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# Responses to the Ten Questions

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## RESPONSES TO THE TEN QUESTIONS

Amos N. Guiora<sup>†</sup>

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### 2. HOW SHOULD AMERICA ADDRESS THE THREAT OF HOMEGROWN TERRORISTS?

What is the primary threat to American national security? The answer is in the title: homegrown terrorism. This assessment is relevant both to the United States and Europe; post-9/11 terrorist attacks convincingly demonstrate that the modus operandi is acts of domestic terrorism conducted by citizens (or nationals) of that country.<sup>1</sup>

The fundamental (but not exclusive) motivation for these acts of domestic terrorism is religious extremism, largely driven by religious extremist faith leaders inciting members of their respective congregations. The threat is not from religion, rather from religious extremists committing acts of terrorism in their own countries.<sup>2</sup>

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1. See *Thwarted Terror Plots Against the U.S. Since September 11, 2011*, HERITAGE FOUND., <http://www.heritage.org/static/reportimages/21764F97F93267B1B7698EEC4E37A804.gif> (illustrating how a majority of the thwarted terror plots since 9/11 have involved individuals residing in the United States) (last visited Apr. 26, 2011).

2. See charts at the end of this section on domestic terrorist attacks in the United States.

Homegrown terrorism—whether motivated by religious extremism or another motivation—raises profoundly disturbing questions; it suggests the threat is from within, potentially turning neighbor against neighbor. Nevertheless, that discomfort must not dissuade national security officials from recognizing the threat and taking mitigation measures. For example, in the religious-extremism paradigm, the role of the extremist threat leader is essential in inciting the religious-extremist actor. Put another way, the religious-extremist faith leader is inciting religious-extremist actors in houses of worship.

There are at least two distinct communities at risk from religious-extremist faith leaders: internal communities (of that faith) and external communities (of the larger body polity). In the internal-community paradigm, members at risk would include child-brides (the Fundamental Church of Jesus Christ of Latter-Day Saints), honor killings (extremist Islamic communities), and group-member, person-specific attacks (assassination of former Israeli Prime Minister Yitzhak Rabin by a Jewish extremist terrorist). With respect to the external-community paradigm, the at-risk community includes larger society deemed to be a legitimate target by the religious extremist inciter; to that end, terrorist attacks in which both non-group and group members can both be targets in the context of randomness of terrorism are legitimate.

Resolving tension between justified surveillance and the cost associated with such surveillance is a difficult issue; resolving this tension is, however, essential to adequately protect the community. Given the direct threats posed by religious-extremist inciters, I recommend that law enforcement engage in proactive monitoring and surveillance of houses of worship, to which end I recommend the following measures:

- A. Gather criminal evidence or intelligence information that the faith leader is inciting terrorist action;
- B. Analyze the community's willingness—and capability—to act in accordance with the incitement;
- C. Analyze the faith leader's intent to incite the congregation as a call to duty;
- D. Warn the faith leader that law enforcement has received evidence or intelligence regarding the incitement and will conduct surveillance unless the incitement stops, in conformity with the idea of due process;

- E. Conduct the surveillance in a manner that least affects the person of faith's freedom of religion;
- F. Enhance cooperation between law enforcement and clergy;
- G. Adopt a heightened probable cause standard regarding monitoring of houses of worship;
- H. Articulate clear guidelines for how monitoring is to be conducted;
- I. Articulate and enforce limits on free speech with respect to religious extremism.

Conducting surveillance in houses of worship has the potential to chill participation in religion. Not only may potential members hesitate to join, but preachers, rabbis, imams and other religious leaders may not feel free to fully express their messages.

The Supreme Court examined this chilling effect in *NAACP v. Alabama ex rel. Patterson*<sup>3</sup> and held that the State of Alabama's interest in obtaining the NAACP's membership list was superseded by the constitutional rights of the NAACP members.<sup>4</sup> The Court held that "immunity from state scrutiny of [petitioner's] membership lists . . . is here so related to the right of [petitioner's] members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment."<sup>5</sup> The state's interest in obtaining the records did not outweigh the enormous potential to chill association were individual members' names revealed.

However, the potential to chill membership does not supersede all considerations. Certainly if there is specific evidence of an imminent threat the government is justified in conducting surveillance, even at the cost of inhibiting religion by potentially chilling participation. The question thus becomes where to draw the line between permissible government surveillance and impermissible surveillance. Professor Michael McConnell suggested the following test:

If the plaintiff can show that a law or governmental practice inhibits the exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of

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3. 357 U.S. 449 (1958).

4. *Id.* at 466.

5. *Id.*

some important (or “compelling”) secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets his burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.<sup>6</sup>

Protecting the general population is a compelling government objective; the question is whether monitoring houses of worship is the least restrictive means available for achieving this objective.

Because of the ethical concerns associated with conducting surveillance in houses of worship, appropriate probable cause standards must be determined relevant to surveillance of churches, mosques, temples, and synagogues. Probable cause is based on the Fourth Amendment, which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>7</sup>

While stereotypes such as “Muslims are dangerous” are clearly insufficient to support probable cause, the Supreme Court observed in *Illinois v. Gates* that “probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.”<sup>8</sup>

Thus, while the government cannot rely on stereotypes, once there is a probability of criminal activity, law enforcement is justified in conducting surveillance. However, because of the danger of a chilling effect on the practice of religion, monitoring houses of worship requires a heightened probable cause. That is, the traditional probable cause standard is—I suggest—insufficient for monitoring houses of worship because of the inevitable conflict with the Free Exercise Clause of the United States Constitution.<sup>9</sup> However, because of the danger posed by religious extremism—in particular incitement occurring in houses of worship—it is necessary to enable law enforcement to monitor and conduct surveillance. While granting immunity to religion poses a clear

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6. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416 (1990).

7. U.S. CONST. amend. IV (emphasis added).

8. 462 U.S. 213, 243 n.13 (1983).

9. U.S. CONST. amend. I.

danger to society, the Constitution cannot be used as a buttress to forbid the state from fulfilling its fundamental obligations. A heightened probable cause standard would resolve this tension.

Enhanced cooperation between law enforcement and clergy would enable the former to warn the latter regarding suspected criminal conduct of individual congregants. Furthermore, were particular clergy engaging in speech deemed capable of inciting acts of terrorism, open channels of communication would facilitate law enforcement's ability to minimize a potential chilling effect by warning faith leaders regarding the potential criminal nature of their particular speech. That is, by engaging in a proactive discussion with the faith leader regarding prior speech, the need for future monitoring would be potentially negated were the clergy to no longer engage in such speech.

A heightened probable cause standard would enable monitoring of houses of worship while minimizing any chilling effect on people of faith. Determining whether previous speech justifies surveillance in accordance with a heightened probable cause standard would serve to ensure that surveillance would occur only when and where it was truly required. This approach would significantly contribute to a more balanced and nuanced approach to facilitating law enforcement while protecting the freedom of religion; a heightened probable cause standard would facilitate respect for the Free Exercise Clause while ensuring that government fulfills its primary obligation of protecting the public.

Christopher Slobogin argues it is deceptive for the FBI to conduct surveillance operations using undercover agents.<sup>10</sup> However, there is a cost with respect to the chilling effect were agents to sit in church dressed in a manner different from parishioners and holding pen and pencil while writing the words spoken by the faith leader. A faith leader with whom I spoke indicated that, were his church under surveillance, he would prefer FBI agents remain undercover to reduce the chilling effect. While arguably this is less transparent, it leads both to better information and minimizes Free Exercise violations. Were the FBI's

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<sup>10</sup> See Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778 (1997) ("Undercover work is by definition deceptive. It normally involves outright lies. Typically, an undercover agent gives or presents a fake identity and a fabricated history, denies any involvement with the police, and engages in any number of other lies.")

surveillance efforts aimed at a particular parishioner, the enhanced cooperation referenced above would be particularly important.

Finally, we must re-articulate the limits of speech as they relate to clergymen. How often do clergy need to incite before law enforcement moves in? What words justify monitoring? In *Brandenburg v. Ohio*, the Court held:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.<sup>11</sup>

The Court went on to say, “The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”<sup>12</sup>

The authority and power of an extremist religious cleric is, potentially, extraordinary. Therefore, when we examine the three prongs of the *Brandenburg* test—imminence, likelihood, intent<sup>13</sup>—the first two are almost certainly met in the case of an extremist religious authority determined to encourage his congregation to act. Sermons regularly addressing various dangers and evils will ultimately reach a critical mass and the listener’s act will become imminent. A religious listener is likely to obey the words of an individual he or she views as an ultimate authority on spiritual matters.

Where does that leave the secular state? Precisely because of the absolutism of the religious extremist, the state has no choice but to respond accordingly. Perhaps the fundamental weakness of my argument is that I am suggesting that the state restrict the rights of citizens. Perhaps society in response to the examples discussed above—in order to protect the unprotected—may have no choice but to consistently and aggressively monitor and prosecute religious extremists who endanger civil democratic society.

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11. 395 U.S. 444, 447–48 (1969).

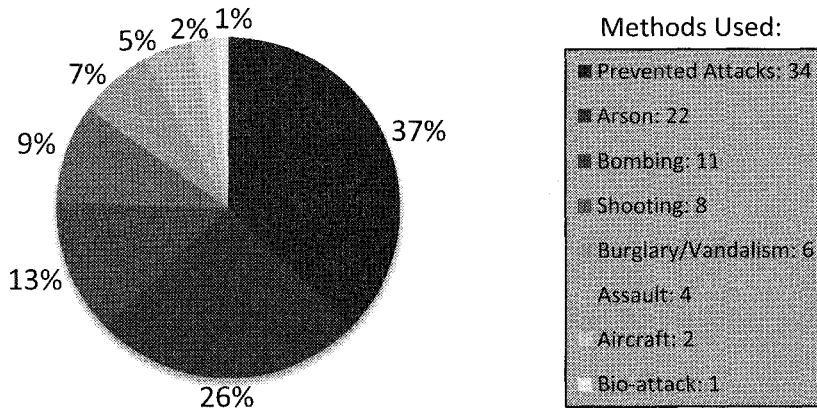
12. *Id.* at 448 (quoting *Noto v. U.S.*, 367 U.S. 290, 297–98 (1961)).

13. *Id.* at 447.

### Appendix A

#### Domestic Terrorist Attacks Since September 11, 2001

Between September 11, 2001 and December 31, 2010, there were 52 domestic terrorist attacks and 34 thwarted domestic terrorist attacks in the United States.

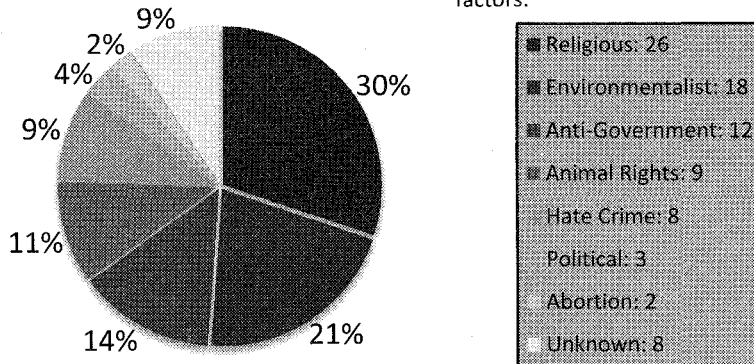




### Motivation For Domestic Terrorist Attacks Since September 11, 2001

Of the 86 domestic terrorist attacks or attempts in the United States between September 11, 2001 and December 31, 2010, seven motivating factors have been identified.

The motivation came from support or opposition to the following factors:



### 3. IS PRESIDENT OBAMA'S USE OF PREDATOR STRIKES IN AFGHANISTAN AND PAKISTAN CONSISTENT WITH INTERNATIONAL LAW AND INTERNATIONAL STANDARDS?

Much has been written on U.S. drone policy<sup>14</sup> and on the

14. See, e.g., Kenneth Anderson, *Predators Over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010, at 26–34; *Drones II: Second Hearing on Drone Warfare Before the Subcomm. on Nat'l Security and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2010) (written testimony of Kenneth Anderson, Professor of Law, Washington College of Law), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1619819&rec=1&srcabs=1561229](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1619819&rec=1&srcabs=1561229); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt, ed., forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1501144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1501144); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237 (2010); Afsheen John Radsan & Richard W. Murphy, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405 (2009); Jane Mayer, *The Predator War*, NEW YORKER, Oct. 19, 2009, available at [http://www.newyorker.com/reporting/2009/10/26/091026fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer); Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law, The Obama

Israeli targeted-killing policy;<sup>15</sup> in my own writings I have argued that Israel's targeted-killing policy meets international law standards of preemptive self-defense in the context of operational counterterrorism, subject to restrictions and criteria articulated below.<sup>16</sup>

Critical to ascertaining the legality, morality, and effectiveness of the policy (drone and targeted killing) is analyzing the criteria implemented with respect to specific operational decisions. Both policies are predicated on engaging a target defined as legitimate because of the danger posed by that individual. However, mere identification of an individual as a legitimate target is insufficient for a targeted killing/drone decision to be deemed lawful; the action must be based on person-specific self-defense intended to prevent future acts of terrorism.

For either policy to be legal it must be dependent on meeting two distinct, four-part tests, one related to intelligence information, the other to international law. The essence of the two tests—and of lawful preemptive self-defense—is that the intended target is involved in planning and implementing a future action; international law does not—and must not—tolerate revenge-based counterterrorism predicated on retribution. Developing and implementing the two distinct, four-part tests directly facilitates—in both the targeted-killing and drone-attacks paradigms—minimizing the loss of innocent life and maximizing the accuracy of the

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Administration and International Law (Mar. 25, 2010), *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm>; Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM* (Benjamin Wittes ed., 2009).

15. See, e.g., STEVEN R. DAVID, *FATAL CHOICES: ISRAEL'S POLICY OF TARGETED KILLINGS* (The Begin-Sadat Center for Strategic Studies, Bar-Ilan University, Mideast Security and Policy Studies No. 51, 2002), *available at* <http://www.biu.ac.il/Besa/david.pdf>; Orna Ben-Naftali & Keren R. Michaeli, *Justice-Ability: A Critique of the Non-Justiciability of Israel's Policy of Targeted Killing*, 1 J. INT'L CRIM. JUST. 368 (2003); David Kretzmer *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); NILS MELTZER, *TARGETED KILLING IN INTERNATIONAL LAW* (2008).

16. Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004) (cited by the Israel Supreme Court in HCJ 769/02 Pub. Comm. Against Torture in Isr. vs. Gov't of Isr. [2005] and HCJ 8794/03 Yoav Hess vs. Government of Israel [2008]); Amos N. Guiora, *License to Kill*, FOREIGN POL'Y (July 13, 2009), *available at* [http://www.foreignpolicy.com/articles/2009/07/13/licence\\_to\\_kill](http://www.foreignpolicy.com/articles/2009/07/13/licence_to_kill); Amos N. Guiora, *Targeted Killings*, WORLD (July 15, 2009), <http://www.theworld.org/2009/07/15/targeted-killings>.

proposed action.

Intelligence information (gathering/analysis) is the heart and soul of operational counterterrorism (money being essential to terrorism); for the received information to be deemed actionable (meaning its use is justified), it must meet a four-part test:

1. **Reliable:** Past experiences show the source to be a dependable provider of correct information; requires discerning whether the information is useful and accurate; demands analysis by the case officer whether the source has a personal agenda/grudge with respect to the person identified/targeted.
2. **Viable:** Is it possible that an attack could occur in accordance with the source's information? The information provided by the source indicates a terrorist attack that could take place within the realm of possibility and is feasible.
3. **Relevant:** The information has bearing on upcoming events; consider both the timeliness of the information and whether it is time-sensitive, which could necessitate imposing immediate counterterrorism measures.
4. **Corroborated:** Another source (who meets the reliability test above) confirms the information in whole or in part.

With respect to international law, the proposed action must meet the following criteria:

1. **Proportionality:** requires that the anticipated loss of life and damage to property incident to attacks must not be excessive in relation to the concrete and direct military advantage<sup>17</sup> expected to be gained from the proposed action;
2. **Military Necessity:** justifies those measures not forbidden by international law, and which are indispensable for securing the complete submission of the enemy as soon as possible;<sup>18</sup>
3. **Alternatives:** targeted killing is impermissible when there is a "non-lethal alternative which would entail a comparable military advantage without unreasonably

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17. INCENDIARY WEAPONS – LEGAL STATUS, <http://www.globalsecurity.org/military/systems/munitions/incendiary-legal.htm> (last visited Mar. 20, 2011).

18. *Id.*

increasing the risk to the operating forces or the civilian population”;<sup>19</sup>

4. **Collateral Damage:** inadvertent casualties and destruction inflicted on civilians in the course of military operations.

The Israel Supreme Court (sitting as the High Court of Justice, President Barak) ruling regarding targeted killings establishes clear criteria—a checklist for operational counterterrorism decision making—with respect to targeted killing. Harming civilians that

[take direct part in hostilities], even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent civilians nearby are not harmed. Harm to the latter must be proportionate. That proportionality is determined according to a values based test, intended to balance between the military advantage and the civilian damage.<sup>20</sup>

This guideline approach, predicated on checklists maximizing rationale-based decision making, is intended to minimize unnecessary harm to innocent civilians who neither directly nor indirectly participate in hostilities. The following charts suggest the issues to be considered and weighed in the targeted-killing decision making process:

Source
<ul style="list-style-type: none"> <li>• What is the source’s <i>background</i> and how does that affect the information provided?</li> <li>• Does the source have a <i>grudge/personal score</i> to settle based either on past personal or family relationship with the person the information targets/identifies?</li> <li>• Who is the <i>target</i> of the source’s information?           <ul style="list-style-type: none"> <li>• What is the person’s role in the terrorist organization?</li> </ul> </li> </ul>

19. William Abresch, Book Review, GLOBAL LAW BOOKS – TARGETED KILLING IN INTERNATIONAL LAW, <http://www.globallawbooks.org/reviews/detail.asp?id=529> (last visited Apr. 6, 2011) (reviewing NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW (2008)).

20. HCJ 769/02 Pub. Comm. Against Torture in Isr. vs. Gov’t of Isr. [2005] ¶ 60, [http://elyon1.court.gov.il/Files\\_ENG/02/690/007/a34/02007690.a34.HTM](http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM) (last visited Apr. 6, 2011). See Appendix B for charts showing legitimate targets killed versus innocent civilians killed in U.S. targeted drone strikes in Pakistan.

- How will detention affect that organization, short-term and long-term alike?
- What insight can the source provide regarding impact?
- What are the *risks* to the source if the targeted individual is targeted?
  - Source protection is essential to continued and effective intelligence gathering;
  - Protecting the source is essential both with respect to that source and additional—present or future—sources
- What are the *risks* to the source if the intelligence is made public?
  - Key to determining the proper forum for trying suspected terrorists;

If protecting the source/information gathering methods and techniques takes precedence over the traditional right guaranteed to the defendant to confront his accuser, an alternative judicial forum must be considered.

### Target

- For example, in the suicide bombing infrastructure, there are four distinct actors: the bomber, the logistician, the planner, and the financier; determining the legitimacy of the target (for a targeted killing) requires ascertaining the potential target's specific role in the infrastructure. Subject to the two, four-part tests above, the four actors are legitimate targets as follows:
  - (a) **Planner**—legitimate target 24/7;
  - (b) **Bomber**—legitimate target solely when operationally engaged;
  - (c) **Logistician**—legitimate target when involved in all aspects of implementing a suicide bombing but—unlike the planner—not a legitimate target when not involved in specific, future attack;
  - (d) **Financier**—a largely unexplored subject in the context of targeted killings; a legitimate target when involved in—for example—wiring money or laundering money (both essential for terrorist attacks) but subject to debate and discussion regarding when “not in the act.” To that extent, the question is whether the financier is more akin to the bomber or to the logistician. Arguably, given the centrality of the financier's role the correct placing is between the logistician and planner.
- What are the *risks/cost-benefits* if the targeted killing is delayed?
  - How time-sensitive is the source's information;
  - Does it justify immediate action;
  - *Or* is the information insufficient to justify a targeted killing but significant enough to justify other measures, including detention (subject to operational considerations);
- What is the nature of the suspicious activity?
  - Does the information suggest involvement in significant acts of terrorism justifying immediate counterterrorism measures;
  - *Or* is the information more suggestive than concrete;
  - In addition, if the information is indicative of minor/not harmful possible action, effective counterterrorism might suggest additional information gathering—same or additional source—before authorization of the targeted-killing.

- What information can the individual provide? (premised on the operational feasibility of detention rather than authorizing a targeted killing)
- Does the individual possess information, to varying degrees of specificity, relevant to future acts of terrorism/individuals?

### Appendix B



