economic backgrounds, to religious fanaticism, to education, culture, or upbringing, non-spurious profiling rests on the non-spurious assumption that one group of individuals offends more than the other, holding everything else constant. If their offending is different, then why would their elasticity be the same? If members of the profiled group are offending more because they are more religious, then might they also be less elastic to policing? There is no *a priori* reason why the group that offends more should be more or as elastic than the other.

The bottom line, then, is that if the profiled group has lower elasticity of offending to policing, profiling that group will probably increase the amount of terrorism in the long-term. I demonstrate this with mathematical equations in my article *Rethinking*
Racial Profiling, but the proof is captured well and more simply by modifying the earlier graph to reflect different elasticities:
In essence, as long as the equilibrium point in offending at Time 2 is achieved above the average offending rate at Time 1, the profiling will produce increased crime in society.

In the terrorism context, the elasticity of offending represents only one form of possible substitution. There are others that can also result in an increased long-term rate of attacks, including, for instance, the use of different terrorist modes of attack that would be less susceptible to detection by profiling. The central empirical questions, then, are (1) whether and to what extent the group of profiled individuals (Arab-looking young males) are elastic to policing; (2) whether and to what extent the group of non-profiled individuals (non-Arab looking young men and all other men and women) are elastic to policing; (3) more importantly, how those elasticities compare; and (4) whether there are different forms of substitution that might also occur.

E. Empirical Research on Counterterrorism Measures

On these central questions, there is no reliable empirical evidence. There is no empirical research on elasticities—absolute or comparative—and on substitution effects in the racial profiling context. The only forms of substitution that have been studied empirically in the counterterrorism context involve substitution as between different methods of attack and intertemporal substitution.

Rigorous empirical research in the terrorism context traces to a 1978 paper by my colleague at the University of Chicago, William Landes, that explores the effect of installing metal detectors in airports on the incidence of aircraft hijackings. Extending the rational choice framework to terrorist activities, Landes developed an economic model to test whether mandatory screening reduced the likelihood of a terrorist hijacking. Using a dataset of United States Federal Aviation Administration (FAA) records of aircraft hijackings from 1961 to 1976, Landes analyzed the time interval between hijackings to measure the frequency of these events. Landes found that “increases in the probability of apprehension, the conditional probability of incarceration, and the sentence are associated with significant reductions in aircraft hijackings in the 1961-to-1976 time

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period,” and he estimates that between 41 and 67 fewer aircraft hijackings occurred on planes departing from the United States following mandatory screening and the installation of metal detectors in U.S. airports.\footnote{Landes 1978: 28.}

In his 1978 study, Landes used sophisticated quantitative analyses to regress the quarterly totals of aircraft hijackings, as well as time and flight intervals between successive hijackings, on the probability of apprehension. The effect, though, can be visualized here based on data from the RAND-MIPT Terrorism Incident Database Project.\footnote{Landes 1978:28-29. Landes also found that the cost of mandatory screening of all passengers was “enormous”: The estimated net increase in security costs due to the screening program (which does not include the time and inconvenience costs to person searched) . . . translates into a $3.24-to-$9.25 million expenditure to deter a single hijacking. Put differently, if the dollar equivalent to the loss to an individual hijacked passenger were in the range of $76,718 to $219,221, then the costs of screening would just offset the expected hijacking losses” (Landes 1978: 29).}

This graph charts both the number of aircraft hijackings between 1968 and 1980, as well as the proportion of terrorist acts that consisted of hijackings:

\footnote{The underlying data are also available in Charles H. Anderton and John R. Carter, “Applying Intermediate Microeconomics to Terrorism,” at 28 (Table 1), College of the Holy Cross, Department of Economics Faculty Research Series, Working Paper No. 04-12 (August 2004).}
The graph clearly demonstrates that mandatory screening and the installation of metal detectors in 1973 coincided with a significant drop in both the absolute number and the proportion of international terrorist acts represented by hijackings. Landes’ research suggests that the terrorist’s decision whether to engage in a terrorist act is a function of the probability and expected utility of different possible outcomes.

Subsequent research built on Landes’ framework to explore possible substitution effects. In their 1988 article *Intervention Policy Analysis of Skyjackings and Other Terrorist Incidents*, Jon Cauley and Eric Im used interrupted time series analysis to explore the impact of the installation of metal detectors on different types of terrorist attacks. They found that, although the implementation resulted in a permanent decrease in the number of hijackings, it produced a proportionally larger increase in other types of terrorist attacks. In their 1993 article *The Effectiveness of Antiterrorism Policies*, Walter Enders and Todd Sandler also revisit mandatory screening, and similarly show that, although mandatory screening coincided with a sharp decrease in hijackings, it also coincided with increased assassinations and other kinds of hostage attacks, including barricade missions and kidnappings. The introduction of metal detectors, they show, resulted in a steady increase in other kinds of hostage events—consistent with the idea that “terrorist groups substituted away from skyjackings and complementary events involving protected persons and into other kinds of hostage incidents.”

These researchers have also looked at other forms of substitution. Retaliatory strikes, like the United States strike on Libya on April 15, 1986, resulted in “increased bombings and related incidents;” but they tended to level off later. As Enders and Sandler explain, “The evidence seems to be that retaliatory raids induce terrorists to *intertemporally* substitute attacks planned for the future into the present to protest the retaliation. Within a relatively few quarters, terrorist attacks resumed the same mean

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56 Enders and Sandler 1993: 835.
number of events.” Enders and Sandler also found that the fortification of U.S. embassies and missions in October of 1976 resulted in a reduction of terrorist attacks against U.S. interests, but produced a substitution toward assassinations. Cauley and Im (1988) also analyze the effect of target hardening of U.S. embassies and find that they had an “abrupt but transitory influence on the number of barricade and hostage taking events.” Their conclusion is that “the unintended consequences of an antiterrorism policy may be far more costly than intended consequences, and must be anticipated.”

But that’s all the solid empirical evidence. The most recent and thorough review of the empirical literature, based on a Campbell Collaborative protocol, identified only seven rigorous empirical studies: “In the course of our review, we discovered that there is an almost complete absence of evaluation research on counter-terrorism strategies. From over 20,000 studies we located on terrorism, we found only seven which contained moderately rigorous evaluations of counter-terrorism programs. We conclude that there is little scientific knowledge about the effectiveness of most counter-terrorism interventions.”

Moreover, there are no empirical studies on racial profiling in the terrorism context. I found only one article, and it is theoretical, not empirical. Concerned that this may have been an artifact of a U.S.-bias, I contacted Dr. Ganor Boaz (a leading researcher on terrorism in Israel) at the Institute for Counter-Terrorism at the Interdisciplinary Center Herzliya (a leading research center on terrorism in Israel), and

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58 Enders and Sandler 1993: 842.
59 Cauley and Im 1988: 30.
60 Enders and Sandler 1993: 843. These substitution effects can also be aggravated by innovation effects—which include new modes of attack and new techniques and weapons. Enders and Sandler explain that, “In the long term, terrorists will develop ingenious countermeasures to circumvent the technology. Immediately after airport vigilance was increased as a result of 9/11, Richard Reid (aka Tariq Rajah) was discovered on a flight from Paris to the United States with an explosive device in his shoes. Now that airport security routinely inspects shoes, plastic guns, electronic jamming equipment, bottles of flammable liquid or other explosive devices are predicted to be hidden on (or in) the terrorist or in carry-on luggage. Thus, there are dynamic strategic interactions; authorities must be vigilant to improve technology by anticipating ways of circumventing current technological barriers. This vigilance must lead to periodic upgrades in the technology prior to the terrorists exposing the technology’s weakness through a successful attack.” Enders and Sandler 2002/4 at *18.
61 Lum, Kennedy, and Sherley 2006 at 3.
asked him if there were any empirical studies on profiling in Israel. His response: no. He is unaware of “any empirical research that has been done in Israel on the efficiency of profiling.” 63 The reason, in large part, is that ethnic appearance is a poor indicator of terrorism in Israel. As Dr. Ganor explains, “There were many cases of public and security awareness that prevented or limited terrorist attacks in Israel based on the looks of the suspect but it is sometimes difficult to define if this practice was based on national identity, ethnic profile or suspicious behavior, or all of the above together.” 64

F. Some Loose Ends

Naturally, there are a lot of other unanswered questions. First, in all likelihood terrorist organizations are already recruiting outside the profiled group regardless of whether the NYPD is engaged in racial profiling. What difference, then, would racial profiling make? Does the incremental cost of profiling in the subways really change the equation? And how sensitive are terrorists to such an incremental cost?

Second, the decision to have police officers search bags and monitor subway entrances—regardless of whether they profile—already increases the cost of such an attack. What is the incremental difference achieved by racial profiling and will it have any effect on behavior?

Third, even if there is more substitution, might it lead to less harmful attacks? As Enders and Sandler suggest, “Even some piecemeal policies that cause substitutions by focusing on only part of the overall terrorism problem may have some net positive impacts. To the extent that the National Defense Authorization Act leads to a reduction in the likelihood of biological terrorism, substitutions into other attack modes will occur. The desirability of such policies is that they may force terrorists to substitute into less harmful events. Anti-terrorist policies can be most effective when the government simultaneously targets a wide range of terrorist attack modes, so that the overall rise in the prices of terrorist attacks becomes analogous to a decrease in resources.” 65

Fourth, might racial profiling itself affect comparative elasticities? Is it possible that racial profiling might soften the elasticity of the non-profiled group, or harden that of

63 Communication with Dr. Boaz Ganor, February 24, 2006.
64 Id.
the profiled group, by reinforcing a perception that the United States and European countries are anti-Muslim? There is good reason to believe, for instance, that the torture at Abu-Ghraib in 2004 may serve as a future recruitment tool for terrorist organizations. As Anderton and Carter suggest, “It is likely that the degrading images of Iraqi prisoners hardened the preferences of terrorists against the United States. It may have also created terrorist preferences among some individuals who previously had flat indifference curves [as to terrorist activities]. Hence, the prisoner abuse scandal can be seen as a form of ‘negative advertising’ that may have reshaped terrorist preferences toward more terrorism.” In the same way, might the profiling of young Muslim men in New York City serve as a form of “negative advertising” that may undermine efforts to eradicate terrorism?

Finally, might racial profiling produce a loss of political legitimacy at home or abroad, possibly increasing the responsiveness of non-profiled group members to recruitment efforts? The perception that our counterterrorism measures are illegitimate may affect obedience to the law. Psychologist Tom Tyler has demonstrated how perceptions of the legitimacy of criminal justice procedures affect the willingness of citizens to abide by the law. Tyler’s book Why People Obey the Law (1990), and his writings on procedural fairness and institutional legitimacy, including his essay Trust and Democratic Governance (1998), rest precisely on the idea that individuals derive a strong sense of identity from their relationship with legal authority. When the relationship is positive and respectful, a form of social trust—a concept closely linked to the idea of social capital made popular in Robert Putnam’s book, Bowling Alone—develops and promotes obedience to the law. “[S]ocial trust,” Tyler contends, “is linked to creating a commitment and loyalty to the group and to group rules and institutions.” This commitment and loyalty to the group translates into greater obedience to the law. When this loyalty is undermined, so too is obedience to the law. Will this affect the responsiveness of members of non-profiled groups?

These are all fascinating questions, but all relatively minor compared to the central question: whether racial profiling of young Muslim men in the New York

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subways will likely detect a terrorist attack or instead lead to the recruitment of non-profiled persons and the substitution of other acts for subway attacks—in other words, whether profiling will detect or increase terrorist attacks. The answer to this question is pure speculation. In the end, then, there is no need or reason to engage in a rights trade-off.

**CONCLUSION**

There is a lesson here. Defensive counterterrorism measures need to be evaluated closely. As Enders, Sandler, Faria, Tucker, and other counterterrorist experts emphasize, measures that raise the price of one and only one specific activity, such as airplane hijackings, are likely to produce troubling substitution effects; measures that raise the price of all terrorist acts or conversely reduce the resources of terrorists are less problematic and less likely to produce unanticipated substitution.\(^68\) The optimal strategy to combat terrorism is to reduce terrorist resources across the board. It is for this reason that intelligence and proactive counterterrorism operations are generally viewed as a priority. As General Meir Dagan, former head of the Bureau for Counterterrorism in the Israeli prime minister’s office, explains, “Investments in intelligence are invisible, whereas increased security is visible but often wasteful. The first priority must be placed on intelligence, then on counterterrorism operations, and finally on defense and protection.”\(^69\)

Racial profiling as a defensive counterterrorism measure is suspect for precisely this reason: it may well encourage the recruitment of terrorists from outside the core profile and the substitution of other terrorist acts. Does this mean that the New York City police department should not harden targets like the subway system—targets that are attractive to terrorists because of the number of potential victims? No. It is probably better to divert terrorist attacks away from large groups of people, wherever and whenever possible. But it does mean that the police should harden those types of targets without deploying a racial profile. There is no point triggering the potential substitution effects associated with racial profiling.

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\(^{68}\) Enders and Sandler 2002/4 at *10; Faria 2006; Tucker 2003.

\(^{69}\) Tucker 2003: *2. Walter Enders and Todd Sandler seem to agree: “Governments must act to reduce the terrorists’ resource endowments (i.e., their finances, leadership, and membership) if an overall decrease in terrorism is to follow. Efforts to infiltrate and undermine terrorist groups and to freeze their assets have the consequence of reducing the overall amount of terrorism.” Enders and Sandler 2002/4 at *17.
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