

PROFILES IN TERROR: A LEGAL FRAMEWORK FOR THE BEHAVIORAL PROFILING PARADIGM

Justin Florence and Robert Friedman***

INTRODUCTION

You're at an airport, standing in line to go through security. You're sweating, having rushed from the curb with bulky suitcases, gripping a zip-lock bag in one hand and your shoes in another. Nervous that, as the security line crawls along, you may miss your flight, you glance around impatiently at the officials and your watch. Government agents are watching your every move—looking to see whether you exhibit certain facial expressions that they believe are the telltale signs of a terrorist. This is Screening Passengers by Observation Technique (“SPOT”), the Department of Homeland Security’s behavioral profiling program, in which trained federal agents closely observe travelers’ faces for hints that they may be security risks. It is in operation in airports across the United States, and is used in other settings, such as urban mass transit.

SPOT is just one element of an emerging paradigm in homeland security and counter-terrorism programs. Rather than investigate particular plots or actual, known suspects, the United States and other governments are developing new tools to make quick evaluations of whether individuals might be dangerous. Rather than rely on explicit racial or religious profiling, they purport to use objective, scientific criteria to identify dangerous people by analyzing their facial movements, voices, blood pressure, sweat levels, heart and breathing rates, and even brain waves. Rather than apply scientific techniques, *CSI*-style, to crime scenes, these new programs are applying them to people in a crowd. There is much to like about these programs: they provide an extra layer of security, are non-invasive, efficient,

* Justin Florence is an Associate in the Washington, D.C., office of O’Melveny & Myers LLP and a Non-Resident Fellow of the Georgetown Center on National Security and the Law. J.D., Yale Law School; M.A., Harvard University; B.A., Yale College. We received excellent advice and comments on earlier versions of this article from Aaron Crowell, James Forman, Matthew Gerke, Olivier Kamanda, Neal Katyal, and Marc Sorel. We also thank Tom Cummins and the editors of the *George Mason Law Review* for their outstanding editorial assistance. Finally, thanks to Maya Florence and Mariana Marques for their helpful comments, support, and guidance. The views expressed here are those of the authors alone.

** Robert Friedman is an Associate in the Washington, D.C., office of Venable LLP, a Non-Resident Fellow of the Georgetown Center on National Security and the Law, and a Principal in the Truman National Security Project. J.D., Georgetown University Law Center; M.A., Johns Hopkins University; B.A., Emory University.

and targeted. Given the obvious lesson of 9/11 that our security must focus not just on dangerous objects, but dangerous people, these profiling programs are likely to be at the center of law enforcement and homeland security initiatives for the foreseeable future.

But these mass behavioral profiling programs raise serious legal and constitutional questions. Are they really just covers for racial profiling? Do they violate the Constitution's equal protection principles? The Fourth Amendment's prohibition on unreasonable searches and seizures? Are they fundamentally unfair? Can they easily be abused? How can the government be kept in check if the public does not even know what agents are looking for? Most importantly, given the secrecy required to operate these sorts of national security programs, what oversight institutions can keep them in line with our constitutional commitments?

This Article offers a framework for keeping behavioral profiling programs legal, with a particular focus on SPOT. We take constitutional and civil liberties challenges to behavioral profiling seriously, but argue that if the programs operate as the Department of Homeland Security asserts they do, behavioral profiling neither violates the Constitution nor is inconsistent with America's core civil libertarian values. Our initial conclusion, however, is frustratingly tentative at best, for it rests on a series of tenuous assumptions about how these highly secretive programs do in fact function. And, to the extent these assumptions are inaccurate, the programs would likely violate one or more constitutional provisions—and likewise be contrary to our nation's deeply held values.

Our central question then becomes: what mechanism or institution can best evaluate the validity of these assumptions and test the legality of behavioral profiling? Because these are primarily homeland security programs, both the programs' design and operational details are classified and not publicly available to either constitutional scholars or members of the public. After surveying the likely role of federal courts and Congress, we argue that in practice it is the executive branch itself that is best positioned to conduct the review necessary to test these assumptions and conduct the oversight needed to determine and maintain the legality of behavioral profiling. Internal oversight of profiling from within the executive branch is likely to succeed here because the legal and security elements of behavioral profiling reinforce each other. But the executive branch can only carry out this function if it adopts—or has imposed on it—certain structural mechanisms, which we lay out.

The Article proceeds as follows. We first survey operational details of profiling programs to the extent they are public, and describe some of the security benefits and rationales for programs of this nature. We then, in Part II, consider their doctrinal legality under three different constitutional provisions: the Equal Protection Clause, the Fourth Amendment, and the Due Process Clause. This analysis leads us to a tentative conclusion that behavioral profiling programs—to the extent they are designed and function as

the government claims—are constitutional and consistent with core civil liberties. Nonetheless, as we explain in Part III, for each of these three constitutional provisions, our analysis is premised on certain significant assumptions about how behavioral profiling programs are designed and operate, and neither the federal judiciary nor Congress is particularly likely to conduct the oversight of behavioral profiling necessary to ensure its legality. In Part IV, then, we urge that the executive branch itself be tasked with monitoring behavioral profiling programs.

To be clear, we do not come to this conclusion as supporters of a unitary executive constitutional approach or as opponents of a legislative or judicial role in national security issues. We would welcome involvement from Congress and the courts. Rather, our concern is that in the behavioral profiling paradigm, the oversight required is so extensive, continuous, and technical that the civil service bureaucracy is in the best position to undertake it. We conclude by providing a blueprint for what this oversight from within the executive branch would look like.

I. THE BEHAVIORAL PROFILING PARADIGM

In this Part, we provide a brief introduction to the behavioral profiling paradigm. We first explain the operations and origins of the SPOT program, as representative of this new security trend. We then review other programs currently in development that would extend behavioral profiling beyond just facial observations, and move it from airports to a range of public institutions. We conclude by describing the rationale for behavioral profiling and the range of benefits that this type of security promises.

A. *The Basics of SPOT*

The Department of Homeland Security's Transportation Security Administration ("TSA") began operating SPOT, its airport behavioral profiling program, in June 2003.¹ Under the program, Behavior Detection Officers ("BDOs") observe airport passengers for certain physical and physiological characteristics and reactions.² BDOs work in pairs and scan passengers at security checkpoints for signs of specific behaviors listed on the officers'

¹ Transp. Sec. Admin., BDOs SPOT More Than Just Opportunities at TSA [hereinafter BDOs SPOT], http://www.tsa.gov/press/happenings/boston_bdo_spot.shtm (last visited Oct. 16, 2009); see also Kip Hawley, Assistant Sec'y, U.S. Dep't of Homeland Sec., Transp. Sec. Admin., Prepared Statement Before the United States Senate Committee on Commerce, Science, and Transportation (Jan. 17, 2007), available at http://www.tsa.gov/press/speeches/air_cargo_testimony.shtm.

² Thomas Frank, *Suspects' Body Language Can Blow Their Cover*, USA TODAY, Dec. 28, 2005, at 3A.

checklists.³ Because of the high volume of passenger traffic in busy airports nationwide, BDOs must monitor multiple individuals simultaneously.⁴ BDOs are trained to look for individuals who exhibit unusual or anxious behavior, which can be as simple as changes in mannerisms, excessive sweating on a cool day, or changes in the pitch of a person's voice. Assertedly, "[r]acial or ethnic factors are not a criterion for singling out people."⁵ The program is "rooted in the notion that people convey emotions" through unconscious gestures and facial expressions.⁶ The aim is that BDOs will identify the dangerous faces in the crowd and subject them to more extensive questioning or searches than other travelers.

Before providing more details, it may help to mention what SPOT is not. The program purportedly focuses in particular on unconscious facial expressions or reactions—not more conscious or planned characteristics of human behavior. SPOT is different than, for example, identifying high-risk travelers based on whether they are flying one-way, how they paid for their tickets, or how much luggage they are carrying. It also differs from traditional law enforcement criminal profiling, in which officers use characteristics associated with a particular crime or group of crimes to develop a profile of the likely perpetrator—for example, a serial-killer or drug courier.⁷

SPOT, in contrast, focuses on an individual's subtle behavior and appearances—in particular, facial micro-expressions like raising the inner corners of the eyebrows so that the brows slope down from the center of the forehead, the cheeks become elevated, and the corners of the lips slightly dip.⁸ Other signs of visual suspicion can include body language and gestures, such as a slumped posture or excessive pocket-patting.⁹ Judging from a pre-determined set of criteria consisting of some thirty possible suspicious behaviors—each with an assigned numerical score—BDOs analyze whether an individual's observed behavior registers a high enough tally for more intrusive questioning, pat-downs, or baggage inspections.¹⁰ For some indi-

³ Paul Shukovsky, *Airport Profilers: They're Watching You*, SEATTLE POST-INTELLIGENCER, Dec. 25, 2007, at B1.

⁴ Transp. Sec. Admin., Master Transportation Security Officer—Behavior Detection Officer, http://www.tsa.gov/join/benefits/soar/tsa/master_bdo.shtm (last visited Nov. 19, 2009) [hereinafter Master Transportation Security Officer]; see also Press Release, Transp. Sec. Admin., TSA Expands Career Opportunities for Transportation Security Officers (July 17, 2006) [hereinafter TSA Expands Career Opportunities], available at http://www.tsa.gov/press/releases/2006/press_release_0684.shtm.

⁵ Sally B. Donnelly, *A New Tack for Airport Screening: Behave Yourself*, TIME, May 17, 2006, <http://www.time.com/time/nation/article/0,8599,1195330,00.html>.

⁶ Frank, *supra* note 2, at A3.

⁷ See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 16-19 (2002).

⁸ See Paul Ekman, *How to Spot a Terrorist on the Fly*, WASH. POST, Oct. 29, 2006, at B03.

⁹ *Id.*

¹⁰ Jonathan Karp & Laura Meckler, *Which Travelers Have 'Hostile Intent'? Biometric Device May Have the Answer*, WALL ST. J., Aug. 14, 2006, at B1; see also Lenese Herbert, *Othello Error:*

viduals identified as suspicious, a secondary examination in the form of a face-to-face interview may be conducted by local police.¹¹ In other cases, a person's name might be run against national criminal databases to determine whether any threat exists.¹²

TSA does not tally the number of incidents at each airport, but last year BDOs "nationwide required 98,805 passengers to undergo additional screenings" and "[p]olice questioned 9,854 of them and arrested 813."¹³ TSA maintains that secondary security screening referrals are based only on specific observed behaviors that coincide with behaviors catalogued on officers' checklists *and not* on passengers' appearance, race, ethnicity, or religion.¹⁴ TSA's Assistant Administrator of Security Operations, Mo McGowan, reinforced the point that the "SPOT program is the antidote to profiling because referrals are solely based on the behavior of the passenger."¹⁵ Nonetheless, TSA has not made public the precise list of characteristics for which it is observing, or the requirements for being selected for additional inquiry by a BDO.

Right now, there are more than one thousand BDOs operating nationwide.¹⁶ These officers are stationed at 161 U.S. airports.¹⁷ Because SPOT consists of observation by humans, not machines, its effectiveness depends largely on the officers—the BDOs—who are tasked with identifying potential threats through SPOT.¹⁸ BDO recruits are culled from the group of routine security screeners at TSA—a job that requires only a high school degree, GED, or its equivalent, and a criminal background check.¹⁹ Transportation security personnel selected for the SPOT program undergo four days of classroom instruction in behavior observation and analysis and twenty-four hours of on-the-job training in an airport security checkpoint environ-

Facial Profiling, Privacy, and the Suppression of Dissent, 5 OHIO ST. J. CRIM. L. 79, 82 (2007); Ekman, *supra* note 8.

¹¹ Donnelly, *supra* note 5.

¹² *Id.*

¹³ See Ken Kaye, *TSA Screening More than Just Carry-on Bags: Behavior Detection Officers Covertly Watch Travelers*, WASH. POST, Nov. 9, 2009.

¹⁴ Transp. Sec. Admin., Behavior Detection Officers (BDO) [hereinafter BDOs], http://www.tsa.gov/what_we_do/layers/bdo/index.shtm (last visited Oct. 16, 2009).

¹⁵ Transp. Sec. Admin., Man Charged with Murder SPOTted at Minneapolis-St. Paul Airport (Apr. 3, 2007), available at http://www.tsa.gov/press/happenings/man_spotted.shtm.

¹⁶ Kristen Sze, *Behavior Detection Officers at Airports*, ABC NEWS, May 19, 2008, <http://abclocal.go.com/kgo/story?section=news/local&id=6151281>.

¹⁷ See Kaye, *supra* note 13.

¹⁸ TSA Expands Career Opportunities, *supra* note 4. The designation of special BDOs appears to be part of a larger Transportation Security Officer ("TSO") Career Progression initiative introduced in 2006. The initiative creates new pay bands for TSOs to progress through the ranks of the agency with career tracks focused on providing opportunities in advanced positions. *See id.*

¹⁹ Bernard E. Harcourt, Behavioral Profiling at U.S. Airports (Aug. 20, 2006), <http://www.law.uchicago.edu/files/files/harcourt-search-defend.pdf>.

ment.²⁰ Many BDOs have been trained by a former corrections officer who relies on his experience with the incarcerated to detect deception.²¹

TSA's behavioral profiling program relies on the Facial Action Coding System ("FACS"), which was developed in 1978 by psychologists Paul Ekman and Wallace Friesen.²² Using a catalogue to map over ten thousand facial muscle combinations, Ekman and Friesen created FACS as a "comprehensive, anatomically based system for measuring all visually discernible facial movement."²³ FACS thus purports to standardize a method of deciphering facial behavior for cues of deception.²⁴ Even in the face of a purposeful or unconscious attempt to conceal, according to the theory behind FACS, human emotions manage to appear as micro-expressions, which last from one-fifth to one-twenty-fifth of a second or less.²⁵

Ekman explains how he and his co-author gathered empirical data to develop his catalogue:

In our studies, we recorded interviews set up in such a way that we knew when a person was lying. Afterward, we replayed the videotapes over and over in slow motion to identify the expressions and behaviors that distinguish lying from truth-telling. We spent hours identifying the precise moment-to-moment movements of the facial muscles based on [FACS] to get comprehensive evidence of the kinds of facial looks that accompany spoken lies. Once such expressions are identified, people can be quickly trained to recognize them as they occur.²⁶

"According to Ekman and Friesen, faces manifest each emotion similarly, irrespective of race, ethnicity, or gender."²⁷

Ekman and Friesen's work has been criticized on several grounds. First, and most fundamentally, some suggest that expressions do not reflect the inner feelings of the expresser.²⁸ Instead of forecasting emotions in the person exhibiting a particular expression, these scholars argue that

²⁰ BDOs SPOT, *supra* note 1.

²¹ *Id.*; see also Master Transportation Security Officer, *supra* note 4.

²² Herbert, *supra* note 10, at 82. For a comprehensive look at Ekman's work, see <http://www.paulekman.com>.

²³ Erika L. Rosenberg, *The Study Of Spontaneous Facial Expressions in Psychology*, in WHAT THE FACE REVEALS: BASIC AND APPLIED STUDIES OF SPONTANEOUS EXPRESSION USING THE FACIAL ACTION CODING SYSTEM (FACS) 3, 13 (Paul Ekman & Erika L. Rosenberg eds., 2d ed. 2005).

²⁴ Herbert, *supra* note 10, at 82.

²⁵ *Id.*

²⁶ Ekman, *supra* note 8.

²⁷ Herbert, *supra* note 10, at 82. Ekman also notes how he studied the "behavioral signs that accompanied the act of thinking up an answer on the spot (e.g., an increase in pauses) and signs of emotion in the face, voice or gesture that contradict the words being spoken ("The answer is definitely no' accompanied by just a slight nod of the head)." Ekman, *supra* note 8; see also PAUL EKMAN & WALLACE V. FRIESEN, UNMASKING THE FACE: A GUIDE TO RECOGNIZING EMOTIONS FROM FACIAL EXPRESSIONS 17 (1975).

²⁸ Beth Azar, *What's in a Face?*, MONITOR ON PSYCHOLOGY, Jan. 2000, <http://www.apa.org/monitor/jan00/sc1.html>.

“[e]xpressions evolved to elicit behaviors from others.”²⁹ Thus, “a smile may encourage people to approach while a scowl may impel them to stay clear, and a pout may elicit words of sympathy and reassurance.”³⁰ If facial expressions are social cues intended to send signals to other human beings, then a SPOT security program premised on the scientific rationale of detecting suppressed emotions—especially a propensity for truthfulness—would be undermined.

A second possible limitation in Ekman and Friesen’s FACS model is that it contains only a subset of all human facial muscle movements and represents merely a recorded portion of the “total repertoire used by a person during his daily life.”³¹ After all, the FACS catalogue was created by humans, and researchers can only score those expressions that have actually been observed. Therefore, it is possible that the facial expressions accompanying a terrorist’s response to a BDO query might not register under the FACS coding framework and would tell security personnel nothing about that person’s emotions. Moreover, even if the facial expression has been coded, humans differ greatly in the manner in which they process emotions: the relative speed at which an emotion arises, the level of intensity and duration, and the time an emotion takes to return to its baseline levels.³²

A third critique of FACS concerns whether it can be used effectively outside of the laboratory environment. Ekman and Friesen’s laboratory research relied on recorded interviews and the replaying and scrutinizing of videotapes in slow motion. Whether the accuracy of decoding facial expressions for deception cues can be effectively transferred from the laboratory setting to the real-time chaos and commotion of fast-paced American airports is an open question. And whether the skillful and expert detection abilities of scientists trained in the art of emotion recognition can be replicated by BDOs, who receive fairly limited substantive training, is equally uncertain. Ekman himself acknowledged some uncertainties about the translation of FACS from the lab to the airport.³³ There are, for example, significant differences between the two environments when it comes to the potential for background noise and interruption. Because a person seeking to suppress an emotional response can typically do so one-twenty-fifth of a

²⁹ *Id.*

³⁰ *Id.*

³¹ Michael Heller & Veronique Haynal, *Perspectives for Studies of Psychopathology and Psychotherapy*, in EKMAN & ROSENBERG, *supra*, note 22, at 506, 507-08.

³² See Clark Freshman, *After Basic Mindfulness Meditation: External Mindfulness, Emotional Truthfulness, and Lie Detection in Dispute Resolution*, 2006 J. DISP. RESOL. 511, 517.

³³ Ekman, *supra* note 8 (“Meanwhile, short-term research on several questions—whether SPOT misses people whose behaviors are on its checklist; whether other behaviors should be included on the list; and whether additional training would increase observers’ accuracy—could help improve the program.”).

second after an emotion initially appears, observers who blink or are distracted may fail to see it.³⁴

While SPOT's scientific basis lies in FACS, its more immediate precursor lies overseas in Israel.³⁵ Israel conducts mandatory full searches and interviews of every passenger,³⁶ with an average time spent of fifty-seven minutes per person.³⁷ These interviews focus not just on the passenger's verbal answers, but on their behavior and expressions.³⁸ Behavioral profiling for airport security emerged in Israel and made its way to the United States via a program run by Massachusetts state officials at Boston's Logan International Airport in 2002. In England, the British Aircrafts Authority ("BAA") has also implemented behavioral profiling at the Heathrow Express rail service. The trials were so successful that "the BAA was considering training all frontline staff at its seven airports, including 6,000 at security checkpoints."³⁹

There are, however, significant differences between behavioral profiling in U.S. airports, which (at least initially) relies on observation, and the use of behavioral profiling in Israeli aviation security, in which observation is carefully combined with in depth questioning of all passengers.⁴⁰ Moreover, the difference in air passenger volume between Israel and the United States is substantial. In 2007, just over ten million international passengers passed through Ben Gurion International Airport and just four hundred thousand domestic travelers.⁴¹ The number of scheduled domestic and international passengers on U.S. airlines during the first eleven months of 2007 was 706.6 million.⁴² To implement an aviation security program in the United States that paralleled the Israeli model would present massive logistical difficulties and significant financial costs. And spending an hour interviewing and scrutinizing each passenger, as the Israelis do, would make airport travel even more cumbersome and slow.

³⁴ See ALDERT VRIJ, *DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE* 40 (2000).

³⁵ David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913, 941.

³⁶ *Id.* at 942.

³⁷ Harcourt, *supra* note 19.

³⁸ Harris, *supra* note 35, at 942.

³⁹ *US Airport Security Enters a 'New Age' Thanks to Israeli Expertise*, ISRAEL 21, Sept. 10, 2006, <http://www.israel21c.org>.

⁴⁰ See Anthony L. Kimery, *Keep Your Shoes On and Tell the Truth*, HOMELAND SEC. TODAY, Apr. 29, 2008, http://www.ultimatectmission.com/press_ben-gurion.htm.

⁴¹ *Ben Gurion International Airport Expands Coverage of SimGuard 3000 Planning and Simulation System*, SECURITYPARK.NET, June 23, 2008, http://www.securitypark.co.uk/security_article261753.html.

⁴² Press Release, U.S. Dep't of Transp., Bureau of Transp. Statistics, November 2007 Airline Traffic Data: 11-Month 2007 System Traffic Up 3.2 Percent from 2006 (Feb. 14, 2008), available at http://www.bts.gov/press_releases/2008/bts008_08/html/bts008_08.html.

The training of security personnel differs significantly between the U.S. and Israel. As outlined above, BDOs are typically culled from the ranks of routine security screeners at TSA and need only a high school degree or GED equivalent. The Israelis select officers—the vast majority of whom have military backgrounds—and subject them to tests in order to select those with above-average intelligence and particularly strong personality types.⁴³ The Israeli recruits then benefit from nine weeks of training in behavior recognition where they practice identifying terrorists who may have been trained to evade behavioral pattern recognition. These highly trained Israeli aviation security agents develop advanced skills in order to recognize the precise behaviors exemplified by potential hijackers or terrorists.⁴⁴ By contrast, BDOs receive just four days of classroom instruction and analysis—which relies in part on watching videotapes with known visual cues of deception—and twenty-four hours of on-the-job training in an airport security checkpoint environment.⁴⁵

B. *Profiling Beyond SPOT*

SPOT may be the behavioral profiling security program most in use now in the United States, but it is hardly the only one. Scientists and security officials are pursuing many similar programs, which involve observation of people for particular biological cues.⁴⁶

A close variation on SPOT involves *electronic* rather than *human* observation of travelers for some of the same characteristics that BDOs currently look for. Although at this point publicly available evidence suggests that SPOT is conducted only by human officers, in the near future the program could be combined with video surveillance. A chief architect of the scientific theories underpinning the SPOT program indicated that within one to two years, TSA will be able to identify, via surveillance cameras and behavioral profiling, “anyone whose facial expressions are different from the previous two dozen people in line.”⁴⁷ The potential for implementing SPOT with the use of video surveillance raises the possibility that the program could be expanded to monitor both a greater number of airports and a greater number of passengers at each airport.⁴⁸ Such an expanded approach

⁴³ Harcourt, *supra* note 19.

⁴⁴ Harris, *supra* note 35, at 942.

⁴⁵ Harcourt, *supra* note 19.

⁴⁶ E.g., Ian MacLeod, *Airport Screening to Focus on Body Language; ‘Behavior Detection Officers’ to Scrutinize People, Not Things*, OTTAWA CITIZEN, Aug. 14, 2009, at A1.

⁴⁷ Ekman, *supra* note 8.

⁴⁸ See Karen B. Froming et al., Comprehensive Affect Testing System (CATS) (2006), <http://www.psychologysoftware.com/CATS.htm> (providing a well-validated, reliable computerized test of human emotion processing); Janet Rothwell et al., *Silent Talker: A New Computer-Based System for the Analysis of Facial Cues to Deception*, 20 APPLIED COGNITIVE PSYCHOL. 757, 757 (2006), available

to passenger profiling would be consistent with emerging trends in security and law enforcement monitoring; the Department of Homeland Security (“DHS”) has been channeling millions of dollars to local governments around the country to create hi-tech camera networks that can be linked with private surveillance systems.⁴⁹

In addition to mere *visual* monitoring—by humans or cameras—another variation on SPOT involves closely observing a person’s behavior while he is responding to questions. During the summer of 2006, TSA began testing a biometric-based security screening technique that uses complex algorithms, artificial-intelligence software, and polygraph principles to ferret out passengers who exhibit certain suspicious physiological responses to automated questioning.⁵⁰ In a pilot project in Tennessee, passengers answered questions about their travel plans as they placed their hands on sensory monitors that measure blood pressure, pulse, and sweat levels. Biometric identification through the use of techniques such as retinal scans and fingerprint matching has expanded, and TSA continues to test this technology at airports and harbors across the country.⁵¹ Even the Nintendo Wii video game system has been put to use as a potential tool for behavioral profiling.⁵² In order to monitor passenger “fidgeting” while going through airport security, “[r]esearchers took a Wii balance board—a device people stand on to interact with certain Nintendo Wii video games—and altered it to show how someone’s weight shifts. Studies are now under way to deter-

at <http://www.forensic-centre.com/files/Silent%20Talker.pdf> (describing a non-invasive psychological profiling system that analyzes involuntary non-verbal behavior).

⁴⁹ Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 2 (2008) [hereinafter Balkin, *The Constitution in the National Surveillance State*]; Charlie Savage, *United States Doles Out Millions for Street Cameras*, BOSTON GLOBE, Aug. 12, 2007, at A1 (“Since 2003, the Department has handed out some \$23 billion in federal grants to local governments for equipment and training to help combat terrorism . . . [including] millions on surveillance cameras, transforming city streets and parks into places under constant observation.”).

⁵⁰ Karp & Meckler, *supra* note 10; see also Guy Grimland, *Israel Startup Uses Behavioral Science to Identify Terrorists*, HAARETZ, May 9, 2008, available at <http://www.haaretz.com/hasen/spages/981986.html> (describing technology known as WeCU that, “[a]ccording to the company’s founders, in under a minute . . . can screen an individual, without his or her knowledge or cooperation and without interfering with routine activities, and disclose intentions to carry out criminal or terror activity” by measuring subtle physiological and behavioral changes during the exposure to certain stimuli).

⁵¹ Transp. Sec. Admin., Biometrics, <http://www.tsa.gov/approach/tech/biometrics.shtm> (last visited Oct. 16, 2009); see also Pam Benson, *Will Airports Screen for Body Signals? Researchers Hope So*, CNN, Oct. 6, 2009, available at <http://www.cnn.com/2009/TECH/10/06/security.screening/index.html> (describing a Department of Homeland Security-funded project called Future Attribute Screening Technology which focuses on “whether you have hidden explosives or whether you’re carrying a weapon” by using “sensors and cameras located at security checkpoints” that “measure the natural signals coming from your body—your heart rate, breathing, eye movement, body temperature and fidgeting”).

⁵² See Benson, *supra* note 51.

mine whether there is a level of fidgeting that would suggest the need for secondary screening.”⁵³

Security and law enforcement agencies are also working on programs to analyze voices. Israeli airport security appears to have developed the most advanced automated and human monitoring of passengers’ visual and auidial cues to date. An Israeli company has developed a technology known as Suspect Detection Systems (“SDS”), essentially an individualized polygraph test, which purportedly can evaluate whether an individual is a threat in three minutes. As described by a recent report:

The way it works is that the passenger approaches the machine—they put their passport on a scanner and their other hand on a sensor. He is then presented with an array of written questions in the language indicated by the passport (or in an audio mode with earphones if requested). A special detector then measures physiological responses.⁵⁴

The company presented the technology at a recent conference attended by former DHS Secretary Michael Chertoff, who has expressed enthusiasm for this approach.⁵⁵ A system like SDS builds not just on behavioral observation, but the related technology of voice risk analysis (“VRA”). In a different context, VRA is already being tested to determine whether social-services benefits applicants in the United Kingdom are lying. The system purportedly detects “changes in the sonic frequencies of people’s voices that are caused by stress” and “places the changes on a spectrum of risk” from which operators can “form their own judgment of risk based on both the VRA technology and behavioural-analysis skills in which they are also trained.”⁵⁶

Yet another application would use not just visual, hand, or voice sensors, but actual brain scans to detect an individual’s thoughts or plans. A recent article presages the next generation of detection devices using “MRI brain scans [that] detect surprisingly specific mental acts—like whether you’re entertaining racist thoughts, doing arithmetic, reading, or recognizing something.”⁵⁷ Some entrepreneurs are already pushing the technology into the marketplace: firms like No Lie MRI will conduct a “truth verification” scan for employees.⁵⁸

⁵³ *Id.*

⁵⁴ David Brinn, *Israeli Airport Technology Detects Intent of Terrorists*, ISRAEL 21C, May 8, 2005.

⁵⁵ Avida Landau, *Chertoff Keen on Israeli Airport Security Technology*, REUTERS, May 29, 2008, <http://www.reuters.com/article/latestCrisis/idUSL29854328>.

⁵⁶ *Whose Pants on Fire*, ECONOMIST, May 10, 2008, at 104.

⁵⁷ Clive Thompson, *Why the Next Civil Rights Battle Will Be Over the Mind*, WIRED, Mar. 24, 2008, http://www.wired.com/techbiz/people/magazine/16-04/st_thompson.

⁵⁸ *Id.*

DHS recently unveiled its next generation of security screening technology: devices that utilize body scanners that can read travelers' minds.⁵⁹ A new system called MALINTENT uses a series of sensors and imagers that measure body temperature, heart rate, and respiration for unconscious signs of bad intentions that escape the naked eye.⁶⁰ The technology is currently packaged in a mobile screening laboratory and is in the process of being field tested.

Just as behavioral profiling programs are not limited to the facial observations in SPOT, they also are not limited to airport security. Secretary of Homeland Security Janet Napolitano has "strongly advocated using security technology as a law enforcement tool."⁶¹ In particular, as Governor of Arizona she promoted the use of face identification and recognition technology by surveillance cameras.

To date, the available evidence points to the use of the official SPOT program only at a certain number of U.S. airports; however, TSA readily admits that the technique serves as an additional layer of security that is highly beneficial to *all modes of transportation security* because it maximizes the effectiveness of security personnel already deployed and does not require additional specialized screening equipment.⁶² Thus, the initial use of SPOT's behavioral profiling features at airports could foreshadow an expanded use of the program at other public places frequented by large numbers of Americans, such as subway systems, bus terminals, and sports stadiums.

In fact, closely related programs have already been implemented by the TSA and local authorities in other areas, like subways. For example, in the lead up to presidential inauguration in January 2005, Washington, D.C., Metro police officers used behavioral profiling techniques to patrol subway stations and identify and question suspicious riders.⁶³ Similarly, TSA began deploying Visible Intermodal Protection and Response ("VIPR") teams in December 2005 "along Amtrak's Northeast Corridor and Los Angeles rail lines; ferries in Washington state; and mass transit systems in Atlanta, Philadelphia, and Baltimore."⁶⁴ Between 2007 and 2008, VIPR teams conducted

⁵⁹ Allison Barrie, *Homeland Security Detects Terrorist Threats by Reading Your Mind*, FOX NEWS, Sept. 23, 2008, http://www.foxnews.com/printer_friendly_story/0,3566,426485,00.html.

⁶⁰ *Id.*

⁶¹ Thomas Frank, *Napolitano Backs Security Tech*, USA TODAY, Dec. 29, 2008.

⁶² BDOs, *supra* note 14.

⁶³ Sara Kehaulani Goo, *Metro Officers Keep a Keen Eye on Riders: New Behavioral Profiling Techniques, TSA Training Help Target Suspicious Subway Passengers*, WASH. POST, Jan. 10, 2005, at A06.

⁶⁴ Sara Kehaulani Goo, *Marshals to Patrol Land, Sea Transport: TSA Test Includes Surveillance Team on Metro System*, WASH. POST, Dec. 14, 2005; *see also* Transp. Sec. Admin., VIPR Teams Enhance Security at Major Local Transportation Facilities (June 20, 2007), http://www.tsa.gov/press/happenings/vipr_blockisland.shtml (noting that "VIPR teams over the past two years have augmented security at key transportation facilities in urban areas around the country, including New York City,

494 operations in the aviation mode.⁶⁵ As part of this program, air marshals—who are trained to covertly detect suspicious criminal activity—were assigned to support the VIPR teams by looking for individuals attempting to avoid or depart areas upon visual observation.⁶⁶ DHS is developing a mobile lab to conduct this sort of profiling operation anywhere in the country.⁶⁷ And even the private sector may have an interest in using these techniques in certain industries.⁶⁸

The expansion makes sense, as behavioral profiling may have more benefit outside the airport, where there are not as many layers of security, and where not every traveler goes through a metal detector and has her belongings x-rayed. It is not inconceivable that the U.S. intelligence community's alleged domestic use of spy satellites could be combined with SPOT-like visual cue observation so that virtually everybody in a public place is subject to behavioral profiling at all times.⁶⁹

C. *The Benefits of Behavioral Profiling*

There are a variety of reasons that security advocates have enthusiastically embraced behavioral profiling programs. We see six possible benefits to this type of security.

First, and most fundamentally, behavioral profiling provides an additional layer of security and another opportunity for homeland security officials to identify potential threats. That is to say, the appropriate question is not whether behavioral profiling is superior to other layers of security—

Buffalo and Syracuse, N.Y., Los Angeles, Boston and Providence, R.I.” and “[l]ooking to expand the VIPR concept beyond the rail sector to other forms of mass transit, TSA has been reaching out to several high-volume ferry operators to provide additional security, particularly during the summer months when ridership is at its peak”).

⁶⁵ Kip Hawley, Assistant Sec’y, U.S. Dep’t of Homeland Sec., Transp. Sec. Admin., Continuing Efforts to Improve Our Aviation Security Environment, Statement Before the United States House of Representatives Committee on Transportation and Infrastructure, Subcommittee on Aviation (July 24, 2008), available at http://www.tsa.gov/press/speeches/072408_hawley_aviation_security.shtm.

⁶⁶ *Id.*

⁶⁷ Jay M. Cohen, Science and Technology Stakeholders Conference: A World in Change . . . Building Collaborations in Science and Technology to Enable Homeland Security Capabilities 11 (May 21-24, 2007), available at http://www.homelandsecurity.org/StakeholdersMay07/P11_Cohen.pdf.

⁶⁸ A *Washington Post* article notes the overlap between new homeland security efforts and surveillance in Las Vegas casinos. See Ellen Nakashima, *From Casinos to Counterterrorism*, WASH. POST, Oct. 22, 2007, at A01 (noting that “[c]asinos have tried to use facial-recognition software to identify known cheats in real time” with the possibility for using iris scan technology to identify customers in the near future).

⁶⁹ All of the visual observation could be combined with an expanded satellite program so that government could watch people on streets more easily. See Michael Isikoff & Mark Hosenball, *You’re On Candid Camera: The Bush Administration Now Wants to Watch You from the Sky*, NEWSWEEK, June 25, 2008, <http://www.newsweek.com/id/143257>.

such as hardened cockpit doors, baggage screening, and metal detectors—but rather, whether it enhances security when used in addition to those programs.

Second, a core lesson of 9/11 is that it is people, not particular tools, weapons, or objects that pose the greatest threat. The simple box-cutters used as weapons by the 9/11 hijackers are no longer allowed through security, but surely cunning terrorists can devise suitable alternatives if they wish to perpetrate violence on an airplane. Whether through plastic knives, liquid explosives, or blunt objects, it seems unlikely that screening objects alone can eliminate the risk of terrorism. As a TSA spokesman put it, “[s]omewhere out there the needle in the haystack is a bad guy. If our behavior detection officer’s [sic] give us better odds of finding that needle, we’re going to use every tool we can while protecting the rights and privacy of passengers.”⁷⁰ Behavioral profiling is not the only aviation security tactic that focuses on people—watchlists serve the same function. But again, behavioral profiling can be used *in addition to* watchlists, and, given the numerous problems with watchlists,⁷¹ behavioral profiling may well be more effective. At a minimum, behavioral profiling focuses on the actual individual in question, not just a name.

Third, compared to subjecting all passengers to high scrutiny (as the Israeli model does), targeted behavioral profiling along the lines of SPOT is a more efficient use of resources. SPOT allows TSA officials to focus only on particular individuals for more intensive questioning, maximizing the effectiveness of available resources.

Fourth, and similarly, behavioral profiling is far less burdensome and invasive for individuals than would be a questioning of every single traveler, as in the Israeli model.⁷² If the United States were to adopt that approach, passengers would face lengthy delays and be forced to reveal extensive information about themselves. From the standpoint of passenger convenience and air travel expediency, the SPOT program seems to benefit from two important attributes. Because SPOT is based on visually observable behavioral cues, the program is executed through non-intrusive means and effective implementation does not require conducting physical searches. And unlike mandatory baggage screening procedures which apply to all passengers and create delays, long lines, and increased hassle, enforcing SPOT does not necessitate stopping every passenger who walks through

⁷⁰ Sze, *supra* note 16.

⁷¹ See, e.g., Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2152 (2006).

⁷² Now, Americans have become somewhat more tolerant of security hassles; indeed, 71 percent of respondents in a *USA Today* Gallup Poll conducted five years after 9/11 agreed that the terrorist attacks permanently changed the rules for how Americans fly. And more than three-quarters of those surveyed thought airport security was effective while 70 percent said none of the security measures used in airports should be stopped. Marilyn Adams, *Most Fliers Accept Intrusion in the Name of Security*, USA TODAY, Sept. 7, 2006, at B1.

the airport. For an air travel population that already registers a strong distaste for TSA and the burdens of aviation security, the less intrusive the passenger impact, the more likely the public will tolerate a security measure.⁷³ Moreover, in passing a law to implement the recommendations of the 9/11 Commission, Congress included a provision directing TSA to reduce the average security-related delays in airports to less than ten minutes—which certainly could not be achieved were every passenger interviewed.⁷⁴

Fifth, behavioral profiling need not involve any explicit racial or ethnic profiling. This has several advantages. It has a security value, in that it does not permit an individual to evade detection merely because he or she does not have a racial or ethnic appearance that seems to signal a terrorist. Law enforcement experts generally contend that observing an individual's behavior is far more valuable than profiling based on race or ethnicity alone.⁷⁵ Further, this type of profiling is likely to improve public support for and confidence in the program, by lending it additional legitimacy.

Sixth, anecdotal evidence suggests behavioral profiling can yield results. In a recently publicized incident, a BDO identified five men in a security screening line at Washington D.C.'s Dulles International Airport whose behavior seemed suspicious. TSA immediately notified the Metropolitan Washington Airports Authority Police Department. Subsequent questioning revealed that all five passengers had entered the U.S. illegally and possessed likely-fraudulent identification.⁷⁶ Some of the publicly available results of SPOT also include: identification of a passenger carrying surveillance photos of high-risk buildings and bridges; interception of a man wearing several layers of clothing with wires extending from his sleeves to a

⁷³ See Eileen Sullivan, *Poll: Travelers Dislike TSA as Much as IRS*, USA TODAY, Dec. 20, 2007. Indeed, an Associated Press ("AP") poll conducted in December 2007 ranked the TSA as the second most least-liked federal agency—about as popular as the much maligned IRS. *Id.* The AP poll found that the more people travel, the less they like TSA and that the inconvenience of security was the top complaint of air travelers—mentioned by 31 percent of those who had taken at least one trip in the past year. *Id.*

⁷⁴ Implementing the 9/11 Commission Recommendations Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, § 1612(b)(2) (2007); *cf.* Harcourt, *supra* note 19 (reporting that departing passengers in Israel are interviewed and subjected to a one-on-one forensic search, resulting in an average time spent of fifty-seven minutes per person).

⁷⁵ See, e.g., David A. Harris, *Racial Profiling Redux*, 22 ST. LOUIS U. PUB. L. REV. 73, 89 (2003) ("It is a truism among veteran police officers that it is not what people look like that tells them who to regard as suspicious; it is what people do that matters. If police officers want to know what someone is up to, they watch the subject's behavior . . . Using a racial or ethnic profile to decide whom to stop and search cuts directly against this experience-based rule. When law enforcement uses skin color or ethnic appearance as a proxy for actual dangerousness, law enforcement agents shift their attention. They begin to turn away from what counts—how people behave—and instead attend to what people look like. They pay less attention to what is important—behavior—and more to what is literally only skin deep." (footnote omitted)).

⁷⁶ Press Release, Transp. Sec. Admin., *Illegal Immigrants Again Put on the 'SPOT' at Dulles* (June 11, 2007), available at http://www.tsa.gov/press/happenings/iad_spot.shtm.

black box he was carrying; and the detection of several passengers who were sitting separately but making clandestine signs to one another, while pretending not to know each other, and who later admitted to being paid \$5,000 to travel between airports and observe security.⁷⁷ And recently, a Jamaica-bound passenger aroused the suspicion of BDOs, who, working in conjunction with the Orlando Police Department, the Orange County Bomb Squad, and the Federal Bureau of Investigation, uncovered everything needed to make a bomb in the passenger's checked bag.⁷⁸

In sum, behavioral profiling has the potential to provide more effective security, at a lower cost, with less disruption of innocent people, than other counter-terrorism screening techniques. As new research into human behavior develops alongside emerging technologies, security officials will have the power and ability to profile more people in more places in more different ways. The behavioral profiling paradigm offers the promise of better security alongside more liberty and less hassle for travelers.

But is this legal? And who keeps watch on the behavioral profilers? It is to those questions that we turn in the following Parts.

II. THE CONSTITUTIONALITY OF BEHAVIORAL PROFILING: DOCTRINE

As we have explained above, behavioral profiling has the potential to strengthen homeland security without the burden, intrusion, and expense of other alternatives. But privacy and civil liberties scholars and advocates have leveled a series of claims that behavioral profiling is inconsistent with our constitutional law and values. In this Part, we address those claims.

Part II.A examines whether behavioral profiling—in its design or implementation—is really racial profiling by another name, and violates the Equal Protection Clause of the Constitution.⁷⁹ Part II.B considers privacy concerns with the program, including whether it may infringe upon the Fourth Amendment right to be free of unlawful searches and seizures. Part II.C then looks at the consequences of being identified by behavioral profiling and concerns under the Due Process Clause.⁸⁰ For each of these three areas, there is a constitutional issue that is linked to a civil liberties principle: equality, privacy, and liberty. Moreover, in each case the legal doctrine shadows the policy principle. For equality, the Constitution asks whether the program is rational. For privacy, whether it is reasonable. For

⁷⁷ BDOs SPOT, *supra* note 1.

⁷⁸ Hawley, *supra* note 65.

⁷⁹ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

⁸⁰ See U.S. CONST. amend. V (“[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law . . .”).

liberty, whether it treats people fairly, given the competing interests at stake.

Our analysis in this Part is purely doctrinal: we analyze behavioral profiling under current judicial constitutional doctrine for each of these issues. It is also conditional—we can conclude only that behavioral profiling is constitutional *if* we assume that it operates in the manner that the government describes. We address this uncertainty in Parts III and IV.

A. *Equality: Profiling and the Equal Protection of the Laws*

The most obvious potential legal flaw with behavioral profiling programs is that they may simply be racial or ethnic profiling in disguise.⁸¹ Several critics have leveled precisely this charge against SPOT.⁸² This concern is not far-fetched, since the very purpose of SPOT is to look at a person's face and other bodily characteristics to determine if he is likely to be a terrorist or criminal suspect. Before addressing the legal standard here, we delineate the different varieties of racial or ethnic profiling that might occur as part of a behavioral profiling program.⁸³ (Of course, to the extent the government has particularized information about an individual or suspect that involves race, this would not be considered racial profiling. This sort of "suspect description reliance is perceived as innocuous," in contrast to "use[s] of race that stigmatize[] a group as crime prone."⁸⁴)

⁸¹ Consider an example from the Democratic National Convention in Boston in 2004:

[L]aw enforcement used behavioral profiling as part of heightened security measures. However, there were incidents where it appeared that law enforcement was actually engaging in racial profiling. Three bearded men of South Asian origin were detained in separate incidents based upon their alleged suspicious behavior. Their accounts all indicate that they were merely walking around, their only distinguishing feature being the color of their skin. Yet, the Secret Service maintained, "[w]e don't interview individuals based on their appearance. We interview them based upon their behavior." This incident illustrates how easily behavioral profiling can be perceived as a guise for racial profiling.

Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 500-01 (2005) (footnotes omitted).

⁸² See, e.g., Herbert, *supra* note 10, at 86. ("SPOT provides the government with unfettered discretion to select and investigate certain individuals. If public sentiment and history are our guides, SPOT is destined to disproportionately target race, ethnicity, and color, not to detect terrorist activity." (footnotes omitted)).

⁸³ We do not address religious profiling. On that, see Murad Hussain, Note, *Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling*, 117 YALE L.J. 920 (2008).

⁸⁴ R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1206 (2004); see also *id.* at 1205 ("Legal scholars have uniformly concluded that suspect description reliance is permissible under the Equal Protection Clause because it is not racially discriminatory. Two decades ago, Professor Sheri Lynn Johnson concluded that officers' reliance on a race-based suspect description should not be viewed as racially discriminatory. More recently, Professors Randall Kennedy and David Cole both have urged that racial profiling be prohibited, yet that officers be permitted to rely on race in

1. Varieties of Racial Profiling

First, at a most extreme level, since the official criteria for being identified through the program have not been made public, it is possible that race, religion, or ethnicity is actually one of the criteria BDOs are trained to look for. Although the government denies this,⁸⁵ unless the criteria are made public (something unlikely to happen for obvious security reasons), the possibility cannot be entirely discounted. In particular, there is some concern that the Israeli airport security model from which SPOT derives does rely on intentional racial or ethnic profiling.⁸⁶

Second, and relatedly, the possibility exists that the SPOT criteria do not directly target people of a particular race or ethnicity, but instead focus on second-order behavioral traits of certain groups. For example, imagine if the program identified people who cross themselves, cover their heads, or have long beards.⁸⁷ To the extent the program intentionally looks to these types of criteria as proxies for race or ethnicity, this would function in essentially the same way as the most explicit and direct type of racial profiling described above. On the other hand, it is of course conceivable that these concerns actually are directed at behavior, not an underlying racial, ethnic, or religious group—for example, TSA might believe that people who cross themselves are nervous and more likely to be a security risk, not that Catholics are a security risk.

efforts to apprehend a known perpetrator. Other scholars have similarly concluded that suspect description reliance is both constitutionally permissible and practically desirable.” (footnotes omitted)).

⁸⁵ TSA maintains that secondary security screening referrals are based only on specific observed behaviors that coincide with behaviors catalogued on officers’ checklists and *not* on passengers’ appearance, race, ethnicity, or religion. BDOs, *supra* note 14.

⁸⁶ See Larry Derfner, *Stereotyping Security*, JERUSALEM POST, Mar. 22, 2007 (reporting that security officials admit that Arabs—including Israeli Arabs—are scrutinized to a greater degree than Jews). Israeli officials admit they engage in additional layers of selective passenger screening based on specific social and physical criteria. For example, the greatest suspicion falls on males between their late teens and mid-30s traveling alone. *Id.*; see also *Rights Group Challenges Israel’s Airport Security: Arabs Complain They Face Racist Treatment when Boarding Planes*, MSNBC, Mar. 19, 2008, <http://www.msnbc.msn.com/id/23714853> (arguing that a group of civil rights organizations recently filed a legal challenge with Israel’s Supreme Court arguing that Israel’s “practice of ethnic profiling is racist because it singles out Arabs for tougher treatment” and should be deemed illegal).

⁸⁷ Ramirez & Woldenberg, *supra* note 81, at 500-01 (“What may seem like out of place behavior is very culturally subjective. To the extent that behaviors are subjective or normative, behavioral profiling can easily and unconsciously bleed into racial profiling. For example, asking law enforcement to make decisions based upon a person’s apparent nervousness or profuse sweating can be easily used as a pretext for stopping someone for their appearance based on race or national origin.” (footnotes omitted)). For additional development of this idea, see Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002); Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES, Jan. 15, 2006 (“Discrimination was once aimed at entire groups Now a subtler form of discrimination has risen to take its place. This discrimination does not aim at groups as a whole. Rather, it aims at the subset of the group that refuses to cover, that is, to assimilate to dominant norms.”).

Third, and more likely, is the possibility that SPOT's criteria are not particularly exacting and leave extensive discretion to BDOs to target anybody who "looks suspicious"—and the BDOs themselves might determine who "looks suspicious" on the basis of race or ethnicity.⁸⁸ As one scholar puts it, "[w]ithout concrete, objective criteria, behavioral profiling can become just another way for law enforcement to ferret out what they think of as 'different' behavior."⁸⁹ This, too, the agency denies: it asserts that BDOs are trained not to profile based on race.⁹⁰ But again, without making the details of the training public (which would be inconsistent with security concerns), this is difficult to establish.

Fourth, and most likely, is the concern that even if the BDOs are given clear, non-race-based objective criteria—and are trained not to select passengers based on race or ethnicity—human observers will nonetheless tend to pay more attention to, and look more scrutinizingly at, persons of a particular race or ethnicity because of either conscious or unconscious bias.⁹¹ No matter how well-trained, a BDO is only human, and cannot look at all people in a crowded airport or even a single security line for the same amount of time, with the same focus, and the same perception. It has been noted that "[t]he main advantage of FACS [the facial expression catalogue that serves as the scientific underpinning of SPOT] is the possibility to measure facial behavior objectively."⁹² However, even assuming that facial behaviors have been coded objectively, the interpretation of that expression may occur subjectively, through the observers' "inferential judgments about what emotion is present upon a scrutinized face."⁹³

Fifth, and finally, is the concern that for whatever reason, objective, non-racial criteria, applied evenly and appropriately by BDOs, still end up targeting a disproportionately high number of people from certain classes. There would be two likely explanations for this. One is straightforward: there may be a greater number of security threats among certain popula-

⁸⁸ Cf. *City of Chicago v. Morales*, 527 U.S. 41 (1999) (striking down a city ordinance that required a police officer who observed a person whom he reasonably believed to be a criminal gang member loitering in any public place with one or more other persons to make all persons disperse, as unconstitutionally vague for failing to provide fair notice of prohibited conduct or minimal guidelines for enforcement).

⁸⁹ Ramirez & Woldenberg, *supra* note 81, at 500; see also Sarah Kershaw, *Acting Like a Usual Suspect*, N.Y. TIMES, Oct. 21, 2007 ("Many investigators trying to read behavior and the intent to commit a crime engage in 'confirmation bias,' Mr. Turvey [an expert Forensic Scientist] said; that is, the officer or profiler is looking for proof to support a theory—a theory typically based on that profiler's previous experience—and not for evidence that would discount the theory.").

⁹⁰ See Donnelly, *supra* note 5 (noting that BDOs are trained to look for red flags in individuals who exhibit unusual or anxious behavior and "[r]acial or ethnic factors are not a criterion for singling out people").

⁹¹ This is the key charge levied, and developed by Professor Herbert, *supra* note 10, at 102-04.

⁹² Eva Bänninger-Huber, *From PAMS to TRAPS: Investigating Guilt Feelings with FACS*, in EKMAN & ROSENBERG, *supra* note 22, at 529, 530.

⁹³ Herbert, *supra* note 10, at 91.

tions. The second possibility is that certain classes of people—because they assume they are going to be the subjects of more intense scrutiny by nature of their race or ethnicity—become more nervous when going through airport security, and so exhibit more of the “objective” criteria which SPOT targets.⁹⁴ Indeed, the potential for security programs like SPOT to “distort” the social world has an antecedent in traditional racial profiling. One scholar notes that “many African-Americans cope with the possibility of pretextual traffic stops by driving drab cars and dressing in ways that are not flamboyant so as not to attract attention.”⁹⁵ So too, travelers of certain races or ethnicities may act or appear differently in airports because they are conditioned to believe there is a greater likelihood of being stopped or questioned.

2. Concerns with the Unconscious

The SPOT program, which relies on human observation, may be particularly open to unconscious racial profiling. Recent scholarship on implicit cognition indicates that “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁹⁶ As Sigmund Freud long ago explained: “[V]ery powerful mental processes or ideas exist . . . which can produce all the effects in mental life that ordinary ideas do (including effects that can in their turn become conscious as ideas), though they themselves do not become conscious.”⁹⁷

Professor Charles Lawrence’s landmark article on unconscious racism may have particular resonance with respect to the behavioral profiling paradigm.⁹⁸ As he explained, Americans share a common historical and cultural heritage in which racism has played, and still plays, a dominant role. Because of this shared experience, Americans also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual’s race and induce negative feelings and opinions about nonwhites. But they do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions.

⁹⁴ Ramirez & Woldenberg, *supra* note 81, at 500 (“[G]iven the current state of counterterrorism racial profiling, many people who fit an Arab, Muslim, or Sikh profile are already nervous about being singled out, especially in public places such as airports.”).

⁹⁵ David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 305 (1999).

⁹⁶ Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006).

⁹⁷ Sigmund Freud, *The Ego and the Id*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 3, 14 (James Strachey trans., 1961).

⁹⁸ Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.⁹⁹

What has long been suspected anecdotally, and posited as a matter of psychoanalytical theory,¹⁰⁰ is now supported by a substantial body of empirical evidence. The Implicit Association Test (“IAT”) was developed by Dr. Anthony Greenwald in 1994, working out of the University of Washington. The IAT is “designed to examine which words or concepts are strongly paired in peoples’ minds.”¹⁰¹ For example, in the early years of the test, Greenwald used stereotypically white-sounding names, such as Adam and Chip, and stereotypically black-sounding names, such as Alonzo and Jamel. He grouped these terms with pleasant words such as “dream,” “heaven,” and “candy” and unpleasant words such as “evil,” “poison,” and “devil.” Given a random list of these words, the task of grouping the white-sounding names with pleasant words and the black-sounding names with unpleasant words was relatively simple. However, grouping the black-sounding names with pleasant words and the white-sounding names with unpleasant words was more difficult and took more time.¹⁰² And because it takes more time for the mind to connect concepts it perceives as incompatible, researchers have observed that the time differential can be quantified to measure implicit attitudes.¹⁰³

The IAT’s general methodology can be adapted to measure a wide variety of group-trait associations that underlie diverse attitudes and stereotypes.¹⁰⁴ For example, psychologist Robert Livingston conducted a study in which volunteers were told that a woman had been assaulted and suffered a concussion which required several stitches. In half the subjects, the perpetrator was said to be “David Edmonds from Canada” and the other half were told the attacker was “Juan Luis Martinez from Mexico.”¹⁰⁵ The volunteers were asked an appropriate length of time to sentence the attacker to prison, and the IAT tended to predict a longer sentence for the Mexican.¹⁰⁶

Research conducted in connection to IATs reveals how unconscious bias might play out in the profiling paradigm. Harvard University operates a website that aggregates tens of thousands of IATs taken anonymously by subjects online. One analysis indicated that more than two-thirds of non-Arab, non-Muslim volunteers displayed implicit bias against Arab Muslims.¹⁰⁷ While it is difficult to conclude with any degree of certainty whether BDOs harbor stereotypical views of air travelers, if their attitudes track

⁹⁹ *Id.* at 322.

¹⁰⁰ *See, e.g.*, JOEL KOVEL, WHITE RACISM: A PSYCHOHISTORY ch. 8 (1970).

¹⁰¹ Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Greenwald & Krieger, *supra* note 96, at 952.

¹⁰⁵ Vedantam, *supra* note 101.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

the nation at large and hew to the views of the average American, then there is a good chance that some unconscious bias is present. Even before 9/11, some viewed Arab Americans and Muslims as likely terrorist suspects.¹⁰⁸ And the events of 9/11 and its aftermath only solidified this stereotypical view in the eyes of some Americans.¹⁰⁹ Finally, many have suggested that the media contributes to the development of these cultural stereotypes by regularly printing newspaper headlines with words such as “Islam” and “Muslim” next to words like “fanatic,” “fundamentalist,” “militant,” “terrorist,” and “violence.”¹¹⁰ If federal officials are constantly on the look-out for behavior that illustrates characteristics related to terrorism, danger, and criminality, while at the same time harboring unconscious bias, they are more likely to make a decision about who to stop that is based on their (perhaps unconscious) stereotypes instead of a rational decision based on purportedly empirically-based criteria.

3. Doctrine

The Equal Protection Clause (applied to the federal government through the Fifth Amendment’s Due Process Clause¹¹¹) prohibits the government from denying “any person” the equal protection of the laws. If SPOT and other behavioral programs do consist of racial profiling, they would be subject to strict scrutiny review in court. Thus, if SPOT is deemed to be a racial profiling law enforcement program, it violates the Constitution, unless it is narrowly tailored and necessary to achieve a compelling government purpose. For, “[t]he Constitution prohibits selective enforcement of the law based on considerations such as race.”¹¹²

Nonetheless, in order for SPOT to be subject to strict scrutiny analysis by a court, a plaintiff would have to overcome a high threshold standard. To show that a law enforcement program improperly uses race in violation of the Equal Protection Clause, a plaintiff must prove that the government’s

¹⁰⁸ Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”*, 8 ASIAN L.J. 1, 12 (2001); Seth Hilton, *American Conceptions of the Middle East and Islam*, 1 U.C. DAVIS J. INT’L L. & POL’Y 355, 355-56 (1995).

¹⁰⁹ Clark Kent Ervin, *Stereotyping Terrorists: The Usual Suspects*, INT’L HERALD TRIB., June 27, 2006.

¹¹⁰ The Pluralism Project, *Struggling Against Stereotypes*, http://www.pluralism.org/ocg/CDROM_files/islam/struggling.php (last visited Oct. 17, 2009).

¹¹¹ See *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 272-74 (1986). Because SPOT is a federal, not state program—and is staffed by federal officials—it would be analyzed under the Fifth Amendment’s Due Process Clause, which incorporates the Fourteenth Amendment’s equal protection principles. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-15 (1995); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

¹¹² *Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause).

“actions had a discriminatory effect and were motivated by a discriminatory purpose.”¹¹³

We address these two requirements in turn. The former—discriminatory impact or effect—is simpler and easier to satisfy: “To prove discriminatory effect, the plaintiffs are required to show that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class.”¹¹⁴ Under current doctrine, it is unclear whether statistics about how a program operates can be used to establish discriminatory effect. That is, it may be the case that even if persons who are members of a protected class are subjected to SPOT and could not identify a particular similarly situated person who did not get targeted by SPOT, they could still use overall statistics about the program to show its discriminatory effect. In this situation, “[t]he statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated,” and the government could challenge the validity of the statistics.¹¹⁵ Were any of the five possible varieties of racial profiling identified above a part of SPOT, statistics about the program could likely be used to establish that it had a discriminatory effect or impact on certain racial groups.

But merely proving discriminatory effect is not sufficient to subject a program to strict scrutiny or to result in a constitutional violation. The plaintiff must also establish that the “decisionmakers in [their] case acted with discriminatory purpose.”¹¹⁶ This standard “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of . . . its adverse effects upon an identifiable group.”¹¹⁷

Given the government’s public statements about SPOT,¹¹⁸ it is highly unlikely that TSA would ever acknowledge that the program’s design looks to race as a factor either directly or through the use of proxies (these are the first two concerns described above).¹¹⁹ Moreover, with respect to the third and fourth sort of profiling described above, it is unlikely that a TSA officer

¹¹³ *Washington v. Davis*, 426 U.S. 229, 239-42 (1976); *see also* *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that the requirements for a selective-prosecution claim are drawn from equal protection standards and “the claimant must demonstrate that the prosecutorial policy ‘had a discriminatory effect and that it was motivated by a discriminatory purpose’” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))).

¹¹⁴ *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001).

¹¹⁵ *Id.* at 638 (noting that the plaintiffs did not offer any “statistical support for a contention that the mentally ill as a class are burdened disproportionately to any other class” (citing *Schweiker v. Wilson*, 450 U.S. 221, 233 (1981))).

¹¹⁶ *Washington*, 426 U.S. at 239-42.

¹¹⁷ *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) (internal quotation marks omitted).

¹¹⁸ *See, e.g., supra* text accompanying note 15.

¹¹⁹ *See supra* notes 17-20.

is likely to acknowledge that race played a role in his targeting some individuals through the program.¹²⁰ And, the fifth category described above—disparate impact on certain groups without any intent by the agency or the BDOs—would fail this test on its face.¹²¹ The best hope for a plaintiff to succeed in a lawsuit on this point would be to have a whistleblower from TSA come forward to describe the inner-workings of the program—if this were even possible given the need for secrecy in the operational details.

However, while insufficient alone to establish a denial of equal protection, it is conceivable that statistics about the program could be used as evidence in support of the intent requirement. As one court of appeals explained: “Only in rare cases [has] a statistical pattern of discriminatory impact demonstrated a constitutional violation, though ‘the Court has accepted statistics as proof of intent to discriminate in certain limited contexts.’”¹²² In particular, civil rights statutes can, and often do, allow violations to be proved based on discriminatory impact without evidence of a discriminatory purpose. For example, the Court has accepted statistics to prove statutory violations under Title VII of the Civil Rights Act of 1964.¹²³ But it bears repeating that statistics alone cannot satisfy the discriminatory intent requirement in a racial profiling law enforcement program.¹²⁴ In sum, then, it is highly unlikely, based on what we now know about the program and the assumptions we have made about its operation, that a court would ever find that SPOT engaged in intentional racial discrimination and so was subject to strict scrutiny review.

On the other hand, even if SPOT were viewed as a racial profiling program, and so subject to strict scrutiny review, this would not necessarily be fatal. The Court has observed: “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.”¹²⁵ The DOJ’s recent guidelines on racial profiling, released in 2003, contemplate that some governmental security actions—including airport

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Chavez v. Ill. State Police*, 251 F.3d 612, 647 (7th Cir. 2001) (quoting *McCleskey*, 481 U.S. at 293 n.12); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹²³ See generally *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (finding that the government, which presented evidence showing pervasive statistical disparity in certain positions between employment of minority members and whites and bolstered its statistical evidence with testimony of individuals who recounted over forty specific instances of discrimination, carried its burden of proof in employment discrimination action).

¹²⁴ *Chavez*, 251 F.3d at 648 (“In this context, statistics may not be the sole proof of a constitutional violation and neither *Chavez* nor *Lee* have presented sufficient non-statistical evidence to demonstrate discriminatory intent.”); see also *McCleskey*, 481 U.S. 279 (holding that proof of discriminatory impact is insufficient to prove an equal protection violation; there also must be proof of discriminatory purpose).

¹²⁵ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

security screening—may engage in racial classifications and still survive constitutional scrutiny:

The Constitution prohibits consideration of race or ethnicity in law enforcement decisions in all but the most exceptional instances. Given the incalculably high stakes involved in such investigations, however, Federal law enforcement officers who are protecting national security or preventing catastrophic events (*as well as airport security screeners*) may consider race, ethnicity, and other relevant factors to the extent permitted by our laws and the Constitution.¹²⁶

With that in mind, if the government could establish that some form of racial profiling in airports was “necessary” for purposes of national security, and narrowly tailored to serve that compelling governmental interest, the program would not violate equal protection principles. This would be a difficult burden for the government to satisfy, but not impossible.

This does not, however, end the equal protection analysis of the program. The Equal Protection Clause protects people, not just protected classes. Even if a state action does not classify on the basis of race or gender, to the extent it discriminates in how it treats individuals, it still must do so reasonably.¹²⁷ In a line of cases known as “class-of-one” equal protection cases, courts have thus made clear that even a single governmental actor’s decisions about how to make classifications between individuals are subject to rational-basis review: they must be rationally related to a legitimate governmental purpose.¹²⁸

Dicta in a recent class-of-one case raises the question of whether the Court would view any sort of profiling as a classification subject to equal protection.¹²⁹ The case concerned discrimination against a public employee, and the Court held that the Constitution does not protect against discrimination, however arbitrary or unreasonable, in the public employment context, unless specific protected classes are involved. In the majority opinion, Chief Justice Roberts explained that “[t]here are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.”¹³⁰ “In such cas-

¹²⁶ See U.S. Dep’t of Just., Civ. Rts. Div., Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (June 2003), http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm (emphasis added). It is also worth mentioning that in *Korematsu v. United States*, 323 U.S. 214 (1944), the Court applied the strict scrutiny test and still found that a massive program of profiling Japanese-Americans did not violate the Equal Protection Clause. See *id.* at 216. While that holding is rightly denounced today, it is no coincidence that it came during wartime and that the Court deferred to “the finding of the military authorities” about the program being “necessary.” *Id.* at 218-19.

¹²⁷ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450-51 (1985).

¹²⁸ See *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-66 (2000). This requirement does not apply to the government in the employment context. See *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2155 (2008).

¹²⁹ *Engquist*, 128 S. Ct. at 2154-57.

¹³⁰ *Id.* at 2154.

es,” the Court observed, “the rule that people should be ‘treated alike, under like circumstances and conditions’ is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted.”¹³¹ As the Court reasoned, “[i]n such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.”¹³² The Court explicitly analogized the public employment case at issue to police traffic stops:

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. *Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns. But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.*¹³³

Based on this expansive language, one could argue that so long as SPOT does not involve intentional racial profiling against identifiable protected classes, the Equal Protection Clause would not apply, even if the program operated in an entirely arbitrary and vindictive manner. But this is a poor analogy. For the very theory behind SPOT is that it is not “in its nature” a “subjective, individualized decision” but rather a scientific program that identifies security threats based on purportedly objective, neutral criteria. And so even assuming there is no racial component, the Equal Protection Clause still requires that the scientific basis of the program—or its implementation—not be arbitrary and unreasonable.

B. *The Fourth Amendment and Privacy Concerns*

A second prominent critique offered against behavioral profiling programs, including SPOT, is that they violate the Fourth Amendment’s prohibition against illegal searches and seizures. There are two distinct, albeit related, issues here. The first goes to the “search” portion of the Amendment: to what extent do travelers have a right to privacy in their face, facial

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2154 (emphasis added).

expressions, and visual behavioral cues? The second concerns the consequences of searches—is it a constitutional “seizure” to subject individuals to further questioning, searches, or examinations based on their being identified by SPOT? In this Section, we address these two issues, and then turn to the question of whether these searches and seizures comport with the Fourth Amendment’s guarantee of the right of the people to be “secure in their persons.”

1. Profiling as Search

Critics are, not surprisingly, sobered by a program in which government security agents carefully observe travelers’ facial expressions and emotions in an attempt to peel back travelers’ thoughts. The premise of uncovering thoughts or intentions raises the specter of a department of pre-crime¹³⁴ and so seems to conflict with our basic notions of privacy. Even though this surveillance takes place in a public space, not the home, as the Supreme Court’s foundational *Katz v. United States*¹³⁵ case held, “the Fourth Amendment protects people, not places.”¹³⁶ And so, “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.”¹³⁷ The Amendment’s “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”¹³⁸

Under *Katz*, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹³⁹ As Justice Harlan’s concurrence summarizes: “[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”¹⁴⁰

Although the case could certainly be made that a person has no reasonable, subjective expectation of privacy in his facial expressions when in

¹³⁴ The notion of “pre-crime” is depicted in Steven Spielberg’s *Minority Report* (20th Century Fox 2002), which examines a world in which “criminals” are identified and prosecuted before their intended crimes are committed. See Penelope Pether, *Militant Judgment?: Judicial Ontology, Constitutional Poetics, and “The Long War,”* 29 *CARDOZO L. REV.* 2279, 2285 n.39 (2008).

¹³⁵ 389 U.S. 347 (1967).

¹³⁶ *Id.* at 351.

¹³⁷ *Id.* at 359.

¹³⁸ *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968).

¹³⁹ *Katz*, 389 U.S. at 351 (citations omitted).

¹⁴⁰ *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)); see also *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979); *Oliver v. United States*, 466 U.S. 170, 177 (1984).

a public place,¹⁴¹ if SPOT operates as the government indicates, it is not interested in a person's face but in what lies behind the face. If the government had developed a new technological device—a probe it could place in front of a person's eyes or ears that could read his brain function and emotions—that would almost certainly be considered a search subject to the Fourth Amendment. Just as in *Kyllo v. United States*,¹⁴² where the Court held that new technology that senses activity in the home implicates the Fourth Amendment, even if it does not actually enter the walls,¹⁴³ so too would a technological sensor into the mind or body give rise to a Fourth Amendment search, even if it does not physically enter the body. Surely a person's inner emotions—not his outward appearance, but the thoughts and feelings hidden behind the facial façade—are something that people “seek[] to preserve as private.”¹⁴⁴ As the *Kyllo* Court reasoned, “[w]e think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”¹⁴⁵ Substitute “mind” in place of “home” and the parallels are clear.¹⁴⁶

¹⁴¹ See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 15-16 (2000) (discussing the etiquette of making one's face available or off-limits to public observers); see also Alexander T. Nguyen, *Here's Looking at You, Kid: Has Face-Recognition Technology Completely Outflanked the Fourth Amendment?*, 7 VA. J.L. & TECH. 2, ¶ 21 (2002) (“[T]here is neither a subjective nor an objective expectation of privacy in public spaces. Unless an individual wears a veil or a mask every time he or she leaves an apartment, there is no subjective expectation of privacy. Courts have held that there is no expectation of privacy in what an individual knowingly exposes to the public. There is no part of the body, no feature of an individual, that, in America at least, is exposed as openly or often, and so a subjective expectation of privacy is certainly not present in the face.” (footnote omitted)).

¹⁴² 533 U.S. 27 (2001).

¹⁴³ *Id.* at 40.

¹⁴⁴ *Katz*, 389 U.S. at 351.

¹⁴⁵ *Kyllo*, 533 U.S. at 34-35 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)) (citation omitted); see also *id.* at 33-34 (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. For example . . . the technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.” (citation omitted)).

¹⁴⁶ A similar analogy can be drawn to the Court's doctrine on open fields searches. See, e.g., *Oliver v. United States*, 466 U.S. 170, 178 (1984) (“[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.”). Open faces are a bit like open fields. As explained in text, however, there are significant differences between behavioral profiling and looking at people's open faces. To be sure, open faces, like open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be.

A hypothetical brain-sensor device is analogous to the scientific theory underlying SPOT: that careful expert observation by well-trained humans can penetrate beyond the facial expressions in public view into a person's inner feelings, emotions, and intentions. If SPOT were simply racial profiling—looking only at a person's skin—the analogy would fail. But the very premise of SPOT is that it looks not at the skin but digs beyond to what lies underneath.¹⁴⁷ People have a subjective expectation of privacy in their emotions and thoughts, and society recognizes this as reasonable.¹⁴⁸ So, a security program like SPOT that glares under the skin could be considered a “search” for constitutional purposes.

2. Profiling as Constitutional Seizure

The most likely result of an individual being targeted through SPOT is that that the traveler is subjected to additional questioning by federal or local law enforcement officials, and a full search—in other words, something like a *Terry* stop.¹⁴⁹ While “[n]o right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law,”¹⁵⁰ this, of course, does not mean that such stops are illegal. Just as there is a threshold question about whether SPOT effects a “search” under the Fourth Amendment, so too a preliminary question exists as to whether being sub-

Id. at 179. But the whole basis for SPOT is that it does not just look for things that “usually are accessible to the public and the police” but instead at activities for which there are very strong “societal interest[s] in protecting . . . privacy.” *Id.* Thus, the Court’s observation in *California v. Ciraolo*, 476 U.S. 207 (1986), that visual surveillance is permissible and “the Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares” has little effect here, for the very purpose of SPOT is not to look at faces but through faces. *Id.* at 213; *see also* *Kyllo*, 533 U.S. at 32-33 (distinguishing *Ciraolo*).

¹⁴⁷ *See* Herbert, *supra* note 10, at 119 (“Staring—particularly at another’s face—is not merely looking. Rather, it is an intense, extended examination, violating politeness rules and experienced as an invasion of the self. The invasion stems from the sense that the observer is looking for a reason, namely to judge us, perhaps finding our expressions odd, our appearance displeasing, or our perceived character weird or unkind. But such judgments are based upon little information.”).

¹⁴⁸ *Cf.* *United States v. Place*, 462 U.S. 696, 707 (1983) (finding a canine sniff does not constitute a search within the Fourth Amendment context); Nguyen, *supra* note 141, at 15 (contending that a program known as FaceIt, which “generates a face print and compares it to files in its database of wanted criminals” does not give rise to a Fourth Amendment concern because like a canine sniff for narcotics, it merely makes a binary determination of whether there is a match). SPOT is quite different from either a canine sniff or FaceIt, for it is not just looking to see if a face matches something in a database, but to study each face individually for what lies behind.

¹⁴⁹ *See* *Terry v. Ohio*, 392 U.S. 1 (1968).

¹⁵⁰ *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891).

jected to further questioning and a more invasive search after being targeted constitutes a “seizure.”

To the extent that being selected by SPOT simply results in a short consensual conversation with a BDO or other officer, and the passenger feels free to leave, there is no “seizure” under the Fourth Amendment.¹⁵¹ “Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment.”¹⁵²

In *Terry v. Ohio*,¹⁵³ the Court held that it does constitute a seizure under the Fourth Amendment for a law enforcement officer to stop an individual for a more thorough pat-down search:

It is quite plain that the Fourth Amendment governs “seizures” of the person which do not eventuate in a trip to the station house and prosecution for crime—“arrests” in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person.¹⁵⁴

With a stop and search based on SPOT, just as in the *Terry* case itself, when a security or law enforcement officer takes hold of an individual and questions or searches his person, the officer “seizes” him within the meaning of the Fourth Amendment. Indeed, “[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.”¹⁵⁵

3. Does Profiling Violate the Fourth Amendment?

If behavioral profiling observation constitutes a “search,” and if those identified by behavioral profiling and subjected to more intensive screening and questioning are considered to have been “seized,” these searches or seizures must be “reasonable” to survive Fourth Amendment scrutiny. “The reasonableness of a seizure under the Fourth Amendment is determined ‘by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.’”¹⁵⁶

¹⁵¹ See *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (holding that “a seizure does not occur simply because a police officer approaches an individual and asks a few questions,” because the encounter must “lose[] its consensual nature” such that a reasonable person would not feel free to disregard).

¹⁵² *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185-86 (2004). When an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983).

¹⁵³ 392 U.S. 1 (1968).

¹⁵⁴ *Id.* at 16.

¹⁵⁵ *Id.* at 24-25.

¹⁵⁶ *Hiibel*, 542 U.S. at 187-88 (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

There are two different doctrinal approaches for evaluating whether warrantless searches and seizures conducted pursuant to SPOT conform with the Fourth Amendment's reasonableness requirement. First, searches such as those at airports that are directed at national security, rather than simply criminal law enforcement, are generally considered to be "administrative" searches.¹⁵⁷ (Standard airport screening procedures, whereby individuals go through metal detectors, are also generally permissible as "consent searches" because the individual can back out. Behavioral profiling, however, is done secretly—so the individual has no opportunity to provide either express or implied consent.¹⁵⁸) These situations are typically justified in terms of what it is that necessitates deviation from the usual Fourth Amendment requirements, usually described in terms of some "special need" distinct from ordinary law enforcement.¹⁵⁹

The Court's decision in *Camara v. Municipal Court*¹⁶⁰ established the theoretical approach to administrative searches. In finding that unconsented safety inspections of housing could be conducted pursuant to a warrant issued upon less than the usual quantum of probable cause, the Court determined that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."¹⁶¹ The probable cause approach is unhelpful when analysis centers

¹⁵⁷ See, e.g., *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007); *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973) ("[R]outine airport screening searches will lead to discovery of contraband and apprehension of law violators. This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional."), *overruled by Aukai*, 497 F.3d 955. For further discussion of the doctrine surrounding administrative searches, see Herbert, *supra* note 10, at 126-28 (noting that "there is little doubt that FACS observations, if subjected to the strictures of the Fourth Amendment, would fit into the category of 'administrative searches'"), or see generally Bethany A. Gulley, Note, *Criminal Law—No Right To Revoke And Avoid Search—Ninth Circuit Rules that Consent to Airport Screening Cannot be Revoked in an Administrative Search*, *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2007), 31 U. ARK. LITTLE ROCK L. REV. 515, 525-29 (2009); Sanford L. Dow, Comment, *Airport Security, Terrorism, and the Fourth Amendment: A Look Back and a Step Forward*, 58 J. AIR L. & COM. 1149, 1176-83 (1993); Michael G. Lenett, *Implied Consent in Airport Searches: A Response to Terrorism*, *United States v. Pulido-Baquerizo*, 800 F.2d 899 (9th Cir. 1986), 25 AM. CRIM. L. REV. 549, 558-59 (1988); Jack H. Daniel III, *Reform in Airport Security: Panic or Precaution?*, 53 MERCER L. REV. 1623, 1638-40 (2002); Julie Solomon, Comment, *Does The TSA Have Stage Fright? Then Why Are They Picturing You Naked?*, 73 J. AIR L. & COM. 643, 646-52 (2008).

¹⁵⁸ See *United States v. Homburg*, 546 F.2d 1350, 1352 (9th Cir. 1977), *overruled in part by Aukai*, 497 F.3d 955.

¹⁵⁹ See e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653-54 (1995).

¹⁶⁰ 387 U.S. 523 (1967).

¹⁶¹ *Id.* at 536-37. Under this balancing theory, it is necessary to consider (i) whether the practice at issue has "a long history of judicial and public acceptance," (ii) whether the practice is essential to achieve "acceptable results," and (iii) whether the practice involves "a relatively limited invasion of . . . privacy." *Id.* at 537. Assessing those factors, the Court in *Camara* held that inspection warrants could

on the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations.¹⁶²

As Judge Posner has described it: the difference between the traditional criminal search and those characterized as administrative is that the constitutionality of the former is assessed at the level of the individual search, while the latter are evaluated as to the entire program.¹⁶³ Pursuant to these “special needs,” the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons. And at least one court of appeals has specifically, repeatedly held (as far back as 1973 and again in 2006) that “airport screening searches of potential passengers and their immediate possessions for weapons and explosives is reasonable so long as each potential passenger maintains the right to leave the airport instead of submitting to the search.”¹⁶⁴ In so holding, the court referred to several airport screening procedures, “including behavioral profiling,” although a very early form of it.¹⁶⁵

But behavioral profiling might differ from traditional aviation security measures that are either: (1) administered to a randomly selected subset of people,¹⁶⁶ or (2) administered to everyone (e.g., metal detectors and baggage screening).¹⁶⁷ Courts have found the *Camara* balancing test appropriate and determined that procedures passed Fourth Amendment muster when they involved a general regulatory scheme without the potential for arbitrariness.¹⁶⁸ The courts have imposed a requirement that administrative searches be conducted according to neutral standardized criteria and procedures, which seek to prevent the search from being used as a pretext for an investigative foray. And, although BDOs utilize uniform, standardized criteria in evaluating travelers under SPOT, their individualized decisions about who to stop and question are largely subjective and their judgments are informed by personal observation, analysis, and discretion.

issue pursuant to “reasonable legislative or administrative standards” even without case-by-case probable cause finding. *Id.* at 538-40.

¹⁶² *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

¹⁶³ *Edmond v. Goldsmith*, 183 F.3d 659, 663 (7th Cir. 1999), *aff’d sub nom.* *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

¹⁶⁴ *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006) (quoting *United States v. Davis*, 482 F.2d 893, 912-13 (9th Cir. 1973)).

¹⁶⁵ *Davis*, 482 F.2d at 900.

¹⁶⁶ *See United States v. Marquez*, 410 F.3d 612, 617 (9th Cir. 2005) (random selection for greater scrutiny defensible, for “the randomness of the selection for the additional screening procedure arguably increases the deterrent effects of airport screening procedures because potential passengers may be influenced by their knowledge that they may be subject to random, more thorough screening procedures”).

¹⁶⁷ *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974).

¹⁶⁸ *See e.g., id.*

Precedent in the area of border searches provides a useful analogy to behavioral profiling. Courts have upheld fixed checkpoints near the border—used to stop vehicles and briefly question the occupants to detect illegal aliens—as legitimate administrative searches.¹⁶⁹ But vehicles stopped by patrol units near the border may be questioned only upon a reasonable suspicion that the vehicle contains illegal aliens.¹⁷⁰ Similarly, fixed metal detectors at airports that require every passenger to pass would be justified as an administrative search, while roving BDOs who target individual travelers based on subjective judgments would likely require a showing of reasonable suspicion.

A second approach to evaluating the constitutionality of SPOT searches is by analogy to the *Terry* stop—when police stop and frisk an individual whom they have reasonable suspicion is dangerous. As the Court explained in *Terry*:

When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.¹⁷¹

The Court's reasoning in *Terry* applies well in the SPOT context. The Court explained that when evaluating the legality of a *Terry* stop, in “determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”¹⁷² To the extent BDOs make stops based on inferences drawn from their training and experience with SPOT, this could satisfy the Fourth Amendment's requirements. Of course, “*Terry* accepts the risk that officers may stop innocent people.”¹⁷³ With

¹⁶⁹ *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 (1976).

¹⁷⁰ *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975).

¹⁷¹ *Terry*, 392 U.S. at 24; *see also Hiibel*, 542 U.S. at 185-86 (“To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be ‘justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.’ For example, the seizure cannot continue for an excessive period of time, or resemble a traditional arrest.” (quoting *United States v. Sharpe*, 470 U.S. 675, 682 (1985))).

¹⁷² *Terry*, 392 U.S. at 27 (citations omitted); *see also id.* at 30 (“[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”).

¹⁷³ *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

SPOT, as with a *Terry* stop, “[i]f the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.”¹⁷⁴

The doctrine arising out of *Terry v. Ohio* is not limited to the narrow category of “stop and frisk” cases in which the police pat down an individual for dangerous contraband that might place the officer himself in danger. The Court has applied a similar theory to border patrol search cases:

[B]ecause of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer’s observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion. As in *Terry*, the stop and inquiry must be “reasonably related in scope to the justification for their initiation.” The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.¹⁷⁵

The totality of the circumstances approach applies in this border patrol context as well: “Any number of factors may be taken into account in deciding whether there is reasonable suspicion to stop a car in the border area.”¹⁷⁶

Since *Terry*, the Court has refined and developed its approach to reasonable suspicion searches and seizures, reaffirming that “[w]hile ‘reasonable suspicion’ is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence, the Fourth Amendment requires at least a minimal level of objective justification for making the stop.”¹⁷⁷ In particular, the Court applies a “totality of the circumstances” approach to determining when stops and searches are reasonable, which relies on the judgment and experience of law enforcement professionals.¹⁷⁸ As the Court explained in *United States v. Cortez*:¹⁷⁹

[T]he assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.

....

¹⁷⁴ *Id.*

¹⁷⁵ *Brignoni-Ponce*, 422 U.S. at 881-82 (quoting *Terry*, 392 U.S. at 29) (citation omitted).

¹⁷⁶ *Id.* at 884.

¹⁷⁷ *Wardlow*, 528 U.S. at 123 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).

¹⁷⁸ *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (“[T]he totality of the circumstances—the whole picture—must be taken into account.”); see also *Sokolow*, 490 U.S. at 8; *Wardlow*, 528 U.S. at 125 (“[R]easonable suspicion must be based on commonsense judgments and inferences about human behavior.”).

¹⁷⁹ 449 U.S. 411 (1981).

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.¹⁸⁰

The Court thus has blessed the theory behind SPOT and similar behavioral profiling programs as justifying *Terry* stops. Such programs, in theory, are based on “objective observations” and developed from scientific study “of the modes or patterns of operation of certain kinds of lawbreakers.”¹⁸¹ They are purportedly based on “data” and the BDOs are “trained officer[s]” who “draw[] inferences and make deductions . . . that might well elude” somebody not trained in behavioral profiling.¹⁸² Significantly, SPOT assertedly relies on “probabilities” and “conclusions about human behavior”—so it is of no accord that it allows stopping travelers based on something less than “hard certainties.” In fact, the Court has “recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.”¹⁸³

Finally, we note that the Court has addressed the role of profiling based on race, ethnicity, or alienage in the border patrol search and seizure cases. In *United States v. Brignoni-Ponce*,¹⁸⁴ the Court held that an individual’s apparent ethnicity did not, by itself, provide a basis for reasonable suspicion: “In this case the officers relied on a single factor to justify stopping respondent’s car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens.”¹⁸⁵ As the Court reasoned, “this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.”¹⁸⁶ The Court’s language was particular to this case—it noted that “[l]arge numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens” and so “[t]he likelih-

¹⁸⁰ *Id.* at 418.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Wardlow*, 528 U.S. at 124 (citations omitted).

¹⁸⁴ 422 U.S. 873 (1975).

¹⁸⁵ *Id.* at 885-86; *cf.* *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (“[W]e are confronted with the narrow question of how to square the Fourth Amendment’s requirement of individualized reasonable suspicion with the fact that the majority of the people who pass through the checkpoint in question are Hispanic. In order to answer that question, we conclude that, at this point in our nation’s history, and given the continuing changes in our ethnic and racial composition, Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required. Moreover, we conclude, for the reasons we have indicated, that it is also not an appropriate factor.”).

¹⁸⁶ *Brignoni-Ponce*, 422 U.S. at 886.

ood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.”¹⁸⁷ Nonetheless, the Court also held that a trained officer may look to a person’s race and apparent ancestry among other factors “in light of his experience” in making immigration stops.¹⁸⁸

To summarize, whether a behavioral profiling program violates the Fourth Amendment’s prohibition on unlawful searches and seizures will turn on whether the program is reasonable. And this, in turn, requires knowing a variety of details about how the program is designed, how it works in practice, and the science underlying it.

C. *The Due Process of Law and the Fairness Principle*

A third constitutional principle that is implicated by the behavioral profiling paradigm is the Fifth Amendment right to the due process of law. The Due Process Clause prevents the federal government from depriving an individual of “liberty” without due process. The Supreme Court has declined to define “liberty” precisely, noting only that the concept is broad.¹⁸⁹ Behavioral profiling programs might impact two liberty interests protected by the Due Process Clause: the right to travel, and the right to avoid a stigma imposed by government. In this Section, we briefly describe the nature of each of these two liberty interests, and then turn to the procedural requirements of the Clause.

These due process concerns go to the fundamental fairness of the behavioral profiling paradigm. To the extent it functions arbitrarily or vindictively, is significantly overbroad in whom it identifies, or seriously disrupts the ability of the public to travel, the due process—or fairness—concerns with the program are high. If programs operate properly, however, they will not run afoul of the Due Process Clause.

¹⁸⁷ *Id.* at 886-87.

¹⁸⁸ *Id.* at 885-87; *see also* *United States v. Martinez-Fuerte*, 428 U.S. 543, 550, 563 (1976) (upholding the constitutionality of Border Patrol checkpoints that refer motorists to secondary inspection areas, even without reasonable individualized suspicion).

¹⁸⁹ *See* *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972). There, the Court defined “liberty” in the following way:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of liberty must be broad indeed.

Id. (citation and internal quotation marks omitted).

1. The Right to Travel

The Constitution has long protected the right of individuals to travel between states. In the nineteenth century, the Court stated: “We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”¹⁹⁰ Although the Articles of Confederation provided that “the people of each state shall have free ingress and regress to and from any other state,”¹⁹¹ no single clause of the Constitution explicitly guarantees the right to interstate travel. The Court has suggested that “a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”¹⁹² Accordingly, the Court has located the fundamental right to travel as implicit in textual provisions including the Privileges and Immunities Clause of Article IV, the Commerce Clause, and extratextual concepts of federalism and sovereignty.¹⁹³

As the Court has explained, the constitutional right to travel includes the right “to use the highways and other instrumentalities of interstate commerce in doing so,”¹⁹⁴ and to be “uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”¹⁹⁵ The Court has yet to decide whether a restriction on a particular mode of travel violates this fundamental right and is subject to strict scrutiny, but a ban on flight might.¹⁹⁶

¹⁹⁰ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 49 (1867) (striking down a Nevada statute that taxed people who traveled out of the state).

¹⁹¹ ARTICLES OF CONFEDERATION art. IV, § 1.

¹⁹² *United States v. Guest*, 383 U.S. 745, 758 (1966).

¹⁹³ *Att’y Gen. v. Soto-Lopez*, 476 U.S. 898, 902 (1986); *see also Saenz v. Roe*, 526 U.S. 489, 500 (1999) (holding that the right to travel protects (i) the right of a citizen of one state to enter and leave another state, (ii) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and (iii) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (holding that restricting welfare benefits to new residents of a state violates the fundamental right to travel). For further analysis of the development of the fundamental rights prong of the Equal Protection Clause with respect to the right to travel, see Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1572-75 (1989).

¹⁹⁴ *Guest*, 383 U.S. at 757.

¹⁹⁵ *Saenz*, 526 U.S. at 499.

¹⁹⁶ Some lower federal courts have held that the fundamental right to travel does not include the right to use any particular mode of transportation. *E.g.*, *Gilmore v. Ashcroft*, No. C 02-3444 SI, 2004 U.S. Dist. LEXIS 4869, at *19-20 (N.D. Cal. Mar. 19, 2004), *aff’d sub nom.* *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006). The Ninth Circuit held that there is no fundamental right to fly, but qualified this by stating that “the identification policy’s ‘burden’ is not unreasonable” because one could still fly without identification by agreeing to additional screening. *Gilmore*, 435 F.3d at 1137; *see also Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (stating that there is no fundamental right to drive). Others

Whatever the precise dimensions of the fundamental right to travel, the Due Process Clause would not countenance arbitrary denial of a particular individual's ability to travel freely. For restriction on physical movement is a quintessential definition of a deprivation of liberty. The Court has thus stated that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law."¹⁹⁷ By analogy, even though there may not be a fundamental right to drive, a state cannot revoke a driver's license without due process.¹⁹⁸ Another analogy can be made to the Court's precedents on restrictions on international travel. Although the Court has explicitly distinguished the fundamental right to interstate travel from the liberty to travel abroad, which is protected only by the Due Process Clause, it has held that this liberty can only be restricted without process if it is an across-the-board ban, not one that targets specific individuals.¹⁹⁹

2. The Liberty Deprivation of a Stigma

In addition, the Court has held that people have a constitutional "liberty" interest in their reputations. A person must receive due process when the government takes an action that damages his standing in the community or places a stigma on him. To the extent behavioral profiling programs single out individuals in public view as potential terrorists for more intensive questioning or searches, these programs may require due process.

In *Wisconsin v. Constantineau*,²⁰⁰ the Court held that a statute that permitted a city's police department to share a notice with retail liquor outlets stating that certain listed persons were not to be sold liquor due to their prior "excessive drinking" placed a stigma on the individuals and violated the Due Process Clause. The Court held that a person was entitled to due process before being placed on such a list:

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting"

have suggested that comprehensive restrictions, such as banning passengers from flying to a particular airport, may be susceptible to constitutional challenge. *E.g.*, *City of Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1192 (5th Cir. 1982) ("No one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim."). The Supreme Court has yet to confront this issue.

¹⁹⁷ *Kent v. Dulles*, 357 U.S. 116, 125, 126 (1958) (noting that this "right was emerging at least as early as the Magna Carta" and stating that "freedom of movement is basic in our scheme of values").

¹⁹⁸ *See, e.g.*, *Bell v. Burson*, 402 U.S. 535, 539 (1971).

¹⁹⁹ *E.g.*, *Haig v. Agee*, 453 U.S. 280, 306 (1981) ("[T]he freedom to travel outside the United States must be distinguished from the right to travel within the United States.>").

²⁰⁰ 400 U.S. 433 (1971).

under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one.²⁰¹

Poorly designed or operated behavioral profiling programs could well trigger an individual's constitutional liberty interest in his reputation. Moreover, the stigma attached to an individual who is treated by law enforcement as a potential terrorist is far higher than that attached to a mere drunk. To be sure, since *Constantineau* the Court has clarified that a stigma alone, without any additional government deprivation, will not give rise to a due process violation.²⁰² But when an individual is targeted by behavioral profiling, in addition to being publicly identified as a potential terrorist, the individual is likely subjected at a minimum to additional questioning, search, and delay—which would seem to satisfy this condition.

We turn next to the process due an individual whom SPOT deprives of the liberty to travel, or his good standing and reputation.

3. The Process Due

As explained above, to the extent behavioral profiling denies an individual the right to travel or stigmatizes him, the Due Process Clause applies.

The Court has repeatedly proclaimed that the procedural requirements of due process are flexible and must be tailored to particular circumstances. In recognition of this flexibility, the Court has articulated a three-pronged balancing test for determining what process is due an individual.²⁰³ And it has recently applied this precise test in the national security context.²⁰⁴ The three factors of the *Mathews v. Eldridge*²⁰⁵ test are

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest,

²⁰¹ *Id.* at 437. More recently, Justice Stevens has applied similar reasoning in requiring due process for persons on sex offender registration lists: "The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply. . . . In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty." *Smith v. Doe*, 538 U.S. 84, 111-12 (2003) (Stevens, J., dissenting).

²⁰² *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that the circulation of handbills to merchants describing an individual as a shoplifter was not a deprivation of liberty absent additional government action).

²⁰³ *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁰⁴ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529-35 (2004).

²⁰⁵ 424 U.S. 319 (1976).

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁰⁶

As of now, there is no process provided to people who are deprived of the liberty to fly by SPOT. Under the *Mathews* test, this could be permissible to the extent that SPOT is an effective security program. If SPOT really does contribute to the great government interest in homeland security, then this factor of the *Mathews* test, when balanced against the relatively limited liberty interests that individuals are deprived of, might not require much, or any, process. But, if behavioral profiling programs are not rationally or effectively run, under *Mathews* the balance would tip toward providing a robust redress system.

D. *Doctrinal Conclusions*

Behavioral profiling security measures raise serious questions with respect to the Constitution's guarantees of equal protection, freedom from unreasonable searches and seizures, and the due process of law. Whether by coincidence or not, the Court's doctrinal approaches to these three provisions all involve a fundamental balancing test that looks to the reasonableness of the government's actions. For the Equal Protection Clause, assuming that the program involves no intentional discrimination on the basis of race, ethnicity, or alienage, the doctrine asks whether the classifications made by the program are reasonably related to a legitimate government purpose. With respect to both the initial "search" of all travelers and the "seizure" of identified individuals for further questioning, the Fourth Amendment analysis turns on whether the initial observation is reasonable and whether it creates a reasonable suspicion that identified individuals may be a danger. Finally, as far as concerns about due process go, the Court balances the government interest against the individual liberty at stake—and again, to the extent the program operates reasonably and effectively, it is likely to survive this balancing test.

Based on what the government has revealed about the SPOT program, it appears to be consistent with these three provisions of the Constitution. But details are sparse, and we know even less about other components of the emerging behavioral profiling paradigm. In the following Parts, we describe the series of assumptions on which our tentative constitutional conclusion rests, and consider which institution of government is best suited to evaluate and monitor these assumptions.

²⁰⁶ *Id.* at 334-35.

III. THE CONSTITUTIONALITY OF BEHAVIORAL PROFILING: INSTITUTIONS

This Part moves from constitutional doctrine to constitutional practice. In particular, it looks to the three branches of government to consider which, in practice, is most likely to keep behavioral profiling programs within constitutional bounds.

The doctrinal analysis in the prior Part rests on a series of crucial assumptions about how the government designs and implements behavioral profiling programs. In the case of SPOT, and most others, these are that:

- * the program's design is based on valid, scientific theories supported by actual evidence;
- * the scientific theories translate successfully from a laboratory environment to an actual, real-world security operation;
- * the program, in design and actual effect, avoids racial, ethnic, or religious profiling;
- * the BDOs responsible for implementing the program are sufficiently trained and are able to implement the program correctly and consistently in practice, and do not bring in any racial, ethnic, or religious bias—consciously or not;
- * the program is not abused or used for inappropriate purposes, such as harassing individuals;
- * the individuals affected by the program are not repeatedly wrongly targeted, and, if they are, they have some opportunity for redress;
- * the program is updated to respond to and reflect new developments in science and world affairs, so that it can minimize the targeting and inconveniencing of innocent travelers; and
- * the program provides effective security.

None of these assumptions should be taken for granted. If any of them are inaccurate, then the behavioral profiling program may run afoul of one or more provisions of the Constitution. Serious oversight should be in place to test these assumptions. The oversight role should include what Jack Balkin calls “metasurveillance”:

Metasurveillance is surveilling the act of surveillance or information gathering. Essentially, it is the idea of designing a system of surveillance that “watches the watchers,” or more generally, “watches the information gatherers.” Mandatory recording of whom the [National Security Agency (“NSA”)] is listening to, when it is listening, and for what purpose is surveillance of surveillance. Reporting requirements that require businesses to account for what sorts of data they are collecting and their practices of discarding information is metasurveil-

lance. Recording police and [Central Intelligence Agency (“CIA”)] interrogations is also met-surveillance, although in this case surveillance of information gathering.²⁰⁷

Behavioral profiling is, as explained above, a form of surveillance under which the trained eyes of government officials are focused on the appearance, emotions, and expressions of air travelers. For all these reasons, a system of “metasurveillance”—“metaprofiling” we might call it—is necessary for behavioral profiling programs, like SPOT, to ensure they function constitutionally. And since programs are likely to change and adapt over time, ongoing oversight is required to make sure that they are continuously operating appropriately.

Thus, some institution of government should take care that behavioral profiling programs do not run afoul of constitutional and legal principles and do not inappropriately violate Americans’ civil liberties. This is an unremarkable claim. Our concern is that the institutions currently tasked with ensuring the constitutionality of these sorts of programs are unlikely to be in a position, by themselves, to exercise the requisite oversight.

A. Courts

The judicial branch is normally tasked with resolving whether a challenged government program complies with the Constitution and laws of the United States.²⁰⁸ The Court has the duty to “say what the law is”—and has recently made clear that the same duty applies when national security issues are at stake.²⁰⁹ And Congress has given the federal courts jurisdiction over suits challenging government programs, so an individual or organization could sue DHS over the constitutionality and legality of a behavioral profiling program—seeking either injunctive relief or damages.²¹⁰ Nonetheless,

²⁰⁷ Jack Balkin, *Three Concepts of Surveillance in the National Surveillance State*, BALKINIZATION, Jan. 11, 2008, <http://balkin.blogspot.com/2008/01/three-concepts-of-surveillance-in.html>; Balkin, *The Constitution in the National Surveillance State*, *supra* note 49, at 3 (“In the National Surveillance State, the government uses surveillance, data collection, collation, and analysis to identify problems, to head off potential threats, to govern populations, and to deliver valuable social services.”); *id.* at 10-11 (“Older models of law enforcement have focused on apprehension and prosecution of wrongdoers after the fact and the threat of criminal or civil sanctions to deter future bad behavior. The National Surveillance State supplements this model of prosecution and deterrence with technologies of prediction and prevention. . . . Governance in the National Surveillance State is increasingly statistically oriented, ex ante and preventative, rather than focused on deterrence and ex post prosecution of individual wrongdoing. Such tendencies have been around for at least a century, but new technologies for surveillance, data analysis, and regulation by computer code and physical architecture have made them far easier to put into effect.” (footnotes omitted)).

²⁰⁸ See U.S. CONST. art. III, § 2.

²⁰⁹ See *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008) (citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803)).

²¹⁰ See 28 U.S.C. § 1291 (2000).

there are several reasons why the federal courts are not likely in practice to be particularly successful at testing and monitoring behavioral profiling programs.

As an initial matter, courts are not likely to be called upon to evaluate the legality of these programs. For the most part, being identified by SPOT (for example) merely results in more intensive screening or questioning, and few travelers are likely to bring a lawsuit on this basis—the collective action problem looms large. There is a significant difference between a counter-terrorism or homeland security program and a security program used as part of the criminal process. If a person is arrested, indicted, and prosecuted for criminal activity based on some sort of scientific, sociological, or psychological program, the defendant will have strong incentives, in court, to object to the basis for that program, because the exclusionary rule makes inadmissible as evidence in a criminal case the fruits of an illegal search or seizure.²¹¹ But this is not the case if there is no criminal prosecution.

In addition to the problem of a lack of incentive for affected persons to bring lawsuits, there are several doctrinal barriers to a court reaching the merits of a case and resolving SPOT's legality. We note two in particular. First, the state secrets privilege might prevent plaintiffs from bringing a successful suit.²¹² As an initial matter, the government might move to dismiss a legal challenge at the pleadings stage on the basis of the privilege based on the theories that: (1) the program's operations necessarily must remain secret; (2) the plaintiffs would not be able to get sufficient evidence to establish a prima facie case;²¹³ and/or (3) allowing a suit against individual defendants would prejudice them because they would lack the secret evidence necessary to show their actions were legal. The government has done this in response to lawsuits challenging the NSA's warrantless surveillance program and an alleged CIA rendition and torture program.²¹⁴ Even if the government did not move to dismiss—or a court rejected such a motion—the state secrets privilege might still prevent plaintiffs, during discovery or trial, from obtaining and entering into evidence the information necessary to allow a court to rule on the merits of the program.

Second, it might be difficult for any plaintiff to have standing to sue over the program. This is because no single plaintiff—or even group of plaintiffs—would necessarily be able to establish that he or they were tar-

²¹¹ *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²¹² The state secrets privilege is a common law evidentiary privilege—which the Executive maintains has a constitutional foundation—which protects certain national security information from public disclosure in civil litigation. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953).

²¹³ In this regard, the heightened pleading standards the Court recently announced in *Iqbal v. Ashcroft*, 129 S. Ct. 1937 (2009), and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), will make it even more difficult for plaintiffs to survive a motion to dismiss.

²¹⁴ *See, e.g.*, *El-Masri v. United States*, 479 F.3d 296, 302 (4th Cir. 2007).

gets of the program. If an individual were detained at an airport for further questioning, or forced to miss a flight, or arrested, the government could simply argue that as a result of the state secrets privilege, it will not be able to confirm or deny whether the individual was, in fact, identified by the SPOT program—or even whether the program was in operation at the particular time and location in which the individual was identified. This problem has frustrated litigation against the wiretapping programs.²¹⁵

Even if a plaintiff established standing and overcame the state secrets privilege, it is not clear that a federal court would be in a strong position to address whether the program accords with the constitutional principles discussed above. Behavioral profiling programs are complex and evolving, both in terms of operational details and scientific underpinnings. While judges can have the assistance of expert testimony, special masters, and the like, they may not be in the best position to assess the scientific rationality and effectiveness of the programs. In the Fourth Amendment context, to choose just one example, judicial doctrine explicitly defers to law enforcement expertise:

In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.²¹⁶

Given this degree of deference to the judgments of law enforcement in the course of ordinary police work, judicial deference to behavioral profiling tactics—as a practical matter—is likely to be all the greater in the national security context.

In the equal protection context, courts are unlikely to ferret out unconscious bias. Moreover, as a matter of current judicial doctrine, the Court's equal protection analysis focuses on discriminatory purpose. That is, plaintiffs challenging the constitutionality of a law that is neutral on its face must show a racially discriminatory motive on the part of the decisionmaker in order to prevail.

²¹⁵ See, e.g., *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 493 F.3d 644, 681-83 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008). Moreover, even if an individual could identify that he was, in fact, targeted by a behavioral profiling program, it is still not clear that he would have standing to seek injunctive relief. This is because standing requires not just causation and injury, but also redressability, and there is some case law suggesting that if a person is unlikely to be targeted again, he lacks standing. See, e.g., *Park v. Forest Serv.*, 205 F.3d 1034, 1038 (8th Cir. 2000) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983)). The complex doctrine surrounding constitutional damages suits—as well as the qualified immunity doctrine—would make suits for anything other than injunctive relief extremely difficult.

²¹⁶ *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000).

Finally, of course, even if a court could fully assess the legality of a program at one point in time, the specific operational details of behavioral profiling are likely to change significantly over time. New training methods, technologies, or criteria could be used to identify targets. Ensuring the legality of the profiling paradigm requires ongoing monitoring, not just a one-time review. For these reasons, while we by all means welcome judicial assessment of the legality of a particular behavioral profiling program in an appropriate case, we are skeptical that courts are by themselves capable of sufficiently monitoring behavioral profiling programs.

B. Congress

Through its legislative powers, Congress must authorize and fund (at least broadly speaking) federal homeland security programs, including behavioral profiling operations.²¹⁷ Accordingly, if Congress so desired, it could extensively study and assess proposed programs prior to authorization and enact detailed legislation delineating how programs should operate. Although we welcome greater legislative involvement, it is unlikely that a single highly detailed statutory scheme would suffice in this area. Behavioral profiling programs are constantly evolving with new scientific and technological developments. Even if Congress engaged in extensive study before authorization of one program, (e.g., SPOT), that would not ensure the adequacy of other related programs, or even of that particular program over time.

In any event, secrecy concerns might limit the amount of detail that Congress would want to write into law: it would be unwise to openly debate and enact a list of specific criteria that BDOs can look for, or procedures for how they conduct operations. In addition, it seems almost certain as a practical matter that any legislation in this area will leave administrative agencies some flexibility in how they implement programs. For example, the statutory requirement to “screen” aviation travelers could be interpreted by the agency to allow screening through behavioral profiling. A final problem with relying on legislation is that Congress itself is not likely to provide redress to harmed individuals.

Moreover, effective policing of behavioral profiling requires more than just setting up effective programs and letting them run. Ensuring the legality of the profiling paradigm requires ongoing quality control of both

²¹⁷ For example, in August 2007 the 110th Congress passed a law that provided for the implementation of the recommendations of the 9/11 Commission. The Act contained provisions that, *inter alia*, would require specialized training for screeners on security skills such as *behavioral observation and analysis*, explosives detection, and document examination. CONG. RESEARCH SERV., TRANSPORTATION SECURITY: ISSUES FOR THE 110TH CONGRESS 4-5 (2007), available at <http://lieberman.senate.gov/documents/crs/transportationsec.pdf>.

the science behind a program and its actual implementation in the field. To be sure, Congress has oversight authority to investigate programs administered by the executive branch—including by holding hearings and requesting documents—and could use its powers to do so. Nonetheless, for various reasons Congress's traditional tools for conducting oversight may not be particularly useful in this context.

First, Congress lacks the institutional resources to conduct this sort of oversight by itself. Effective oversight would require detailed substantive knowledge of the program's scientific underpinnings, continuous quality control monitoring throughout the country, and comprehensive auditing. Members of Congress operate with fewer staff than executive branch agencies, and could not realistically send large teams out into the field for lengthy periods of time. While congressional aides have extensive knowledge in particular areas, they tend to be focused on a broad range of policies, lacking the time to develop deep, program-specific expertise and institutional knowledge. And both personal offices and committee staff on Capitol Hill lack the resources and personnel to conduct the wide-ranging oversight required in this case.

Second, Congress lacks the political motivation to conduct continuous, and at times tedious, monitoring of the day-to-day implementation of profiling programs. It prefers, instead, to delegate large sums of regulatory authority to agencies. This is both rational and unsurprising. Lawmakers legislate with broad policy goals in mind and must reach a consensus among a majority of 535 elected officials with vastly different interests and constituencies.²¹⁸ Lawmakers can be more responsive to the interests of their constituents than to investing time and political capital in conducting oversight of complex programs. Relatedly, increased partisanship and ideological homogeneity has limited the willingness of Congress to conduct independent oversight during times when the same political party controls Congress and the White House.²¹⁹

Third, executive branch officials have concerns about secrecy and confidentiality when members of Congress (and their staff) are engaged in oversight within the national security or intelligence communities. The utility and reach of traditional tools of congressional investigation are greatly curtailed when dealing with highly classified activities. For example, only members of the "Gang of Eight" are briefed on certain classified intelligence activities.²²⁰ And even those members who are given limited infor-

²¹⁸ Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices about Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 62 (1995).

²¹⁹ See JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE* (1990).

²²⁰ The "Gang of Eight" consists of the chairman and ranking members of the House and Senate Intelligence Committees, the Speaker and minority leaders of the House of Representatives, and the majority and minority leaders in the Senate. See Dan Eggen, *Congressional Agency Questions Legality of Wiretaps*, WASH. POST, Jan. 19, 2006.

mation on classified programs have expressed frustration that they could not seek the guidance of their professional staff and counsel after the briefing.²²¹ The need to keep critical aspects of behavioral profiling programs secret is important to the overall success of the programs. The executive branch's secrecy concerns may limit what information and program details they make available to congressional investigators.

Fourth, changes in the legal landscape and structural developments in Congress have contributed to the decreased effectiveness of its inter-branch checking function. After the Supreme Court's decision in *INS v. Chadha*,²²² Congress no longer has the ability to correct agency action merely through bicameral consensus.²²³ Rather, the only way for Congress to effectively register its objection to an executive branch decree is to cobble together a solid enough majority to accomplish the difficult task of overriding a presidential veto.²²⁴

None of this is to say that legislators should not pay more attention to the programs they are authorizing or conduct investigations of any programs they believe are troubling. And, as we explain below, to the extent the executive branch itself does not set up an effective oversight mechanism for behavioral profiling within the Department of Homeland Security, Congress should enact legislation to do so. But Congress by itself is not in position to keep the behavioral profiling paradigm constitutional.

C. *The Executive Branch*

The Constitution places responsibility with the executive branch—alongside the courts and Congress—to protect the Constitution. This is reflected in Article II's Take Care Clause,²²⁵ commanding that the President “shall take Care that the Laws be faithfully executed.”²²⁶ So too, the Constitution requires the President to take an oath of office “to the best of my Ability, preserve, protect and defend the Constitution of the United

²²¹ DENIS MCDONOUGH, MARA RUDMAN & PETER RUNDLET, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 22 (Report for Ctr. for Am. Progress, June 2006). In connection with the recent controversy surrounding the warrantless eavesdropping on U.S. citizens by the National Security Agency, Senator Rockefeller had concerns about the program and was severely limited in the actions he could take to lodge this dissent; he resorted to writing a letter to Vice President Cheney outlining his concerns; he put a copy of the letter in a safe. *Id.*

²²² 462 U.S. 919, 1016 (1983).

²²³ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006).

²²⁴ *Id.* Moreover, the veto power has become a weapon to entrench presidential decrees, rather than a seldom-used tool to block congressional misadventures. *Id.*

²²⁵ See Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2293-94 (2006).

²²⁶ U.S. CONST. art. II, § 3.

States.”²²⁷ Presidents have always guarded their own authority to interpret, defend, and apply the Constitution.²²⁸ And the executive branch contains an institution—the Justice Department’s Office of Legal Counsel—tasked with determining the constitutionality and legality of particular programs within the administration.²²⁹

The Executive’s constitutional influence—as a matter of practice, if not constitutional theory and design—is particularly strong with respect to matters of national and homeland security. As Professors Sandy Levinson and Jack Balkin explain, “much constitutional development (and therefore much constitutional change) occurs outside of judicial case law.”²³⁰ For this reason, “[i]n many areas, the constitutional law enunciated in formal opinions and memoranda issued by the Office of Legal Counsel (OLC) within the Department of Justice (DOJ) is sometimes at least as important as any decision of Article III courts.”²³¹ Indeed, according to Balkin and Levinson, “change in formal judicial constitutional doctrine often only comes along after major attempts within other branches, particularly the executive, to transform the status quo.”²³²

We do not intend to join the debate about the scope of the President’s commander-in-chief powers or to argue that the executive branch should be the exclusive institution responsible for the legality of the behavioral profiling paradigm. We hope courts and Congress do not abdicate their responsibilities. Rather, our point is simply that it is consistent with the Executive’s constitutional duties and powers to conduct oversight of itself, and to hold itself accountable—regardless of whether the coordinate branches of government do the same. When, for the reasons explained above, Congress and the courts are unlikely to exercise strenuous oversight, the Executive’s responsibility to check itself is even greater.

Internal oversight of profiling from within the executive branch is particularly appropriate—and likely to be effective—in this case because the legal and security elements of behavioral profiling go hand-in-hand. The key questions and assumptions on which our doctrinal constitutional analysis of the program turns correspond closely with the likely effectiveness of the program as a security measure. To the extent these assumptions do not hold, not only is a program likely unconstitutional, it also will not be useful from a security standpoint. For example, if SPOT is not based on sound science that translates well into the airport context, it is not likely to

²²⁷ U.S. CONST. art. II, § 1, cl. 7.

²²⁸ See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 958-59 (2008) (citing examples).

²²⁹ See, e.g., Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1576 (2007).

²³⁰ Jack M. Balkin & Sanford Levinson, *The Processes Of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 498 (2006).

²³¹ *Id.*

²³² *Id.* at 500.

identify actual terrorist suspects. It would thus detract from the overall counter-terrorism effort, provide false comfort, and waste valuable resources. For this reason, the profiling paradigm is not one in which security and civil liberties are a zero-sum game that must be balanced against each other.²³³ Because, in this context, security and liberty go hand-in-hand, many of the concerns with deferring to the Executive on other national security legal issues—for example detention or interrogation—simply do not exist.

Moreover, the civil service bureaucracy within the executive branch can provide a particularly useful check. As Neal Katyal explains, “the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise).”²³⁴ Although “[m]uch maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview. These benefits have been obscured by the now-dominant, caricatured view of agencies as simple anti-change agents.”²³⁵ In particular, “[a] well-functioning bureaucracy contains agencies with differing missions and objectives that intentionally overlap to create friction.”²³⁶ These careerists are “repositories of organizational memory” and “[t]heir personal intelligence and communications networks have been built up over many years dealing with the same organizations, people, and issues.”²³⁷ We turn next to how the executive branch bureaucracy can provide needed oversight of behavioral profiling.

IV. METAPROFILING

In this Part, we flesh out what effective executive branch oversight of behavioral profiling programs might look like. We propose that an institution within the executive branch—an oversight office—be responsible for conducting the metaprofiling to ensure that behavioral profiling programs operate properly. We believe it is in the executive branch’s interests to establish this sort of oversight system by itself. But to the extent the Executive declines to do so, Congress should enact legislation to require the Executive to perform the functions we describe below—and should stand up an office with the resources to do so.

²³³ Cf. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15 (2007) (advocating the tradeoff theory).

²³⁴ Katyal, *supra* note 223, at 2317.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ James P. Pfiffner, *Political Appointees and Career Executives: The Democracy-Bureaucracy Nexus in the Third Century*, 47 *PUB. ADMIN. REV.* 57, 61 (1987).

A. *The Contours of Metaprofiling*

Having made the case for internal oversight of behavioral profiling programs from within the executive branch, we now turn to describing two core oversight functions: (1) ensuring that behavioral profiling programs are effectively designed based on sound science; and (2) making sure programs are properly implemented, so that scientific security theories, in fact, translate to practice in appropriate ways and provide redress to harmed individuals.

1. Program Design

As an initial matter, the executive branch should take care to make sure that behavioral profiling programs are designed based on sound, peer-reviewed, properly applied scientific research. We suggest this be accomplished by requiring a Scientific Validity Statement for each new program.

This Scientific Validity Statement would have two core substantive elements. First, it would review the scientific theory or research that is the basis for the security program. It would aggregate all of the available scientific data underpinning the specific policy proposal and present the range of scientific evidence related to the issue. Investigators would scrutinize the scientific studies in a process equivalent to a peer review.²³⁸

²³⁸ This sort of peer review process is not foreign to the federal government. On December 16, 2004, the Office of Management and Budget (“OMB”), in consultation with the White House’s Office of Science and Technology Policy (“OSTP”), issued its Final Information Quality Bulletin for Peer Review to the heads of departments and agencies. Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2,664, 2,664 (Jan. 14, 2005). This new guidance was designed “to realize the benefits of meaningful peer review of the most important science disseminated by the Federal Government.” *Id.* Unfortunately, peer review is only mandated for “influential scientific information,” defined as “scientific information the agency reasonably can determine will have or does have a clear and substantial impact on important public policies or private sector decisions.” *Id.* Moreover, peer review was further limited to information the agency intends to disseminate. *Id.*

In fact, the National Institute of Health has promulgated regulations that establish criteria to be used by peer reviewers, which should be adopted in this context. The reviewing group

shall assess the overall impact that the project could have on the research field involved, taking into account, among other pertinent factors: (a) The significance of the goals of the proposed research, from a scientific or technical standpoint; (b) The adequacy of the approach and methodology proposed to carry out the research; (c) The innovativeness and originality of the proposed research; (d) The qualifications and experience of the principal investigator and proposed staff; (e) The scientific environment and reasonable availability of resources necessary to the research; (f) The adequacy of plans to include both genders, minorities, children and special populations as appropriate for the scientific goals of the research; (g) The reasonableness of the proposed budget and duration in relation to the proposed research; and (h) The adequacy of the proposed protection for humans, animals, and the environment, to the extent they may be adversely affected by the project proposed in the application.

42 C.F.R. § 52h.8 (2004).

Second, the Scientific Validity Statement would evaluate whether the proposed security program properly translates the underlying scientific research and theory into practical use. Scientific research in the security context will often differ from the purpose for which it was developed. Moreover, the conditions on the ground—even if properly implemented—are likely to be significantly different from those in a lab. In the context of SPOT, for example, facial recognition may have strong scientific foundations for certain purposes, but not for detecting likely terrorists. And what works well with test subjects staring intently at a face on a computer screen in a quiet research environment may have little to do with BDOs working in hectic conditions, at busy airports, viewing travelers' entire bodies, attire, and interactions with other passengers.

Scientific Validity Statements would be similar to other regulatory requirements for new federal programs. For example, the National Environmental Policy Act²³⁹ requires environmental impact assessments that certain governmental decisions that affect the environment be accompanied by notice, comment, and public participation procedures.²⁴⁰ So too, section 208 of the E-Government Act requires all federal agencies to conduct and complete Privacy Impact Assessments (“PIAs”) for all new or substantially changed technology that collects, maintains, or disseminates Americans' protected personal information.²⁴¹ DHS issues these frequently: the DHS Chief Information Officer approved and published fifty-four PIAs between July 2006 and July 2007.²⁴² As the agency readily acknowledges, “addressing privacy issues publicly through a PIA builds citizen trust in the operations of the Department of Homeland Security.”²⁴³

A Scientific Validity Statement, with a peer review process as its centerpiece, would create overlapping layers of accountability: first within the

²³⁹ 42 U.S.C. § 4321 (2000).

²⁴⁰ See 43 Fed. Reg. 55,978, 55,992-97 (Nov. 29, 1978).

²⁴¹ DEP'T OF HOMELAND SEC., PRIVACY OFFICE ANNUAL REPORT TO CONGRESS 5 (2007) [hereinafter PRIVACY OFFICE ANNUAL REPORT], available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_rpt_annual_2007.pdf.

²⁴² *Id.*

²⁴³ DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENTS: OFFICIAL GUIDANCE 8 (May 2007), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_guidance_may2007.pdf. Although environmental impact statements, privacy impact analyses, and Scientific Validity Statements share the notion of collaboration and consensus-building in government, and promote deliberation within the executive branch, there are some important differences. One fundamental difference will likely be the security sensitivity information at issue in many homeland security initiatives. In fact, just such an issue has arisen in the context of several PIAs where the Chief Privacy Officer reviewed and approved two documents for national security systems for intelligence and analysis and, given the sensitivity of the systems, the PIAs were not published. PRIVACY OFFICE ANNUAL REPORT, *supra* note 241, at 5. This is likely to frequently arise in the context of Scientific Validity Statements as well and, where appropriate, confidentiality and security should be protected. However, notwithstanding the need to protect vital national security information, both public and confidential versions of the statements should be issued—in redacted form whenever possible.

scientific community, and second between the executive branch and Congress and the American people. Such a process would be well-suited for addressing the potential dangers of programs like SPOT. Because SPOT's constitutionality relies on its rationality—that is, whether it is based on solid science—it cannot rely on the research of just a few social scientists that has not been validated by intensive peer review.

Mandating a Scientific Validity Statement for new behavioral profiling programs would also bring greater transparency.²⁴⁴ To the extent national security permits, the Scientific Validity Statement (or portions of) should be made publicly available. And, in the case of a new regulation published alongside the formal rule in the Federal Register, at a minimum it should be provided to the policy decisionmakers within the executive branch, the Department of Justice and DHS Office of General Counsel, and the relevant congressional oversight committees. Ideally, it would be completed before initiation of the security program, although this requirement could be waived in emergency situations. In preparing to report the findings of the Scientific Validity Statement, DHS should make clear both the majority and minority views of the scientific community, as well as any major disagreements that exist with respect to the subject at issue.

Presenting policymakers with a more nuanced framework for evaluating scientific data that reflects areas of disagreement and elucidates competing views would aid the oversight process and facilitate greater deliberation. Just as the National Intelligence Estimate uses probabilistic language to reflect the intelligence community's estimates of the likelihood of developments or events,²⁴⁵ reporting requirements could mandate both majority and minority views and the relative confidence in each. In sum, then, the development of a peer-review-based Scientific Validity Statement—focused not just on the underlying scientific research, but also its ability to translate to the particular security environment—would serve as the initial check to make sure SPOT and similar programs are properly designed.

²⁴⁴ DHS's track record on this score has been spotty at best. The ability of outside industry groups and the general public to obtain information from DHS with respect to its science and technology programs has often been criticized. *See, e.g.*, Spencer S. Hsu, *DHS Terror Research Agency Struggling*, WASH. POST, Aug. 20, 2006, at A08.

²⁴⁵ *See e.g.*, NAT'L INTELLIGENCE ESTIMATE, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES 5 (2007), available at http://www.dni.gov/press_releases/20071203_release.pdf (using terms such as "probably/likely," "very likely," and "almost certainly" to indicate a greater than even chance; terms such as unlikely and remote to indicate a less than even chance that an event will occur; and terms such as might or may reflect situations where analysts are unable to assess the likelihood, generally because relevant information is unavailable, sketchy, or fragmented).

2. Ongoing Oversight

Determining whether behavioral profiling programs are legitimately designed is only a first step to evaluating whether they are reasonable, constitutional, and effective. A well-designed behavioral profiling program, based on the latest science, and constructed with the best of intentions, may still be both ineffective and unconstitutional if it is not implemented properly in ongoing daily operations. The executive branch must therefore conduct continuing review over time to make sure that the actual operations of the program on the ground match up to the program's design, that the program is refined over time, and that the program provides appropriate avenues of redress to harmed individuals. The results of ongoing oversight should also be released in regular written reports. The federal government regularly conducts these type of audits—this is the function of the Government Accountability Office (“GAO”)—and it would be particularly useful here.²⁴⁶

An ongoing oversight process would have significant import for a program like SPOT for several reasons. First, it is unclear whether behavioral profiling officers receive sufficient training to properly implement programs. Without effective training, these programs will quickly dissolve into pure arbitrariness at best, racial profiling at worst.

Second, only through continuous auditing over time will we know whether the program is effective at identifying possible terrorists. This requires detailed record-keeping to allow comparisons of the “hit rate” of identified persons. TSA screeners operating metal detectors are continuously tested by having images (e.g., a gun) appear in certain items to make sure they are finding the needle in the haystack.²⁴⁷ A parallel program should be in place for behavioral profilers, perhaps employing actors or others to test them.

Third, substantive, quantitative auditing is the only way to determine whether, in practice, behavioral profiling does not simply constitute racial or ethnic profiling by another name. If it turns out, for example, that a disproportionate number of members of certain ethnic, racial, or religious groups are picked out by SPOT, that would cast grave doubt on whether it

²⁴⁶ GAO's quality assurance system is a great resource to guide the executive branch in developing a review procedure. GAO's system is designed “to provide confidence that work is professional, independent, and objectively designed and executed; evidence is competent and reliable; conclusions are supported; products are fair and balanced; and recommendations are sound.” GOV'T ACCOUNTABILITY OFFICE, INTERNATIONAL PEER REVIEW OF THE PERFORMANCE AUDIT PRACTICE OF THE UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE 4 (2008) (peer review report), available at <http://www.gao.gov/about/internationalpeerreviewrpt2008.pdf>.

²⁴⁷ Jeanne Meserve & Mike M. Ahlers, *TSA Tester Slips Mock Bomb Past Airport Security*, CNN, Jan. 28, 2008 (“[E]very TSA X-ray machine has a Threat Image Projection system, which digitally inserts images of guns, knives and bombs into the X-rays of luggage, to keep screeners alert.”).

is, in fact, simply looking for race-neutral facial features. Only through this sort of careful scrutiny and review of how the program operates on a daily basis can we be certain that it is, indeed, constitutional.

Fourth, ongoing oversight should ensure that a profiling program took into account recent scientific and technical—or intelligence—developments that have emerged since the program’s design. Transparency and refinement work as cleansing mechanisms to gradually sweep away scientific misunderstandings and errors.²⁴⁸ Thus, when subsequent empirical data is gathered, new national intelligence information is obtained, or more effective strategies are discovered, these methods and insights can be integrated into the existing program.

Fifth, ongoing oversight should provide mechanisms for whistleblowers—BDOs or other officials who are knowledgeable about how the program works in practice—to report concerns about behavioral profiling programs. This point is particularly important when considering the security sensitive aspects of SPOT. While most government operations benefit from the added accountability that an alert public, often informed by reports in the press, can create, this outside pressure is largely unavailable in the national security context.²⁴⁹

Sixth, the executive branch should have a system in place to receive feedback from members of the traveling public, and to provide redress to individuals who are inappropriately harmed by the program. This could take several forms: conducting investigations; providing agency hearings;²⁵⁰ ensuring that passengers who are repeatedly inappropriately targeted have fewer problems in the future; and, depending on the harm, some form of financial compensation. By performing this function, the Executive can assuage some of the due process concerns described above. Moreover, this type of response and redress to the traveling public is likely to make the program more effective and efficient as a security measure.²⁵¹

²⁴⁸ CONG. RESEARCH SERV., THE ENDANGERED SPECIES ACT AND “SOUND SCIENCE” 10 (2006), available at <http://www.fas.org/sgp/crs/misc/RL32992.pdf>.

²⁴⁹ MCDONOUGH, RUDMAN & RUNDLET, *supra* note 221, at 20. The Office of Special Counsel (“OSC”) is currently tasked with handling whistleblower complaints and investigating allegations of wrongdoing. Unfortunately, the Government Accountability Project (“GAP”) has reported a drastic statistical decline in OSC’s performance over the last several years, “including a 60 percent reduction in the number of whistleblowers that receive any help from OSC.” Press Release, Gov’t Accountability Project, House to Hold Oversight Hearing on U.S. Office of Special Counsel Tomorrow (July 11, 2007), available at http://www.whistleblower.org/content/press_detail.cfm?press_id=1087.

²⁵⁰ For an example of how secure agency redress hearings might work, see Florence, *supra* note 71, at 2169-76.

²⁵¹ See, e.g., JAMES SUROWIECKI, THE WISDOM OF CROWDS 31-32 (2004).

B. *Effective Bureaucracy*

We recognize that our proposal for the executive branch will likely provoke criticism both from opponents of larger government and opponents of enhancing executive power. The first group will take issue with adding layers to the bureaucracy more generally. The second will argue that an oversight office within the executive branch will have no real teeth. A tension thus emerges between avoiding unnecessary bureaucratic additions, and creating a strong and robust oversight office with true enforcement power. We believe that creating a modest new oversight office within DHS could create effective and independent oversight without unnecessary bureaucracy.

To begin, we address whether existing institutions suffice to carry out the metaprofiling functions described above. Although DHS's sprawling bureaucratic structure is oft-critiqued,²⁵² other comparable institutions within and outside the Department lack the structure to conduct the type of oversight necessary here.

The closest fit within the federal bureaucracy may be the Inspectors General ("IG") offices—particularly the DHS IG. However, the mission, workforce capacity, and institutional competency of an IG differ from what effective metaprofiling would require.²⁵³ IGs tend to be generalists and emphasize auditing and accounting techniques to detect and deter waste, fraud, and abuse. They do not possess the level of specialization and scientific expertise needed to conduct the scientific peer review and subsequent testing of behavioral profiling programs. Most significantly, IG investigations are often ex post initiatives that result from congressional pressure or public controversy about a particular matter. Rarely do they detect and deter prob-

²⁵² Elaine Kamarck, formally of Harvard's Kennedy School of Government and now an official at DHS, believes that the Department is too large and that pulling together so many disparate agencies has been a near impossible task. Pam Fessler, *Key Voices Weigh In on Homeland Security Dept.*, NPR, Jan. 14, 2008, available at <http://www.npr.org/templates/story/story.php?storyId=17969438>.

²⁵³ Under the Inspector General Act, IGs are selected without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial and management analysis, law, public administration, or investigations. Their principle roles include: (1) conducting and supervising audits and investigations relating to the programs and operations of the federal agency; (2) providing leadership and coordination and recommending policies for activities designed to promote the economy, efficiency, and effectiveness of such programs and operations, and preventing and detecting fraud and abuse in such programs and operations; and (3) "providing a means for keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, and the necessity for and progress of corrective action." CONG. RESEARCH SERV., STATUTORY OFFICES OF INSPECTOR GENERAL: ESTABLISHMENT AND EVOLUTION 2 (2003), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-5206:1> [hereinafter CONG. RESEARCH SERV., STATUTORY OFFICES OF INSPECTOR GENERAL].

lems before they arise. Thus, an IG would not be well equipped for pre-implementation and ongoing review of behavioral profiling programs.²⁵⁴

DHS has two entities tasked with scientific missions. The Directorate for Science and Technology (“S&T”) is responsible for the development and use of high technology in support of homeland security.²⁵⁵ With a budget of \$830.3 million in fiscal year 2008, S&T conducts research and development at laboratories within the federal government and funds activities by private industry and universities.²⁵⁶ But S&T’s framework for researching and deploying science and technology solutions to protect the homeland does not provide commensurate tools for long-term program evaluation, independent accountability, and stakeholder reporting and feedback mechanisms—the precise roles an oversight office would play. A second body, the Homeland Security Science and Technology Advisory Committee, provides a source of independent, scientific and technical planning advice for the Under Secretary for Science and Technology at the Department of Homeland Security.²⁵⁷ Unfortunately, the committee has not posted minutes of any meeting since *November 2005*.²⁵⁸ And even when the committee is fully functional, it serves the limited role of providing the Under Secretary of Science and Technology with non-binding advice and recommendations.

Two other offices outside of DHS also have a mandate for assuring the propriety of executive branch programs. The Office of Legal Counsel, as well as general counsels’ offices within particular departments and agencies, must approve the constitutionality and legality of federal programs. Although these offices have a crucial role and are generally staffed by talented attorneys, their function is legal and not scientific. And the legal analysis of these programs will only be as good as the information attorneys get from security officials and scientists. A final entity worth noting is the GAO. In its enabling legislation, GAO was granted broad power to request information in order to carry out its mandate to “investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement,

²⁵⁴ Moreover, a recent report noted another weakness in the federal inspectors general system: “Federal inspectors general too often ignore or discount the complaints of whistleblowers, and concerned citizens attempting to report government waste or mismanagement may face difficulty making even basic contact with the offices via telephone or the Internet.” Ed O’Keefe, *Federal Inspectors Often Difficult to Reach, Group Says*, WASH. POST, Mar. 23, 2009, at A13 (citing a report released by the independent Project on Government Oversight).

²⁵⁵ Dep’t of Homeland Sec., Science and Technology Directorate, http://www.dhs.gov/xabout/structure/editorial_0530.shtm (last visited Oct. 17, 2009).

²⁵⁶ CONG. RESEARCH SERV., *THE DHS DIRECTORATE OF SCIENCE AND TECHNOLOGY: KEY ISSUES FOR CONGRESS 1* (June 22, 2009).

²⁵⁷ Dep’t of Homeland Sec., Homeland Security Science and Technology Advisory Committee (HSSTAC), http://www.dhs.gov/xres/committees/gc_1163542152895.shtm (last visited Oct. 17, 2009).

²⁵⁸ *Id.*

and application of public funds.”²⁵⁹ GAO’s ability to compel disclosure of documents has been severely limited. In the wake of the decision in *Walker v. Cheney*,²⁶⁰ GAO was effectively stripped of its ability to challenge in court the executive branch’s decision to withhold documents. Thus, without mandatory subpoena power, GAO has no way to compel disclosure of critical security information retained by the executive branch. It thus lacks a crucial advantage of placing responsibilities for metaprofiling with the Executive.

While some combination of these existing institutions could conduct the type of metaprofiling of SPOT and related programs we describe above, a new office tasked solely with this responsibility would be more appropriate. In particular, a new oversight office for behavioral profiling security programs could include the following three features in order to establish a degree of independence, professionalism, and accountability.²⁶¹

First, the oversight office should be led by a Chief Science Officer (“CSO”), a well-respected scientist who possesses experience as both a science practitioner and public administrator. This individual will need to understand the intricacies of the office’s technical work and have the ability to manage a staff of dozens of civil servants. To accomplish this, there should be fairly substantial qualifications for serving as CSO.²⁶² The CSO

²⁵⁹ The Comptroller General “was given extensive access to information in ‘all departments and establishments . . . regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective office as he may from time to time require.’” CONG. RESEARCH SERV., GAO: GOVERNMENT ACCOUNTABILITY OFFICE AND GENERAL ACCOUNTING OFFICE 4 (Sept. 10, 2008) [hereinafter CONG. RESEARCH SERV., GAO], available at <http://www.fas.org/sgp/crs/misc/RL30349.pdf>.

²⁶⁰ 230 F. Supp. 2d 51, 65-66 (D.D.C. 2002).

²⁶¹ These include: (1) ensuring that security programs are effectively designed based on sound science; (2) making sure programs are properly implemented, so that scientific security theories are, in fact, translated to practice in appropriate ways; (3) continuing oversight that would provide a capacity for redress to persons harmed by programs, while giving the agency the ability to refine programs as threats change, or science or the law develops.

²⁶² To foster a genuine sense of independence and inter-branch deliberation, the ideal CSO would be chosen by the President from a slate of candidates submitted by a joint commission of legislators from the House and Senate Homeland Security or Science and Technology committees. Creating a role for the executive and legislative branches at the outset will help to counter claims that the oversight office is merely subservient to the President and that its work only serves to further partisan political ends. There is precedent for such inter-branch cooperation in the presidential appointment process. In the case of the Comptroller General who heads up the GAO, when a vacancy occurs, Congress establishes a commission to recommend a slate of candidates to the president. General Accounting Office Act of 1980, Pub. L. No. 96-226, 94 Stat. 311 (1980). The commission consists of the Speaker of the House of Representatives, the President Pro Tempore of the Senate, the majority and minority leaders of the House of Representatives and the Senate, the Chairman and ranking minority member of the Senate Committee on Homeland Security and Governmental Affairs, and the Chairman and ranking minority member of the House Committee on Oversight and Government Reform. *Id.* The Comptroller General is then appointed by the President with the advice and consent of the Senate. In crafting a role for the executive and legislative branches in the appointment process, Congress recognized that the President

would function more effectively if granted some limited protection from political interference. Creating a fixed term of office for the CSO would encourage longevity of service, the gradual accrual of institutional knowledge, and promote greater independence. For example, the GAO's Comptroller General is appointed for a fifteen-year nonrenewable term. This statutory provision is designed to protect both professional integrity and objectivity.²⁶³ In addition, including a modest for-cause removal provision that insulates the CSO from wholly arbitrary and partisan firing would make great strides towards establishing the independence of the office.²⁶⁴

Second, to ensure the requisite level of independence and subject matter specialization, the permanent staff of the oversight office should be career civil servants. DHS has a relatively large number of political appointees.²⁶⁵ But only an office shielded from partisan influence could provide evaluations of critical programs without undue pressure from agency appointees. This would be an important safeguard against the potential for the politicization of science.²⁶⁶ This danger, unfortunately, is not hypothetical. Moreover, because the office would conduct subsequent testing and ongoing monitoring of science-based programs, understanding the history of an initiative's implementation can be vital to assessing its effectiveness over time. Careerists are "repositories of organizational memory" and "[t]heir personal intelligence and communications networks have been built up over many years dealing with the same organizations, people, and issues."²⁶⁷ Accordingly, continuity in office staffing across administrations will contribute to the agency's long-term success.

could still nominate an individual not recommended by the commission, in light of "the President's authority under the Appointments Clause However, it is expected that the President would give great weight to the Commission's recommendations." Senate Comm. on Governmental Affairs, General Accounting Office Act of 1980, S. REP. NO. 96-570, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 732, 741. In fact, since the nominating panel was established in 1980, on both occasions when there was a vacancy in the office of Comptroller General—President Reagan in 1981 and President Clinton in 1998—a nominee from the initial congressional list was chosen. *See* CONG. RESEARCH SERV., GAO, *supra* note 259, at 21.

²⁶³ CONG. RESEARCH SERV., GAO, *supra* note 259, at 23.

²⁶⁴ *See* CONG. RESEARCH SERV., STATUTORY OFFICES OF INSPECTOR GENERAL, *supra* note 253, at 3.

²⁶⁵ Shane Harris, *The Coming Storm*, NAT'L L.J., June 2, 2007.

²⁶⁶ President Obama recently issued a presidential memorandum aimed at insulating scientific decisions across the federal government from political influence. A co-chair of Obama's Council of Advisors on Science and Technology noted that the memorandum will order the Office of Science and Technology Policy to "assure a number of effective standards and practices that will help our society feel that we have the highest-quality individuals carrying out scientific jobs and that information is shared with the public." Rob Stein, *Obama Aims to Shield Science From Politics*, WASH. POST, Mar. 9, 2009, at A02 (quoting a co-chair of the Obama administration's Council of Advisors on Science and Technology).

²⁶⁷ Pfiffner, *supra* note 237, at 61.

Third, the oversight office should feature an ombudsman, who would serve as a clearinghouse for complaints and allegations of wrongdoing from government employees and members of the public.²⁶⁸ The ombudsman could report her findings to both houses of Congress and, in appropriate cases, to the public.²⁶⁹ This would create an additional channel for federal employees to report their concerns without fear of harassment or retaliation. It would also allow members of the public—either those with specialized expertise or those who have been affected by behavioral profiling—a means to improve security programs or obtain redress themselves.

CONCLUSION

Since 9/11, public debate on the appropriate domestic response to the terrorist threat has focused on balancing civil liberties and the rule of law against the need for national security. While both critics and proponents of behavioral profiling programs may wish to frame the debate through this narrative, we believe this approach is unnecessary and unhelpful. For the reasons we described in Part I, the behavioral profiling paradigm makes a good deal of sense. It allows security officials to identify and focus resources on the people who are most likely to be a security risk, with relatively little cost. Nonetheless, as we acknowledge in Part II, behavioral profiling raises serious constitutional concerns under the Equal Protection Clause, the Fourth Amendment, and the Due Process Clause.

The security benefits of behavioral profiling need not be balanced against these constitutional and civil liberties concerns. For, as a matter of doctrine, the fundamental issue is whether behavioral profiling programs are reasonable: whether they provide a rational basis for distinguishing between some persons and others, whether they provide reasonable suspicion for a law enforcement officer to conduct a follow-up search and seizure, and whether they treat people fairly, including by offering some redress for wrongly harmed persons. An effective behavioral profiling program will do all of these well—and be constitutional. Nonetheless, we worry that neither the federal judiciary nor Congress is well-positioned to guarantee the legitimacy of behavioral profiling programs. Accordingly, the executive branch itself should take on this responsibility. By so doing, it will uphold the promise of behavioral profiling: to provide better security, while minimizing the interference with Americans' liberty.

²⁶⁸ See Katyal, *supra* note 223, at 2347-48 (outlining a proposal to permit the minority party in Congress to appoint two ombudsmen to each federal agency during periods of single-party government).

²⁶⁹ *Id.*