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Recommended Citation

McQuade, Barbara. "Searching for Effective and Constitutional Responses to Homegrown Terrorists." *Wayne Law Review* 57, no. 1 (2011): 255-260.

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SEARCHING FOR EFFECTIVE AND CONSTITUTIONAL RESPONSES TO HOMEGROWN TERRORISTS

BARBARA L. MCQUADE[†]

Thank you, Brad, and thank you to the Law Review for inviting me here today. Protecting national security while honoring civil liberties is the greatest challenge of our generation. As a prosecutor, I am charged with protecting national security, and I understand the importance of protecting the public from acts of terrorism. But prosecutors are also sworn to uphold the Constitution. In fact, at the U.S. Attorney's Office, we are also charged with prosecuting violations of civil rights. So in every case, we understand how important it is to protect people's constitutional rights, such as First Amendment rights to free speech, association, and religion, and Fourth Amendment rights to be free from unreasonable searches and seizures. How then in a democratic society do we address these potentially conflicting challenges? Lawyers in my office are confronted with these issues every day in very stark terms, and so it is a very important issue. And it's one that we as a society need to get right.

HOMEGROWN TERRORISM

We have been discussing these issues since September 11, 2001, but what is new is the concern with radicalization of young people and homegrown terrorism. We feel duty-bound to prevent attacks by homegrown terrorists, but at the same time how do we do that in a way that respects our Constitution?

Congressman Peter King of New York has scheduled hearings for next week to investigate whether there is hidden radicalism within the Muslim American community and hidden radicalism in mosques. Uncovering threats is important, but how do you go about investigating such a thing in our democracy? It's a very important challenge to both protect our citizens, but at the same time to make sure that we are appropriately protecting our civil liberties.

Radicalism and homegrown terrorism is not an unfounded fear. It seems to be a growing trend. We saw the shooting at Fort Hood, where 13 people were killed by Major Nidal Hassan, an American citizen and Army officer. He had been recruited by the radical cleric Anwar al-

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Awlaki, who is himself an American citizen. And there are people like Awlaki, who are out there on the Internet, encouraging young people to become terrorists.

Recently we saw the plot in Oregon to blow up a Christmas tree lighting ceremony, again allegedly involving a young person. The defendant in that case is a 19-year-old U.S. citizen, a former student at Oregon State University. We saw the case of Faisal Shazad, the Connecticut man that tried to blow up an SUV in Times Square. And Najibullah Zazi, an American who plotted to bomb the New York subways.

So these fears of homegrown terrorism are certainly well-founded and not just a myth. But let me suggest that violent acts are not committed only by Muslims and Arabs. You need look no further, I think, than the fatal shootings in Tucson, Arizona. Or right here in Michigan just two weeks ago when we had a shooting at the Sixth Precinct of the Detroit Police Department. We have a case against members of the Hutaree militia pending in our district, in which we have charged individuals with plotting to kill police officers. And just last week a man who drove his car from San Diego to Dearborn was charged with attempting to blow up a mosque. The defendant in that case is not Muslim or Arab and, in fact, the targeted victims in that case were Muslims. And, of course, one of the most notorious terrorists in the history of America was not a Muslim, but Timothy McVeigh.

So, looking only to mosques and looking only in the Middle Eastern community is perhaps a naïve way to look for threats. That strategy might cause us to overlook others who might pose a real threat. Instead of looking at profiles of people based on religion and ethnicity, I would submit that looking into people's conduct is a more reliable indicator of whether they are going to commit a violent act, and a more efficient use of law enforcement resources.

PREVENTING TERRORIST ATTACKS

So what do we in the law enforcement community do to enforce the law and to protect people from terrorist attacks? I think people expect not just that we will respond and prosecute people responsible for terrorist attacks, but that we will also prevent terrorist attacks. So how do we do that in a system that honors civil liberties? In the federal system we have a number of legal tools available to us. We have search warrants, visual surveillance, and electronic surveillance. We can conduct witness interviews, we use the grand jury process to subpoena witnesses, and a number of other things. But there are two techniques that I want to talk about in particular because they have been very controversial lately,

particularly in this context. One is the use of informants, and the other is the use of undercover or “sting” operations. Both of these law enforcement techniques are frequently used.

INFORMANTS

First, informants are used in all kinds of cases, and have been used for decades in drug cases, organized crime cases, public corruption cases, and now, in terrorism cases. What is an informant anyway? Who becomes an informant? An informant may be someone who is just a good citizen who wants to share a tip with the police. That’s one thing that motivates people to become informants. Sometimes people are just very patriotic and they say they want to help provide information to the government. Some people sign up to become informants on an ongoing basis because perhaps they enjoy the excitement. They do not ask for anything in exchange for their assistance because they enjoy being involved in law enforcement operations. Some informants sign up for money—they want to get paid to provide information to law enforcement organizations. And some, and probably the largest category, are people who themselves have some criminal exposure. They have been charged with a crime, and they want a reduced sentence, and so they agree to work for the government to provide information in hopes that they will get a break at the time of their sentencing.

So you can see that people can become informants with all different motives. Some are very pure, while some are very self-serving. And so, as a prosecutor, when someone comes to you as an informant, it is healthy to be skeptical of why the informant is providing information and to question whether that information is accurate. As prosecutors, we do not rely solely on the words of informants because we know that they bring with them all of that baggage and that at a trial they are going to be cross-examined by the defense attorney about all of that baggage. Rather than relying solely on the word of informants, we use the information for investigative purposes, and then we corroborate that information with other law enforcement techniques, such as search warrants, visual surveillance, electronic surveillance, recorded conversations. With that kind of corroboration, you are not relying solely on the word of someone who may have an ax to grind for some impure motive. Instead, you are relying on information that you can objectively verify.

There is a perception that informants are being used in a widespread way, that the FBI is sending informants into every mosque in America and fishing around for information. That is simply not the case. It would be poor law enforcement and inefficient to do it that way. Instead, the use of informants in any place is done in a deliberate and thoughtful way.

Informants are used in instances where there is specific information that illegal activity is occurring in a certain place, be it a mosque or anywhere, just as informants are used when illegal activity occurs in all other segments of the community. The FBI Special Agent in Charge in Detroit will tell you that it is not the mosques he is worried about; it is actually the Internet where most of the radicalization is occurring. So it would not be efficient to send informants into mosques for fishing expeditions.

The other reason I can say with confidence that the FBI is not routinely sending informants into every mosque is that the FBI guidelines on domestic investigations prohibit it. The FBI is not allowed to base investigations solely on activity that is protected by the First Amendment, such as worshipping in a mosque. And so for those reasons, not only is it inefficient, but it is prohibited by the FBI's own guidelines to send informants on fishing expeditions.

UNDERCOVER OPERATIONS

The other law enforcement technique that has been somewhat controversial recently is the undercover or "sting" operation. Undercover operations have been used in a number of investigations in recent months. Again, this is another technique that is used in all kinds of cases—drug cases, public corruption cases, child pornography cases, and now, terrorism cases. It is a legitimate law enforcement tool and gives law enforcement an opportunity to collect evidence that a defendant is attempting to commit a serious crime without putting the public in danger. As a recent example, the case involving the Portland Christmas tree lighting ceremony was an undercover operation. According to the charges, the defendant himself devised the plan to attack the tree lighting ceremony, the defendant himself selected the target, he selected the date, he selected the method, he delivered bomb components to an undercover FBI agent so that they could be assembled, and it was the defendant who pressed a button on a cell phone, which he believed would detonate and explode the truck that was near the tree lighting ceremony. There are other examples of the use of undercover operations in terrorism cases: the plot to blow up fuel tanks underneath JFK airport; a case in Dallas involving a plot to blow up skyscrapers; and a plot in New York to blow up a synagogue and a Jewish community center.

Sometimes we hear people criticize these undercover operations by saying that the defendants were just amateurs, or that the defendant was not really going to follow through with his plans anyway, or that it was the FBI who put the idea into their heads. As a prosecutor with an obligation to prevent terrorist attacks, an undercover operation needs to

be a valid option. When someone is intent on killing people and has expressed that desire, what is the government to do? Do you stand idly by? No, the government has an obligation to try to do all that it can to prevent such an attack. Using undercover operations has been one method for bringing to justice people who have expressed a desire to kill others and preventing attacks before they occur. Undercover operations remain an important way to prevent attacks from occurring and to bring dangerous people to justice.

CONCLUSION

So what is the best way to address some of these challenging issues? We need to protect the public in a way that respects civil liberties. As we have seen from cases like the Hutaree, the Tucson shooting, and last week's attempted attack in Dearborn, it is a mistake to myopically focus on Muslims. Profiling Muslims is not only inappropriate and illegal, it is also ineffective, because it misses some very dangerous people. A better approach is aggressive, but sound law enforcement, using all tools available, in a way that respects the constitutional rights of all Americans. We can do that by basing investigations on conduct and facts, as opposed to profiling people based on their ethnicity or religion, and by vigorously using all lawful law enforcement techniques. In this way we can best protect American lives while honoring civil liberties.