

America's Challenge:

Domestic Security, Civil Liberties, and National Unity After September 11



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Migration Policy Institute

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“The very qualities that bring immigrants and refugees to this country in the thousands every day, made us vulnerable to the attack of September 11, but those are also the qualities that will make us victorious and unvanquished in the end.”

U.S. Solicitor General Theodore Olson

Speech to the Federalist Society, Nov. 16, 2001.

Mr. Olson's wife Barbara was one of the airplane passengers murdered on September 11.

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Foreword

The intersection of civil liberties, national security and immigration policy is an area of special concern for the Migration Policy Institute (MPI). The ability to understand and untangle these forces is critical to our identity as a nation. Understanding the vitality of immigrant communities and engaging these communities in combating terrorism is necessary both to resolve contradictions between security and liberty and to strengthen fundamental principles of justice.

This report illustrates MPI's commitment to generating informed and thought-provoking proposals that support sound immigration policy. The report's findings and recommendations point the way toward answers to some of the most difficult challenges facing the United States today. They also reveal the promise and the strength of the country's diversity and the fundamental values that have evolved through the experience of this nation of immigrants.

Led by two of MPI's most senior staff, an experienced team of authors has drawn on the public record as well as a unique set of interviews with immigrant leaders and communities most directly affected by post-September 11 domestic security measures. The report describes and evaluates the impact of government policies on the country's vulnerability to terrorism, on civil liberties—especially as experienced by Arab- and Muslim-Americans—and on the sense of national unity that has long been one of the United States' great strengths. The authors had the benefit of advice from a distinguished panel of experts, as well as invaluable pro bono research from one of the country's most respected law firms. This report thus brings together an unprecedented body of original research and expert analysis to support policy recommendations in which security and civil liberties are complementary rather than competitive.

The Migration Policy Institute (MPI) is an independent, non-partisan, non-profit think-tank dedicated to the study of the movement of people worldwide. The Institute provides analysis grounded in research and practical experience, develops policy proposals and offers evaluation of migration and refugee policies and programs at the local, national, and international levels. It aims to meet the rising demand for pragmatic responses to the challenges and opportunities that large-scale migration, whether voluntary or forced, presents to communities and institutions in an increasingly integrated world.

The importance of thoughtful migration policymaking has increased exponentially in recent years as states have been compelled to balance their interests in economic growth, humanitarian response, national security, and social cohesion in the face of sweeping demographic change. This report aims to enlarge the range of options that governments and societies may consider in pursuit of policies that simultaneously strengthen their nations' cohesion, security, and liberty.

Kathleen Newland and Demetrios G. Papademetriou

Co-Directors, Migration Policy Institute

Acknowledgments

The creation of this report has truly been a team effort. Many institutions and individuals have contributed to an undertaking that lasted over 15 months. September 11, 2001, and the events that followed, profoundly touched the lives of many of us. The need to respond in some tangible way was perhaps partly responsible for the generosity and willingness with which many offered to work on the report. They deserve our deepest gratitude.

This report would not have been possible without the extraordinary support that the Migration Policy Institute (MPI) received from the law firm of Cleary, Gottlieb, Steen & Hamilton. The firm contributed its resources and thousands of hours of time of its partners, associates, summer associates, and paralegals over the last year. MPI and the authors are grateful to the firm particularly for its assistance with Chapters Two and Three, and its compilation of empirical data and statistical tabulations on detainees and other appendix materials. Although it is not possible to individually recognize each of the attorneys and staff who assisted with this report, we especially thank Jeff Lewis, Evan Davis, Asli Bâli, Adam Barcan, Stephen Foundos, Sabra Gandhi, Michael Hanna, Anil Kalhan, Tal Kastner, Rupa Mitra, Katherine Mooney, Diana Moreno, Greg Tzeuschler, and Amélie von Briesen. We especially thank Asli Bâli for the sustained energy she brought to her role coordinating the work of the Cleary team.

Three other institutions made significant contributions to the report. Cornell Law School students Lauren Harris, Sarah Schuette, Rachana Trivedi, and Cristina Velez prepared the initial draft of the chronology of post-September 11 actions and interviewed numerous lawyers to prepare summaries of people detained after September 11. Rebecca Miller and Sandeep Solanki, two students from the Immigrants Rights Clinic at New York University School of Law, also interviewed detainees and lawyers. Sameer Ashar supervised their work. Mehdi Bozorgmehr and Anny Bakalian of the Middle East and Middle Eastern American Center of the City University of New York provided valuable insight and assistance in the development of Chapter Three.

Although all the authors are responsible for the overall report, individual chapters were penned by different people; thus the different styles in which the chapters are written. Chapter One was principally written by Jay Peterzell; Chapter Two by Michael Wishnie, with the assistance of the Cleary Gottlieb team; Chapter Three by Muzaffar Chishti, Stephen Yale-Loehr, and members of the Cleary Gottlieb team; and Chapter Four by Doris Meissner. Demetrios Papademetriou contributed to all the parts. Finally, Paul Sherer's astute and masterful editing of an often unwieldy manuscript provided the final important touches to the entire effort.

At MPI, various colleagues assisted in the many tasks that go into a report of this size. We especially thank Kathleen Newland, Kim Hamilton, Amy Mehringer, Jon Pattee, Alex Aleinikoff, and Adam Mugavero for their help.

We gratefully acknowledge the generosity of the Ford Foundation, the Open Society Institute, the Carnegie Corporation of New York, and the Charles Evans Hughes Memorial Foundation for funding this project.

The members of our Advisory Panel deserve special thanks. They were patient and understanding with the long drafts of the report they reviewed. Their ideas, debates, and judgments contributed significantly to our analysis. However, final responsibility for the content and conclusions herein rests with the authors alone and does not reflect the positions of the other individuals or organizations that participated in the report's preparation.

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* Members provided valuable advice and guidance for this project. The views presented in the report are those of the authors alone.

Overview

The values of this Western civilization under the leadership of America have been destroyed. Those awesome symbolic towers that speak of liberty, human rights, and humanity have been destroyed. They have gone up in smoke. I tell you freedom and human rights in America are doomed.

Osama bin Laden

Interview on Al-Jazeera television

Oct. 21, 2001

The cause of civil liberty must not be surrendered at the end of one, or even one hundred, defeats.

Abraham Lincoln

Letter to Henry Aibury,

Nov. 19, 1858

On September 11, 2001, al Qaeda dealt the United States a catastrophic blow. The possibility of similar attacks with more lethal weapons poses an existential threat to the nation.

The United States has responded to that threat with military action, as in Afghanistan; through intelligence operations to disrupt al Qaeda and arrest its members; and by re-organizing homeland security.

Since all 19 terrorists were foreign visitors who entered the country on valid visas, the government also responded with new immigration measures. Many of these measures single out for special scrutiny visitors and immigrants from Muslim countries.

Under the circumstances, a renewed focus on immigration controls was inevitable. But investigation and enforcement based on nationality discomfort America's sense of justice. September 11 challenged our country in many ways. None is more fundamental than the need to improve security while protecting civil liberties.

For most Americans, the new security measures are at most an inconvenience. Catching a flight may no longer be as simple as catching a bus, but that is a small price to pay for preventing future attacks.

Other individuals and communities in the United States are paying a far higher price. Indeed, the U.S. government has imposed some immigration measures that are more commonly associated with totalitarian regimes, measures that violate the fundamental freedoms defining America's identity. As this report details, there have been too many instances of long-time U.S. residents being detained by the government and held without charge, denied effective access to legal counsel, or having their immigration hearings held in secret.

Are these measures necessary to prevent another September 11?

It is too easy to say that if we abandon our civil liberties the terrorists win. It is just as easy to say that without security there will be little room for liberty. What is hard is to take both arguments with equal seriousness and to integrate them within a single framework.

As we worked on this report, we became convinced that it is not just security and civil liberties—that is, the rights of individuals—that are at stake. There is a third element: the character of the nation. On our humblest coin, the penny, are the words *e pluribus unum*, or “from many, one.” The phrase goes to the heart of our identity as a nation and to the strength we derive from diversity. We believe that an effort to include Muslim communities in a more positive way in the fight against terrorism would not only serve this American value but help break the impasse between security and liberty, strengthening both.

But first we have to untangle the arguments. We begin by separately analyzing the government's responses to September 11 from three perspectives: the effectiveness of security measures, civil liberties, and national unity.

Chapter One measures the effectiveness of the government's response to September 11 against the threat. Our analysis is based on a broad review of the public record, on interviews with current and former senior government officials, on statements by al Qaeda, and on the recently-concluded joint inquiry into September 11 held by the House and Senate intelligence committees.

Al Qaeda's hijackers were chosen to avoid detection: all but two were educated young men from middle-class families with no criminal record and no known connection to terrorism. Despite improvements in security, operatives of this sort would get into the country again today.

That does not mean that immigration controls are not useful. It means they are only as useful as the information provided by intelligence and law enforcement agencies. What immigration measures are able to do is bar terrorists about whom the government already has information from entering the country, and set up gateways and tracking systems so that someone already here can be found if intelligence agencies identify him as a suspect.

Thus, immigration and intelligence have to work together for either to be effective. The implications of this, which are drawn out in Chapter One, include:

- It is unnecessary and counterproductive to treat as criminals people required to register under the tightened immigration rules. It reduces compliance and the cooperation on which effective counterterrorism depends.
- Unless the intelligence system is improved, new immigration restrictions will have diminished the openness of our society to little purpose. A detailed analysis of the September 11 case shows how these two systems should have—and did not—work together in the weeks before the attack.
- The more effective watchlists and immigration controls become, the more groups like al Qaeda will be forced to rely on their “best” operatives—educated young men like the September 11 hijackers against whom authorities have no information. If, through its foreign policy, the United States can reduce the appeal of anti-American violence among such people, that will reduce terrorist groups' ability to conduct operations in this country.

Chapter Two examines the recent national security measures in terms of their constitutionality and accordance with fundamental American legal tenets. We find that many of these measures violate core constitutional principles, including the right to due process, protection from detention without charge, the right to legal counsel, and the public's right to be informed about the actions of their government.

More than 1,200 people—the government refuses to say how many, who they are, or what has happened to all of them—have been detained. Many of them have suffered civil rights violations. Despite the government's determined efforts to shroud these actions in secrecy, as part of our research we were able to obtain information about 406 noncitizens detained after September 11. The appendix to this report contains these summaries, as well as a statistical analysis.

We found that the majority of the detainees had significant ties to the United States and roots in their communities. Of those for whom relevant information was available, over 46 percent had been in the United States at least six years, and almost half had spouses, children, or other family ties in the United States.

Most important, we found that the government's major successes in apprehending terrorists have not come from post-September 11 detentions but from other efforts such as international intelligence initiatives, law enforcement cooperation, and information provided by arrests made abroad. A few noncitizens detained through immigration initiatives after September 11 have been characterized as terrorists, but the charges brought against them were actually for routine immigration violations or unrelated crimes.

The negative impact of the government's actions and policies discussed in this report have principally affected recently arrived Arab and/or Muslim immigrants.¹ Rather than concentrating its efforts on investigation, surveillance and law enforcement based on individualized suspicion, the government has essentially used national origin as a proxy for evidence of dangerousness. By the discriminatory action of targeting specific ethnic groups with its new measures, the government has violated a core principle of American justice.

A series of interviews with Muslim- and Arab-American leaders in New York, Chicago, Los Angeles, Washington, DC, and Dearborn, Mich., allowed us to probe the communities' evolving responses to the gov-

ernment's new immigration measures after September 11. These interviews are summarized as part of Chapter Three.

We found that the new government security programs have put these communities under siege. Arabs and Muslims in America feel isolated and stigmatized. They feel they have been victimized twice: once by the terrorists and once by the reaction to terrorism. As one Arab-American community leader put it, "We, as Americans, were attacked. And at the same time, our fellow Americans are blaming us for something we didn't do."

But community leaders also point out a paradoxical effect: this period of trauma has spurred Muslim communities to begin to assert their rights and engage in the political process in ways that are classically American.

September 11 and its aftermath have ushered in what could be called the "Muslim moment": a period of rising Muslim self-consciousness, new alliances outside their own communities, and generational change. The sense of siege has strengthened some Muslim- and Arab-American political organizations and has led them to a greater focus on civil rights, social services, and economic development. The notion of a distinct "American Muslim" identity has gained new currency. It is an identity that seeks to assert its independence from forces abroad, one that combines the essential elements of Islam and the values of American constitutional democracy.

Meanwhile, applications for naturalization in Muslim- and Arab-American communities—driven in part by the increasing civil liberties risks faced by non-citizens—increased by 61 percent in the first three months after September 11. The image of newly minted Americans of Arab and Muslim descent waving flags at naturalization ceremonies is not what bin Laden had in mind when he ordered the September 11 attacks.

In doing our research, we were guided in part by cautionary lessons from the past. Throughout U.S. history the government has responded to national security crises by targeting immigrants with sweeping programs of

¹In this report we have used terms like Arab-Americans, Muslim-Americans, American Muslims, Middle Easterners, Arabs, or Muslims to characterize the people and communities we are referring to. There is no consistent usage in popular or academic writing; the terms tend to be used interchangeably. We have used various terms, depending on the context. It should be noted that some of the individuals we are referring to are noncitizens, and thus not Americans; in other places, we refer to communities with strong roots in this country.

Arab-Americans constitute a diverse community with roots in over twenty countries of the Middle East. The majority of Arab-Americans are Christian; only 23 percent are Muslim. Muslims in the United States are an even more diverse community. Thirty-six percent are born in the United States. The 64 percent who are foreign-born hail from 80 different countries. Sixty-four percent of those born abroad arrived in the United States in the last two decades. African-Americans constitute about 20 percent of the total Muslim population. South Asians constitute over 32 percent and Arabs over 26 percent.

investigation, incarceration, and deportation. In most of those cases, such as the internment of Japanese-Americans during World War II, Americans have later come to view these actions with regret, as being ineffective in countering the perceived threat, and as undermining fundamental principles of American justice.

In sum, we believe it is possible to preserve fundamental American principles while strengthening our national security. We offer guidelines to do so: a new framework for immigration enforcement and national security, described in Chapter Four. This new framework rejects the patchwork of ad hoc immigration actions that the Bush administration has adopted, and incorporates immigration law and policy into comprehensive national and international strategies that confront the terrorist threat.

We conclude the main body of this report with our detailed Findings and Recommendations. We believe the full authority of the law enforcement system, including immigration law, should be tapped to combat terrorism. But maximum safeguards should be established and built into counterterrorism law enforcement to protect civil liberties.

The resulting measures may please neither civil libertarians nor those who believe civil liberties are a luxury we can no longer afford. For example, closed hearings and pre-charge detentions beyond two days may be necessary in rare circumstances. But they should be allowed only on a case-by-case basis and must be subject to judicial review. Crucially, Congress must exercise its oversight role to closely monitor the executive branch's use of its expanded national security powers.

Ultimately, the answers to terrorism reside most fully in foreign, not domestic, policy. Issues of high politics, such as relations with key allies in the Middle East, military action, and the Israeli-Palestinian conflict, are fundamental. So are the elements of "soft power"—how America is seen in the world, the credibility of our leadership, and the power of our democratic values and principles.

Domestic immigration policy reverberates in foreign policy through the perceptions it conveys about America and the character of our society. When we intimidate Arab and Muslim communities in the United States, there is an echo effect that deepens the perception abroad that America is anti-Muslim and that its principles are hypocritical. This reinforces fears in the Arab

and Muslim worlds of persecution and exclusion by the West. It strengthens the voices of radicals and other detractors in their drive to recruit followers and expand influence, at the expense of moderates and other actors more sympathetic or intellectually aligned with Western philosophies and goals.

Thus, in the name of buttressing domestic security, current immigration policy may be contributing to forces that potentially make us more vulnerable. In the post-September 11 era, immigration policy and actions must be part of a new security system in which the measures we take to protect ourselves domestically can also win the war over hearts and minds abroad.

Chapter One: The Effectiveness of Government Security Responses to September 11

During much of the Cold War, there was so little consensus about the dangers posed by communism that Americans who cared about security and Americans who cared about civil liberties often talked past each other. The dangers posed by al Qaeda are more concrete. The two concerns can no longer talk past each other; they are everyone's concerns.

This chapter analyzes the effectiveness of security measures taken since September 11. It addresses three questions: What is the purpose of the new measures? How likely are they to work? And what other changes—for example, in intelligence analysis or in foreign policy—must accompany them in order for them to work?

The government's responses to September 11 have not been in place long; and the record they have generated is partly secret. The analysis that follows is based on a broad review of the public record; on interviews with current and former government officials; on statements by al Qaeda; and on the Joint Inquiry into September 11 held by the House and Senate intelligence committees. The committees reviewed more than 400,000 pages of government documents, conducted 400 interviews, held public hearings that included seven interim staff reports, and have issued the findings and recommendations section of a Final Report. This gives us a place to start in judging how suited the government's response is to the threat.

The Threat

Al Qaeda's great innovation—in addition to its lethality, piety, patience and intent to kill Americans everywhere

in the world¹—is the use of operatives specially picked to avoid detection by U.S. security.

In all but two cases, the September 11 hijackers had no criminal records, no known association with terrorism—and even today there would be no basis for denying them visas. “We know that bin Laden deputy Muhammed Atif deliberately chose the hijackers from young Arab men who had no previous terrorist activities,” CIA Director George Tenet told the Joint Inquiry.

Seventeen of the 19 hijackers were in fact “clean”....They also selected men from countries whose citizens traditionally have little trouble obtaining US entry visas and instructed them to travel under true name using genuine passports....Once in the US, the hijackers were careful, with the exception of minor traffic violations, to avoid drawing law enforcement attention and even general notice that might identify them as extremists. They dressed in Western clothes, most shaved their beards before entering the US, and they largely avoided mosques.

Tenet said the investigation “has revealed no major slip in the conspirator's operational security.”²

FBI Director Robert Mueller, adding further details, told the panel that the hijackers received money by wire in small amounts to avoid detection, used hundreds of different pay phones and cell phones and 133 calling cards, opened checking accounts with debit cards, and otherwise “did all they could to stay below our radar.” Perhaps most important—and frustrating from the FBI's point of view—they contacted no known terrorist suspects or sympathizers in the United States. And

¹ In 1998, Osama bin Laden and other members of the newly-formed Islamic Front for Jihad Against the Jews and Crusaders issued this fatwa: “The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it” in order to liberate Jerusalem and drive U.S. forces out of all Islamic countries. This was “God's order to kill the Americans.” (Statement by World Islamic Front, Feb. 23, 1998.) Later in 1998 he began warning of attacks inside the United States (*Frontline* interview, May 1998), and since September 11 he has continued to threaten. The most articulate statement of al Qaeda's positions is in the “Letter to America,” Nov. 24, 2002, available at <http://www.observor.co.uk/worldview/story/0,11581,845725,00.html>. Many of bin Laden's other statements are at www.jihadology.com.

² Statement of CIA Director George Tenet before the Joint Inquiry Into Terrorist Attacks Against the United States (“Joint Inquiry”), June 18, 2002, pp. 3–4, 12. The proceedings of the Joint Inquiry have not yet been published and so page numbers refer to documents downloaded from the internet. These may vary from printer to printer; the published version is expected in summer 2003.

when three of the hijackers did get speeding tickets shortly before September 11, "they remained calm and aroused no suspicion."⁷

Indeed, bin Laden himself, on a videotape found in Afghanistan, speaks proudly of the security design of the plot.⁸

Since at least 1995, U.S. intelligence has understood al Qaeda's ability to analyze security measures and tailor its method to U.S. vulnerabilities.⁹ And according to Tenet, the United States has merely closed the barn door on one means of attack. "Ongoing security enhancements and the development of new leads, investigations and human sources," he told the Joint Inquiry,

have made it harder for identical attacks to take place. However, al Qaeda is known for changing its tactics, and a determined group of terrorists, using a slightly different approach, could succeed if they used much of the resilient tradecraft employed by the 11 September hijackers.¹⁰

That being said, it is not the whole story.

As has been widely reported, two of the hijackers, Khalid al-Mihdhar and Nawaf al-Hazmi, were known by the CIA to be associated with al Qaeda before they came to the United States and should have been put on watchlists.¹¹ The two tried to learn to fly in the United States but failed, though they participated in the plot and became hijackers.

One and possibly two members of the al Qaeda cell in Hamburg attempted to take their place. One of these, Ramzi bin al-Shibh, had been Mohammed Atta's roommate in Germany. Al-Shibh tried four times in 2000 to get a U.S. visa, failing because he was on TIPOFF, the State Department's terrorist watchlist. Finally he gave up and became the plot's administrator, wiring money to the hijackers in the United States.¹²

The point is that al Qaeda's tradecraft was inconsistent. In fact, either of these errors—the use of al-Mihdhar and al-Hazmi; or the attempted use of the two men from Germany—could have led to the unraveling of the plot. There are three likely explanations of the apparent lapse:

1. Al-Mihdhar and al-Hazmi came to the United States for another purpose (perhaps the Millennium bombings) before being added to the September 11 plot. The CIA seems to believe this.¹³
2. The technique of using "clean" operatives had been adopted by al Qaeda but was not yet rigorously applied. Perhaps al Qaeda did not fully understand the visa/watchlist system—hence al-Shibh's repeated applications.¹⁴
3. "Clean" operatives are not as plentiful as one would like.¹⁵

But whatever the reason, al Qaeda does use several types of operatives, and these call for different responses. Indeed, Bruce Hoffman, a terrorism expert at RAND,

⁷ Statement of FBI Director Robert Mueller before Joint Inquiry, June 18, 2002, pp. 1-2; Statement of Robert Mueller before Senate Committee on the Judiciary, "Reforming the FBI in the 21st Century," May 8, 2002, p. 3. See also testimony of FBI executive assistant director for Counterterrorism and Counterintelligence Dale Watson at Senate intelligence committee hearing, Feb. 6, 2002: "why didn't we detect any of these people? The answer is, there were no contacts with anybody we were looking at inside the United States...that's how they did it."

⁸ "The brothers, who conducted the operation, all they knew was that they have a martyrdom operation and we asked each of them to go to America but they didn't know anything about the operation, not even one letter....One group of people did not know the other group." "Transcript of Usama bin Laden Video Tape," Dec. 13, 2001. The tape was released to the media by the U.S. government, which says it was probably made in Kandahar the previous month. www.fas.org/irp/world/pars/ubl-video.html or www.jihadmap.com.

⁹ A 1995 National Intelligence Estimate said that al Qaeda conspirators in a plot to blow up aircraft abroad "were guided in their selection of the method and venue of attack by carefully studying security procedures in place in the region. If terrorists operating in this country are similarly methodical, they will identify serious vulnerabilities in the security system for domestic flights." Tenet statement before Joint Inquiry, Oct. 17, 2002, p. 20.

¹⁰ Tenet statement before Joint Inquiry, June 18, 2002, p. 17.

¹¹ Tenet statement before Joint Inquiry, June 18, 2002, pp. 5-7.

¹² Al-Shibh applied for visas on May 17, June 15, Sept. 15 and Oct. 25, 2000. In August he had wired a \$2,200 deposit to the flight training school in Florida that one of the other pilots was then attending. After al-Shibh gave up, another member of the Hamburg cell, Zakaria Essabar, applied for a visa but was also turned down. See Mueller statement before Joint Inquiry, June 18, 2002, p. 4 and Tenet statement of the same date, p. 14.

¹³ Tenet statement before Joint Inquiry, June 18, 2002, pp. 13-14.

¹⁴ There is some reason to think al-Mihdhar and al-Hazmi were particularly trusted and perhaps this outweighed the security design of the plot. Al-Mihdhar's name had come up in the investigation of the bombing of U.S. embassies in Africa. Both men were sent by al Qaeda to a meeting in Malaysia in January 2000. Al-Mihdhar left the U.S. for a year while the September 11 plot was under way, possibly to recruit and arrange the travel of the other hijackers (the "muscle" as opposed to the pilots). [Mueller, June 18, 2002, p. 3] Finally, in one statement, bin Laden singles out al-Mihdhar and al-Hazmi and his brother by name, among all the hijackers, before honoring the plotters in verse. ("Osama bin Laden's Latest Statement," p. 3. The statement is undated but refers to events in a way that makes clear it is from December 2001. It can be found at www.jihadmap.com.)

¹⁵ Khalid Shaykh Mohammed, the head of al Qaeda's military committee and the main planner of September 11, told a reporter that the organization had "a large surplus of brothers willing to die as martyrs," but that is a different matter. ("Al-Jazeera offers accounts of 9/11 planning," CNN.com, Sept. 12, 2002.) Photographs of the hijackers are at www.fbi.gov/pressrel/penitbom/penitbom.htm.

told the Joint Inquiry that al Qaeda is dangerous in part because it is so adaptive and has no "single identifiable footprint." He distinguished at least three operational styles for al Qaeda terrorism:

- **Professional cadre.** These used for the highest-value targets, are well-trained and generously funded. Targeting is very specific and based on careful planning. Examples include September 11 and the U.S. Embassy bombings in Africa.
- **Trained amateurs.** Targeting is open-ended. Operatives receive some training, only modest funding, and have limited ability to withstand scrutiny. An example is Ahmed Ressam, who panicked and was arrested in December 1999 while transporting explosives from Canada. Another is Richard Reid, the "shoe bomber." Though visibly psychotic and detained overnight, Reid did eventually board a plane, but so unnerved the flight attendant that she kept a close eye on him.
- **Local walk-ins.** These are people or groups who come up with their own ideas and ask al Qaeda for financial support. The Islamists who planned to blow up tourist hotels in Jordan in 2000 fit this model. Though not mentioned in this context by Hoffman, another example may be Jose Padilla, the former Chicago gang member who returned to the United States after allegedly offering to explore the possibility of assembling a radiological or "dirty" bomb here on al Qaeda's behalf.¹²

This analysis of the threat will be useful in assessing the effectiveness of measures meant to deal with it.

The Response

How this section is organized. The government responses to September 11 described in the Glossary are grouped here for discussion as follows:

- I. Measures to control entry into the United States. (The visa and watchlist system.)
- II. Monitoring of foreigners and immigration enforcement in the United States. (The National

Security Entry-Exit Registration System, SEVIS, the Absconder apprehension initiative, and the change-of-address requirement.)

- III. Community reporting. (The voluntary interview program and TIPS.)
- IV. Intelligence-gathering in the United States. (FBI guidelines, FISA, "secret" detentions, and closed immigration hearings.)
- V. Intelligence analysis and interagency coordination.

I. Measures to Control Entry into the United States

The government attempts to prevent terrorists and other undesirable persons from entering the country by checking the names of visa applicants against the State Department's terrorist watchlist (TIPOFF),¹³ and by other means such as an interview with a consular officer. Such measures failed to stop the September 11 hijackers and, despite improvements, would fail to stop them again today.

"That's useful only for people who are on a watchlist," says former CIA counterterrorism official Vincent Cannistraro. "If you're trying to stop terrorism from al Qaeda and you're facing a threat from young kids from middle-class families—which is basically what al Qaeda is—who haven't been here before and haven't committed any crimes and aren't in the system, they're not going to show up."¹⁴ As a senior Western intelligence official put it: "It's hard to detect someone at the border who has an intention but not a record."¹⁵

Washington's initial response to this problem was to do what it was already doing, but on a much bigger scale. The Enhanced Border Security and Visa Reform Act of 2002 required the State Department to conduct a security review of any citizen of the seven countries on the Department's list of states that sponsor terrorism. At the insistence of the Justice Department, the State Department also created a new category of visa clearances known as "Condor." Under the still-classified

¹² Statement of Bruce Hoffman before Joint Inquiry, Oct. 8, 2002, pp. 7, 13–15. The Padilla case is described in "The Case of the Dirty Bomber," *Time.com*, June 16, 2002.

¹³ TIPOFF is described further in the glossary. As of August 2002, TIPOFF included biographic records on nearly 85,000 names of suspected or known terrorists. Inclusion in the system is based on reasonable suspicion and does not automatically result in denial of a visa. TIPOFF is part of a larger State Department database of persons about whom the U.S. has adverse information known as the Consular Lookout and Support System (CLASS). Before September 11 there were 5.8 million name records in CLASS. Since then the number has roughly doubled. (Statement of State Department Coordinator for Counterterrorism Francis Taylor before the Joint Inquiry, Oct. 1, 2002, pp. 5–6.)

¹⁴ Interview with Vincent Cannistraro, former Chief of Counterterrorism Operations and Analysis at the CIA's Counterterrorism Center, Nov. 7, 2002.

¹⁵ Interview with Western intelligence official, Nov. 21, 2002.

program, a national agency check is required before granting a visa to any male between the ages of 16 and 45 from any of 26 countries with an al Qaeda presence or to persons who fit certain other criteria.¹⁵

The requirements initially overwhelmed agencies in Washington and have created months-long delays for foreigners seeking to visit the United States, with attendant damage to economic and foreign relations. "The Secretary of State is very upset," says one official.

Attempts to improve security and yet decrease the backlog have generated an interagency tussle over two related issues: 1) unifying the terrorist watchlist and 2) whether to adopt a more targeted but in-depth security review rather than the current blanket approach.

Certainly the first step in preventing terrorists from entering the United States is to include on the terrorism watchlist whatever identifying information the government has. The CIA has admitted the mistake it made by failing to tell the State Department until shortly before September 11 what it knew about two of the hijackers—Khalid al-Mihdhar and Nawaf al-Hazmi—whom it had photographed at an al Qaeda meeting in Malaysia. The CIA did not understand the importance of the two men until late in August 2001, when it realized that the meeting had also been attended by one of the principal planners of the USS Cole bombing. This

illustrates the importance of making watchlisting an automatic process rather than waiting for an intelligence official to have an analytic epiphany.

The CIA appears to have absorbed this point. After September 11, the agency gave the State Department 1,500 intelligence reports it had not provided until then. These contained the names of 150 suspected terrorists and resulted in the addition of 58 new names to TIPOFF. The CIA has revised its policy, lowering the threshold for provision of names and of information that in the past would have been withheld to protect operational security. It has briefed officers on how to flag names for watchlisting and created a dedicated unit at the Counterterrorism Center to review names and fragments of identity-related information for provision to TIPOFF. The CIA and State Department are cooperating to turn TIPOFF into a National Watchlist Center that will coordinate all watchlist information and be accessed by all relevant agencies.¹⁶

The situation with the FBI is murkier. In April 2002 Attorney General John Ashcroft directed the FBI and other Justice Department agencies to set up procedures for regularly sharing information with TIPOFF.¹⁷ Indeed, the State Department has tried for ten years to get access to FBI information for watchlisting purposes; those discussions are still going on.¹⁸ The matter is treated with great delicacy in the hearings, and the FBI

¹⁵ Section 306 of the Enhanced Border Security and Visa Reform Act of 2002 forbids issuing a visa to any national of a state that sponsors terrorism without a determination that the person does not pose a threat. As currently interpreted, this requires a favorable "security advisory opinion"—that is, a review coordinated in Washington—before a visa may be issued. (See also "Attorney General John Ashcroft Outlines Foreign Terrorist Tracking Task Force," Department of Justice, Oct. 31, 2001, p. 2.) In addition to security advisory opinions there is a category of visa review known as a national agency check, in which relevant agencies are queried to see if they have any information "against" the applicant; a visa is normally granted if there is no response within a certain time limit. Consular clearances were meant to be of this type but the backlog they generated soon resulted in the time limit being waived and visas are not granted without an affirmative response from Washington. (Richard Sindler, "CHIMERA, NSEERS, Lookouts, and Security Checks: the New Age," *Border's Immigration Bulletin* 8 (Jan. 15, 2003): 97; interview with State Department official, Nov. 4, 2002.)

¹⁶ Statements of George Tenet before the Joint Inquiry, June 18, 2002, pp. 5-7, 17 and Oct. 17, 2002, pp. 17-18; Interim report of Joint Inquiry Staff Director Eleanor Hill, Sept. 20, 2002, pp. 4-9, 12-14 (hereinafter "Interim Report of Eleanor Hill," with dates specified). The USS Cole was bombed while refueling in Yemen on Oct. 12, 2000. The 58 new names were part of a larger increase in TIPOFF listings. In the three months after September 11, 4,251 names of suspected terrorists were added—a 455% increase over the previous three months. Many of these names were provided by the CIA, but the figure is not broken down by agency. (Statement of Eleanor Hill, Sept. 20, 2002, p. 13; interview with State Department official, Nov. 4, 2002.)

¹⁷ "Coordination of Information Related to Terrorism," Memorandum from the Attorney General to the Deputy Attorney General, Director of the FBI and others, April 11, 2002. The memo notes that the USA PATRIOT Act (that is, the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001") authorizes the sharing of foreign intelligence obtained through criminal investigations including grand jury proceedings and criminal wiretaps, and directs Department officials to draft procedures for doing so. (See pp. 2, 4-5.) The USA Patriot Act also authorizes sharing information in "criminal history databases." (See "Prevention of Acts Threatening Public Safety and National Security," Memorandum from the Attorney General to Heads of Department Components, Nov. 8, 2001. Ashcroft's first attempt to make the point was on Sept. 21, 2001, in a memo titled "Disseminating Information to Enhance Public Safety and National Security.")

¹⁸ Interim Report of Eleanor Hill, Sept. 20, 2002, pp. 14-15. State Department officials told the Joint Inquiry that the department had never had access to the FBI's National Crime Information Center (NCIC) Interstate Identification Index, though it was available to state and local police. In its Fiscal Year 1996 and 1997 appropriations bills, Congress requested that the agencies develop a plan to share the information, apparently without result. An attempt to resolve the issue was made again in the USA Patriot Act, and the FBI and State Department are now developing agreements concerning the incorporation of certain files from NCIC III into CLASS (of which TIPOFF is a part), "with the eventual goal of incorporation of all usable and relevant data." The Treasury and Energy departments have also tried and failed to get access to NCIC III information for security purposes. See also Statement of State Department Coordinator for Counterterrorism Francis Taylor before the Joint Inquiry, Oct. 1, 2002, pp. 8, 11.

is not very clear in explaining its reluctance. According to one official, the problem is that there are legal limits on sharing information and it is difficult to sanitize intelligence in order to pass it to another agency. In addition, he says, "people are presuming that we have a lot more than we do."²⁰ Former FBI Associate Deputy Director for Investigations Buck Revell says that although the USA Patriot Act was intended to make such sharing easier, there are still conflicting directives and the Bureau still does not have enough analysts to go through reports and sanitize them to protect sources and third-party information.²¹

Another former FBI official who was directly involved in counterterrorism matters says the problem is also operational: someone whose name is in TIPOFF may find out he's being investigated. The Bureau is worried, he said, that if a U.S. person is stopped or taken aside because he's on the watchlist he may sue and learn that his name was submitted by the FBI. "Let's say he really is involved in terrorism," the former official says:

He sues to find out what's going on, because if he's under suspicion he wants to shut down his operation....And the fact that he's an American just ratchets it up. He goes to the Hill and his friendly Senator who hates the Bureau starts kicking the FBI in the balls and yelling about the "rights of my constituent being violated." You go up there and say, "Senator, thanks for the letter, but—here's the problem. Your constituent is a f---g terrorist, Senator. He's directly linked to so-and-so, and he's been intercepted saying this-and-that." "Oh," he says. "Oh, I see."²²

Presumably this problem would not arise under the post-September 11 system of Condor and terrorism-sponsor visa checks because U.S. persons do not need visas to enter the country.²³

The second interagency dispute has to do with how broadly or narrowly to focus the government's attention. As an initial response to September 11, perhaps it was

understandable that the Justice Department pushed for security reviews of all visa applications by citizens or adult males from certain countries. At first, says a State Department official, the Justice Department "wanted to shut down visas, just like they shut down airplanes. Secondly, they wanted to shut down visas for certain parts of the world."

But as months-long delays in visa processing built up, the costs of so broad a focus became apparent. "There are a lot of people in the Middle East who are friendly to the U.S. and support us," says the official.

A blanket approach does draw them in as well, and the question is, do you want to do that? It does have negative political, economic and whatever other consequences that I think someone in the White House should balance out....I question the Condor as a valuable tool.²⁴

Meanwhile, the CIA has pulled out of the program. Now that the agency has set up an automatic system for passing terrorist-related names to TIPOFF, it considers checking these same names a second time under Condor redundant. "To do all of them [again under Condor] is checking names for no reason," says a government official familiar with the issue. "There's nothing new." What's needed, says the official, is not just name checks but a more-detailed risk assessment of individuals. The CIA, State Department, and FBI "agree that we want to be in a better position to do risk analysis of visa applicants" and are working to create a system for doing this—but have not yet resolved their differences.²⁵

"The conversations have been occurring for months, and we are in the process of re-defining the Condor criteria," a Justice Department official says.

There is a difference in culture between the State Department and Justice that makes some disagreement inevitable. The State Department is trying to improve security but at the same time avoid offending other countries, so they have constantly been

²⁰ Interview with FBI official, Jan. 14, 2003.

²¹ Interview with Buck Revell, Nov. 21, 2002. The 1978 Foreign Intelligence Surveillance Act (FISA) permits the dissemination of information for counterterrorism purposes. See Foreign Intelligence Surveillance Act, Public Law 95-511, Sec. 106(a) and Sec. 101(a), (b) and (c).

²² Interview with former FBI official, Nov. 17, 2002. "U.S. persons" include citizens and resident aliens. TIPOFF is an unclassified system of names and identifying information. A "hit" in effect refers the user back to the State Department's Bureau of Intelligence and Research, which maintains the classified information that is the basis for the listing.

²³ But a permanent resident or citizen can be on TIPOFF. And if so he may feel the effects in the form of being taken aside, searched and questioned at ports of entry. TIPOFF information is now also available to immigration inspectors.

²⁴ Interview with State Department official, Nov. 4, 2002.

²⁵ Interview with U.S. government official, Nov. 15, 2002. But this sort of joint risk analysis may be done at the recently-formed interagency Terrorist Threat Integration Center, which is discussed later in this chapter.

pushing to have as narrow and targeted Condor criteria as possible. And the [Justice] Department's view is that we're here to enforce the law and national security and better safe than sorry. The argument is that intelligence criteria are not perfect and it is better to cast the net broader than you need than narrower than you need. So our view is "Hey, let's not take any risks."²⁵

If the CIA's and State Department's position is correct, and Condor-type name checks (under which the FBI does its own review of a large class of visa applications) merely duplicate the function of a proper and up-to-date watchlist, then many of the negative political and economic effects of the post-September 11 delays could be eliminated by incorporating FBI information in TIPOFF. But that still leaves open the problem of how to select persons—whether on the watchlist or not—for a more-detailed risk assessment.

In other words, it leaves open the problem of al Qaeda: an organization whose operatives are specially picked to avoid detection by U.S. security and whose names are unlikely to be in U.S. files. This problem cannot be solved by name checks, whether broad or narrow.

Conversely, an in-depth analysis to spot non-obvious risk factors cannot be done for everyone.²⁶ If foreigners continue to visit the United States and we want better security, there is no way around the use of intelligence criteria to focus on persons of plausible security concern.

The visa system has other problems:

- False documents. Although the United States is working with other governments to improve standards for travel documents, the consular system has little ability to look beyond an authentic-appearing document.

This is an obvious way for a terrorist to avoid being connected with his record. The State Department's Consolidated Consular Database is being made available at U.S. ports of entry and provides a photographic means of verifying identity. In Miami, where it was first installed, INS²⁷ inspectors used it to detect 108 fraudulent visa holders in the first six months. In New York, they caught an alien using a falsified Russian diplomatic passport. At present the database is available only in secondary inspection. More to the point, it merely compares the presenter to information already in the system.²⁸

- Visa-waiver program. Citizens of 28 countries may visit the United States for 90 days without a visa and based only on a passport. Zacarias Moussaoui, the so-called "20th hijacker," for example, is a French citizen and entered the United States without a visa.²⁹ Partly to deal with this issue the Justice Department has given the INS discretion to subject persons born in countries of concern to "special registration" even if they have since become citizens of countries for which visas are not required.³⁰ But there is still a potential problem because of the availability of false identity documents. "People can go to a no-visa country like France, present forged documents that show they're French citizens and come to the U.S. without a visa," says a former FBI counterterrorism official. "It's a big hole."³¹ Indeed, the Justice Department's Inspector General found that the INS had made insufficient efforts to track missing passports from visa-waiver countries and that this "could contribute to the admission into the United States of criminal aliens or terrorists." He also warned that poor security in transit-without-visa holding areas for travelers passing

²⁵ Interview with Justice Department official, Nov. 27, 2002.

²⁶ It is impossible as a matter of resources. And it would demoralize the experienced analyst charged with doing in-depth risk assessments of elderly women from Toronto. Computers may help select visa applicants for closer review, but the assessment (itself has to be done by a person. The issues raised by computer "data-mining" are discussed later in this chapter.

²⁷ The terms INS and Immigration and Naturalization Service are used throughout this report, but the service ceased to exist under that name on March 1, 2003. It is now part of the Department of Homeland Security and its functions are divided among three new DHS Bureaus: Citizenship and Immigration Services; Immigration and Customs Enforcement; and Customs and Border Protection.

²⁸ For this paragraph generally: *National Strategy for Homeland Security*, Office of Homeland Security, July 2002, p.60; Statement of INS Assistant Commissioner for Investigations Joseph Greene before the Joint Inquiry, Oct. 1, 2002, p. 3.

²⁹ Statement of Department of Justice Inspector General Glenn Fine before the Senate judiciary committee, "Oversight Hearing on Terrorism," June 6, 2002, p. 4. On Moussaoui, see Testimony of Assistant Secretary of State for Intelligence and Research Carl Ford Jr. at a hearing of the Senate intelligence committee on "The Worldwide Threat in 2002," Feb. 6, 2002, page number not available; also Statement of Eleanor Hill Sept. 24, 2002, p. 15. Moussaoui later obtained a student visa, though it expired by the time of his arrest in August 2001.

³⁰ This has caused some friction with U.S. allies, especially Canada. ("Women tells of humiliation by U.S. officials," *Globe and Mail*, Nov. 6, 2002.) The case that has gained most attention is that of Maher Arar, a Syrian-born Canadian whom the U.S. accused of being an al Qaeda member and deported to Syria. Both Canada and Syria protested, saying he should have been returned to Canada, and Canada filed a formal protest about the lack of consultation. According to one report Arar held both Canadian and Syrian citizenship. ("An outrage against Canada," *Globe and Mail*, Oct. 16, 2002; "Colleagues Surprised by Man's Deportation," *Boston Globe*, Oct. 31, 2002; "Temper Flare After U.S. Sends a Canadian Citizen Back to Syria on Terror Suspicion," *New York Times*, Nov. 11, 2002.)

³¹ Interview with former FBI official, Nov. 19, 2002.

through U.S. airports could allow terrorists to enter the United States.³³

- Access to foreign criminal records. Even if a consular officer does have suspicions about an applicant, criminal records in about half the world's countries—including many of greatest concern—are not available through Interpol.³⁴

Thus there are inherent limits on the effectiveness of the visa system. It works only if the identity of the applicant is genuine, and only to the extent that intelligence and law-enforcement information about the applicant is available.

Measures that would improve the system include better intelligence collection and analysis and the inclusion of all relevant results on watchlists. In addition to a lookout system based on adverse information about specific individuals, it may be useful to assess the possible security risk posed by certain classes of people—for example, those who traveled to Afghanistan in the 1990s, or young men from Iraq when the United States is invading their country—without regard to whether they are on a watchlist. To be effective, however, the criteria for selecting people for such assessments must be based on a detailed appreciation of the threat so that the focus is on persons of plausible security concern and not, for example, on everyone from certain countries.

To the extent that the visa and watchlist system improves, it will force terrorists to rely on operatives like al Qaeda's September 11 hijackers: middle-class young men with no criminal or terrorist background. In the long run this presents the United States with opportunities to affect al Qaeda's recruitment efforts if it is able to reduce the appeal of anti-U.S. violence among such people.

II. Monitoring of Foreigners and Immigration Enforcement in the United States

Under the National Security Entry-Exit Registration System (NSEERS), citizens of certain countries and broad classes of other persons visiting the United States are fingerprinted, photographed and interviewed when they enter the country.³⁵ If they stay more than thirty days there is a second, more-detailed interview. They must show up for another interview each year and notify the INS when they leave the country. Those who overstay their visas are entered into the FBI's National Crime Information Center (NCIC) and can be arrested if that database is checked, for example in the course of a traffic stop. Under other related programs, visitors must notify the INS every time they change their address, and all foreign students must keep the government informed about their student status and field of study. Foreigners subject to a final deportation order but who have not complied are also entered into the NCIC; attempts are made to find and deport them, with priority given to "Absconders" from countries where al Qaeda is active. Those arrested are interviewed in depth and their answers entered into a growing national database maintained by the Foreign Terrorist Tracking Task Force (FTTTF).³⁶

Not a perfectly tight system, but tight. While not designed to catch terrorists, it is meant to gather better information than in the past about the backgrounds of foreign visitors, including what they are doing in the United States, where they are living, and whether and when they leave.

³³ Statement of Glenn Fine, *supra* note 30, p.4. See also Fine's statement before the House immigration subcommittee concerning the visa waiver program, Feb. 28, 2002, available at <http://www.usdoj.gov/oig/testimony/022802.htm>.

³⁴ Comments of Sen. Bob Graham at hearing of the Senate intelligence committee on "The Worldwide Threat in 2002," Feb. 6, 2002, page number not available.

³⁵ The program began in September 2002, with full implementation on October 1. Since then more than 138,000 foreign visitors from more than 151 countries have been registered on arrival in the United States. Although nationals of certain countries are automatically subject to registration, people from anywhere may be registered based on intelligence criteria—for example, travel patterns or the availability of stolen passports in a country. State Department Foreign Press Center Briefing on NSEERS, Jan. 17, 2003; testimony of Staff Director of Operations for the Bureau of Immigration and Customs Enforcement (BICE) Michael Dougherty before the House immigration subcommittee, May 8, 2003, available at www.house.gov/judiciary/dougherty050803.htm.

³⁶ The National Security Entry-Exit Registration System (NSEERS), new change-of-address requirements, the Student and Exchange Visitor Information System (SEVIS) and the Absconder Apprehension Initiative are described in more detail in the Glossary of this report.

The Department of Homeland Security recently announced that NSEERS and SEVIS will be incorporated into a new electronic U.S. Visitor and Immigrant Status Indication Technology (U.S. VISIT) system. The idea is to use photographs, fingerprints and perhaps iris scans to reduce document fraud without delaying travelers. An initial phase is to begin by the end of 2003. (Department of Homeland Security press release, April 29, 2003, available at www.dhs.gov/ihpublic/display/content?582.)

The argument is sometimes made that terrorists will not comply with these measures and that once in the country they will disappear. Ramzi Yousef, the planner of the 1993 World Trade Center bombing, entered the country, applied for asylum and—because the INS lock-up was full that night—was not detained but merely told to appear for a hearing. He didn't show.³⁷ Although those who disappear from the system will be entered into NCIC, police do not always check the computer; besides, it is easy enough to avoid the police;³⁸ and the system can be defeated altogether by using fake identity documents.

But the argument that terrorists will comply with immigration rules is perhaps stronger. The system now being put in place does have some enforcement mechanisms. The fingerprints and photograph of a registered person are on file, which makes fake identity documents less valuable, at least on investigation.³⁹ In addition to listing NSEERS violators on NCIC, those violators judged to pose a higher threat will be sought out for arrest by immigration authorities with the assistance of U.S. Marshals. Thus there is a two-tier system for seeking NSEERS violators.⁴⁰

More to the point, however: to the extent that the September 11 model is followed, terrorists will not violate NSEERS. They will study and follow the rules, adapting their behavior to avoid suspicion. It should not strain the wit of a terrorist with a decent cover story to show up for an annual interview or to stay enrolled in school.⁴¹

While well-trained terrorists may be able to avoid being snared by NSEERS, one part of the program does pose a serious dilemma for undocumented or out-of-status aliens already in the U.S who are not terrorists. That part, called Special Call-In Registration, requires non-immigrant foreigners of certain nationalities who are already in the country to register with the INS.⁴² This is a one-time requirement the government sees as part of putting NSEERS into place.

If out-of-status aliens comply with the requirement they may be arrested or deported even if they have made lives and have families here. If they don't comply they remain free; but in addition to the civil offense of overstaying a visa they will now have committed the crime of failing to register. (Those who still don't register thus become customers of the false-documents industry.) To the extent that the program serves a serious counterterrorism purpose, it is useful to maximize compliance; and the government has made some effort to do this by

³⁷ Interview with former FBI official Nov. 19, 2002.

³⁸ *Id.* For example, he says, Yousef did not drive but was chauffeured by people who had licenses and were in-status.

³⁹ This is certainly the case if the person is physically present. Having a good photograph is also useful if authorities are looking for someone.

Another question is whether the use of computerized "facial recognition" technology can assist in locating people who have disappeared from the system. Such systems have been tried in two kinds of situations: controlled settings like a visa office where distance, angle and lighting can be held constant; and what might be called a "general surveillance" setting where cameras scan a street scene or people passing through a turnstile. The last of these was used, for example, to scan for known terrorists and criminals at the January 2001 Superbowl. It is this sort of "general surveillance" that in theory might locate people who have disappeared from NSEERS. While computerized identification of persons in public may be a step toward totalitarianism, it is probably not unconstitutional. (John Woodward Jr., *Super Bowl Surveillance*, RAND 2001.) But the prospect is unpleasant enough that the ACLU and House Majority Leader Dick Armey issued a joint statement on July 11, 2001, protesting the use of "these dangerous technologies."

Despite the claims sometimes made for such systems, however, they are a long way from working reliably even in controlled conditions where lighting, angle, etc. are held constant. The Pentagon and the National Institute of Justice sponsored a study of various systems, "Facial Recognition Vendor Test 2000." According to Dr. James Wayman, an expert on the technology, even under uniform conditions and with a very small database of "mug shots," there was a 1:20 chance of a false positive (incorrectly identifying someone as a suspect) and a 1:2 chance of a false negative (missing the real guy). And the systems' ability to identify people is greatly diminished by changes in lighting, angle, facial expression and other "minor" parameters. Finally, as the size of the database of photos increases, so does the number of false positives or "possibles" retrieved by the computer. ("Biometrics Expert Delivers Lecture on Facial Recognition at RAND's Washington Office," http://www.rand.org/ratscc_areas/products/facialrecog.html; interview with John Woodward, Jan. 14, 2003.)

⁴⁰ Interview with Justice Department official, Nov. 27, 2002.

⁴¹ But the system may catch operatives who are less careful or do not realize the United States has information about them. According to Michael Dougherty's testimony on May 8, 2002, NSEERS has led to the identification of 11 persons "linked to terrorism," though it hard to judge from this phrase what the mechanism was or what kind of links he meant.

⁴² See www.immigration.gov/graphics/shared/lawenfor/specialreg/index.htm for a description of call-in registration. The term is discussed further in the glossary of this report.

extending the deadline for early rounds of the process. But this does little to reassure people who are out-of-status. Given the one-time nature of the problem, the government might have adopted a policy of leniency for out-of-status persons. Instead it has left them in doubt about their fate, and a significant number may have failed to register.⁴³

One aspect of NSEERS could identify terrorist suspects whose names are not known through other sources. Fingerprints taken at ports of entry are checked against a "terrorist database" maintained by the FBI that includes fingerprints taken from al Qaeda sites in Afghanistan. "You've got all these unidentified prints, but until we had NSEERS there was no way of running them against a defined population," says a Justice Department official.⁴⁴

With that exception, though, NSEERS is not meant to identify terrorists. As a senior Western intelligence official puts it, "tightening immigration controls doesn't help you that much until the intelligence side gives you a name, and then it helps you track them." The Justice Department official agrees. Under NSEERS, he says, "you have more points of contact. It forces them to jump through hurdles and gives us more opportunities to act."⁴⁵

But the immigration system and the intelligence system must work together for either to be effective.

III. Community Reporting

The Voluntary Interview and TIPS (Terrorism Information and Prevention System) programs are

something between routine monitoring of foreigners and targeted intelligence collection against suspects. They can be considered community reporting programs.

"The best way of collecting intelligence is to have good sources and good entrée" into the foreign immigrant community, says Cannistraro, the former CIA counterterrorism official. If the threat is from recently-arrived young men from certain countries, "then you really need the communities in which these high-risk people reside to get better information...If the communities feel they're being assailed they develop an us-them attitude and a mind-set of, tell as little as possible and stay out of the way. On the other hand, if you build up good relations and incentives for giving information, the community can act as an early-warning system."⁴⁶

"That's always been the way you monitor," agrees a former senior FBI official. "People notice strangers, notice demeanor...In hindsight, you'll see statements from people in the community that did notice weird things about these [September 11] guys—they were super-straight, disciplined, serious, didn't interact, paid in cash, etc. If you have sources in the community maybe you'll hear about things like this."⁴⁷

Voluntary Interview Program

The voluntary interview program initially caused great concern in the affected communities. In part this was because the sweeping nature of the interview requests made whole communities feel they were under suspicion. In part it was because the program had multiple, and to some extent conflicting, goals. These included

⁴³ For example, the government could allow out-of-status or undocumented aliens to leave the country voluntarily and apply for a new visa without prejudice. Instead, harsh enforcement has made NSEERS so fruitless that the Senate in January 2003 banned the whole program without discussion, though the ban was later lifted in a House-Senate conference on an appropriations bill. As restored, Congress required the government to provide a detailed explanation of the program's origins, its efficacy, and the reasons for a large number of detentions. ("Senate Votes to Halt INS Registration Program," *Washington Post*, Jan. 25, 2003; "Congress Funds INS Registration System but Demands Details," *Washington Post*, Feb. 15, 2003. See more generally "A Register of Immigrants' Fears: For Many, Worries Over Deportation Clash with Anti-Terrorism Efforts," *Washington Post*, Jan. 20, 2003; "Registration Stirs Panic, Worry," *WashingtonPost.com*, Jan. 16, 2003; "Immigrants fear new US policy," *BBC News*, Jan. 10, 2003).

As of mid-January 2003, some 23,414 people already in the United States had registered. Of those, 1,169 had been detained, though many of them were released after records checks were made, 164 remained in custody. Thus far none has been deported. (See State Department Foreign Press Center Briefing on NSEERS, Jan. 17, 2003).

⁴⁴ Interview with Justice Department official Nov. 27, 2002. Both this official and an FBI official said there had been at least one case in which someone was identified as a suspected terrorist operative in the course of special registration and arrested. The FBI official said the suspect's fingerprints matched those of an unidentified person at a terrorist site abroad that was in the terrorist database. Prints in the terrorist database come from people detained at Guantanamo Bay or in Afghanistan; from foreign governments; or from al Qaeda sites in Afghanistan or other places where members of terrorist groups are known to have been. The database contains "thousands" of prints (see "Attorney General Prepared Remarks on the National Security Entry-Exit Registration System," June 6, 2002).

⁴⁵ Interviews with Justice Department official, Nov. 27, 2002; and with Western intelligence official, Nov. 21, 2002.

⁴⁶ Interview with Vincent Cannistraro, Nov. 13, 2002.

⁴⁷ Interview with former FBI counterterrorism official, Nov. 20, 2002.

eliciting information about September 11 or other terrorist activity, recruiting people as informants, enforcing the immigration laws and disrupting undiscovered terrorist plots by creating a general sense of scrutiny.⁴⁸ "Those don't work together," says Cannistraro. "You don't intimidate and recruit at the same time. I mean, the Bureau has tried that for years and it doesn't work."

The FBI understood the point as well. "Agents are trained to make sure it's not an intimidating thing," says an FBI spokesman. "There's an—I don't want to say sensitivity training—but sensitivity to what happens when you approach someone from a foreign country where there's a repressive regime and either they cooperate or face the consequences."⁴⁹

In Dearborn, Michigan, Arab-American community leaders repeatedly complimented the U.S. Attorney's office and the FBI, which established a dialogue with local leaders and assured them that no one would be arrested solely for immigration violations under the program. Interviews were non-confrontational⁵⁰ and the FBI recruited a number of new informants.⁵¹

One community leader in Dearborn said he had heard that in Florida the FBI had knocked on doors at midnight and that people felt they had to let the agents in. He said that in Michigan the interviews were voluntary and handled relatively well.⁵²

Community leaders in Los Angeles and Washington, D.C. also complimented the FBI's actions.⁵³

The MPI interviews do not represent a country-wide survey and it is possible that government actions differed by locale. They paint a consistent picture, though:

⁴⁸ The approach to be taken and topics to be covered are described in a Memorandum for all United States Attorneys from the Deputy Attorney General, "Guidelines for the Interviews Regarding International Terrorism," Nov. 9, 2001. The document stresses the consensual nature of the interviews and does not discuss disruption. But in an interview a Justice Department official involved with the policy said, "You didn't mention disruption, which should be at the top of the list. Once you start interviewing and word gets out, we believe that has a disruptive effect and can either delay or interfere with any terrorist plans." (Interview with Justice Department official, Nov. 27, 2002.)

⁴⁹ Interview with FBI official, Jan. 14, 2003.

⁵⁰ MPI interviews with community leaders.

⁵¹ MPI interview with a Michigan immigration lawyer.

⁵² MPI interview. These interviews are described in more explicitly in Chapter Three. The ambivalence that runs throughout them was expressed with some bitterness by another local leader. MPI's notes of the conversation read: "In Michigan, however, the FBI negotiated an arrangement with the community, it was all voluntary here. Community representatives... were present at the interview, a lawyer was present, and letters were sent in advance arranging for time and place of interviews. The FBI and INS reached out to the community here... a dialogue between the FBI and the U.S. Attorney's office [and the community] had been going on before the local coalition was established. Though the program was handled relatively well in Michigan, it did leave the community feeling victimized or singled out."

⁵³ MPI interviews with organization leaders in Los Angeles and Washington, D.C.

⁵⁴ "Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001," General Accounting Office report GAO-03-459, April 2003, pp. 0, 5 ("GAO report").

⁵⁵ Interviews with FBI official, Jan. 14, 2003; and Justice Department official, Nov. 27, 2002. Examples of circumstances that could prompt another interview program include an immediate, credible threat of a terrorist strike. Note that at the time of the 1991 Gulf War, the FBI conducted an interview program somewhat more extensive than the recent one. The FBI also interviewed several thousand Iraqis during the recent war in Iraq. See "America at War: FBI Fans Out, Rounds Up Iraqis for Questioning," *Houston Chronicle*, March 21, 2003.

The GAO report says the Justice Department asserted that the interviews yielded intelligence information, had a disruptive effect on terrorists and produced leads, but gives no detail (pp. 6, 16). It says more than half the law enforcement officers the GAO interviewed "raised concerns about the quality of the questions or the value of the responses." GAO report, *supra* note 54, p. 10.

the communities included in the voluntary interview program resented and were at first frightened by being singled out, but in most cases the FBI's style was not intimidating and the Bureau established reasonably good relations with the community.

Indeed, a recent study of the program by the General Accounting Office found agreement among law enforcement officials, attorneys for interviewees and immigration advocates on the voluntary nature of the interviews but said there was nonetheless suspicion on the part of interviewees. "The attorneys and immigration advocates with whom we spoke," the report says,

told us that interviews were conducted in a respectful and professional manner, and interviewees were not coerced to participate. They noted, however, that the interviewed aliens did not perceive the interviews to be truly voluntary because they worried about repercussions, such as future INS denials for visa extensions or permanent residency, if they refused.⁵⁵

The results of the interviews were entered, with the Absconder interviews, into a database maintained by the Foreign Terrorist Tracking Task Force.

It was not possible to learn enough about these results to make an independent assessment of the voluntary interview program's effectiveness. FBI and Justice Department officials say the program was useful and that similar interview programs will be undertaken again according to circumstances. They say that many of those interviewed cooperated and that the program enabled the Bureau to recruit informants.⁵⁶

The interview program did not, however, result in the discovery of al Qaeda cells in the United States. Asked about this several months after the interview program, former FBI executive assistant Director for Counterterrorism and Counterintelligence Dale Watson said,

Are there core cells like the 19 [hijackers]? Have we identified anybody that carries the commonalities of the 19? No, not at this point in the process.³⁵

But perhaps there was none to find.

Tips

A conflation of purposes discredited Operation TIPS. Announced in January 2002, the Justice Department's Terrorism Information and Prevention System encouraged "millions of American truckers, letter carriers, train conductors, ship captains, utility employees and others" to report suspicious activity that could be terrorism-related.³⁷ In fact, this combines a good idea with a very bad idea.

The good idea is what former Assistant Secretary of Defense Ashton Carter calls "intelligence of means"—that is, countersurveillance of persons taking an unexplained interest in likely methods and targets of attack: airports, shipping, chemical storage facilities, nuclear plants, antibiotic-resistant strains of bacteria, etc.³⁸ One element of TIPS was meant to encourage reporting by civil employees of those industries. As Acting Director of the Defense Intelligence Agency (DIA) Rear Adm. Lowell Jacoby, told the Joint Inquiry,

There are scores—in some cases hundreds—of discrete steps taken by terrorists as they choose, plan,

and move in on a target....the purchase or forgery of travel documents, 'accidental' intrusions in secure areas, or movement of cash may have innocent explanations and benign implications. But maybe not.

During the pre-incident period, potential indications of terrorist activities are far more likely to be observed by police, security, or bystanders than by traditional intelligence collectors.³⁹

This is quite a different matter from the other aspect of TIPS, which was to engage those who have greatest access to people's homes—mailmen, utility employees and so on—to keep an eye on the citizenry.

These two sorts of surveillance are distinguishable on at least three grounds. "Intelligence of means" is essentially passive, observes people in circumstances where there is little expectation of privacy, and forms suspicions—even if inaccurate ones—based on activities that have at least been judged in advance to be relevant to terrorism. "Intelligence by mailmen" is active, observes people at home or going about their ordinary business, and forms suspicions based on vague criteria that are by nature inclined to cultural bias.⁴⁰

In response to criticism of the program, the Justice Department attempted to draw just this distinction. In August 2002 it excluded from TIPS postal, utility and other employees "whose work puts them in contact with homes and private property."⁴¹ But by then it was too late: the House version of the Homeland Security Act of 2002 prohibited TIPS altogether, and the distinction was lost.⁴²

Of course, if a mailman sees someone with a bomb he doesn't need TIPS to tell the police. But a training and

³⁵ Testimony of former FBI executive assistant Director for Counterterrorism and Counterintelligence Dale Watson in a hearing on "Current and Projected National Security Threats to the United States" before the Senate intelligence committee, Feb. 6, 2002, page number not available. [Questioning by Sen. Edwards]

³⁶ "What is Operation TIPS?" *Washington Post*, July 14, 2002. TIPS was developed by the Justice Department in coordination with other agencies—the FBI, Labor, the Office of Homeland Security and the Federal Emergency Management Agency (FEMA). It was to be a project of Citizen Corps, which is administered by FEMA. Information about TIPS, including the description above, was at one time on the Citizen Corps web site, www.citizen corps.gov, but has since been deleted.

³⁷ Statement of Ashton Carter before the Senate governmental affairs committee, June 26, 2002, "Rules for the White House and the New Department," pp. 7-8. "Countersurveillance" means gathering intelligence about enemy surveillance activities. It would include, for example, detecting and spying on someone who was taking video footage of a nuclear power facility. Carter distinguishes between "intelligence of means" and countersurveillance of places but makes the same point in both cases.

³⁸ Statement of Lowell Jacoby before the Joint Inquiry, Oct. 17, 2002, p. 4.

³⁹ Asked about the program, an FBI official expressed the Bureau's reservations this way: "We want," he said, "to give people the sense that we're not collecting information on individuals just to collect. We really do want the credible information that gives us the opportunity to prevent a terrorist event...[rather than] sifting through information that is useless and thereby preventing ourselves from doing our job because we have too much information." (Interview with FBI official, Jan. 14, 2002.)

⁴⁰ "Operation TIPS Fact Sheet." This updated version was on www.citizen corps.gov/tips.html as late as October 2002 but is now gone. The August date is from "Proposal to Enlist Citizen Spies Was Doomed From Start," *Washington Post*, Nov. 24, 2002.

⁴¹ And the provision banned any successor program, as was made clear in a colloquy between House Democratic and Republican leaders. See "Colloquy on banning proposed TIPS program with Majority Leader Arney during debate on Homeland Security Act," Statement by Rep. Nancy Pelosi, Sept. 24, 2002. This clarified section 808 of the Act, which states: "Any and all activities of the Federal Government to implement the proposed component program of the Citizen Corps known as Operation TIPS are hereby prohibited." References to TIPS on the Citizen Corps website were then deleted.

reporting system for those who work at likely targets of terrorist attack is part of a coordinated homeland security program; or would have been if not for the Justice Department's irrational exuberance. Operation TIPS, said an FBI official when asked about the program, was "a sticky wicket, it's the Attorney General's idea. Let him talk about it."

IV. Intelligence-Gathering in the United States

Since September 11, the government has expanded its authority to collect intelligence within the United States. The Attorney General has changed the guidelines for FBI domestic security and foreign counterterrorism investigations. Congress has amended the Foreign Intelligence Surveillance Act (FISA) to make it easier to conduct secret wiretaps and searches in criminal cases. The Justice Department has imposed new secrecy measures on detentions and immigration proceedings involving suspected terrorists. And Congress has increased the length of time suspects may be detained while under investigation.

FBI Guidelines

In May 2002 the Attorney General issued a new version of the guidelines that regulate FBI investigations of domestic terrorism and other general crimes.⁴² Though much-discussed, in fact these guidelines have nothing to do with investigations of al Qaeda, which are conducted under classified guidelines for "Foreign Counterintelligence Investigations."⁴³ Officials say that the classified guidelines have also been changed, largely

in ways similar to the domestic guidelines; so the two sets of guidelines will be discussed together.⁴⁴ Indeed, they work together in the sense that the domestic guidelines govern investigations of suspected terrorist-related activity that is not—or not yet shown to be—connected to a foreign group.

The new Attorney General's guidelines make at least three significant changes in the FBI's authority to investigate suspected terrorist crimes. They permit the FBI to attend public events and gather publicly-available information without any threshold of suspicion of illegal activity. They allow terrorism investigations to be authorized by field offices rather than headquarters. And they authorize the FBI to operate and participate in computer systems drawing on a wide range of government and private sources "for the purpose of identifying and locating terrorists."⁴⁵

Attending public events and gathering publicly-available information. Previously the FBI was permitted to do this only in a limited manner except as part of an authorized investigation. The new authority to attend events (e.g. at mosques) is limited to counterterrorism purposes, and no information may be retained unless it relates to terrorist or criminal activity.⁴⁶ The FBI has been correctly criticized for its sometimes-poor understanding of the cultural and historic context in which fundamentalist Islamic terrorism takes place; surely part of remedying this is allowing the Bureau to read and listen to what Islamists say.

On the other hand, there is potential for abuse here: ambiguous statements at the mosque may lead to further investigation and infiltration that chills or disrupts

⁴² "Attorney General Guidelines," Remarks of John Ashcroft, May 30, 2002. The domestic security "Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations" (hereinafter *Guidelines*) are available at the Department of Justice web site. So are accompanying guidelines on FBI "Undercover Operations" and on the "Use of Confidential Informants."

⁴³ The classified "Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations" (hereinafter "Foreign Counterintelligence Guidelines" or *FCI Guidelines*) govern FBI investigations of foreign intelligence services and foreign terrorist organizations like al Qaeda. They were revised in 1989 as a result of the FBI's investigation of the Committee in Solidarity with the People of El Salvador (CISPES), and substantial portions of the guidelines were released that year. The specific standards for counterintelligence and counterterrorism investigations, and a few other sections, remained classified.

⁴⁴ Statement of former FBI Director Louis Freeh before the Joint Inquiry, Oct. 8, 2002, p. 43; interview with FBI official, Jan. 14, 2003; interview with former FBI counterterrorism official, Nov. 1, 2002.

⁴⁵ Guidelines sections VI.A.2 and VI.B.1-2; III.B.1; and VI.A.1.

⁴⁶ According to the Justice Department's letter of May 13, 2003 to the House judiciary committee (pp. 39-40) the FBI has made only one visit to a mosque under this authority. No information about criminal or terrorist activity was gathered and no information was retained in FBI files. The Department says an informal survey of 45 FBI field offices found that about 10 had carried out investigative activities at mosques. Given the distribution of mosques in the United States this is a significant number; but except for the one visit already cited, the Department says these investigative actions were pursuant to or "related to" preliminary inquiries or full investigations. The FBI already had the authority to visit places of worship as part of an authorized investigation before the Ashcroft *Guidelines*.

First Amendment religious activity but does not find evidence of crime. Because of its history, the FBI is extremely sensitive to these problems and—with the notable exception of its investigation of the Committee in Solidarity with the People of El Salvador (CISPES) in the 1980s—has largely avoided them since the mid-1970s. Also because of that history, the FBI tends to react to any scandal about its conduct by becoming defensive, and indeed timid;¹⁴ and over-reaching by the Bureau in ways that harm civil liberties indirectly but also profoundly damage the FBI's effectiveness. With changes in the Guidelines and the USA Patriot Act, says one official, the Bureau now has the tools it needs. "I don't think anyone wants it to go any further," he says, "because then what are we protecting? We're not protecting the way of life we've been given to defend."¹⁵

Authorizing counterterrorism investigations.

Investigations can now be authorized by the Special Agent in Charge (SAC) of an FBI field office rather than an official at headquarters. In effect this means the SAC rather than someone at headquarters will make the judgment that "facts and circumstances reasonably indicat[e] the existence of [a terrorist] enterprise." Such judgments can involve considerable subjectivity and discretion.

Given the inherently political—and now religious—nature of terrorist activity and the Bureau's expanded authority to investigate, oversight of this judgment is especially important. "I worry about individual SACs deciding on meeting the guidelines," says a former senior Bureau official who otherwise agrees with the new rules.¹⁶

According to the Attorney General, the change was made so that field agents could counter terrorist threats "swiftly and vigorously without waiting for headquarters to act." Fine; perhaps field offices should have this authority when they determine that circumstances require immediate action.

But the change seemed to paper over a more serious difficulty at the FBI. A fact sheet that accompanies the Attorney General's statement says that until these revisions were made, "field agents lost significant investigative opportunities as they waited for headquarters to consider their requests over a period of weeks, or even months." If true, the real problem was headquarters' failure to act in a timely way, and this should have been dealt with by some means other than dumping the matter in the field offices' lap. The change has removed an important layer of judgment and oversight concerning the sensitive question of whom the FBI investigates.¹⁷

As already noted, the classified Foreign Counterintelligence (FCI) guidelines have been changed in much the same way as the domestic security guidelines, including giving field offices authority to initiate and renew counterterrorism investigations. The FCI guidelines govern investigations of al Qaeda and other suspected foreign terrorists, so it may be useful to review the lessons of CISPES—an FCI case that went wrong.¹⁸ "The CISPES case was a serious failure in FBI management," the Senate intelligence committee's report says,

resulting in the investigation of domestic political activities that should not have come under governmental scrutiny.¹⁹

¹⁴ Statement of Former FBI Associate Deputy Director for Investigations Oliver "Buck" Revell before the House international relations committee, Oct. 3, 2001. After congressional criticism of the FBI's extralegal tactics in COINTELPRO, Revell says, "the Bureau was quite traumatized and...practically shut down its entire domestic security operation." By the early 1990s a vigorous counterterrorism program had begun but this soon became involved in over-broad investigations of Central America-solidarity groups (CISPES). This produced another round of hearings and criticism of the FBI. As a result, he says, "In 1988 again we almost went down to ground zero in carrying out our counterterrorism responsibilities." Revell says "FBI agents were loathe to undertake anything that had any appearance of being involved in the political process" and as a result failed to follow leads from the assassination of Meir Kahane that would have led to the group that undertook the first World Trade Center bombing in 1993. Of course the 1993 terrorism plots turned things around again...

Another example of the FBI's delicacy in these matters was its timidity in requesting intelligence wiretaps after the FISA court two years ago criticized a series of applications that did not meet the standard set by the law. The Bureau became so over-cautious that it did not request a warrant to search Moussawi's computer, and in fact some FBI officials had made up new legal restrictions that were not in the law.

This decades-long drama of binge and purge helps explain the FBI's caution about its latest grant of authority.

¹⁵ Interview with FBI official, Jan. 14, 2003.

¹⁶ Interview with former FBI official, Nov. 8, 2002.

¹⁷ Remarks of John Ashcroft, May 30, 2002, p. 3; "Fact Sheet - Attorney General's Guidelines: Detecting and Preventing Terrorist Attacks," p. 2.

¹⁸ *The FBI and CISPES*, Report of the Select Committee on Intelligence, United States Senate, July 1989 (hereinafter, "CISPES Report"). The FBI conducted a foreign counterintelligence investigation of the Committee in Solidarity with the People of El Salvador (CISPES) from 1983 to 1985. Based primarily on allegations by an informer who turned out to be unreliable and whose FBI contact agent pocketed part of the informant payments, the investigation grew to involve all 59 field offices, 20,000 employee hours and 178 spin-off investigations. In the course of this the Bureau collected information on 2,175 individuals and 1,330 groups and conducted numerous surveillances of churches involved in the sanctuary movement. In 1985 the Justice Department's Office of Intelligence Policy and Review found that it had not produced information that met the standard for such investigations and it was closed (pp. 1-2).

¹⁹ CISPES Report, p. 1.

²⁰ CISPES Report, p. 9.

And:

The Committee believes that an investigation having First Amendment implications comparable to the CISPES case should have the Director's personal review.⁷⁵

The FBI has limited resources with which to meet its extensive law enforcement and intelligence responsibilities. The efficient use of those resources depends on skilled professional investigators and supervisors, both at FBI Headquarters and in the 59 field offices around the country. If the supervision is inadequate, the FBI can dissipate its energies on unnecessary investigative activities that do not contribute to the accomplishment of sound counterterrorism objectives.⁷⁶

Based on the FBI's own prior Inspection Division report on the matter, then-FBI Director William Sessions found that the review and approval process for the CISPES investigation were insufficient and were carried out at too low a level, given the sensitivity of this type of investigation....all international terrorism investigations will now have to be approved at a higher level.⁷⁷

"Probably the most critical area requiring attention," he said,

was how to conduct investigations of groups where legitimate First Amendment activities were being undertaken by the rank-and-file members. I found that, in the CISPES investigations, guidance on dealing with activities protected by the First Amendment was given to the field offices in many instances. In spite of this, Headquarters received reports on such activities that failed to specify why the reports were necessary.⁷⁸

Thus the lax review system did not ensure that Headquarters' policy and the field offices' actions matched. "The decision to broaden the investigation unnecessarily," Sessions said,

was made at a comparatively low level, and, put simply, the supervisory personnel at FBI Headquarters who should have reviewed and analyzed this decision and appreciated its significance failed to do so.⁷⁹

As a result, Sessions concluded, the investigation was continually expanded even though "[n]o substantial link between CISPES and international terrorism activities was ever established."⁸⁰

What went wrong in CISPES is that an unreliable informant and a corrupt case agent reported information about the pressing issue of the day,⁸¹ and FBI headquarters exerted too-little supervision to stop the case from mushrooming into a nation-wide investigation of minimal value and considerable intrusiveness.

The lessons of CISPES are no less relevant now that foreign counterterrorism has become the FBI's highest priority. After September 11, even more than in the CISPES case, terrorism investigations will require judgments based on ambiguous information; will involve First Amendment political and religious activities; and will take account of ethnicity and nationality. The Attorney General has given the FBI increased authority to investigate. And he has urged the Bureau in the strongest terms to use it and not to shrink from employing intrusive methods.⁸² All these are reasons to improve rather than decrease Headquarters supervision of FBI investigations.

"Data-mining" of all-source information systems to identify terrorists. The new FBI guidelines authorize the FBI to operate and participate in computerized systems "for the purpose of identifying and locating terrorists." Such systems

⁷⁵ CISPES Report, p. 13.

⁷⁶ Emphasis added. CISPES Report, p. 109; and Statement of FBI Director William Sessions, in *Hearings before the Select Committee on Intelligence of the United States Senate on The FBI Investigation of the Committee in Solidarity with the People of El Salvador (CISPES)*, Feb. 23, April 13, Sept. 14, 1988, p. 125 (hereinafter, "CISPES Hearings").

⁷⁷ CISPES Report, pp. 109-110.

⁷⁸ CISPES Hearings, p. 122.

⁷⁹ CISPES Hearings, p. 120.

⁸⁰ Apparently the national security threat posed by El Salvador.

⁸¹ In his Remarks of May 30, 2002, the Attorney General noted that immediately after September 11 he authorized the FBI to waive the guidelines in extraordinary cases but was "disappointed that [this authority] was not used more widely." His Remarks and the Guidelines themselves state that the fight against terrorism is the FBI's top priority. Section IV.A of the Guidelines says, "The FBI should not hesitate to use any lawful techniques consistent with these Guidelines in an investigation, even if intrusive, where the intrusiveness is warranted....This point is to be particularly observed in investigations relating to terrorist activities."

⁸² Guidelines section VI.A.1.

may draw on and retain pertinent information from any source permitted by law, including information derived from past or ongoing investigative activities...foreign intelligence information and lookout list information; publicly available information, whether obtained directly or through services...that compile or analyze such information; and information voluntarily provided by private entities.⁴²

The FBI's primary system for doing this is the inter-agency Foreign Terrorist Tracking Task Force, established in October 2001 in response to a Presidential Directive.⁴³ According to the *National Strategy for Homeland Security*, by "[u]tilizing law enforcement and intelligence information as well as public source data," the FTTF

employs risk modeling algorithms, link analysis, historic review of past patterns of behavior, and other factors to distinguish persons who may pose a risk of terrorism from those who do not.⁴⁴

In other words, the hope is that "data-mining" will do what neither the immigration nor the intelligence system can do very well—identify terrorists who are not otherwise on the scope. It is a promising idea, and data-mining is already being used by the FTTF in common-sense ways—for example, to screen foreigners who apply to come to the United States to take flying lessons.⁴⁵ During hearings of the Joint Inquiry, however, data-mining was repeatedly spoken of in more ambitious terms: as a way of discovering suspects among

general populations, both in the United States and abroad. The notion, explained former National Security Advisor Brent Scowcroft,

is that every time the terrorists speak, every time they move, every time they spend money, every time they get money, there are some traces of those activities. Now, it's hard to find them but theoretically you can.

There are several problems though, because there are similar activities of millions of other people doing things the same way. How do you distinguish between them?...And in addition, you're dealing with volumes that are horrendous. I think we need to look at technology here, for a solution to each one of those. And one I didn't mention, of course, is how you look through all of these without violating the privacy of all those innocent individuals doing it. I think you can do some things with machines and technology before they get to human beings that help preserve the privacy thing and still let us get more of a handle than we're able to do now.⁴⁶

Scowcroft was in effect describing a research project known as "Total Information Awareness" then under way at the Defense Advanced Research Projects Agency (DARPA). The DARPA project will itself use fabricated information to test computers' ability to find meaningful links in "immense volumes" of data and to distinguish benign activities from those undertaken in preparation for terrorism.⁴⁷ If it works, the idea would be eventually to range over immense volumes of data about real people, and the program has become controversial.⁴⁸

⁴² Homeland Security Presidential Directive-2, "Combating Terrorism Through Immigration Policies," Oct. 29, 2001. The FTTF is supposed to keep terrorist suspects from entering the United States and find those already here. Among other things, the Directive says, the usefulness of "advanced data mining software should also be addressed."

⁴³ *National Strategy for Homeland Security*, Office of Homeland Security, July 2002, p. 27. In addition to this exotic task, the FTTF provided names for the Voluntary Interview and Absconder programs, and the results of both sets of interviews were fed back into its database. See also Interim Report of Eleanor Hill, Oct. 1, 2002, pp. 9-10; and statement of Assistant Commissioner for Immigration Joseph Greene before the Joint Inquiry Oct. 1, 2002, p. 7.

⁴⁴ Interview with FBI official, Feb. 20, 2003.

⁴⁵ Testimony of Brent Scowcroft at a hearing of the Joint Inquiry, Sept. 19, 2002, second panel. Scowcroft's remark is extemporaneous and has been edited slightly for clarity.

⁴⁶ "Overview of the Information Awareness Office," Remarks of Information Awareness Office Director John Poindexter, Aug. 2, 2002; "DOD News Briefing" Nov. 20, 2002; "Many Tools of Big Brother Are Up and Running," *New York Times*, Dec. 23, 2002.

⁴⁷ After a public uproar the Senate voted to require a report on the program from DARPA and prohibited the operational use of whatever technology is developed unless it is approved by new legislation. ("Senate Vows to Curb Project to Search for Terrorists in Databases and Internet Mail," *New York Times*, Jan. 24, 2003.) As enacted in an appropriations law, the requirement for new legislation applies only to the use of such technology with respect to U.S. persons as defined by FISA—that is, citizens and permanent residents. (Public Law 108-7, section 111.) Since Total Information Awareness is just a research program, this does not directly affect it, and the Senate's action apparently had as much to do with the fact that the project is run by former National Security Adviser John Poindexter as with the technology itself, which is more or less in use elsewhere. On Jan. 16, 2003, Sen. Russ Feingold introduced a bill barring all data-mining by the Department of Defense and certain kinds of data-mining by the Department of Homeland Security until the activities are specifically authorized by law. (S. 188, the Data-Mining Moratorium Act of 2003.)

⁴⁸ Statement of Paul Wolfowitz before the Joint Inquiry, Sept. 19, 2002, p. 5. Perhaps referring to the DARPA project, he says "we have aggressive efforts underway to find new ways to discern terrorist 'signals' from the background 'noise' of society." (p. 3)

In fact, DARPA is something of a red herring. As we saw, data-mining of public and private-sector information is already being done by the Foreign Terrorist Tracking Task Force. Technical support for the FTTF is provided by the Defense Department's Joint Counterintelligence Assessment Group. The mission of the latter organization, according to Deputy Secretary of Defense Paul Wolfowitz, is "to better identify and track terrorists" in collaboration with the FBI.⁸⁸

Meanwhile, the Defense Intelligence Agency has expanded its Joint Intelligence Task Force for Combating Terrorism (JITF-CT). Set up after the bombing of the USS Cole, the JITF-CT's mission, says DIA chief Lowell Jacoby, is to be a national-level repository of "the entire range of terrorism related information, regardless of source," and to use state-of-the-art "analytical discovery" tools (that is, data-mining) to

discern and understand obscure linkages between individuals, activities, and methods in the pre-attack phase of a terrorist operation, even if it stretches over years and several continents.⁸⁹

An official of DARPA explained this sort of data-mining in a talk in August 2002. He said there are three ways to proceed. The first would be to compare large databases of "transactions" (e.g., travel, purchases, visa overstays, etc.) looking for unusual links or co-occurrences. But while this can find groups of people who appear to be linked, "it tells us nothing about whether their activities are legitimate or suspicious"—which of course is the problem posed by the September 11 hijackers.

The second method would be to "monitor data streams" looking for indicators of illicit activity (for example, someone applies for visas under more than one name). The problem is that this alerts the computer only to indicators it already knows about. Adding new indicators in response to new behavior or new knowledge may be effective for changes in high-volume activities like credit card fraud, but it is less useful for rare or one-time events like terrorism.

The third method would be to start with known or suspected terrorist groups or individuals and develop an expanding database about their relationships, associates, and activities in hopes of finding "previously unknown but significant connections, representing, for example, a new group, threat or capability." This, the official says, is the approach most likely to be fruitful.⁹⁰

Certainly, the civil liberties implications of starting with known or suspected terrorists are less serious than the other two approaches, but they could still be significant. Data-mining by nature produces a lot of false positives. These links must then be analyzed by real people, and those that are still of interest must be investigated. The question therefore arises whether identification in this way will open individuals to further investigation by the FBI. In principle there is no problem if these investigations require the same criminal standard currently in use. But a judgment that facts and circumstances "reasonably indicate" the existence of a terrorist enterprise involves considerable discretion; and perhaps *different sorts of facts and circumstances* will come to meet this standard in an era of massive link-analysis.

This is not to say that these links are not worth pursuing. For example, repeated coincidences of travel to the same location at the same time as a known terrorist, together with other "co-occurrences," may be worth a closer look; but they are different from facts and circumstances of the sort "Omar says Khalid of al Qaeda is meeting his friends in Singapore."⁹¹

FISA

A change in the Foreign Intelligence Surveillance Act (FISA) made by Congress after September 11 appears to undercut the constitutional protections built into the Act without increasing the government's ability to gather information on international terrorists.

In 1967, the Supreme Court ruled that criminal wiretaps require a warrant based on probable cause just as physical searches do under the Fourth Amendment. The Court left open the question of whether such a warrant is required for national security wiretaps.⁹² In 1972, the Court ruled that a domestic group could not be tapped

⁸⁸ Statement of Lowell Jacoby before the Joint Inquiry, Oct. 1, 2002, p. 2. It should be noted that Jacoby is talking here about information in the government's possession and not private-sector information.

⁸⁹ Remarks of Ted Senator, Director of Evidence Extraction and Link Discovery Program, Information Awareness Office, at DARPAtech 2002 Symposium, August 2002.

⁹⁰ This is in addition to the privacy issues raised by a "total" government awareness of private-sector information, as envisioned by some versions of the DARPA project.

⁹¹ *Katz v. United States*, 389 U.S. 347 (1967).

⁹² *United States v. United States District Court*, 407 U.S. 297 (1972).

without a criminal warrant unless the executive branch could show a connection with a foreign power; again the Court did not address the scope of the President's authority with respect to foreign powers and their agents.⁶⁴

The 1978 Foreign Intelligence Surveillance Act settled the question as follows: intelligence wiretaps of non-U.S. persons in the United States require a warrant based on probable cause to believe the target is an agent of a foreign power or terrorist group (as opposed to probable cause to believe a crime has been or will be committed); for U.S. persons the government must also believe the person is engaged in criminal activity.⁶⁵ In 1994 the Act was amended to include physical searches in foreign intelligence investigations.⁶⁶

Congress knew that FISA surveillances would sometimes produce evidence of criminal activity, and the Act contains procedures for sharing such information with law enforcement. To ensure that FISA was not used as a back door in criminal cases where there was not enough information to obtain a Title III warrant,⁶⁷ FISA required a certification by the executive branch that "the purpose of the surveillance is to obtain foreign intelligence information."⁶⁸ During the 1980s the Justice Department developed screening procedures to allow information to be passed to criminal investigators without risking a court finding that the FISA surveillance was illegal because foreign intelligence collection was not its "primary purpose." These procedures grew increasingly cumbersome in the 1990s, which led to considerable confusion at the FBI and eventually a breakdown of communications between the Bureau and the FISA court.⁶⁹

After September 11, Congress responded to complaints about this "wall" by easing restrictions on the sharing of grand jury and criminal information with

intelligence agencies. It also amended FISA. Rather than "the purpose," foreign intelligence must now merely be "a significant purpose" of the surveillance.⁷⁰

In March 2002 the Justice Department asked the Foreign Intelligence Surveillance Court to approve new procedures for FISA surveillances. The court objected to the revised rules, largely because they authorize prosecutors to give "advice" to intelligence officials as to "the initiation, operation, continuation, or expansion of FISA searches and surveillances."⁷¹ The court concluded that this would result in criminal prosecutors "directing FISA surveillances from start to finish." They will, said the court,

tell the FBI when to use FISA (perhaps when they lack probable cause for a Title III electronic surveillance), what techniques to use, what information to look for, what information to keep as evidence and when use of FISA can cease because there is enough evidence to arrest or prosecute

— and all this without the right to notice or discovery that attend a normal criminal case.⁷² The court found that this did not meet the law's notion of "minimization procedures." It re-wrote the Justice Department's proposal to allow prosecutors to consult and coordinate with intelligence officials where there are overlapping intelligence and criminal investigations but not to direct or control the use of FISA techniques for purposes of criminal prosecution.⁷³

In November 2002, the Foreign Intelligence Surveillance Court of Review reversed, approving the Justice Department's new procedures. The Review Court reasoned that the distinction between collection for foreign intelligence purposes and collection for prosecution per se was false on two grounds. First, FISA's criminal standard for surveillance of U.S. persons means

⁶⁴ Interim Report of Eleanor Hill, Oct. 8, 2002, pp. 21-22; Foreign Intelligence Surveillance Act of 1978 (FISA) Sections 101(h) and (c). Background on FISA and its amendment is also included in *The USA PATRIOT Act: A Legal Analysis*, Congressional Research Service, April 15, 2002, pp. 8-10, 12-23; and in *FBI Intelligence Investigations: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited*, GAO 2001.

⁶⁵ Intelligence Authorization Act for FY 1995, P.L. 103-359, 108 Stat. 3423 (1994).

⁶⁶ Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 permits law enforcement officers to seek a judicial warrant, based on probable cause, allowing the interception of communications to obtain evidence of any of a statutory list of crimes.

⁶⁷ FISA Section 104(a)(7).

⁶⁸ Statement of Eleanor Hill Oct. 8, 2002, pp. 22-24.

⁶⁹ USA PATRIOT Act, P.L. 107-56, 115 Stat. 272. Section 218 amends the "purpose" language of FISA.

⁷⁰ *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623 (U.S. Foreign Intelligence Surveillance Court, May 17, 2002).

⁷¹ *Id.*, pp. 622-24.

⁷² *Id.*, pp. 624-25.

that the activities to be surveilled involve a violation of criminal statutes. Second, the act defines "foreign intelligence information" as information that relates or is necessary to the ability of the United States to protect against international terrorism or hostile intelligence activities. The Review Court cited report language stating that prosecution was one way of protecting, and it found nothing in the act barring the deliberate collection for prosecution of what the Review Court called "foreign intelligence crimes." The act's special provisions for disseminating "evidence of a crime" it interpreted as applying to evidence of unrelated "ordinary" crimes acquired during a surveillance.¹⁰⁴

That being said, the Review Court found that "the Patriot Act altered and to some degree muddied the landscape."¹⁰⁵ By requiring that foreign intelligence collection be "a significant" purpose, the Patriot Act contemplates that the primary purpose can be the collection of information that is not foreign intelligence. Since in the Review Court's opinion "foreign intelligence information" includes evidence for prosecution of crimes involved in terrorist or hostile intelligence activities, the Patriot Act appears to permit the use of FISA to collect evidence for prosecution of ordinary crimes so long as there is also a colorable intelligence purpose. "Nevertheless," the Review Court says, "it is our task to do our best to read the statute," and in a series of somewhat tortured hypotheticals feels for the limits of this new authority. But all it manages to say for sure is that FISA cannot be used to investigate "wholly unrelated" ordinary crimes.¹⁰⁶

Well, legislate in haste. The Review Court interprets FISA in a way that gives the government everything it needs, then insightfully lapses into confusion about what else the Patriot Act means. At some point

Congress might want to un-muddy the landscape. A possible revision consistent with the Review Court's opinion may be to return to the original "purpose" language of FISA and amend the definition of "foreign intelligence information" to include evidence for prosecution of specified foreign intelligence crimes.

It's worth noting that intelligence officials have had few complaints about the original version of FISA.¹⁰⁷ "There's no need to change that. It's fine," says former National Security Agency (NSA) Director William Odum. "It's a matter of how you use it. The FBI was reprimanded by the FISA court, and they should have been."¹⁰⁸

Moreover on the last day of hearings before the Joint Inquiry, NSA's current Director Michael Hayden, said:

I will speak only of NSA but I think it fair to say that—historically—we have been able to be more agile in sharing information with some customers (like the Department of Defense) than we have with others (like the Department of Justice). This is not something that we created or chose. For very legitimate reasons, Congress and the courts have erected some barriers that make the sharing with law enforcement more careful, more regulated.

As a practical matter, we have chosen *as a people* to make it harder to conduct electronic searches for a law enforcement purpose than for a foreign intelligence purpose. This is so because law enforcement electronic searches implicate not only 4th Amendment privacy interests, but also 5th Amendment liberty interests. After all, the purpose of traditional law enforcement activity is to put criminals behind bars.¹⁰⁹

¹⁰⁴ *In re Sealed Case No. 02-001*, 310 F.3d 717 (U.S. Foreign Intelligence Surveillance Court of Review Nov. 18, 2002), pp. 722-25, 731, 742, 745. The doctrine that once the government's primary purpose shifts to prosecution a surveillance no longer meets the FISA standard of being "for the purpose of obtaining foreign intelligence" is based on a series of court cases and, until the Patriot Act, was accepted by the Justice Department. The Review Court wrote that these cases should have drawn a line, not between evidence for prosecution and other foreign intelligence information, but "between ordinary crimes and foreign intelligence crimes." (see p. 744 and pp. 725-28, 742-44.)

¹⁰⁵ *Id.*, pp. 728-29.

¹⁰⁶ *Id.*, pp. 728-36. The series of hypotheticals are on 735-36. For example: the Patriot Act re-introduces the "Gale" distinction between prosecution and other purposes, so FISA cannot be used where prosecution is the only purpose. But this will be no bar, as the government usually entertains more options than prosecution when beginning a surveillance. Another: the Review Court rejects the government's claim that its primary purpose can be to prosecute a foreign agent for "ordinary crimes," but if the crimes have any tie to foreign intelligence crimes—e.g. bank robbery to finance manufacture of a bomb—the surveillance would be permissible.

¹⁰⁷ If there were a need to gather foreign intelligence more easily the answer might be to lower the FISA standard to reasonable suspicion. A bill to do this for non-U.S. persons was proposed after September 11, but the Bush Administration declined to support it. Explaining the Administration's position on S. 2659 last year, Council for Intelligence Policy James Baker said it was not clear the change would "pass constitutional muster." In addition, he said, "[i]t may not be the case that the probable cause standard has caused any difficulties in our ability to seek the FISA warrants we require." (Statement of James Baker before the Senate Intelligence Committee, July 31, 2002, p. 3.)

¹⁰⁸ Interview with William Odum, Nov. 15, 2002.

¹⁰⁹ Statement of NSA Director Michael Hayden before the Joint Inquiry, Oct. 17, 2002, pp. 10-11.

“Secret” Detentions and Closed Immigration Hearings

The government has refused to disclose a list of the more than 1,200 people it arrested after September 11. It has also closed immigration proceedings in what it calls “special interest” cases and has not listed on court dockets the names of people subject to those proceedings.

Whether these actions constitute a practice or policy of secret detention is so confusing a question that we will address it briefly before going on. Secret detentions did occur as a matter of policy in the first days or weeks after September 11. According to a recent report by the Justice Department’s Office of the Inspector General, detainees charged with immigration offenses and classified by the FBI as of “high interest” were initially barred even from contacting an attorney. The duration of this official ban was at least three days and perhaps as much as two weeks.¹¹⁰ Most September 11 detainees were categorized as of lower interest and were not subject to such a ban.¹¹¹

But even after the initial two-week period many detainees faced significant problems in maintaining contact with family, lawyers, and others outside. Legal aid groups, consular officials and the attorneys of those arrested had difficulty locating detainees, many of whom were held under harsh conditions. Part of the

problem was that many detainees charged with immigration violations were sometimes moved to INS facilities, across the country, without notice to their families or lawyers. The extent and significance of these practices during the months after September 11 are discussed further in Chapter Two of this report.

After the initial few weeks, three classes of detainees were at issue, and the question of secret detentions is somewhat different for each. 129 of those arrested were charged with federal crimes. 751 were held on immigration violations. And slightly fewer than 50 were held as material witnesses.¹¹²

It is true that the government has never released a list of the names of those detained in connection with September 11. But the term “secret detention” has far more serious connotations: imprisonment without notice, without the ability to communicate, without counsel and without due process as happened initially with some detainees. After the first two weeks, was the fact of detainees’ imprisonment secret?

For those charged with federal crimes: their detention, as an individual matter, was a matter of public record.

For those charged with immigration violations and classified as “special interest” cases:¹¹³ in at least 611 of these cases, the court barred access to records of the person’s detention, closed their deportation hearings,

¹¹⁰ A Bureau of Prisons (BOP) official ordered a communications blackout for high-security detainees in the Northeast Region on September 17, 2001. Three days later it was lifted for legal but not for social communications. According to BOP Assistant Director for Correctional Programs Michael Canksey, all high-security detainees were incommunicado for the first 8-10 days. On October 1, 2001, he sent a memo to all BOP facilities lifting the ban on legal communications. (*The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, Department of Justice Office of the Inspector General [“IG Report”], April 2003, pp. 111-14.) The report examines conditions at the BOP’s high-security Metropolitan Detention Center (MDC) in New York City and at the lower-security Passaic County Jail in Patterson, N.J. 762 people arrested in connection with the September 11 investigation were held on immigration charges. The FBI classified 184 of them as “high interest” and these were held at maximum security prisons; 84 were at MDC. 578 were classified as of lower or undetermined “interest” and kept at jails under contract with INS to house immigration detainees like Passaic, where 400 September 11 detainees were held.

¹¹¹ *Id.*, pp. 111, 172.

¹¹² *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002), Memorandum Opinion, pp. 98-99. The numbers do not add up to 1,182 but presumably the remainder were released. The figure for material witnesses is from a May 13, 2003 letter to the House judiciary committee from the Justice Department’s Office of Legislative Affairs (“Justice Department letter of May 13, 2003”), p. 50. The letter responded to the committee’s detailed questions about the USA PATRIOT Act.

¹¹³ Some 766 people have been designated as “special interest” cases and 611 of these had closed hearings, according to a brief filed by the government in opposition to U.S. Supreme Court certification in *North Jersey Media Group v. Ashcroft*, 02-1289 as reported in “U.S. Deported Suspected Terrorists Whose Trials Could Jeopardize Probes,” *New Jersey Law Journal*, May 20, 2003.) Most were among the more than 1,200 people arrested after September 11, though some were already in detention (*Detroit Free Press v. Ashcroft*, Brief for Appellants, April 22, 2002, p. 5) and some may be “absconders” suspected of ties to terrorism. Note that the government earlier said 751

people had been detained on immigration charges. The new figure may include additional arrests or may include people who were detained before September 11.

¹¹⁴ Testimony of Director of the Executive Office for Immigration Review Kevin Rooney before the House Judiciary subcommittee on Immigration, Border Security, and Claims, May 8, 2003. Available at 80 Interpreter Releases 692 (May 12, 2003). Rooney is paraphrased as saying the courts barred “access to the related administrative record and docket information.” It is not clear that this bar on disclosure of detention records applied at all to the 155 special interest detainees who did not have closed hearings.

and the cases were not listed on the immigration docket.¹¹⁴ Thus the detentions were secret from the outside looking in. But they were not secret from the inside looking out. That is, detainees had the right to contact their families, obtain counsel, present evidence in support of their claims and publicly identify themselves to the press, though the conditions of their detention often made it very difficult to do so.

Despite these difficult conditions, however, more than 75 percent of the 611 detainees who had closed hearings were represented by a lawyer.¹¹⁵ Note that the appendix to this report contains detailed profiles of more than 400 detainees.¹¹⁶

For those held as material witnesses: information on these detentions was secret under grand jury rules, but according to the government witnesses were free to identify themselves publicly. (But see Chapter Two: in practice some material witnesses had great difficulty contacting their attorneys and families for weeks at a time.) They had a right to legal representation, were provided with a court-appointed lawyer if they could not afford one and had a right to a prompt bond hearing and to status hearings. The government says all material witnesses in the September 11 investigation were represented by counsel.¹¹⁷

“Secret detentions,” argues a Justice Department official, “is a misnomer.”

There were no group lists, but everyone had the right to counsel and to communicate with family. Any one of them could go to the press and say he’s being detained. Just because a mass list isn’t provided doesn’t mean there are secret detentions or a Star Chamber.¹¹⁸

In any case, the issues to be examined in this chapter are the government’s refusal to disclose a list of detainees and the closing of immigration hearings.

“Secret” detentions. The government’s reluctance to release such a list was the subject of a Freedom of Information Act (FOIA) suit brought in the District of Columbia by twenty-three public interest groups.¹¹⁹ In August 2002, U.S. District Court Judge Gladys Kessler ordered release of the names. The order is on appeal.¹²⁰

The government made three arguments in the case. Disclosure may “eliminate valuable sources” because terrorist groups may refuse to deal with detainees after they are released. It would “reveal the direction and progress of the investigations” and thus help terrorists develop ways to avoid detection. And it could allow terrorist organizations to create “false or misleading evidence.”¹²¹

Despite Judge Kessler’s professed bewilderment, it is plain enough what the government is talking about. The first and third arguments have to do with recruiting informants who can gather intelligence on terrorist groups. If someone is known to have been detained during the September 11 investigation—and though released shows an unaccustomed enthusiasm for Islamist violence—chances are they will either be rebuffed by al Qaeda or given false information in hopes that it will be reported back to U.S. authorities.

The government’s arguments about recruiting sources are not empty. According to a law enforcement official who did not want to be further identified, the government has been successful in recruiting informants among the detainees. A former intelligence official said he had been told this as well.

The government’s second reason—that disclosure would reveal the direction of the investigation—is not persuasive if it is assumed (as the judge did in this case) that the people whose identities are to be disclosed are members of al Qaeda. The group does not need a list to know which of its members have been arrested. But the government does not say the detainees at issue are

¹¹⁴ Testimony of Kevin Rooney, *op. cit.* According to Justice Department Office of Legal Affairs Director of Public Affairs Barbara Comstock, detainees who could not afford a lawyer were given lists of attorneys who could represent them for free. (Barbara Comstock letter to the editor of *Time Magazine*, May 15, 2003 [DOJ/OLA Notification (05.15.03 #1)].) (See www.usdoj.gov/opa/pr/2003/May/03_0pa_292.htm, for her letter.) Immigration attorneys say that as a general matter lists of the sort Comstock describes are sometimes inaccurate in which case it is hard for the detainee to find representation.

¹¹⁵ Most of the 406 people are identified by name, but the names of all individuals are known. 199 are “special interest” cases, 114 are not, and 93 are unknown or inapplicable.

¹¹⁶ Justice Department letter of May 13, 2003, *supra* note 112, pp. 48–9.

¹¹⁷ Interview with Justice Department official, Nov. 27, 2002.

¹¹⁸ *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002). The author of this chapter at one time worked for the Center for National Security Studies.

¹¹⁹ Defendant’s Notice of Appeal Aug. 8, 2002, filed with U.S. Court of Appeals for the DC Circuit (case No. 02-5254).

¹²⁰ 215 F. Supp. 2d at 101. These are primarily set out in Declaration of James S. Reynolds, Jan. 11, 2002, and in Reynolds’ supplemental declaration.

¹²¹ Memorandum in Support of Defendant’s Motion for Stay Pending Appeal, p. 4.

¹²² The reader may attempt the exercise for herself by examining the appendix of this report.

members of al Qaeda,¹²² and the analysis changes if it not assumed that they are. Assume instead they are people the government believes have some connection to or access to members of al Qaeda—or indeed are merely people the government detained in the course of its investigation of al Qaeda. By examining what kind of people were arrested it is not implausible to think that al Qaeda might learn something about how to avoid detection.¹²³

We often hear of al Qaeda's patience in studying the security system against which it must operate. "We know that in the East African Embassy bombings," says Mary Jo White, the former U.S. Attorney who prosecuted the cases,

[lists of] the unindicted co-conspirators from the proceedings...got extreme scrutiny. We know that this list was presented to bin Laden. One has to be aware of what is happening, and has to pay attention to what terrorists figure out that we don't know from discovery and conventional civil procedure.¹²⁴

In the FOIA case for names of detainees, the Justice Department asserts that terrorist organizations have been "monitoring the government's investigation" but "have had no way of collecting en masse a list of the names of individuals who have been deemed by the U.S. Government to be potentially useful."¹²⁵

This is a plausible point. What's implausible is the government's expectation that it can keep secret for very long a series of detentions that it insists are not themselves secret.¹²⁶

Closed immigration hearings. The analysis is somewhat different for closed immigration hearings in what the Attorney General has designated as "special interest" cases.

The government's two reasons for closing these hearings are the same as in the case of "secret" detentions: veiling the investigation and protecting possible informants.¹²⁷

The argument that disclosure would reveal the direction of counterterrorism investigations is not persuasive here. In the detentions case the "universe" is limited to those detainees arrested in post-September 11 terrorism investigations. In the case of immigration hearings the "universe" is the totality of immigration violators. Nothing distinguishes a subset of these as terrorism-related except for the government's own "special interest" designation; and this distinction can be avoided by simply opening the hearings. As with the detainees case it might still be possible to compile a list of terrorism-related cases by attending every immigration hearing, but this is the sort of thing the government thinks al Qaeda cannot easily do on its own.¹²⁸

The more serious argument has to do with recruiting informants. The government does obtain and use deportation orders as a means of persuading immigrants to become informants in terrorism cases, according to the law enforcement official who declined to be further identified.¹²⁹ "The use of INS in that way is a routine thing in organized-crime enforcement," recalls former deputy Attorney General Philip Heymann.¹³⁰

Vincent Cannistraro, the former counterterrorism official, says he knows of one recent case in which the government obtained a deportation order against someone and then offered to let him stay in the country if he would cooperate on terrorist matters. "He said 'screw you' and they deported him."¹³¹

¹²² MPI interview with Mary Jo White, September 2002.

¹²³ Memorandum in Support of Defendant's Motion for Stay Pending Appeal, p. 5.¹²³ Note that the Justice Department agreed to process the FOIA request on an expedited basis because it involved a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affect public confidence." (215 F. Supp. 2d at 97, quoting Office of Information Privacy letter to plaintiff.)

¹²⁴ Indeed, the judge in the secret detentions case complains that the Justice Department merely recycled the affidavit an FBI official gave in the closed hearings (*Detroit Free Press*) case. (215 F. Supp. 2d at 104.)

¹²⁵ Recently the government has asserted a new, though related, reason for having closed the hearings. In an April 25, 2003, brief opposing U.S. Supreme Court certification in *New Jersey Media Group v. Ashcroft*, the Justice Department says "many" of the people deported in special interest cases could have been prosecuted on terrorism-related charges but that a decision was made instead to remove them and "ensure they cannot return." ("U.S. Deported Suspected Terrorists Whose Trials Could Jeopardize Probes," *New Jersey Law Journal*, May 20, 2003.) The Justice Department's May 13, 2003 letter to the House judiciary committee, p. 33, says that removals were sometimes made on non-security grounds when they could have been made on security ones because evidence for the latter could not be declassified or because charging someone with a security-related offense has itself become the basis for an asylum claim on the grounds that the person has thus been labeled a terrorist. The government gives no numbers and no detail; but its claim is that it had evidence of security-related offenses in "many" cases where people were deported for routine immigration violations.

¹²⁶ See previous page.

¹²⁷ Interview with Philip Heymann, Nov. 12, 2002. Heymann was Assistant Attorney General for the Criminal Division in the Carter Administration.

¹²⁸ Interview with Vincent Cannistraro, Nov. 7, 2002.

The value of such leverage and the extent of its use more generally was described by Joint Inquiry staff director Eleanor Hill. "We were told," she says,

the most highly lauded member of the JTTF [Joint Terrorist Task Force] is often the INS. INS membership in the JTTF repeatedly has allowed the FBI personnel in the New York, Boston, and Phoenix field offices to use violations of the immigration laws to disrupt and obtain information from individuals the FBI suspects of being terrorists or of having terrorist connections. The INS-FBI collaboration has been instrumental in getting relevant information from those individuals.¹³²

If a government informer begins to form relationships with members of a terrorist group there is some chance that the group will try to find out about the person's background. One thing they might do is check the dockets of immigration hearings. For example, was their new friend recently the subject of a deportation order that the government did not enforce? The argument for keeping such information secret is stronger here than in the case of detainees because the name, and not just a cumulative list of names, really can be hidden. Here the secret withstands investigation; with "secret" detainees it does not.

In August 2002 the Sixth Circuit court of appeals found that blanket closings of immigration hearings violate the Constitution but that arguments for a closed hearing in individual cases may be presented before an immigration judge.¹³³ According to a former Justice Department official, the government is reluctant to accept this limitation because the FBI doesn't know until the end of the process whether someone will cooperate with the government to avoid deportation.¹³⁴ Presumably the government could confine its attentions to those immigrants who are most likely to agree or who, if they do, have useful abilities or connections.

Length of Initial Detention

The August 2001 arrest of Zacharias Moussaoui could have unraveled the September 11 plot. The case raises the question of whether there are circumstances in which detention without charges beyond 48 hours is necessary for effective counterterrorism.

Moussaoui is a French citizen who began classes at Pan Am Flight School on August 13, 2001. He paid cash and, although he had little experience and apparently no pilot's license, wanted to learn to take off and land a 747. He wanted to use the school's equipment to simulate a flight from Heathrow to Kennedy airport. His behavior and demeanor so alarmed his instructor that within two days the instructor called the FBI. "Do you realize," the instructor asked an FBI agent, explaining his concern, "that a 747, loaded with fuel, can be a bomb?" The FBI opened an international terrorism investigation of Moussaoui and queried its attaché in Paris about him. The next day, the INS detained Moussaoui and his roommate.¹³⁵

Much has been made of the FBI Minneapolis field office's unsuccessful attempt to get a FISA warrant to search Moussaoui's computer. In fact, when the search was finally made the computer contained nothing about the plot.¹³⁶ The key piece of evidence was something quite different.

In Moussaoui's possession when he was arrested were letters from Yazid Sufaat identifying Moussaoui as a representative of Sufaat's company and stating that Moussaoui would receive \$2500 per month.¹³⁷ In January 2001, the CIA had photographed two al Qaeda members, Khalid al-Mihdhar and Nawaf al-Hazmi, at a meeting of al Qaeda members held in Mr. Sufaat's apartment in Malaysia. These were the two hijackers whom the CIA should have watchlisted and who were in the United States at the time of Moussaoui's arrest.¹³⁸

¹³² Interim Report of Eleanor Hill, Oct. 1, 2002, ¶ 5. The Joint Terrorist Task Forces are FBI-led groups that bring together representatives of the Bureau, the U.S. Attorney's Office, local and state police, and other agencies. The first was set up in New York after the 1993 World Trade Center bombing. Now they have been organized in all cities where there are FBI field offices.

¹³³ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. Aug. 26, 2002); see also "Court Backs Open Deportation Hearings in Terror Cases," *New York Times*, Aug. 27, 2002.

¹³⁴ Interview with former Justice Department official, Nov. 8, 2002.

¹³⁵ Interim Report of Eleanor Hill, Sept. 17, 2002, pp. 15-17. The flight instructor's comment was quoted by Kristen Breitweiser, founder of the September 11 Advocates, in her statement before the Joint Committee, Sept. 18, 2002, page number not yet available. The remark is quoted in a number of articles; it appears to be derived from a *New York Times* article of Feb. 8, 2002, that does not quite say this, but close.

¹³⁶ Statement of Dale Watson before the Senate intelligence committee, Feb. 6, 2002, pp. 9-10.

¹³⁷ Interim Report of Eleanor Hill, Sept. 20, 2002, p. 4; United States of America v. Zacharias Moussaoui, Indictment, p. 13; "Malaysia site of Sept. 11 plotting, FBI report says," *USA Today*, Jan. 30, 2002.

¹³⁸ Hill, *supra* note 139; see also *supra* note 16.

On August 23, 2002, the CIA realized that the two men were serious al Qaeda operatives and that they were here. The agency sent an urgent cable to the FBI and other agencies asking that they be located. Unfortunately the FBI did not treat the matter urgently.¹³⁹ Yet Moussaoui had been arrested the previous week, and on August 22 French intelligence told the FBI that Moussaoui was linked with Islamist Chechen groups.¹⁴⁰ The letters from Yazid Sufaat linked Moussaoui both to al Qaeda and to al-Mihdhar and al-Hazmi. The CIA already viewed Moussaoui (one CIA analyst put it) as a "suspect airline suicide attacker."¹⁴¹ If the significance of the Yazid Sufaat letters had been understood it is likely that the search for al-Mihdhar and al-Hazmi would at last have been taken seriously. And if they had been found it would have led in turn to one of the September 11 pilots—Hani Hanjour, who had been al-Hazmi's roommate—and perhaps to the whole plot. It is important to note that none of this information was buried in intelligence files. By that third week of August 2001 it was all up on the table.

It is not clear whether the FBI saw the letter among Moussaoui's belongings before September 11. Apparently agents did find a knife among his things and went through his notebook. (Moussaoui's visa had expired in May and he had agreed to let authorities move all his belongings to the INS office. But he refused their request for a search, especially of his laptop computer.) An INS supervisor told the FBI that typically the INS would not hold a visa violator like Moussaoui more than 24 hours before deporting him; but under the circumstances agreed to hold him for seven to ten days.

The point is that even if the letter was noticed by the FBI at the time—or indeed if Moussaoui had consented to a search—it would have taken more than 48 hours to understand and act on this crucial piece of intelligence.

V. Intelligence Analysis and Interagency Coordination

In analyzing the immigration system, we accepted the point that this system is not able or intended to identify terrorists of the September 11 type. Rather, it sets up gateways and tracking systems that come into play when the intelligence system provides the identity of a suspect.

If that is true, then the intelligence system must also work well. Otherwise changes in the immigration system and increased community monitoring diminish the openness of U.S. society to little purpose.

Again and again in public and congressional discussion of what went wrong in September 11 we read that information was not shared among U.S. intelligence agencies and that important evidence was not properly assessed. That is all true, but it is also easy to be too glib about this. Another truth is that in retrospect there is evidence of almost everything. As former FBI Director Louis Freeh told the Joint Inquiry,

the predictive value of these diverse facts at the time that they were being received must be evaluated. Analyzing intelligence information can be like trying to take a sip of water coming out of a fire hydrant. The several bits of information clearly connected and predictive after the fact need to be viewed in real time. The reality is that these unquestionably important bits have been plucked from a sea of thousands and thousands of such bits at the time.¹⁴²

And while counterterrorism is one of the nation's top priorities now, we should keep in mind that, as Joint Inquiry staff director Eleanor Hill put it,

to much of the Intelligence Community, everything was a priority—the United States wanted to know everything about everything all the time.¹⁴³

¹³⁹ Tinetti statement, June 18, 2002, p. 6; Interim Report of Eleanor Hill, Sept. 18, 2002, pp. 18, 22; Interim Report of Eleanor Hill, Sept. 20, 2002, pp. 9-11, 18; Interim Report of Eleanor Hill, Sept. 24, 2002, p. 19.

¹⁴⁰ Interim Report of Eleanor Hill, Sept. 24, 2002, p. 19.

¹⁴¹ *id.*

¹⁴² Statement of Louis Freeh before the Joint Inquiry, Oct. 8, 2002, p. 8.

¹⁴³ Interim Report of Eleanor Hill, Oct. 17, 2002, p. 3.

Indeed, some of the warnings most widely cited—e.g. the “Phoenix EC” requesting a nationwide survey of Middle-Eastern students at flight schools—though insightful, failed to get attention in Washington for understandable reasons.¹⁴⁶ And if acted on, they would have had little effect on the September 11 plot.

But two cases—that of Moussaoui and of al-Mihdhar and al-Hazmi—did cause Washington to react. The system lit up; and its failure to stop the plot, or at least come closer, shows in concrete terms why effective counterterrorism requires tighter immigration controls, better intelligence analysis, and greater integration between these two things.

To put the story together:

Khalid al-Midhhar and Nawaf al-Hazmi came to the CIA’s attention during the FBI’s investigation of the 1998 Nairobi bombing. The agency tracked the two men to a January 2000 meeting of al Qaeda operatives in Malaysia. The meeting was photographed but not bugged. In March 2000, the CIA learned that a few days after the meeting al-Hazmi had flown to Los Angeles.

The FBI’s investigation of the October 2000 bombing of the USS Cole developed information showing that one of the main planners of the attack was a man named Khalid bin-Atash. The FBI told the CIA that other participants in the Cole bombing had delivered money to bin-Atash at the time of the January 2000 al Qaeda meeting in Malaysia. This prompted CIA analysts to take a closer look at the meeting, in the course of which they learned that bin-Atash had attended. This made the CIA more interested in al-Mihdhar and al-Hazmi.

It is not clear why the case then lapsed. But in July 2001 a CIA officer assigned to the FBI again came across the information that bin-Atash had been at the Malaysia meeting and immediately sent an e-mail to the CIA’s Counterterrorism Center. “This is a major league

killer, who orchestrated the Cole attack and possibly the Africa bombings.” A review of all the CIA’s relevant files was begun. By August 22, analysts had put together the facts that al-Hazmi and al-Mihdhar had met with bin-Atash in Malaysia and that they were both now in the United States. The next day an urgent cable was sent to the State Department, FBI, INS and other agencies recommending that the men be watchlisted. The State Department began the process of revoking their visas, and the FBI began looking for the men.¹⁴⁷

Although the FBI asked both the State Department and the INS for information, it did not seek their help in finding the two men, and did not convey any urgency about its own attempts to do so. According to Eleanor Hill,

INS indicates that, if it had been asked...on an urgent, emergency basis, it would have been able to run those names through its extensive database system and might have been able to locate them. Absent a sense of the highest priority, however...

The State Department, Hill writes,

also has told the Joint Inquiry Staff that it has extensive means of locating individuals who are involved in visa fraud or visa violations and also contends that it might have been able to locate the two suspected terrorists if it had been asked to do so.¹⁴⁸

The FAA too complained that it had not been asked to help locate the men—and oddly enough in this case the suggestion sounds promising. “An FAA representative,” Hill writes,

testified that he believes that, had the FAA been given the names of the two individuals, they would have “picked them up in the reservations system.”¹⁴⁹

Note that both men bought tickets under their true names. Hill also writes that, “Prior to September 11, 2001...watchlists were not used to screen individuals boarding domestic flights within the United States.”¹⁵⁰

¹⁴⁶ The suggestion by the Phoenix office was dismissed not because FBI analysts in Washington did not know members of al Qaeda were learning to fly in the United States but because they did know. There was a long history of this, and FBI analysts thought that, as in the past, the purpose was to train pilots to fly al Qaeda planes in Afghanistan. The problem was one of analysis not indifference: the Bureau was slow to reexamine its assumptions in light of a changing intelligence picture. Of course the author of the Phoenix memo had a good idea. But it is not clear that the survey he proposed would have turned up enough information to change analysts’ assessment unless it was connected, as it should have been, to an appreciation that al Qaeda was preparing an attack on the U.S. and to its past planning to use planes as bombs.

¹⁴⁷ Statement of Cofez Black, then-director of the CIA’s Counterterrorism Center, before the Joint Inquiry, Sept. 26, 2002, p. 5; Interim Report of Eleanor Hill, Sept. 20, 2002, pp. 4-5, 7-9, 11. Statement of George Tenet before the Joint Inquiry, June 18, 2002, p. 6.

¹⁴⁸ Interim Report of Eleanor Hill, Sept. 20, 2002, p. 18. INS maintains records on all foreign visitors at its Law Enforcement Support Center in Burlington, Vt. Interim Report of Eleanor Hill, Oct. 1, 2002, p. 7.

¹⁴⁹ Interim Report of Eleanor Hill, Oct. 17, 2002, p. 2.

¹⁵⁰ Interim Report of Eleanor Hill, Sept. 20, 2002, p. 10.

Now domestic flight manifests are checked against a watchlist maintained by the Transportation Safety Administration.¹⁴⁹

The same week the CIA watchlisted al-Mihdhar and al-Hazmi, a CIA officer detailed to the FBI learned about Moussaoui and queried CIA stations about him, calling Moussaoui a "suspect airline suicide attacker" who might be "involved in a larger plot."¹⁵⁰ As argued above, the letters in Moussaoui's possession linked him to al Qaeda and to the two hijackers the FBI was looking for. The letters were either not noticed or not understood. But if they had been, it might—if anything could—have energized the FBI's search and produced a different result.

Bigger Problems at the FBI

The Joint Inquiry brought to light a number of specific problems that hamper the FBI's counterterrorism efforts. Generally they fall in two categories: the case approach, and a lack of ability and interest in analysis.

The case approach. The FBI has tended to see terrorism cases in isolation and failed to preserve or use data from one case that may be useful in others.

In 1995, for example, the Philippine police discovered a new plot by Ramzi Yousef, who had fled the United States after organizing the 1993 World Trade Center bombing. Interrogation of one Yousef's colleagues revealed a series of terrorist plans: to blow up 12 American airliners over the Pacific, to crash a plane into CIA headquarters, to kill the Pope and to bomb U.S. and Israeli embassies in Manila. Only the plan to bomb airliners was prosecuted as the others were still in the "discussion" stage. "The FBI's criminal investigative file reflects" this, Eleanor Hill writes. It contains

almost no references to the plan to crash a plane into CIA headquarters....[FBI agents] confirmed this focus, stating that this case was about the plan to blow up 12 airliners and that the other aspects of the plot were not part of the criminal case and therefore not considered relevant.¹⁵¹

Relevant to what? Perhaps not to that prosecution. But the fact that the mastermind of the World Trade Center bombing, two years later, was making plans to fly an airplane into a major government building may have been relevant to someone attempting to anticipate future events.

The problem is also reflected in the way targets of investigation are characterized. Particularly with the growth of the "International Jihad" movement, individuals may be associated with different groups in different contexts, and identifying them too rigidly by organization may miss important connections. For example, writes Hill,

an individual affiliated with al Qaeda may associate with Hamas members in the United States and be labeled Hamas based on these associations. If such an individual is being worked out of another [FBI] unit, the traditional lack of information sharing makes it unlikely the al Qaeda unit will learn about the investigation. This affects the unit's ability to develop a comprehensive understanding of al Qaeda presence and operations in the United States. There may also be al Qaeda information directly relevant to the investigation about which personnel working Hamas are unaware.¹⁵²

This overly-discrete approach to investigations also results in leads that are shared between cases being simply dropped. When electronic messages are exchanged among FBI offices, they often contain a "leads" section suggesting some follow-up by the receiving office. FBI officials said it was possible that some leads fell through the cracks. After a discussion of the Bureau's computer system, Hills states:

The Joint Inquiry Staff has been informed that the FBI recently determined that there are 68,000 outstanding and unassigned leads assigned to the counterterrorism division dating back to 1995. Since many FBI personnel have not been using the electronic system for these purposes, it is difficult to know how many of these leads have actually been completed. The counterterrorism division's management is currently looking into this situation.¹⁵³

¹⁴⁹ The watchlist, which consists of information supplied by government agencies, was previously kept in less robust form by the airlines. Interview with Transportation Security Administration official, Feb. 10, 2003; and with FBI official, Feb. 10, 2003.

¹⁵⁰ Interim Report of Eleanor Hill, Sept. 24, 2002, p. 19.

¹⁵¹ Interim Report of Eleanor Hill, Sept. 18, 2002, pp. 9-10.

¹⁵² Interim Report of Eleanor Hill, Sept. 24, 2002, p. 13.

¹⁵³ Interim Report of Eleanor Hill, Sept. 24, 2002, pp. 8-9.

Carelessness in keeping track of information not directly relevant to the case an agent is working on is not limited to leads. Department of Justice Inspector General Glenn Fine noted that the FBI's handling of intelligence information is "particularly relevant" to the Bureau's counterterrorism mission. A 1999 report by his office examined the FBI's ability to identify, analyze and disseminate information related to the Justice Department's investigation of alleged campaign finance violations. The Automated Case Support system, Fine explained, is the FBI's primary means of retrieving information on individuals and checking whether they are the subject of other investigations. The report found that

FBI agents often did not enter important information into the database and that agents often did not conduct appropriate searches for information using the database. The end result was that the FBI could not be confident that a search for information in the ACS databases would, in fact, provide all pertinent information in the FBI's possession.

The report made recommendations but two years later the problems had not been fixed.¹⁵⁴

Lack of emphasis on analysis. "The biggest weakness on the counterterrorism side has always been analysis," says a former senior FBI official who worked in the area. In the 1990s the Bureau made an effort to set up a separate analytic unit. Because of Office of Management and Budget (OMB) restrictions on new hiring, the FBI made an effort to promote from within. "So we tended to use lower-level clerical staff and make them GS-9s, 10s and 11s and call them analysts," says the former official. "We'd send them off to school and teach them a little, but I'm not sure how well it worked." That effort says something about the priority and prestige the FBI accorded analysis, the official says, but it's not an easy problem. "Where do you get analysts? You can raid the military, but the CIA does that, and by the time they're done..."¹⁵⁵

Moreover, once an International Terrorism analytic unit was set up, it was itself continually raided by operational units. The Joint Inquiry staff

has been told that every time a competent new analyst arrived, the UBLU or RFU [Usama Bin Laden

Unit or Radical Fundamentalist Unit] would either try to recruit them...or would refuse to share information. This allowed the UBLU and RFU to control the information flow.¹⁵⁶

Though at one point five analysts had been assigned to al Qaeda,

the FBI's al Qaeda-related analytic expertise had been "gutted" by transfers to operational units and that, as a result, the FBI's analytical unit had only one individual working on al Qaeda at the time of the September 11 attacks.¹⁵⁷

To its credit, the FBI recognizes what Director Robert Mueller calls its "analytical shortcomings." To address its responsibilities in counterterrorism, the Bureau has created a new Office of Intelligence. It is being set up and for the foreseeable future will be managed by analysts from the CIA.¹⁵⁸

Why It Is Hard to Share Information

"Sharing information" is the bromide of September 11. A useful one, but it's easier said than done. There are many reasons information is not shared: competition, mistrust, information security, legal restrictions and (in the computer age) system incompatibility. Most of these problems can be solved or partly solved through political will or money. But with the best will in the world one problem still is intractable: knowing what information to share.

There are two ways to share intelligence. Either A selects the information she thinks B will be interested in; or B rummages at will through A's files. When information is selected for transmission it is often passed along with too little context, detail or regularity. The problem was perhaps best explained by former U.S. Attorney Mary Jo White. She was discussing decisions to pass intelligence information "over the wall" to criminal prosecutors, but her point applies generally. To pass information "requires, in the first instance, a recognition of what that information is and what its significance is," White told the Joint Inquiry:

In the area of international terrorism, this is a very difficult task, made more difficult by a combination of language and cultural barriers, coded conversations, literally tens of thousands of names of sub-

¹⁵⁴ Statement of Department of Justice Inspector General Glenn Fine before the Senate Judiciary Committee, June 6, 2002, p. 8.

¹⁵⁵ Interview with former FBI official, Nov. 8, 2002.¹⁵⁶ Interim Report of Eleanor Hill, Sept. 24, 2002, p. 8.

¹⁵⁷ Interim Report of Eleanor Hill, Sept. 18, 2002, pp. 15, 25.

¹⁵⁸ Statement of FBI Director Robert Mueller before the Senate Judiciary Committee, June 6, 2002, p. 6.

jects that are confusing and look alike, and an unimaginably complex mass of snippets of information that understandably may mean little to the people charged with reviewing and analyzing the information and deciding whether to recommend that it be 'passed over the wall.'

A prosecutor or criminal agent who has for years been investigating particular terrorist groups or cells and who had thus amassed a tremendous body of knowledge and familiarity with the relevant names and events might well recognize as significant what seems to other conscientious and generally knowledgeable agents or lawyers as essentially meaningless. What can happen, and I fear may have happened, is that the two halves of the jello box are never put together so that the next investigative step that could eventually lead, when combined with other information or steps, to the detection and prevention of a planned terrorist attack does not occur.¹⁰³

While much can be accomplished through improved working relationships, there is really no substitute for the analyst or group of analysts who are steeped in their subject and see all-source intelligence. And since different agencies have different perspectives and requirements, there is no substitute for various groups of analysts having access to the same totality of information. This is what former NSA Director William Odom calls "distributed processing."¹⁰⁴ Under this scheme, all-source information would be analyzed by each agency according to its needs and without the filtering White describes.

Another way to think about this: Traditionally, intelligence collectors "own" the information they collect, both for bureaucratic reasons and, where sensitive sources are involved, for security reasons. Instead, analysts should "own" the information and have access to the full operational texture of intelligence reporting. As DIA acting director Lowell Jacoby told the committees,

Terrorism is an issue where competitive analysis is essential; planned duplication and redundancy by design are virtues.

The benefit of competitive analysis is optimized only when all parties have access to the same information base. The act of drawing different—even opposing—conclusions from a common body of evidence should be encouraged. It is an opportunity to extract additional 'meaning' from fragmentary data.¹⁰⁵

This is not easy from a bureaucratic or a security point of view. But many mistakes can be made by looking at a partial picture.

Recent Changes

The Joint Inquiry brought to light significant problems of intelligence integration and analysis both within the FBI and across agencies, and recommended ways to fix those problems.¹⁰⁶ The panel heard testimony on whether the counterintelligence/counterterrorism mission in the United States should be left with the FBI or moved to a new agency perhaps modeled on Britain's M.I.5. Among the recommendations of its Final Report, the committees urged the FBI to improve its performance; meanwhile, it said, Congress should consider whether a new agency was needed; and at some point the administration should provide an assessment of whether the FBI had improved enough to do the job.¹⁰⁷

The Joint Inquiry also recommended that the Department of Homeland Security become an "all-source terrorism information fusion center" that would have access to all relevant information, participate in the "tasking" of intelligence agencies to collect additional information, and share information with and acquire intelligence from federal, state and local agencies outside the intelligence community.¹⁰⁸

¹⁰³ Statement of Mary Jo White before the Joint Inquiry, Oct. 8, 2002, pp. 23-24.

¹⁰⁴ Statement of William Odom before the Senate Governmental Affairs Committee, June 21, 2002, p. 4.

¹⁰⁵ Statement of Lowell Jacoby before the Joint Inquiry, Oct. 17, 2002, p. 3.

¹⁰⁶ The work was done jointly by the House and Senate intelligence committees. The terms "Joint Inquiry," "panel" and "committees" are used interchangeably in those three paragraphs.

¹⁰⁷ *Final Report of the Joint Inquiry*, Part I, "Recommendations," pp. 7-8. Part I of the report, consisting of "Findings and Conclusions" and "Recommendations," was released December 10, 2002, along with "Additional Views of Senate Richard C. Shelby." All three are available from the Senate Intelligence Committee, <http://intelligence.senate.gov/pubs107.htm>.

¹⁰⁸ *Id.*, p. 4.

In the event, the government has opted for a hybrid solution that does not follow the committees' recommendations. The changes it has made are only now being put in place, and their effectiveness cannot yet be fairly judged. But we can point out some things to keep in mind as the administration tries to cope with the difficult structural problems of improving and coordinating intelligence analysis.

The FBI has taken a number of steps to address the systemic weaknesses in its handling of intelligence information described above. Last year, the Bureau created an Analysis Branch in the Counterterrorism Division. According to FBI Director Robert Mueller, this unit has produced 30 in-depth analyses, including a comprehensive assessment of the terrorist threat to the United States.¹⁰⁷ The Bureau has increased staffing for counterterrorism by 36% since September 11, with "much" of the increase going to the analytic cadre. And it has created a new corps of reports officers charged with identifying and collecting intelligence from FBI investigations and disseminating it, both within the FBI and to other agencies.¹⁰⁸

Many of these reforms are sensible responses to problems identified by the Joint Inquiry. The Bureau's more-disciplined effort to identify and disseminate foreign intelligence turned up in the course of criminal investigations is also a response to an important section of the USA PATRIOT Act that says federal law enforcement agencies "shall" expeditiously disclose such information to intelligence officials.¹⁰⁹

Rather than leaving the Bureau to make incremental changes, however, the administration is at the same time putting in place a broader interagency framework that will shift much of the responsibility for counterterrorism analysis away from the FBI. As noted earlier, the FBI has set up a new Office of Intelligence that will be largely staffed and managed by CIA analysts. And in his State of the Union address this year, President Bush announced the creation of an interagency Terrorist Threat Integration Center.

This new Terrorist Threat Integration Center (TTIC) began work on May 1 and is housed at the CIA; but "as soon as possible" it will move to a separate facility that it will share with the Director of Central Intelligence's (DCI's) Counterterrorism Center and the FBI's Counterterrorism Division. This will not exactly take the FBI out of the counterterrorism business on an operational level; but will substantially take counterterrorism analysis and management out of the FBI, integrating them into a hybrid national structure.

The missions of the TTIC include preparing all-source threat assessments for national policy makers; overseeing a national counterterrorism tasking system (that is, a system for deciding what information intelligence agencies should collect, though the TTIC will not itself collect intelligence); institutionalizing arrangements for sharing information across agencies and especially between domestic and foreign intelligence agencies; and maintaining a database of known and suspected terrorists. The TTIC is described as a "joint venture" of the FBI, the DCI's Counterterrorism Center, the Department of Homeland Security and the Department of Defense.¹¹⁰

This somewhat Rube Goldberg-like structure is an attempt to wean counterterrorism analysis and management from the FBI and to approximate a national-level counterintelligence organization without losing the benefit of FBI involvement or going through the legislative battle that would be required to create a separate agency.¹¹¹ Perhaps it will work, but it may be a half-solution that will require further changes. Here are some questions to consider:

- If the TTIC is really doing analysis, who will staff it? Will the best analysts be at the TTIC, across the hall at the FBI's Counterterrorism Division, or down the corridor at the DCI's Counterterrorism Center? Will the FBI and CIA keep their best analysts back at headquarters? In other words: will the new structure concentrate or dilute analytical talent?

¹⁰⁷ Statement of Robert Mueller before the Senate Intelligence Committee, Feb. 11, 2003, pp. 6-7. In 1999, the FBI had committed itself to doing such an assessment. In June 2002, Glenn Fine, the Inspector General of the Justice Department, told a Senate committee he was planning to conduct an inquiry to find out why this had not happened. (Statement of Glenn Fine before the Senate Judiciary Committee, June 6, 2002, p. 7.)

¹⁰⁸ Statement of Robert Mueller before the Senate Intelligence Committee, Feb. 11, 2003, p. 7.

¹⁰⁹ Section 905, "Disclosure to Director of Central Intelligence of Foreign Intelligence-Related Information With Respect to Criminal Investigations." A better-known provision of the Act, section 203, says only that law enforcement agencies "may" disclose such information.

¹¹⁰ The account of the TTIC in the above paragraphs is taken from two White House Fact Sheets, both titled "Strengthening Intelligence to Better Protect America." They are dated Jan. 28, 2003, and Feb. 14, 2003. Note that the watchlist of terrorists mentioned here goes back to the discussion of visa watchlists earlier in this chapter. The national watchlist center described there apparently found a home at the TTIC.

¹¹¹ Two important benefits of keeping the FBI involved are the bureau's investigative prowess and the very real sensitivity it has developed to civil liberties as a result of its history. It may be hard to duplicate this sensitivity in a new organization.

- If the TTIC is primarily charged with management rather than analysis, will it add a bureaucratic layer that homogenizes analysis rather than encouraging innovative thinking? According to the chairman of the panel charged with designing the proposal, when the Center is fully functional "all national-level terrorist threat-related analysis will be coordinated with the Director" of the TTIC.¹⁷⁰ Coordination is a virtue that encompasses many sins; and it is especially important given the uncertainties in counterterrorism analysis that unconventional or dissenting views be heard.
- The new structure is meant to close "seams" between analysts at different agencies. But doesn't it widen the seam between analysts and collectors? The TTIC itself has no authority to collect or even, apparently, to task collectors, who continue to report through their existing chains of command at the FBI, CIA or other agencies. This seems to be a cost of trying to address the problem without new legislation.¹⁷¹
- What about the Department of Homeland Security? Although the law that created the DHS implied that it was to be the government's focal point for counterterrorism analysis,¹⁷² its role has been reduced to that of a junior partner in the TTIC. It will receive and analyze terrorism-related information from the TTIC, map that information against its own assessment of U.S. vulnerabilities, and disseminate threat informa-

tion in cooperation with the FBI. Even this limited intelligence role for DHS is to be carried out at the TTIC.¹⁷³

Creation of the TTIC is a useful first step but integrated analysis is not enough. It should be linked, on the one hand, to decisions about what additional intelligence to collect; and, on the other, to decisions about counterterrorist actions, both here and abroad.¹⁷⁴

Foreign Policy and International Cooperation

The elephant in the room no one talks about is foreign policy.

The help of other countries is important at every stage of the war on terrorism: for background checks on visa applicants, document security, tracking and freezing money, intelligence cooperation—and military operations as in Afghanistan.

A more important question is what role U.S. foreign policy can play in making America a target for terrorist attacks or in avoiding them. Do perceptions of the United States affect the ability of groups like al Qaeda to recruit educated young men with no record of violence to sacrifice their lives to kill Americans?

The answer is beyond the scope of this report. And it speaks for itself.

¹⁷⁰ "Joint Statement of the Terrorist Threat Integration Center Senior Steering Group, Winston Wiley, Chair," before the Senate Governmental Affairs Committee, Feb. 26, 2003, p. 3.

¹⁷¹ White House Fact Sheet, "Strengthening Intelligence to Better Protect America," Feb. 14, 2003, pp. 1-3. The TTIC will play a lead role in overseeing a national counterterrorism tasking system but its only direct effect on tasking will be to "inform collection strategies," the document says.

¹⁷² Quoted in Statement of Jeffrey Smith before the Senate Governmental Affairs Committee, Feb. 14, 2003, p. 3. The legislation gave the DHS broad responsibilities to receive and analyze intelligence and to "integrate such information in order to...identify and assess the nature and scope of terrorist threats to the homeland, detect and identify threats of terrorism against the United States, and understand such threats in light of actual and potential vulnerabilities."

¹⁷³ White House Fact Sheet, "Strengthening Intelligence to Better Protect America," Jan. 28, 2003, p. 3.

¹⁷⁴ In a recent hearing on the President's proposal to create the TTIC, two outside witnesses made quite different suggestions but both were aimed at integrating collection, analysis and action.

James Steinberg urged that an integrated counterterrorist role be played by the Department of Homeland Security. Under this scheme, the DHS would not itself collect intelligence but would have authority to "task" the intelligence agencies. In addition to providing information to state and local authorities, he also stresses DHS' role in providing warnings to and helping protect critical infrastructure facilities in the private sector. Part of Steinberg's argument is that the DHS already employs many "collectors" of useful information in the form of Customs, INS inspectors and other officials. (Statement of James Steinberg before the Senate Governmental Affairs Committee, Feb. 14, 2003, pp. 4-6.)

Jeffrey Smith proposed the creation of a "true domestic security service" responsible for analysis, clandestine collection in the United States and exchanges of information with state and local governments. Under Smith's plan, the TTIC would become the analytical branch of the new agency, which would also incorporate the FBI's National Security Division and certain domestic counterterrorism and counterintelligence functions of the CIA. (Statement of Jeffrey Smith before the Senate Governmental Affairs Committee, Feb. 14, 2003, pp. 8-9.)

Chapter Two: The Effect of Post-September 11 Domestic Security Actions on Civil Liberties

I. Introduction

This chapter discusses the civil liberties costs of U.S. government actions taken in response to the attacks of September 11, 2001. It focuses on 12 initiatives grouped into four areas: (1) actions based on national origin; (2) abusive detention practices; (3) secret immigration hearings, secret detentions, and protective orders; and (4) delegation of immigration law enforcement authority to state and local authorities.¹

This chapter focuses on the civil liberties impacts of these measures. Other parts of this report evaluate the effectiveness of these measures in defending against terrorism, and recommend ways to achieve national security goals without undue cost to civil liberties.

Only a handful of these government initiatives have been challenged in court, none of which have reached a definitive conclusion. Some of the cases have resulted in split decisions, with different district or circuit courts reaching contradictory conclusions; these cases are likely to be resolved by the Supreme Court. For most of the 12 measures, the government has not been compelled to articulate a detailed defense of their constitutionality.

For each of the four areas, we outline the government's actions and then analyze their consistency with U.S. law, and more broadly, with the values and principles underlying U.S. law.

That is not to say we predict that arguments in defense of civil liberties will necessarily prevail in court. Over the course of American history, in times of national securities crisis the high courts have consistently acquiesced to executive branch crackdowns on civil liberties. Just as consistently, Americans have later come to view these crackdowns with regret, as misguided and ineffective attempts to scapegoat immigrants, and as undermining fundamental principles of American justice.

¹ In addressing these four areas of concern, this chapter does not by any means consider all of the government's post-September 11th initiatives, or even all of its immigration-related initiatives. Rather, we have focused on these four areas of concern in order to analyze those initiatives that raise some of the more significant civil liberties issues.

² See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Bridges v. Wixon*, 326 U.S. 135 (1945); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

³ 426 U.S. 229 (1976).

⁴ *Id.* at 240.

II. Government Initiatives Based on National Origin

In the wake of the September 11 attacks, the U.S. government undertook a series of measures intended to increase national security that targeted individuals based on their national origin. This section discusses how government measures that discriminate based on national origin are inconsistent with equal protection principles.

The guarantee of equal protection under the law is derived from the Due Process Clause of the Fifth Amendment of the U.S. Constitution. The Supreme Court has stated unambiguously that the "Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."² A law that purposely and expressly discriminates on the basis of characteristics such as race or national origin may violate the principle of equal protection, as might an otherwise textually neutral law that is applied in a way that invidiously discriminates on such grounds. Although they may purport to use the factor of nationality as a basis, three of the government's announced initiatives since September 11—the so-called "Absconder Apprehension Initiative," the "Voluntary Interviews Project," and the "National Security Entry-Exit System"—have effectively targeted certain individuals based on their national origin for law enforcement, investigatory, and surveillance purposes.

A. The Elements of a Claim of Violation of Equal Protection

The Supreme Court in *Washington v. Davis*³ noted that it is a "basic equal protection principle" that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."⁴ Since September 11, several of the government's extraordinary measures, at least on their face,

have targeted individuals based in important part on nationality. However, in practice, the effect of these measures has been to single out individuals based on national origin, race, and ethnicity—in particular Arabs and Muslims.

Classifications based on race attract the highest degree of judicial scrutiny, and in the absence of individualized suspicion, reliance on national origin is comparable to a classification based on race. Both national origin and race are immutable characteristics that have historically been used to single out individuals or groups for arbitrary and unjust treatment. In enforcing its security measures based on such criteria, the government is essentially using national origin, race, and ethnicity as proxies for evidence of dangerousness, rather than concentrating its efforts and resources on investigation, surveillance, and law enforcement based on individualized suspicion.

Each initiative discussed below has a discriminatory effect. More strikingly, however, the government has, in promulgating each initiative, generally been candid about its discriminatory purpose and the conceded absence of an individualized suspicion of involvement in terrorism, thereby furnishing easy evidence of one of the most difficult requirements in an equal protection challenge.

B. The Absconder Apprehension Initiative

As outlined by the government in a memorandum from the U.S. Deputy Attorney General, the goal of the Absconder Apprehension Initiative is to locate, apprehend, interview, and deport those individuals subject to final orders of removal who have remained in the country.⁹ Were the government's action to hew to this simple goal, it is unlikely that any constitutional problems would exist. But the analysis changes in light of the government's declared intent to assign priority in the program to the location and apprehension of individuals

based on their national origin.¹⁰ The memo states that although the ultimate goal is to deport all of the approximately 314,000 absconders, several thousand among that group "come from countries in which there has been al Qaeda terrorist presence or activity."¹¹ Although the manner in which the directive is couched does not specifically mention national origin, race or ethnicity as its basis and may appear to be based on the otherwise permissible basis of nationality, in practice its effects are to single out Arab and Muslim men for selective enforcement.

The Deputy Attorney General's memo goes on to state that "[w]e want to focus our initial efforts on these priority absconders," as the Department of Justice (the "DOJ" or the "Justice Department") believes some of them have "information that could assist [the] campaign against terrorism." The remainder of the memo is devoted to explaining the special procedures that will apply only to the "priority absconders," including the particular steps to be undertaken in the interviewing and apprehension processes.

Of that group, essentially all from Muslim or Arab nations, agents were told to focus first on the 1,000 people believed to be convicted felons.¹² However, the outcome of the Absconders Initiative has thus far "proved much more scattershot."¹³ Far from rounding up anyone with terrorist connections, the program has rounded up "people with established community roots: the neighborhood grocer, families with schoolchildren, and...the spouses or parents of American citizens."¹⁴ Significantly, the Deputy Attorney General's memo does not define what specific countries are considered to have al Qaeda connections. Nor does it outline all the factors used to narrow the list from "several thousand" to "less than a thousand."¹⁵ While the government's legal authority to remove out-of-status aliens is beyond question, the initiative clearly sends a message to the public that the government views young Arab and

⁹ Memorandum from Deputy Attorney General to the Commissioner of the INS, Director of the Federal Bureau of Investigation, Director of the United States Marshals Service, and U.S. Attorneys, *Re: Guidance for Absconder Apprehension Initiative*, Jan. 25, 2002 (hereinafter "Absconder Memo").

¹⁰ 79 Interpreter Releases 528, 529 (April 8, 2002).

¹¹ Absconder Memo, *supra* note 5, at 1. One INS estimate is that there are approximately 5,900 absconders from these countries. See 79 Interpreter Releases 528, 529, *supra* note 6.

¹² Absconder Memo, *supra* note 5, at 1.

¹³ Susan Sachs, "Traces of Terror: the Detainees; Cost of Vigilance, This Broken Home," *New York Times*, June 4, 2002.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The American-Arab Anti-Discrimination Committee has stated that the Absconders Apprehension Initiative is tantamount to "a witch hunt singling out those absconders simply because of their Arab origin," 79 Interpreter Releases 236 (Feb. 11, 2002).

Muslim men as being—almost by definition—suspicious, and as posing the greatest potential for danger to the public.¹¹

C. The Voluntary Interview Program

The Voluntary Interview Project is another government initiative that employs a suspect classification—national origin, once again—as a basis to single out individuals. This program was announced in a Nov. 9, 2001, directive issued by the Attorney General, establishing a vast interview program as part of the Justice Department's antiterrorism plan to prevent further attacks against the United States.¹² The results of the interviews are being entered into a database designed for the project.¹³ Interviews were (and are) to be conducted according to guidelines issued, also on Nov. 9, 2001, by the Deputy Attorney General.¹⁴ Although the guidelines note that ascertaining the legality of the interviewee's immigration status is not the primary purpose of the interviews, given the "federal responsibility to enforce the immigration laws," interviewers are instructed to contact the Immigration and Naturalization Service (the "INS") representative to the Antiterrorism Task Force ("ATTF")¹⁵ if they suspect the interviewee is in violation of federal immigration laws.¹⁶

The DOJ has indicated that the initial list of the approximately 5,000 interviewees was based on al Qaeda related factors.¹⁷ The Foreign Terrorist Tracking Task Force ("FTTTF") devised the original list of interviewees based upon common factors among foreign terrorists, including those who perpetrated the

September 11 attacks.¹⁸ These common factors were used to compile the interview list from the INS database of persons who completed an INS I-94 form, which all nonimmigrants must fill out upon entry into the United States. The common factors were "(1) males between the ages of 18 and 33; (2) who entered the United States after January 1, 2000, on a nonimmigrant visa; and (3) who held passports from or resided in countries which have an al Qaeda terrorist presence."¹⁹ As was the case with the guidelines for the Absconder Apprehension Initiative, the countries implicated by the third parameter were not identified; however, they are believed to include Afghanistan, Pakistan, Yemen, Sudan and Indonesia.²⁰ The final list designated a total of 4,793 persons.²¹ As was the case with the Absconder Apprehension Initiative, most of those targeted were Muslim or Arab.²²

Representative John Conyers, Jr., a member of the House Judiciary Committee, in a letter addressed to the Attorney General, expressed his "concern that the... program is the product of racial and ethnic profiling of Arab-American and American Muslim communities."²³ Representative Conyers went on to note that "conducting questioning at places of employment has already resulted in embarrassment, suspicion, and in some cases termination," and that he had "received complaints of agents intimidating individuals at mosques by insisting they provide lists of worshippers."²⁴

At the same time it released the Interview Report, the DOJ announced a second round of roughly 3,000 interviews. The criteria for the second round matched those

¹¹ Even in instances where the criteria used to prioritize individuals for selective enforcement is expanded beyond national origin, ethnicity and religion—as when age and gender are used as additional factors—the effect remains one of using impermissible criteria to the extent that ascriptive characteristics (that is, features of an individual's identity that are immutable and involuntary, including such criteria as race, ethnicity, age and gender) form the sole basis for enforcement targeting.

¹² The "Antiterrorism Plan" was outlined in a Sept. 17, 2001, directive to the U.S. Attorneys stating that the "guiding principles of this... plan is the prevention of future terrorism through the dismantling of terrorist organizations operating within the United States." (quoted in Memorandum from Kenneth L. Weinstein, Director and J. Patrick Rowan, Assistant U.S. Attorney, Executive Off. for U.S. Att'ys, U.S. Dept. of Just. (Feb. 26, 2002) (hereinafter "Interview Report").

¹³ *Id.* at 1.

¹⁴ Memorandum from The Deputy Attorney General (Nov. 9, 2001) (hereinafter "VI Guidelines").

¹⁵ After Sept. 11, 2001, and pursuant to an Executive Order by President Bush, Attorney General Ashcroft issued a directive that included a provision directing each U.S. Attorney's Office to establish an Antiterrorism Task Force (ATTF) to serve as a standing organizational structure for a coordinated state and federal response to terrorism within the District.

¹⁶ See VI Guidelines, *supra* note 16.

¹⁷ See Interview Report, *supra* note 14, at 4; "DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists," 78 Interpreter Releases 1816, 1818 (Dec. 3, 2001).

¹⁸ Interview Report, *supra* note 14, at 2.

¹⁹ *Id.*

²⁰ John R. Wilke, "Justice Department Ends Interviews with Muslim Aliens," *Wall Street Journal*, March 20, 2002.

²¹ Interview Report, *supra* note 14, at 2.

²² Wilke, *supra* note 22.

²³ Letter from John Conyers, Jr. to The Honorable John D. Ashcroft, Attorney General of the United States (Nov. 27, 2001).

²⁴ *Id.*

of the first round, except that the age span of potential interviewees was increased to between 18 and 46 years old from between 18 and 33 years old, and aliens who entered the United States between October 2001 and February 2002 were added as well.²⁷ Finally, it was announced in November 2002 that the Department of Justice would be seeking to identify over 10,000 Iraqis and Iraqi Americans legally present in the United States (including naturalized U.S. citizens) for additional rounds of interviewing in anticipation of an American-led attack against Iraq. By March 2003, the FBI indicated that over 3,000 Iraqi-born individuals had already been interviewed and that the ultimate goal was "to contact about 11,000 Iraqi-born people in the United States."²⁸

The disproportionate effects of the government's actions are clear, given the statements of the DOJ, which, in setting forth the parameters of those targeted for interviews, expressly single out individuals on the basis of their national origin, demonstrating the discriminatory purpose of this initiative.

D. The National Security Entry-Exit Registration System (NSEERS)

The third example of the federal government's violation of the equal protection principle lies in the government's decision to impose fingerprinting and registration rules on a targeted class of nonimmigrant aliens visiting the United States. Under the new program, nationals²⁹ of certain countries will be singled out for fingerprinting and photographing requirements at the border, for periodic registration requirements, and for exit controls

when they leave the United States. The Attorney General has stated that the government will "impose these requirements on visitors who fall into categories of elevated national security concern" and that the "criteria that are used to identify such visitors will be continually updated to reflect our evolving intelligence on terrorist threats."³⁰ When aliens violate these rules, the government places their photographs, fingerprints, and information in the National Crime Information Center ("NCIC") system.

In June 2002, the DOJ issued a Fact Sheet detailing the initiative's fingerprinting, photographing and registration requirements for all nationals of Iran, Iraq, Libya, Sudan, and Syria, as well as "[c]ertain nationals of other countries whom the State Department and the INS determine to be an elevated national security risk," in addition to "aliens identified by INS inspectors at point of entry upon specific criteria to be established by the Department of Justice."³¹

However, the Attorney General has never described the criteria for who will be deemed to pose an "elevated national security risk," and indeed, Justice Department officials have expressly said they would not disclose the criteria, allegedly "for fear of jeopardizing intelligence-gathering."³² According to a report issued by the American Bar Association in June 2002, some government officials had reported that the system would target 18- to 35-year-old men from largely Muslim countries.³³ As the reality of the registration program has unfolded, since the fall of 2002, it has become clear that the government is targeting a far wider class of individuals.

²⁷ "New Round of Interviews Planned With Foreigners," *Wall Street Journal*, March 21, 2002.

²⁸ See, e.g., Danny Hakim and Nick Madigan, "Immigrants Questioned by F.B.I.," *New York Times*, March 22, 2003 (noting that "F.B.I. officials emphasized that the interviews focused exclusively on Iraqi immigrants, as opposed to Iraqi-Americans. But at least one U.S. citizen, Samey Jawad, 48, of Hacienda Heights, Calif., said he was interviewed on Thursday evening."); Deborah Kong, "FBI Interviews of Thousands of Iraqis," *Washington Post*, March 27, 2003. Some reports suggested that the Iraqi interviews were being conducted in conjunction with an immigration sweep of Iraqis as part of "Operation Liberty Shield," an operation announced by the Department of Homeland Security to increase national security in anticipation of an American attack on Iraq. See, e.g., Michelle Riley and Eric Gorsky, "Iraqis in U.S. Targeted," *Denver Post*, March 21, 2003 (noting that "Federal agents are moving to arrest as many as 50 Iraqis in Colorado—nearly a tenth of the total Iraqi population in the state—in an immigration sweep that federal law officials say is designed to make the country safer during the tense days ahead.").

²⁹ As explained further below, the Department of Justice has taken an expansive view of the definition of "nationals," including not only citizens of the targeted countries but also individuals born in those countries, even if they never held or no longer hold citizenship of that country. Thus citizens of European countries who would normally be beneficiaries of the Visa Waiver Program have been subjected to onerous registration requirements on the grounds that they (and in certain instances not themselves but rather their parents) were born in a targeted country. As discussed below, this has had an especially devastating effect on refugees and asylees—such as the thousands of Iranians who fled the Iranian Revolution and sought asylum and ultimately citizenship for themselves and their families, often in European countries—who rebuilt their lives in their adopted countries only to be treated for registration purposes as "nationals" of countries that they fled, renounced, and to which they cannot return.

³⁰ Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, June 6, 2002.

³¹ DOJ Fact Sheet, June 5, 2002 (available at <http://www.ins.gov/graphics/exitrackingsys.pdf>).

³² Susan Sachs, "US Will Fingerprint Some Foreign Visitors," *New York Times*, Sept. 9, 2002.

³³ Stephanie Francis Cahill, "Fingerprint Program Gets Mixed Reviews: ABA Experts Say Plan May Prevent Terrorism But Could Also Encroach on Liberties," *ABA Report*, June 7, 2002 (available at <http://www.abanet.org/journal/creport/7/visa.html>).

A final registration rule was published in the Federal Register on August 12 and took effect on Sept. 11, 2002.³⁴ The rule contained some significant additions and expansions. First, special registration requirements apply to all male citizens or nationals³⁵ over the age of 16 from the designated countries. Thus the requirements are not restricted to men between the ages of 18 and 35 (there is no upper bound at all), and it is not restricted to citizens of the designated countries.

Secondly, the registration requirements apply not only to nonimmigrants who arrive into the United States, but also to nonimmigrants already present within the United States, through a "call-in" registration program. The implementation of the program has raised significant due process and equal protection concerns.³⁶ According to the Justice Department's first public comments on the impact of NSEERS, 1,169 people had been detained since the NSEERS and Special Call-In Registration programs took effect, with 164 still detained as of Jan. 17, 2003.³⁷ Most of these detentions were of individuals attempting to comply with the call-in registration requirements who were found to have overstayed a visa or to have an ambiguous visa status by the immigration officer conducting the registration. In addition, a Justice Department official stated that the fingerprinting technology used in the NSEERS program had also been used in a pilot program for border patrol and INS secondary inspection offices during 2002 and had yielded the arrest of 3,995 criminals.³⁸ Later figures would drop references to criminal apprehensions but continue the pattern of justifying the

programs in terms of the numbers of out-of-status individuals identified and placed into deportation proceedings through the program.³⁹

The implementation of NSEERS port-of-entry registration began as soon as the final rule took effect on Sept. 11, 2002. At that time, the Attorney General had designated, through a notice published in the Federal Register on September 6,⁴⁰ five countries—Iran, Iraq, Libya, Sudan and Syria—as countries whose citizens or nationals are subject to entry-exit registration. These countries have come to be known as the Group I countries, since several other notices have been published adding new groups of countries to the list. The final rule also requires the inspecting officer at the port of entry to exercise discretion in using "intelligence-based criteria" to identify on an individualized basis other nonimmigrants to be subjected to special registration procedures upon entry. While the Department of Justice has resisted detailing the criteria for such determinations, some relevant resources are available on this question.

First, a confidential memo, also released in early September, from Johnny Williams, Executive Associate Commissioner in the Office of Field Operations at the INS, detailed various criteria to be taken into account by inspecting officers at U.S. ports of entry.⁴¹ These criteria include instructions to register nationals from Pakistan, Saudi Arabia, and Yemen, despite the fact that none of these countries had been publicly designated as countries subject to special registration by the Attorney General.⁴² The clear failure to provide proper notice to nationals of these countries that they would be subjected

³⁴ Registration and Monitoring of Certain Nonimmigrants Final Rule, 67 Fed. Reg. 52584-93 (Aug. 12, 2002).

³⁵ See *supra* note 29.

³⁶ The Department of Justice published its response to comments received following the publication of the proposed rule. It noted that only fourteen comments were received. *Id.* at 52584. Nonetheless, the comments provided by the American Immigration Lawyers Association on July 15, 2002, did note that the regulation would overreach in impact, arguing in particular that "this regulation would provide the most technical and non-substantive basis yet by which individuals could be detained and eventually removed...With so simple a tool for detention and removal at hand, there is no need to look further: To encounter a Muslim is to have an excuse to lock him up." AILA, "Comments to Proposed Rule Titled 'Registration and Monitoring of Certain Nonimmigrants' INS No. 2216-02; AG Order No. 2589-2002; RIN 1115-AG70 (67 Fed. Reg. 40581) (June 13, 2002)," July 15, 2002, at 3-4. Unfortunately, as the rule has taken effect and in particular the call-in registration process has been initiated, this grim description has been all too accurate.

³⁷ Kris Kobach, Counsel to the Attorney General, Department of Justice, Foreign Press Center Briefing, Jan. 17, 2003 (<http://fpc.state.gov/16739pf.htm>).

³⁸ *Id.* The figure Kobach cites is for individuals apprehended "attempting to cross into the United States." This may be in reference to individuals attempting to enter the U.S. through its land borders. Historically, most individuals apprehended at the border as they attempted to cross illegally into the U.S. and deemed criminals have been those whose earlier "crimes" involve immigration violations such as willful failure to depart after a final order of deportation. Kobach does not provide statistics related to the success rate of these registration technologies with respect to the apprehension of individuals suspected of terrorist activities rather than other crimes or immigration violations.

³⁹ See *infra* note 52 and accompanying text.

⁴⁰ 67 Fed. Reg. 57032 (Sept. 6, 2002).

⁴¹ INS Policy Memorandum, "Identification of Nonimmigrant Aliens Subject to Special Registration, or the National Security Entry-Exit Registration System," Sept. 5, 2002.

⁴² *Id.* at 3.

to special registration procedures if they travel to the United States on a valid nonimmigrant visa clearly raises procedural concerns.

In addition, the memo instructed inspecting officers to take travel patterns into account in determining whether to require registration. In particular, travel to Iran, Iraq, Libya, Sudan, Syria, North Korea, Cuba, Saudi Arabia, Afghanistan, Yemen, Egypt, Somalia, Pakistan, Indonesia or Malaysia was to be considered a significant discretionary factor in determining whether an individual should be subjected to special registration.⁴³

Once registered at a port of entry, individuals must go through two additional stages of registration. First, within a 30- to 40-day period after entry into the country, individuals must appear at a designated INS office in person for re-registration to prove that they are in fact in the country for the purposes stated in their visa application and at their initial port-of-entry registration. In addition, registrants must also appear before an INS officer in advance of their departure from the country to undergo an exit control procedure, and then they must depart from a designated port of departure.

Overall, the NSEERS registration process imposes heavy burdens on arriving nonimmigrants, and does so on a selective basis that raises serious equal protection concerns. While Department of Justice officials are fond of comparing the program to European registration requirements, the registration process in the United States is both more intrusive and more selective than the registration requirements elsewhere. In particular, the exclusive designation of countries that are all, but for one, predominantly Arab or Muslim countries for special registration suggests a discriminatory intent not present in the blanket registration requirements for foreign nationals on long-term stay visas in European countries.

Perhaps more disturbing, however, than the effects of the NSEERS registration requirements has been the impact of the accompanying Special Call-In Registration requirements on nonimmigrants already present in the United States. The call-in registration program is an effort by the INS to "capture information that [the INS] would have gotten at the border had the

people come in...after NSEERS was put in place...So there is an effort to sort of retroactively gain information about people who may still be here on temporary visas."⁴⁴ In fact, however, the call-in registration has been perceived as an effort to round up as many Arab and Muslim men in the country as possible and has had the effect of terrorizing immigrant communities and landing significant numbers of nonimmigrant residents in the United States in detention.

The "call-in" registration process was first made public in a notice in the Federal Register in November 2002.⁴⁵ Under this notice, the Department of Justice announced that male citizens or nationals of one of the five countries designated as the first group of countries for special designation who were over the age of 16 and entered the United States prior to the initiation of the NSEERS program would have to appear in an INS office for call-in registration on or before Dec. 16, 2002. The first announcement was quickly followed by the announcement of additional countries designated for special call-in registration, and by January 2003 at least 25 countries had joined the list.⁴⁶

The effects of the call-in registration program only became widely apparent as the first registration deadline for the Group I countries occurred. In particular, as the large Iranian communities that settled in California after the Iranian Revolution attempted to comply with the Group I registration deadline, the Southern California INS field offices became a test case for how call-in registration would be handled.

Unfortunately, as Iranians who had entered the country on student, tourist or temporary work visas arrived in the hundreds to comply with the registration requirements, it became apparent that the INS offices did not have the resources to process the nonimmigrant registrants. In many instances, no policies had even been made available to INS staff, who were uncertain of the process to follow to register individuals. The result was not only chaotic—resulting in long waits and significant inconvenience to those seeking to comply with the registration requirements—but also raised serious procedural concerns regarding the uniformity and consistency with which the call-in registration rule was being implemented across the country.

⁴³ *Id.*

⁴⁴ Kohach, *supra* note 37.

⁴⁵ Registration of Certain Nonimmigrant Aliens from Designated Countries; Notice, 67 Fed. Reg. 67765-68 (Nov. 6, 2002).

⁴⁶ Group II countries were designated by notice in the Federal Register on Nov. 22, 2002, 67 Fed. Reg. 70525-28 (Nov. 22, 2002) and include the following countries: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, the United Arab Emirates and Yemen. Group III includes two additional countries—Pakistan and Saudi Arabia—and notice was published in the Federal Register on Dec. 18, 2002, 67 Fed. Reg. 77642-44. Group IV—including Bangladesh, Egypt, Indonesia, Jordan and Kuwait—was announced by notice in the Federal Register on Jan. 16, 2003, at 68 Fed. Reg. 2363-66.

Worse, as the chaos of hundreds of men filing into understaffed INS offices began to mount, INS officials decided to err on the side of heavy-handed enforcement. They detained individuals about whom questions arose, and issued Notices to Appear to dozens if not hundreds of men who were present in the United States legally, awaiting the adjudication of their pending adjustment-of-status applications.⁴⁰

The experience in California was wholly predictable. With scant guidance provided by INS headquarters in Washington, field offices were left to determine how to implement the registration rules on an ad hoc basis. Reports from immigration lawyers in New York suggest that individual field offices were changing their implementation strategy and the procedures they required individuals to follow on a daily, and some times hourly, basis.⁴¹

The resulting due process violations range from denial of access to counsel and denial of language access (with interpreters and translators often excluded from interviews despite the lack of English-language proficiency of the would-be registrant) to unlawful detention.⁴² Additional detentions and procedural improprieties are almost certain to plague the ongoing call-in registration process, both because INS offices have not been provided sufficient resources or training to administer the program and because the registration rules are themselves ambiguously worded and unclear.⁴³ Ultimately, concerns

with the discriminatory nature of the designations and the mass detentions that occurred as targeted nonimmigrants sought to comply with the new rules has led to massive protests against the program, including from the U.S. Congress. On Dec. 23, 2002, Senators Russell D. Feingold and Edward M. Kennedy, along with Congressman John Conyers, Jr. sent a letter to Attorney General Ashcroft demanding that the special call-in registration be suspended.⁴⁴

Statistics released by the Justice Department in the spring of 2003 (after the deadlines for registration of Groups I through III had passed) indicated that 12 percent of those who have registered have been charged with immigration violations that could result in their deportation.⁴⁵ It was believed that the vast bulk of those found deportable were of Pakistani origin. As of April 2003, no new groups subject to registration had been made public, fueling the speculation that contrary to its original claims the government would limit the program to the 25 countries targeted in the first four groups, that is, countries with large Arab or Muslim populations, and North Korea.

E. The Legal Underpinnings of Discrimination

Despite the strong evidence that Justice Department actions since September 11 violate core values and principles underlying American law, these actions may prove difficult to challenge in court. This is due to 1996

⁴⁰ See, e.g., Staff, "Mass arrests of Muslims in LA," *British Broadcasting Corp. (BBC)*, Dec. 19, 2002 (<http://news.bbc.co.uk/2/hi/american/2589317.stm>); Matthai Kizuvila and Jessie Mangaliman, "INS detains some from Mideast who registered," *San Jose Mercury News*, Dec. 31, 2002; Jeff Rowe, "Fears of detainment," *Orange County Register*, Jan. 5, 2003; and Susan McRae, "INS Detains Hundreds of Middle East Nationals," *Daily Journal*, Dec. 19, 2002.

⁴¹ See, e.g., Memorandum of Julie Dinnerstein to American Immigration Lawyers' Association, "Experiences with Special Registration in New York," Jan. 16, 2002 (documenting changes of policy and procedure over one week of observation of special registration process at the INS office at 26 Federal Plaza in New York City).

⁴² Several community organizations representing affected immigrant communities, as well as immigrants' advocacy groups, have commenced litigation against the INS alleging the unlawful detention of scores of nonimmigrant males in California. For instance, the American-Arab Anti-Discrimination Committee, together with the Council on American-Islamic Relations, the Alliance of Iranian Americans, the National Council of Pakistani Americans and the Center for Human Rights and Constitutional Law filed a class action suit against Attorney General Ashcroft and the INS in Los Angeles. The complaint, filed on Dec. 24, 2002, included two claims: (1) that the mass arrests of nonimmigrants trying to comply with special registration were unlawful warrantless arrests that occurred without an individualized determination of flight risk; and (2) that persons with adjustment applications pending and visas available should not be detained without bond or deported (in the case of individuals who entered the U.S. through the Visa Waiver Program). A separate lawsuit filed in the federal district court in Santa Ana, California was summarily dismissed. The U.S. district court declined to issue a temporary restraining order against the government. See Staff, "Court Upholds Registration Plan," *New York Times*, Dec. 24, 2002.

⁴³ For instance, the registration requirements apply to both citizens and nationals of the designated countries, but the distinction is unclear. The INS definition of nationals—as persons who owe permanent allegiance to a country of which they are not citizens—renders the determination of whether a particular individual should be considered a national of a country of which he is not a citizen subjective and ambiguous. Controversy among immigration lawyers as to whether Palestinians with refugee travel documents issued by other Arab states should have to register is just one example of the confusion associated with the rule even within the immigration bar.

⁴⁴ The letter begins with the following: "Dear Mr. Attorney General: We urge you to suspend further implementation of the National Security Entry-Exit Registration System (NSEERS) by the U.S. Department of Justice Immigration and Naturalization Service (INS) until Congress and the Department complete a thorough review of this program." Letter from Senators Russell Feingold and Edward Kennedy and Congressman John Conyers to Attorney General John Ashcroft, Dec. 23, 2002.

⁴⁵ The statistics released in late March 2003, indicated that 49,712 individuals had undergone port-of-entry registration while 60,822 individuals have reported to authorities as part of the call-in registration program. Of those subject to call-in registration, deportation proceedings were commenced against 7,201 individuals. The figures of call-in registrants subject to deportation for the week before the Pakistani call-in registration deadline passed was 1,565. George Lardner, Jr., "Registrants may face deportation," *Washington Post*, March 27, 2003.

amendments to the immigration statutes, the traditional reluctance of courts fully to enforce civil rights during times of perceived national crisis, and a legacy of the 19th century called the plenary power doctrine, which holds that congressional or executive immigration policies are subject to only deferential judicial review.

In 1996 Congress attempted to limit federal court jurisdiction over a range of immigration matters, including claims of selective enforcement of immigration law.⁵³ In a subsequent ruling, in *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*,⁵⁴ the Supreme Court determined that federal courts generally lack jurisdiction to decide challenges to selective enforcement of immigration laws, although jurisdiction may remain in cases of "outrageous" discrimination.

In the *AADC* case, the claimants, legal permanent residents and others who were placed in deportation proceedings, argued that they had been singled out because of their speech activities and affiliation with a politically unpopular group.⁵⁵ The claim failed in that case because the Court found that initiation of deportation proceedings were within the exclusive jurisdiction of the INS and not subject to judicial review prior to the conclusion of administrative proceedings.

However, the Court in *AADC* did acknowledge that some instances of discrimination might be extreme enough to outweigh the social costs of considering selective enforcement claims, expressly leaving open "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome."⁵⁶

F. Constitutional Limitations on Government Actions in the Immigration Context

In *United States v. Brignoni-Ponce*,⁵⁷ the U.S. Supreme Court held that in a roving border patrol, the officers could not stop a vehicle near the border of Mexico and question the occupants about their immigration status

and citizenship, consistent with the Fourth Amendment, if the only ground of suspicion that the occupants were alien was their apparent Mexican ancestry.⁵⁸ The Court pointed out 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. The likelihood 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."⁵⁹

Although the *Brignoni* decision was grounded in the Fourth Amendment's requirement that a seizure be reasonable, the Court's analysis points out that it is unreliable and indeed unreasonable to use physical characteristics alone to support an inference of illegality or illegal activity. As in *Brignoni*, since September 11, the government has used invidious discrimination as the primary basis for its actions, so that under the Supreme Court's analysis in *Brignoni*, such a basis should not stand.

G. "Egregious Violations" of Fourth Amendment Not Permitted

In a decision with parallels to the *AADC* case, the Court in *INS v. Lopez-Mendoza*⁶⁰ held that the exclusionary rule that bars the admission of evidence obtained as a result of an unlawful arrest does not apply to civil deportation proceedings held by the INS. Still—and again, similar to *AADC*—*Lopez-Mendoza* qualified its holding: the Court stated that its decision did not extend to "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained."⁶¹ This portion of the opinion has been interpreted and applied in a cluster of Ninth Circuit cases involving motions to suppress evidence obtained in searches initiated because of the racial or

⁵³ *But see INS v. St. Cyr*, 533 U.S. 289 (2001) (holding 1996 laws do not eliminate *habeas corpus* jurisdiction to review deportation orders); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (reviewing indefinite detention provisions of 1996 laws and holding provisions violative of due process).

⁵⁴ 525 U.S. 471 (1999).

⁵⁵ *Id.* at 488.

⁵⁶ *Id.* at 491.

⁵⁷ 422 U.S. 873 (1975).

⁵⁸ *Id.* at 886-7.

⁵⁹ *Id.*

⁶⁰ 468 U.S. 1032 (1984).

⁶¹ *Id.* at 1050-1051.

ethnic characteristics of the individual concerned.⁶¹ The Ninth Circuit cases interpret “egregious violations” to include selective enforcement on the basis of race or ethnicity. In *Gonzalez-Rivera v. INS*, the Ninth Circuit explained:

We have long regarded racial oppression as one of the most serious threats to our notion of fundamental fairness and consider reliance on the use of race or ethnicity as a shorthand for likely illegal conduct to be “repugnant under any circumstances.” ... As the Supreme Court has emphasized, “discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive to democratic society.”⁶²

The Ninth Circuit has also held that it is not necessary for both factors mentioned in *Lopez-Mendoza*—transgression of fundamental fairness and diminished probative value of the evidence—to be present: “a fundamentally unfair Fourth Amendment violation is considered egregious regardless of the probative value of the evidence obtained.”⁶³ Again, a strong parallel may be drawn in this context between the government’s invidious use of race and that of national origin. Under the reasoning of *Gonzalez-Rivera* and the other Ninth Circuit cases, deportations and government programs resulting from decisions that clearly and invidiously discriminate on the basis of national origin are unconstitutional.

The government action most similar in recent history to the three initiatives discussed above, was the singling out of Iranian noncitizens in the United States by the INS in 1979. In the wake of the hostage crisis at the U.S. embassy in Tehran, the INS focused on visa violations by Iranians living in the United States by requiring all noncitizen U.S. residents who were Iranian citizens or nationals to report to a local INS office and “provide information as to residence and maintenance of nonimmigrant status.”⁶⁴ The District Court declared the action unconstitutional discrimination on the basis of national origin,⁶⁵ but the D.C. Circuit reversed, in *Narenji v. Civiletti*.⁶⁶ The appeals court stated that “[d]istinctions on the basis of nationality may be drawn in the

immigration field by the Congress or the Executive,” and that “[s]o long as such distinctions are not wholly irrational they must be sustained.”⁶⁷ Like the Supreme Court statement in *ADC*, the D.C. Circuit evaluated the selective enforcement of the immigration laws as a matter of foreign policy. The court articulated that

any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government.... This court is not in a position to say what effect the required reporting by several thousand Iranian students, who may be in this country illegally, will have on the attitude and conduct of the Iranian government. That is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.⁶⁸

In *Narenji*, the Attorney General submitted an affidavit to the court stating that the regulation in question was issued as a fundamental element in the President’s effort to resolve the Iranian hostage crisis. The post-September 11 government actions analyzed here, however, may be distinguished in many respects from the facts in *Narenji*. Most importantly, that case dealt with distinctions based on nationality, not upon national origin. Moreover, the government initiatives discussed in this chapter stem, as the government itself has explained, not from the use of immigration law to target one particular country as a matter of foreign policy. In this regard, one has only to note that some of the post-September 11 programs have a strong adverse effect on the citizens and nationals of some of the United States’ closest and most longstanding allies, such as Pakistan. Unlike in *Narenji*, then, the government has purported to promulgate its post-September 11 programs, not as a function of its war powers and unique ability to formulate foreign policy, but for their use purely as domestic measures to increase national security. In any case, in the 20 or so years since *Narenji*, scholars and courts have generally retreated from reflexive invocation of the

⁶¹ *Arguello-Vasquez v. INS*, 786 F.2d 1433, 1435 (9th Cir. 1986) (suppressing evidence where INS stop was based on Hispanic appearance), *vacated as moot*, 844 F.2d 700 (9th Cir. 1988); *Orbach v. INS*, 38 F.3d 488, 497–498 (9th Cir. 1994) (suppressing evidence where INS arrested individual because he had a Nigerian-sounding name); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1449–50 (9th Cir. 1994) (suppressing evidence where INS arrest was based on Hispanic appearance).

⁶² *Gonzalez-Rivera*, *supra* note 62, at 1450 (citation omitted).

⁶³ *Id.* at 1451.

⁶⁴ *Narenji v. Civiletti*, 617 F.2d 745, 746 (D.C. Cir. 1980).

⁶⁵ *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C. 1979).

⁶⁶ *Narenji*, *supra* note 65.

⁶⁷ *Id.* at 747.

⁶⁸ *Id.* at 748. The Supreme Court denied certiorari in *Narenji*, leaving the last word with the D.C. Circuit.

plenary power doctrine as in *Narenji*, casting doubt on the continuing relevance of *Narenji*.

H. The Plenary Power Doctrine and its Civil Liberties Costs

The plenary power doctrine of immigration law holds that congressional and executive immigration policies are largely immune from judicial review.⁷⁵ It emerged during the 19th century, a time when discrimination based on race, religion, natural origin, sex, and political beliefs was sanctioned by American courts and society, with state and federal courts upholding school segregation, miscegenation laws, exclusion of witnesses based on race, and laws granting preferences to whites.⁷⁶

Over the past century, U.S. constitutional law, through the development of the Equal Protection and the Due Process Clauses, has made great strides toward overcoming those discriminatory notions and toward the reinforcement of the notions of equality and dignity to which American society now aspires.

Law enforcement policies that discriminate based on suspect classifications are inconsistent with these modern constitutional and societal norms. Therefore, the notion that Congress has "plenary power" in the area of immigration policy should not be invoked as the justification to allow Congress and the Executive Branch to instigate discriminatory policies and laws without meaningful judicial review.⁷⁷ Immigration laws that discriminate on the basis of immutable characteristics should be subject to heightened scrutiny, to reflect America's prized values of equality and the fundamental constitutional values of equal protection and Due Process.⁷⁸ Indeed, the three clearly discriminatory post-September 11 government programs discussed above do not pass muster under even a "rational basis" standard of review (the lowest threshold to meet in a challenge as to constitutionality), let alone under a standard of review

of heightened scrutiny (in which courts will analyze more closely both the governmental objective and the means used to attain it).

The *Chinese Exclusion Case*,⁷⁹ decided in 1889 by the U.S. Supreme Court, is considered the foundation of the plenary power doctrine of immigration law. This case is cited for the notion that legislative decisions about which "foreigners of a different race in this country" are dangerous to peace and security are "conclusive upon the judiciary."⁸⁰

However, Professor Louis Henkin's parsing of the language of that case argues that it does not necessarily establish that all Congressional decisions regarding immigration are unreviewable. Rather, he argues, the Court ruled that Congress's decision that the alien in that case could be excluded was "conclusive on the judiciary" only because the noncitizen had not claimed that any of his constitutional rights had been violated, and because the Court was not empowered independently to assert constitutional objections that the noncitizen failed to raise.⁸¹

Although the "conclusive on the judiciary" language is often cited, the Court also used language earlier in the case that subjects *all* the sovereign powers to limits: "The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and public policy and justice which control, more or less, the conduct of all civilized nations."⁸² The Court later refers to Congress's power over the "exclusion of foreigners" as being "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution...."⁸³ The necessary

⁷⁵ The degree of deference to be accorded immigration policies formulated by Congress has been interpreted variously to range from absolute deference to some lesser standard of constitutional review than that normally accorded standard congressional acts.

⁷⁶ Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is there a Plenary Power Doctrine?*, 14 *Geo. Immigr. L. J.* 289, 289 (2000) (noting that the plenary power "emerged and flourished in the nineteenth century when the courts rarely invalidated governmental classifications now considered to be suspect or quasi-suspect").

⁷⁷ Justice Frankfurter acknowledged that the plenary power is not in line with recent developments in constitutional law, but felt bound by the strength of precedent. *Galtan v. Press*, 347 U.S. 522, 530-31 (1954) (noting that but for the "firmly embedded" notion that Congress maintains exclusive power over immigration, substantive due process would likely have limited Congress's power in that arena).

⁷⁸ Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. Rev.* 1, 16 (1998) ("the plenary power doctrine appears motivated by racism").

⁷⁹ *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (affirming constitutionality of provisions of the Chinese Exclusion Act).

⁸⁰ *Id.* at 606.

⁸¹ Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 *Harv. L. Rev.* 853, 858-59 (1987).

⁸² *Chae Chan Ping*, *supra* note 74, at 604.

⁸³ *Id.* at 609.

inference is that the legislature's power over immigration is subject to constitutional limits, as are all sovereign powers.

Legal scholars have characterized the plenary power doctrine as a fossil,⁷³ "aberrational," "a maverick, a wild card," "an oddity," "theoretically unsatisfying," and "inconsistent with modern international law"⁷⁴ and the cases that gave birth to the doctrine are now widely considered relics from a different era.⁷⁵ Professor Gabriel Chin wrote:

That era was...when orotund generalities about sovereignty and national security were a substitute for significant scrutiny of governmental action impinging on individual rights, when the Bill of Rights had not yet become our national hallmark and the principle justification and preoccupation of judicial review. It was an era before United States commitment to international human rights, before enlightenment in and out of the United States brought an end both to official discrimination at home and to national-origins immigration law; before important freedoms were recognized as preferred, inviting strict scrutiny if they were invaded and requiring a compelling public interest to uphold their invasion.⁷⁶

Plenary power was reaffirmed during another dark period in American history, that of the Cold War and McCarthyism. Professor Chin charts the development of

the plenary power and concludes, "the Court has upheld discriminatory immigration laws during periods when domestic discrimination against citizens was permitted on the same basis. Therefore, typically the discrimination was consistent with domestic constitutional law."⁷⁷

A brief comparison of immigration policy with domestic policy illustrates his point. By statute, race was a factor in the determination of immigration rights between 1882 and 1965, and naturalization was restricted until 1952, a time when racial discrimination even against citizens in domestic laws was commonly accepted.⁷⁸ Between 1950 and 1960, the Court upheld many domestic laws aimed at punishing suspected Communist party members, most notably in *Dennis v. United States*.⁷⁹ During this same period, immigration laws were antagonistic towards non-mainstream political views, including Communism.⁸⁰

This pattern of symmetry between immigration policy and domestic policy began to break down in the late 1990s, at which time the American public and the courts began to challenge the legitimacy of racial profiling in domestic criminal law enforcement,⁸¹ but failed to challenge precedent that legitimized national origin and ethnic profiling in the immigration context.⁸²

As public attention focused on the harsh realities of racial profiling by police on the motorways,⁸³ a seeming consensus developed in opposition to this practice.⁸⁴ This consensus was built even in the face of policing

⁷³ Henkin, *supra* note 76, at 862 (considering the doctrine a "remnant of the prerights jurisprudence that we have proudly rejected in other respects").

⁷⁴ Chin, *supra* note 73, at 7-8, nn. 42-49 (citing the scholars who have so characterized the plenary power).

⁷⁵ *Id.* (citing the Court in *Real v. Covert*, 354 U.S. 1, 12 (1957)).

⁷⁶ *Id.*

⁷⁷ Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 *Con. Imigr. L.J.* 257, 258 (2000).

⁷⁸ Chin notes that the Court upheld discriminatory immigration laws throughout that period, but none were Equal Protection challenges. He notes, however, that the Court did not decide any such cases between 1954 and 1965 when racial discrimination was becoming disfavored domestically. *Id.* at 264.

⁷⁹ 341 U.S. 494 (1951).

⁸⁰ In *Hirvander v. Shughnessy*, 342 U.S. 580 (1952), the Court rejected the alien's claim that he had a due process right to remain in the country and that deportation based on his prior membership in the Communist Party was a violation of his First Amendment rights.

⁸¹ See *Whren v. United States*, 517 U.S. 806, 813 (1996) (upholding a pretextual traffic stop under the Fourth Amendment but insisting that a challenge was possible under the Fourteenth Amendment because court "of course agrees with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race").

⁸² *United State v. Brignoni-Ponce*, 422 U.S. 873 (1975) (allowing Border Patrol to consider Mexican heritage when making stops at the Mexican border); *United States v. Martinez-Fuertes*, 428 U.S. 543 (1976) (upholding fixed point Border Patrol traffic stops).

⁸³ Recent data indicates that on highways and interstates on which only 5-20% of the motorists and speeders are Black or Latino, these minorities make up 70-80% of the stops and consent searches by police. David Cole, *Race, Policing, and the Future of Criminal Law*, 26 *Hum. Rts.* 2, 3 (Summer, 1999) (citing statistics in New Jersey, Florida and Maryland).

⁸⁴ According to a 1999 Gallup poll, about 80% of the American public considered racial profiling wrong. Gallup Poll, *Do You approve or Disapprove of 'Racial Profiling' by Police?* (Dec. 9, 1999), available at WESTLAW, USGALLOP:120999 R6 009. Racial profiling has been rejected by state legislatures, local police departments and even the President, forcing police departments to chart the racial patterns of their stops and searches. David Cole, *Enemy Aliens*, 34 *Stan. L. Rev.*, 953, 974. See also David A. Harris, *Addressing Racial Profiling In the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 *U. Pa. J. Const. L.* 367, 377-382, 391 (discussing state court decisions disallowing pretextual traffic stops based on race and stating that "four out of five people of both races characterized profiling as a pernicious practice that should be addressed and eliminated").

efficiency⁹¹ and security rationales similar to those used today in defense of discriminatory immigration policies. Courts rejected the notion that it could be considered evidence of criminal activity to simply be "driving while Black"⁹² or "standing while Black"⁹³ and developed Fourth Amendment search and seizure procedures that were race neutral, and subjected racial profiling in the criminal context to strict scrutiny analysis.⁹⁴

By refusing to hold immigration policies to strict constitutional review and instead choosing to uphold the doctrine of plenary power, the courts would entrench the United States in its history of racism, xenophobia, and discrimination rather than allowing the jurisprudence to evolve to encompass the core constitutional values of Equal Protection and Due Process that have developed domestically. Cases that rely on the plenary power doctrine to further discriminatory immigration policies should be viewed in the same light that we now cast on other cases from the same era, such as those that upheld racial segregation, as blemishes on American legal history.

There are grounds to hope for change. Courts have been moving towards imposing constitutional limitations in areas of historical deference to Congress. While the Supreme Court has asserted that Congress has plenary power over a multitude of its tasks,⁹⁵ it has never held that Congress is authorized to violate the

Constitution in wielding this power. In fact, the Court seems almost eager to curb the "plenary power" of Congress in other areas, such as interstate commerce.⁹⁶

Judicial review of Congress's immigration policies is necessary to maintain the integrity of separation of powers and to maintain the integrity of the Constitution. In *INS v. Chadha*⁹⁷ and *INS v. St. Cyr*,⁹⁸ the Court did not challenge Congress's plenary power over immigration, but emphasized that this power was subject to judicial review because only the courts "can decide the constitutionality of a statute" and that even the Executive's assent to a bill that conflicts with Constitution will not shield it from judicial review.⁹⁹

I. The Standard of Review

Despite the lingering effects of the plenary power doctrine, courts have been willing to subject government policies to constitutional review, though in most cases only rational basis review.¹⁰⁰ Recently, in *Zadvydas v. Davis*,¹⁰¹ the Supreme Court expressly rejected the government's argument that Congress has plenary power "to create immigration law, and that the judicial branch must defer to executive and legislative branch decision-making in that area," by citing a string of cases that reinforced the Court's assertion that that power was subject to "important constitutional limitations."¹⁰² At the same time, *Zadvydas* provides little guidance as to the boundaries of those "important constitutional

⁹¹ "Rational Discrimination" is the notion that targeting a disproportionate number of blacks for traffic stops is not racist but instead a rational and efficient policy choice because it is presumed that blacks commit a disproportionate number of certain crimes. David A. Harris, *The Stories, The Statistics, The Law: Why 'Driving While Black' Matters*, 84 *Minn. L. Rev.*, 265, 294 (1999) (discussing the fallacy of rational discrimination and its assumptions of black criminality). Similarly, some argue that because nineteen of the September 11 attackers were Arab noncitizens, ethnic and national origin profiling in the immigration context is justified. Cole, *supra* note 90, at 957, 975-977 (challenging this argument).

⁹² Harris, *supra* note 91, at 265 ("African Americans call it 'driving while black'—police officers stopping, questioning, and even searching black drivers who have committed no crime, based on the excuse of a traffic offense.")

⁹³ David Cole, "Standing While Black," *Nation*, Jan. 4, 1999, at 24. Cole coined this phrase in reaction to a Chicago ordinance, which was subsequently overturned because it gave inadequate guidance to the police officers required to enforce it, see *City of Chicago v. Morales*, 119 S. Ct. 1849, 1861 (1999), that made "gang loitering" a criminal offense. However, before it was overturned it was the basis for approximately 45,000 arrests of almost exclusively African-American and Latino youth. Harris, *supra* note 91, at 293.

⁹⁴ Cole, *supra* note 90, at 976 (stating that when government authorities rely on racial or ethnic categories they trigger strict scrutiny under the Equal Protection Clause).

⁹⁵ These include "regulation of interstate and foreign commerce, the territories and the District of Columbia, bankruptcy, taxation, war and the armed forces, currency, the Indian tribes, public benefits, navigable waterways, the mails, and appellate jurisdiction of federal courts." Chin, *supra* note 83, at 280 & fn. 180-90 (citing cases).

⁹⁶ See *U.S. v. Lopez*, 514 U.S. 549 (1995), *U.S. v. Morrison*, 529 U.S. 598 (2000).

⁹⁷ 462 U.S. 919 (1983).

⁹⁸ 531 U.S. 1107 (2001) (holding that the Habeas Corpus Clause guarantees some review of deportation orders).

⁹⁹ *Id.* (citing the fundamental cases of *McCulloch v. Maryland* and *Marbury v. Madison*).

¹⁰⁰ See *id.*, *Harris v. Shughart*, 342 U.S. 580 (1952) (engaging in Due Process and First Amendment analysis).

¹⁰¹ 533 U.S. 678 (2001).

¹⁰² *Id.* at 695. See also *INS v. St. Cyr*, 533 U.S. 289 (2001) (Habeas Corpus Clause guarantees some review of deportation orders).

limitations," since the Court's ruling in that case was based on the wording of the statute at issue.

In *Nguyen v. Immigration and Naturalization*,¹⁰³ the Court reviewed the constitutionality of a government action where the statute in question set forth different rules for citizenship depending on the gender of the parent involved. The Court's analysis was based on a standard of intermediate scrutiny (under which, in order to be consistent with the Constitution, the government objective must be an "important" one and the means used to achieve it must be "substantially related" to that objective). The Court declined to decide if some lesser threshold was applicable due to Congress's immigration and naturalization power.¹⁰⁴ Although the Court did state that it would have discussed plenary power if the statute had failed equal protection analysis, it is important to note that the Court chose to apply heightened equal protection scrutiny at all when the plenary power doctrine might have allowed it to resort to a more differential analysis of Congress' decision.

In fact, there is reason to believe that courts might even be ready finally to discard the plenary power. Over the past century, at least eight Justices have held that the Constitution prohibits deportation on the basis of race,¹⁰⁵ and the Restatement (Third) of the Foreign Relations Law of the United States notes that "[i]t was long assumed that there are no constitutional limitations on the power of Congress to determine whom it will admit or exclude...it is now open to question however, whether Congress could exclude an alien...solely on account of race or religion."¹⁰⁶ Historically, the Court has been most willing to overturn Congressional actions when race was a motivating factor.

Without the plenary power doctrine to shield immigration policies, such policies should be subject to ordinary equal protection and due process analyses, and thus the government's actions should be held to the highest standards (intermediate or strict scrutiny) when the

courts evaluate policies that categorize based on race and national origin, two of the clearest examples of suspect classifications.

In *Washington v. Davis*,¹⁰⁷ the Court established the analytic framework. The Court first emphasized that the aim of equal protection is to "prohibit the United States from invidiously discriminating between individuals or groups."¹⁰⁸ Some degree of discriminatory purpose and disproportionate impact was required by the Court to trigger strict scrutiny analysis. While *Davis* involves a law with seemingly neutral text that in reality has a disproportionately high impact on certain racial groups, the government initiatives at issue here—the Absconder Apprehension Initiative, the Voluntary Interview Project, and the National Security Entry-Exit Registration System—are expressly discriminatory in their text alone, in particular, based on national origin, and therefore represent an even clearer case of a violation of equal protection. Following the September 11 attacks, the government has not attempted to hide the discriminatory purpose of its current immigration policies; detention profiles collected in this report and by news media are evidence of the laws' disproportionate impact. Therefore, the *Davis* analysis indicates that these policies should trigger strict scrutiny.

In *Plyler v. Doe*,¹⁰⁹ the Supreme Court emphasized that the U.S. Constitution's Fifth Amendment Due Process protections extended to all persons present in the United States, "even aliens whose presence in this country is unlawful."¹¹⁰ The Court declared, "we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government."¹¹¹ Thus, the government's broad discretion in the immigration area is not a license to engage in invidious discrimination.

The plenary power doctrine stands in direct opposition to fundamental constitutional principles of due process, equal protection and separation of powers.

¹⁰³ 533 U.S. 53 (2001).

¹⁰⁴ *Id.* at 72.

¹⁰⁵ *Chin, supra* note 73, at 54 (citing cases).

¹⁰⁶ *Id.*

¹⁰⁷ 426 U.S. 229 (1976).

¹⁰⁸ *Id.* at 241.

¹⁰⁹ 457 U.S. 202 (1982).

¹¹⁰ *Id.* at 210 (citing *Shaugetney v. Mezzi*, 345 U.S. 206 (1953); *Wong Wing v. United States*, 163 U.S. 228 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

¹¹¹ *Id.* (citing *Mathews v. Diaz*, 426 U.S. 67 (1976)).

Adherence to the doctrine has the destructive effect of “distorting modern constitutional jurisprudence and countenancing what otherwise would be invalidated as arbitrary and discriminatory government behavior” with its “corrosive effects” on the equality norms enshrined in the due process clause of the Constitution.¹¹² The government’s initiatives, to the extent they have been openly based on a policy of invidiously discriminating against individuals within the territory of the United States by singling out some for different treatment according to their national origin, should be invalidated as an egregious violation of the constitutional principle of equal protection under the law.

III. Abusive Detention Practices

A. Prolonged Detention

As MPI’s interviews of post-September 11 detainees and their lawyers found, a large number of individuals were not charged with any immigration violation within forty-eight hours, and in many cases, for weeks or even months.¹¹³ This results in a situation where individuals are detained for prolonged periods without explanation or justification, unable to challenge their continued detention or effectively respond to the government authority, violating both U.S. law and fundamental principles of our society.¹¹⁴ The right to substantive due process is a fundamental principle of U.S. law and society. In the wake of the events of September 11, the U.S. government has enacted a number of policies involving the detention of individuals that violate substantive due process. These initiatives have resulted in many instances of prolonged detention, depriving individuals of their due process rights at various stages in the detention process.

The Fifth Amendment’s Due Process Clause forbids the government to “deprive” any “person...of liberty without due process of law.”¹¹⁵ The Supreme Court in 2001 opined that “[f]reedom from imprisonment—from government custody, detention, or other forms of

physical restraint—lies at the heart of the liberty that Clause protects. Government detention violates the Due Process Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and ‘narrow’ non-punitive ‘circumstances,’ where a special justification, such as harm-threatening mental illness, outweighs the ‘individual’s constitutionally protected interest in avoiding physical restraint.’”¹¹⁶

The Supreme Court has held unambiguously that the “Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”¹¹⁷ In 2001, the Court opined that a statute permitting indefinite detention of a noncitizen raises serious constitutional problems.¹¹⁸

The post-September 11 government initiatives discussed below mandate prolonged detention, depriving individuals of their liberty without due process of law. In doing so, these initiatives have invoked various authorities, none of which command more authority than the U.S. Constitution. This section discusses the prolonged detention of noncitizens in various stages in the process: before being charged, while charges are pending, and at the point at which such individuals have been granted voluntary departure or ordered removed.

B. Precharge Detention and Deprivation of Due Process: Amended 8 C.F.R. §287.3

Following the events of September 11, legislative and regulatory changes have granted the Attorney General greater discretion to detain and deport aliens, endangering established principles of substantive due process. The amendment of 8 C.F.R. § 287.3(d) in 2001 (the “amended regulation”) allows the INS to detain noncitizens without charge for a “reasonable period of time” under “emergency or other extraordinary circumstance[s].”¹¹⁹ In cases in which “reasonable period” is undefined, the regulation thus allows for indefinite pre-trial deten-

¹¹² Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection and Federalism*, 76 N.Y.U. L. Rev. 493, 553 (2001).

¹¹³ See the profiles contained in the Appendix to this report. See also U.S. Department of Justice, Office of the Inspector General, “The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks” (April 2003) (Hereafter 2003 OIG Report); Amnesty International Report 2002 at 11 (available at <http://web.amnesty.org/web/at2002.usd/home/home?OpenDocument>).

¹¹⁴ See, e.g., The International Covenant on Civil and Political Rights (ICCPR), Article 9 (ratified by the USA in 1992); The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (adopted by consensus by the United Nations General Assembly in 1988).

¹¹⁵ U.S. Const. amend. V, § 2.

¹¹⁶ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992), *United States v. Salerno*, 481 U.S. 739, 746 (1987), *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997)).

¹¹⁷ See *Bridges v. Wixon* 326 U.S. 135 (1945); *Zadvydas*, 533 U.S. at 678.

¹¹⁸ See *Zadvydas*, 533 U.S. at 678.

¹¹⁹ Custody Procedures, 66 Fed. Reg. 48,334, 48,335 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287). Prior to the amendment, such detention was normally limited to 24 hours.

tion—contrary to basic principles of due process and the Supreme Court's landmark holding, that indefinite detention even *after* a person is ordered deported is unconstitutional.¹²⁰

The amended regulation does not define "emergency or other extraordinary circumstance." Nor does it require that the alien's detention be related to the emergency. Finally, under the provision, many noncitizens are also being held without bond under the pretext of unrelated criminal charges or minor immigration violations, in "a modern-day form of preventative detention."¹²¹ In *Zadvydas v. Davis*, the Supreme Court held that the Constitution demands that a noncitizen's post-removal-order detention be limited to "a period reasonably necessary" to effect that person's removal.¹²² Even where removal proves impracticable, the Court held that the Constitution "does not permit indefinite detention."¹²³

While the amended regulation governs *pre-trial* detention, as opposed to post-order detention, the concept of indefinite detention at any stage in an individual's case clashes with the constitutional principle of substantive due process and with the application of that principle to the immigration context by the Supreme Court in *Zadvydas*. The authority to detain noncitizens for a prolonged period or indefinitely before charging them is dubious at best.¹²⁴

1. Fifth Amendment Due Process Protections

The amended regulation is at odds with Fifth Amendment Due Process requirements.¹²⁵ The Fifth Amendment restriction on the government's power to detain individuals other than in limited punitive and non-punitive circumstances is reinforced by the Due Process requirement that detention be implemented "in a procedurally fair manner that allows a detainee

to be heard 'at a meaningful time and in a meaningful manner.'¹²⁶

The amended regulation is also not narrowly tailored to its regulatory purpose of "process[ing] cases that arise in connection with terrorist activities" connected to the September 11 attacks, and lacks procedural safeguards to ensure that application of the measure is no broader than necessary. The provision for unlimited detention in emergency circumstances also fails to define a maximum period of detention,¹²⁷ and fails to separate detainees from those held under criminal charges.

Finally, the amended regulation fails to meet the balancing test established by the Supreme Court in *Mathews v. Eldridge*,¹²⁸ lacking procedural protections against the erroneous deprivation of liberty resulting from the governmental interest being served by the amended regulation: the prolonged or indefinite detention of individuals arrested without a warrant for immigration violations to counter terrorism. The lack of procedural safeguards in the context of a deprivation of liberty is even more egregious in light of the relatively small cost to the government of providing a detainee with access to counsel, information regarding the reason for detention, and a meaningful hearing following arrest.

2. Violation of the Fourth Amendment

The amended regulation also runs afoul of the Fourth Amendment requirement of a prompt finding of probable cause following a warrantless arrest.¹²⁹ Courts have held the INS to the probable cause requirements of the Fourth Amendment in connection with stops and searches¹³⁰ and arrests of noncitizens¹³¹ and have found that noncitizens may not be detained for periods of unreasonable duration.¹³² In addition, the standard of a "reason to believe" that an alien is in violation of immi-

¹²⁰ See *Zadvydas*, 533 U.S. at 678.

¹²¹ See Nancy Chang, "The USA PATRIOT Act: What's So Patriotic About Trampling on the Bill of Rights?" Center for Constitutional Rights, November 2001 (available at http://www.ccr-ny.org/whatsnew/usa_patriot_act.asp).

¹²² See 8 U.S.C. § 1231(a)(6) (1994 ed., Supp.V).

¹²³ *Zadvydas*, 533 U.S. at 689. But see *Denmore v. Kim*, 123 S.G. 1708 (2003) (upholding mandatory pre-trial detention provisions of INA as applied to certain noncitizens).

¹²⁴ For a detailed discussion of unconstitutional features of the amended regulation, see Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. Rev. L. & Soc. Change 397 (2000-2001) (hereinafter "Administrative Comment").

¹²⁵ See *id.* at 417-423.

¹²⁶ *Id.* at 418 (citing *Armstrong v. Manzo*, 380 U.S. 543, 552 (1965)).

¹²⁷ The procedural framework in each of *Zadvydas* and *Fischer* did not provide a maximum limit on the period of detention and, as a result, failed judicial scrutiny.

¹²⁸ 424 U.S. 319 (1976).

¹²⁹ See Administrative Comment, *supra* note 124, at 402-07.

¹³⁰ *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

¹³¹ See of Administrative Comment, *supra* note 124 at N. 31 (citing *Arizalo v. Wood*, 811 F.2d 407, 488 (9th Cir. 1987) and related cases).

¹³² See of Administrative Comment, *supra* note 124 at N. 33 (citing *Rhoden v. United States*, 55F.3d 428, 432 (9th Cir. 1995)).

Of the agencies on the list provided to Fayad, only one number was a working contact for an agency that provided legal counseling to detainees and none of the organizations agreed to provide representation. As a result of this policy, Fayad never found legal representation. On October 18, when allowed his first "social" call, Fayad learned that Curtis-Diop had been retained to represent him, however, he was not allowed to speak with her directly until some time later.

On the one occasion that Curtis-Diop was able to speak with Fayad she learned that Fayad had been flown from the Metropolitan Detention Center in Los Angeles to an unknown location, where he was switched to another plane to New York. Following his arrival in New York he was moved to a van and was escorted by six cars to a detention facility in New York. He claimed that he was mistreated while in New York, at which point he had been in jail for over a month. While he was in New York, Fayad said that all the Pakistanis and Arab Muslims were kept in a special housing unit where they were practically held in solitary confinement for nearly twenty-four hours a day.

Fayad was granted voluntary departure on Dec. 18, 2001. Still, the judge refused to grant him bond on the belief that he was a flight risk, due to Fayad's lack of family ties in the United States. While he was in California, Fayad had had medical problems and had not been attending school for twelve credit hours. It was on this basis that the judge decided Fayad was no longer in status and therefore was unlawfully present in the United States.¹⁷⁸ After the grant of voluntary departure, Fayad remained in custody despite the fact that his attorney had received confirmation that he was no longer of interest to the FBI.

1. Violation of Due Process

Although the Justice Department relies on the existing material witness statute in its post-September 11 detention initiative,¹⁷⁹ that statute itself raises constitutional concerns.¹⁸⁰

The material witness statute violates the Due Process Clause because it authorizes the government to deprive individuals who are not suspected of any wrongdoing of their liberty. It does so based on criteria that bear no rational relationship to the ends the statute is meant to achieve and without any prior notice to the innocent witness.

The material witness statute¹⁸¹ in essence says that witnesses should be treated like alleged criminals. The statute, in describing how witnesses arrested and detained should be handled, says they should be treated according to the provisions of another statute (18 U.S.C. section 3142), which prescribes the handling of people accused of crimes, "and is not written with the rights of the innocent in mind."¹⁸²

Section 3142 provides that an individual may be required to post bail, and that bail may be set at an amount the prisoner cannot afford. Additionally, it allows a judicial officer to order the person held in pretrial detention without possibility of release until the case is resolved.

In applying section 3142 to material witnesses, no consideration is given to the difference between witnesses and the accused. In fact, the decision to detain an individual under section 3142 turns on the nature of the crime alleged. But in the case of witnesses, the individual to be detained is not the one charged with the offense.

The material witness statute therefore violates due process, by depriving innocent individuals of their liberty through arbitrarily co-opting the criteria used to establish whether individuals charged with a crime should be released. In addition, the statute fails to require any pre-deprivation notice before an arrest warrant is issued.

2. Contravention of the Fourth and Sixth Amendments

The material witness statute authorizes the arrest and detention of innocent individuals simply on the basis that their testimony is "material in a criminal

¹⁷⁸ Laurie P. Cohen, "Detained on Visa, Egyptian Dentist Faces Plight of Arabs Arrested Since Sept. 11," *Wall Street Journal*, Nov. 28, 2001.

¹⁷⁹ See Nafrali Bendavid, "Material Witness Arrests Under Fire: Dozens Detained in War on Terror," *Chicago Tribune*, Dec. 24, 2001, available at <http://www.chicagotribune.com/news/local/chi-0112240169dec24.story?null> (noting that "Atty. Gen. John Ashcroft has said repeatedly he makes no apology for using every legal tool at his disposal, and even stretching them, to combat the terrorist threat").

¹⁸⁰ See generally, Ricardo J. Bascuas, *On the Legality of Holding "Material Witnesses" In Custody*. Unpublished manuscript on file with MPL.

¹⁸¹ 18 U.S.C. § 3144.

¹⁸² Bascuas, *supra* note 180, at 25.

proceeding” and that “it may become impracticable to secure the presence of the person by subpoena,” violating the Fourth Amendment directive that “no warrants shall issue but upon probable cause.”¹⁹³ According to the Supreme Court, probable cause under the Fourth Amendment requires facts and circumstances providing reasonable grounds for belief of guilt.¹⁹⁴ Where it allows for a warrant to be issued for an individual not suspected of wrongdoing, the material witness statute authorizes arrests without probable cause. The Supreme Court’s consistent interpretation of probable cause cannot support the arrest of an innocent witness.

In addition, the material witness statute does not require that counsel be appointed for individuals arrested under that statute. One court has already ruled that the Constitution requires the appointment of counsel for material witnesses.¹⁹⁵ Therefore, where the statute fails to provide for legal counsel for material witnesses, it is unconstitutional on its face.¹⁹⁶

3. A Case Study: United States v. Awadallah¹⁹⁷

The government’s use of the material witness statute in cases after September 11 has been tested in court at least twice—most prominently in the case of Osama Awadallah.

- On Sept. 21, 2001, FBI agents in California arrested Osama Awadallah as a material witness for a grand jury investigation of the September 11 terrorist attacks.¹⁹⁸ Press reports indicate that authorities found a note with Awadallah’s first name and prior phone number in a car abandoned by some of the hijackers at Dulles International Airport.¹⁹⁹
- Over the next twenty days Awadallah was treated as a high-security inmate; flown to New York, placed in solitary confinement, was shackled and strip-searched whenever he left his cell, and was denied any visitors or use of a telephone.

- Handcuffed to a chair and without immunity, he answered “several hundred” questions before a grand jury on Oct. 10, 2001.
- During that questioning before the grand jury, Awadallah denied he knew anyone named “Khalid” (one of the hijackers’ names) but the government produced an examination booklet that it had obtained from one of his teachers, in which Awadallah had written: “One of the quietest people I have ever met is Nawaf [another hijacker]. Another one, his name Khalid. They have stayed in San Diego for 6 months.”
- Awadallah initially denied writing the name during the October 10 questioning. But five days later, when he again testified before the grand jury, he stated that he had written the word “Khalid.” The government subsequently charged Awadallah with two counts of knowingly making a false material declaration before the grand jury (perjury) for (1) testifying that he did not know anyone named Khalid, and (2) testifying that he had not written the word “Khalid” in the exam booklet.
- On Dec. 3, 2001, Awadallah moved for an evidentiary hearing to suppress “(1) all physical evidence found by law enforcement officers who searched his home, computer and cars, and (2) all statements that he made to any government agent from Sept. 20, 2001, through Oct. 3, 2001,” as well as to dismiss the indictment.
- Awadallah spent 83 days in jail before being released on bail.

On April 30, 2002, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York dismissed the perjury charges against Awadallah, concluding that “Awadallah’s testimony before the grand jury was undoubtedly the product of an unlawful seizure because the government lacked the statutory authority

¹⁹³ U.S. Const. amend. IV. See, e.g., *Franks v. Village of Bradford*, 245 F.3d 869, 876 (6th Cir. 2001) (“Clearly an arrest without probable cause violates the Fourth Amendment . . .”).

¹⁹⁴ See, e.g., *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979) (“This Court repeatedly has explained that probable cause to justify an arrest means facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense”).

¹⁹⁵ See *In re Class Action Application for Habeas Corpus on Behalf of All Material Witnesses in the Western District of Texas*, 612 F. Supp. 940, 942 (W.D. Tex. 1985).

¹⁹⁶ *Basquin*, *supra* at 21.

¹⁹⁷ 202 F.Supp. 2d 55 (S.D.N.Y. 2002).

¹⁹⁸ Except where expressly indicated otherwise, the source of the information on Awadallah’s case is the Awadallah decision itself.

¹⁹⁹ Steve Fainaru and Amy Goldstein, “Judge Rejects Jailing of Material Witnesses,” *Washington Post*, April 30, 2002, available at <http://www.washingtonpost.com/wp-dyn/articles/A11562-2002Apr30.html>.

to detain him under section 3144.¹³⁰ According to the court, under the Fourth Amendment, imprisoning a grand jury witness constitutes a seizure and, as such, must be reasonable.

Judge Scheindlin's opinion asserts that the government may secure an individual's grand jury testimony by court-issued subpoena—a method that "infringes on an individual's liberty [but] is nonetheless a reasonable measure to secure information about a potential crime because the extent of the intrusion on the witness's liberty is minimal."¹³¹ She notes that:

[I]n Congress's view, a reasonable balance was to require that "no material witness be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition." This solution allows the prosecution to obtain testimony for use at trial, permits the defendant to confront the witness as the Constitution requires, and only intrudes on the witness's liberty for the time that is necessary to obtain his testimony.¹³²

Applying that reasoning to Awadallah himself, Judge Scheindlin found that his "imprisonment...as a high security inmate for twenty days illustrates that the limitations in section 3144 are meaningless if the statute applies to grand jury witnesses. Such an interpretation poses the threat of making detention the norm and liberty the exception."¹³³

Judge Scheindlin's opinion also implies that application of the material witness statute to Awadallah may have been a pretext:¹³⁴

[o]ther reasons may motivate prosecutors and law enforcement officers to rely on the material witness statute. Attorney General John Ashcroft has been reported as saying: "Aggressive detention of law-breakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute.¹³⁵

Judge Scheindlin held that the material witness statute does not authorize the detention of material witnesses for a grand jury investigation.¹³⁶ But in a subsequent decision regarding the application of the material witness statute to grand jury witnesses,¹³⁷ Judge Scheindlin's reasoning was rejected by her colleague in the Southern District, Judge Michael Mukasey.

Judge Mukasey cited legal authority supporting the claim that the material witness statute does not violate the Fourth Amendment when applied to grand jury proceedings.¹³⁸ In addition, Judge Mukasey said that the reasoning of *Awadallah* is unpersuasive, since "construing the statute to exclude grand jury proceedings does not avoid the constitutional problem presented by imprisoning someone who is merely a witness and is not accused of a crime."¹³⁹

However, notwithstanding the importance of the civic duty articulated by Judge Mukasey to provide evidence,¹⁴⁰ the fundamental importance of the need to respect individual liberty, an established constitutional principle, supports Judge Scheindlin's approach of interpreting the material witness statute narrowly in light of its potential infringement on fundamental civil liberties.

¹³⁰ *Awadallah*, 202 F.Supp. 2d at 80.

¹³¹ *Id.* at 78 (also noting that "a subpoenaed witness...would not be repeatedly strip-searched, shackled whenever he is moved, denied food that complies with his religious needs, or prohibited from seeing or even calling his family over the course of twenty days and then testifying while handcuffed to a chair.")

¹³² *Id.* (quoting 18 U.S.C. § 3144).

¹³³ *Id.* at 79.

¹³⁴ See also *Presumption of Guilt*, *supra* note 173 at 60-67.

¹³⁵ *Awadallah*, 202 F. Supp. 2d at 77n.28. The opinion further notes that although 28 U.S.C. §1821(d)(4) entitles a witness "detained pursuant to section 3144 of title 18 for want of security for his appearance" to a daily attendance fee "for each day of detention when not in attendance at court...[n]othing in the record indicates that the government has attempted, or considered, reimbursing Awadallah for 'each day of detention.'" *Id.* at 67n.16 (citing 28 U.S.C. §1821(d)(4)(emphasis in *Awadallah* omitted).

¹³⁶ *Id.* at 82.

¹³⁷ *In re The Application of the United States for a Material Witness Warrant*, 2002 WL 1392739 (S.D.N.Y.).

¹³⁸ *Id.* at *2-4.

¹³⁹ *Id.* at *11.

¹⁴⁰ See *id.*

F. The USA PATRIOT Act: Claimed Authority to Detain

The USA PATRIOT Act²⁰⁰ gives sweeping new powers to both domestic law enforcement and international intelligence agencies, and greatly restricts the oversight and authority that previously gave courts the opportunity to ensure that these powers were not abused.²⁰¹

The Act granted the government authority to detain individuals for seven days without charge or probable cause for arrest, on the government's unreviewable belief that the individual is engaged in terrorist activity.²⁰² This authority has apparently not yet been invoked by the government.

These provisions sanction government activity contrary to the Due Process Clause of the Fifth Amendment and the protections of the Fourth Amendment against unreasonable searches and seizures. The USA PATRIOT Act allows detention absent a hearing or a showing that an individual presents a danger or flight risk. In addition, the seven-day detention period authorized by the Act is contrary to the constitutional requirement that justification for an arrest must be determined "promptly."

The Act does not direct the Attorney General either to inform the noncitizen of the evidence on which the certification of involvement in terrorism is based, or to provide the noncitizen with an opportunity to contest that evidence before a court.²⁰³ Section 412 does not permit the release of a noncitizen deemed eligible for asylum or other relief,²⁰⁴ and authorizes extended post-removal-order detention "if the release of the alien will threaten the national security of the United States or the safety of the community or any person."²⁰⁵

G. "Operation Flytrap" and "Operation Tarmac"

Though the government's actions have violated fundamental civil liberties while netting few actual terrorists, they have been effective in wreaking havoc on the lives of tens of thousands of immigrants trying to earn a living, along with their families, colleagues and employers. Two government initiatives that it calls "Operation Flytrap" and "Operation Tarmac" have produced disturbing results.

Operation Flytrap involves sweeps at airports for possible terrorists to "restore public confidence in flying at a time of pitched fears."²⁰⁶ As a result of Operation Flytrap, "low level airport workers—janitors, food service employees and groundskeepers," some of whom were U.S. citizens, were arrested.²⁰⁷ Rather than uncover individuals linked to terrorism, the operation yielded arrests of illegal immigrants working at airports or U.S. citizens with minor criminal records, including a 54-year-old Bolivian grandmother, at significant expense to the government and with serious implications for the individuals involved.

Individuals were asked to arrive early at the airport to view a training video and were then arrested. "Rather than striking a major blow against terrorism, the arrests ended up turning people's lives inside out," said a report in the *Chicago Tribune*. "Parents who were deported have been separated from their U.S. citizen children. Couples have been torn apart. Jobs have been lost."²⁰⁸

Operation Tarmac, another initiative to increase airport security, involved arresting anyone suspected of fraudulently obtaining security badges.²⁰⁹ As a result, almost 800 individuals were arrested and 563 were charged. However, none were linked to terrorism.

²⁰⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

²⁰¹ Section 1001 of the USA PATRIOT Act does direct the Inspector General of the Department of Justice to review and report on complaints of abuses of civil rights and civil liberties by employees of the Department of Justice. *Id.* at Section 1001. In the last six-month reporting period, for example, one allegation that was substantiated involved several correctional officers at a California facility, who placed copies of an American flag and pictures depicting a flag burning inside the food slots of three inmate's cells. On the papers were typed: "American flag: \$25, Gasoline: \$2, Cigarette Lighter: \$2.50, catching yourself on fire because you are a terrorist asshole: PRICELESS." In addition, the complaint alleged that correctional staff placed miniature replicas of the American flag over the windows of the inmate's cell doors. The Federal Bureau of Prisons sustained allegations of unprofessional conduct against the officers, and disciplinary action against the officers is pending. OIG Report to Congress, Jan. 22, 2003, at 11, available at http://www.usdoj.gov/oig/special/2003_01a/final.pdf.

²⁰² USA PATRIOT Act § 412(a)(3)(amending 8 U.S.C. § 1226A(a)(2001)).

²⁰³ See USA PATRIOT Act § 412; Chang, *supra* note 121 at 5.

²⁰⁴ USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(2).

²⁰⁵ USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(6).

²⁰⁶ Michael Tackett, "Airport net caught small fry: Washington-area sweep yielded no terror related charges," *Chicago Tribune*, Oct. 6, 2002.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Ben Ehrenreich, "Operation Tarnish, The plight of LAX workers caught up in a counterterrorism crackdown," *LA Weekly*, Oct. 25-31, 2002.

Many were arrested at their homes, as in the case of Juana Jimenez, a night shift food services employee of Los Angeles International Airport. She was awakened in her home at 2:30 a.m., in front of her children, by U.S. Marshals who handcuffed her in her bedroom.²¹¹

The charges brought against such individuals were related to false representation of a social security number, use of a false social security card or falsely claiming to be a U.S. citizen, all of which are sufficiently minor that a U.S. attorney has the discretion not to prosecute at all.

Federal Public Defender Kiya Kato noted, "These are people who haven't done anything wrong other than work and try to support their families, but they are people who in [the government's] mind are throwaways, who they can use to put forth this appearance of having done something productive about terrorism."²¹²

H. Conclusion

Although the government has a legitimate interest in fighting and preventing terrorism, the bedrock principles of our democratic society must be preserved. Initiatives that result in prolonged and unconstitutional detention strike at the heart of these principles, depriving individuals of their fundamental right to liberty.

Disturbingly, as noted above, such initiatives have been used against individuals who have not been charged with or convicted of crimes of terrorism. Instead the government seems to have undertaken a broad policy of preventive and investigatory detention, in the hope of uncovering information from innocent individuals. Bolstering this impression are the cases in which innocent individuals have voluntarily approached government authorities to provide information and were detained in violation of constitutional norms as a result.

One such case is that of Mustafa Abu Jdai, who approached the FBI on Sept. 13, 2001, knowing that he was out of immigration status, because he believed that he had come into contact with one of the identified hijackers.²¹³ Answering an advertisement for work at a Dallas mosque, Jdai met with four Middle Eastern men

who asked him to attend flight school in Florida in exchange for thousands of dollars in cash and spoke of him being a hero. Jdai identified Marwan Al-Shehhi, one of the hijackers, as one of the men whom he met with in March 2001. As a result of coming forward, Jdai was arrested after failing an FBI-administered polygraph test and was held in a Dallas jail on immigration charges for an expired visa.²¹⁴

IV. Further Deprivation of Procedural Safeguards: Secret Deportation Hearings, Secret Detentions, and Protective Orders

Since the September 11 attacks, the Department of Justice has conducted secret arrests and detentions of more than 1,200 people in terrorism-related investigations.²¹⁵ The government then subjected many of those detainees, and others subsequently arrested, to closed hearings. There has been a determined effort by the government to hide the identity, number and whereabouts of its detainees.

These actions violate bedrock principles of U.S. law and society: the principles of due process, and of the public and press's right of access to government proceedings under the First Amendment.

The First Amendment protection of the public's right to be informed about government action is at the heart of our democratic structure, and is crucial to maintaining government accountability to the public. By preventing the public from examining government activities, the fairness and proper functioning of our democratic system is inherently compromised. In the case of immigration proceedings, where the government is given exceptionally broad discretion, the safeguards of public access to information are even more fundamental.

The individuals directly impacted by policies carried out in secret are further deprived of their rights under the Due Process Clause. Because of the secrecy of their circumstances, they may be unable to obtain the resources needed to exercise or protect their rights.

²¹¹ *Id.*

²¹² *Id.*

²¹³ "East Texan reveals possible ties to terrorists," *Abilene Reporter*, Oct. 13, 2001; "A Deliberate Strategy of Disruption, Massive, Secretive Detention Effort Aimed Mainly at Preventing More Terror," *Washington Post*, Nov. 4, 2001.

²¹⁴ *Id.*

²¹⁵ See 2003 OIG Report, *supra* note 113, at 130-41 (describing detainees subject to "communications blackout" and interference with detainee access to counsel, family, and consular officials. For a somewhat different analysis of the extent to which these detentions were "secret," see the section "Secret Detentions and Closed Immigration Hearings" in Chapter One of this report, "The Effectiveness of Government Security Responses to September 11.")

Because of the complexity of immigration law and the deportation process, a policy depriving noncitizens or their families of access to information regarding their whereabouts, status, or evidence brought against them is squarely at odds with the principles and protections of due process.

A. Secret Deportation Hearings and "Special Interest" Designation

On Sept. 21, 2001, Chief Immigration Judge Michael Creppy issued a memorandum²¹⁶ (the "Creppy Directive") requiring Immigration Courts to close deportation hearings that involved persons in cases classified by the Attorney General as "special interest." This action has resulted in an unknown number of secret hearings, kept off the dockets and removed from the view of the public, the press, and even family members of the parties. These secret hearings are part of a larger system of secrecy employed by the Justice Department in investigations in the aftermath of September 11.

1. Violation of Principles of Due Process and Open Government

Because of the blanket closure of removal hearings, it is impossible to know exactly how many have taken place, and information about the detainees has been limited. More than 1,200 individuals have been arrested following the September 11 attacks in terrorism-related investigations, almost all of whom, according to immigration lawyers, are Islamic or from the Middle East or South Asia.

In a letter to Senator Carl Levin, dated July 3, 2002, Assistant Attorney General Daniel Bryant indicated that the INS has detained 752 individuals in terrorism investigations and the hearings of 611 of such individuals were closed.²¹⁷ Of the 752, most of the detainees have been deported but, as of late June 2002, 81 individuals were being detained.

Over half of those detained were arrested for immigration offenses that were, according to an INS official, similar to "spitting on a sidewalk."²¹⁸

The First Amendment confers a right of public access to deportation hearings.²¹⁹ "The only safeguard on [the] extraordinary government power [to control our borders] is the public, deputizing the press as guardians of their liberty," said the Sixth Circuit in *Detroit Free Press v. Ashcroft*.²²⁰ By placing its actions beyond public scrutiny, the government threatens to deprive the public of this safeguard. "The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully and accurately in deportation proceedings," the Sixth Circuit said. "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation."²²¹

There is little information available on how cases are designated as special interest. The concealment of the process of designating a case as "special interest" denies the individual an opportunity to challenge the "special interest" designation of his case or even understand why the case has been placed into the category, depriving him of his rights to due process. In addition, the government is never called upon to publicly justify or explain the designation, which is contrary to the open working of government intended by the First Amendment.

Since they have been protected from challenge by being hidden from public view, "special interest" designations may be more susceptible to selective application. Despite the secrecy, it has become evident that the "special interest" category has been applied primarily to Arab immigrants.

The district court in *Detroit Free Press v. Ashcroft* reported that the noncitizens undergoing closed removal proceedings were primarily noncitizen young men of Arab or Muslim background. The court stated specifically that, as part of the investigation following September 11, "the Government has identified, ques-

²¹⁶ Memorandum from Chief Immigration Judge, Michael Creppy (Sept. 21, 2001).

²¹⁷ Tamara Aurb, "U.S. Held 600 for Secret Rulings: Immigrants Jailed for Terrorism Investigators," *Detroit Free Press* (July 18, 2002). The letter indicated that 81 individuals remain in INS custody. The number of detainees cited by the letter, however, is inconsistent with the information provided by the Justice Department at the beginning of its antiterrorism investigation that up to 1,200 individuals had been detained. *Id.*

²¹⁸ Tom Brune, "Of 'Special Interest', Immigration System Being Used to Detain Some Suspects," *Newsday*, Sept. 16, 2002.

²¹⁹ See *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

²²⁰ *Id.*

²²¹ *Id.*

tioned, and instituted removal proceedings against a number of noncitizens, primarily young men of Arab or Muslim background.²²²

Under the Creppy Directive, the immigration judge who presides over the removal proceedings has no power to evaluate or rule on either the categorization of the noncitizen as "special interest" or the mandated closure of the proceedings pursuant to this categorization. Once the case is designated "special interest," the hearings in the case are automatically closed.

The inability of lawyers and advocacy groups to locate or identify individuals subjected to secret proceedings further deprives these individuals of their rights. The Sixth Circuit noted in *Detroit Free Press v. Ashcroft* that "[t]he task of designating a case special interest is performed in secret, without any established standards or procedures, and the process is, thus, not subject to any sort of review, either by another administrative entity or the courts. Therefore, no real safeguard on this exercise of authority exists."²²³

As Lee Geleert of the American Civil Liberties Union noted, "It is difficult to overstate the importance of public scrutiny of the INS process, where detainees are facing a trained prosecutor, often without counsel, and the outcome of the hearing will literally determine whether they are locked up for months and then deported."²²⁴

Historically, immigration court proceedings have been, presumptively open to the public, and may only be closed if the presiding immigration judge finds it necessary under certain specified circumstances.²²⁵ Rather than propose a narrowly tailored policy that balances First Amendment and Due Process principles to achieve the legitimate goal of national security, such as a case-by-case analysis, the Creppy Directive is overbroad in depriving individuals and the public of their fundamental rights.

2. *Detroit Free Press v. Ashcroft* and *North Jersey Media Group v. Ashcroft*

In two cases challenging closed hearings, the press has filed suit after being denied entry to removal hearings of noncitizen Arab men. Both cases were decided upon First Amendment grounds at the district court level. On appeal, the Sixth Circuit found the Creppy Directive unconstitutional. The Third Circuit panel disagreed with the Sixth Circuit, reversing in favor of the government.²²⁶

Despite the Third Circuit's opinion, the factual background of the cases demonstrates the intrusion upon individual liberties at stake in the closure of hearings.

In the Eastern District of Michigan, the press filed a complaint after being excluded from the hearing of Rabih Haddad. Haddad, a native of Lebanon, resided in Ann Arbor, Michigan, having arrived in the United States in 1998 with his family. Haddad was the founder of a Muslim charity, Global Relief Foundation.²²⁷ He lectured frequently on Islamic history and the role of Muslims and was the contact person for his community following the September 11 attacks in talks at town hall meetings and other events.

Haddad was taken into custody by the INS on Dec. 14, 2001, and held at the Monroe County Jail for overstaying his six-month tourist visa. On the same day, the charity's Chicago office was raided.²²⁸ The INS initiated removal proceedings in Detroit before Immigration Judge Elizabeth Hacker. The FBI suspected Global Relief of being linked to Osama bin Laden's al Qaeda terrorist network, and the assets of the charity were frozen. Haddad and Global Relief denied involvement with terrorists.

On Dec. 19, 2001, Immigration Judge Elizabeth Hacker conducted a bond hearing in Haddad's case. Shortly before the hearing began and without prior notice, courtroom security officers announced that the hearing was closed to the press and public. In response to Haddad's objection, Judge Hacker "stated that the

²²² *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 940 (E.D. Mich., 2002).

²²³ 303 F.3d 681 (6th cir. 2002).

²²⁴ Tamara Audi, *supra* note 217.

²²⁵ See 8 C.F.R. § 240.10(b), 8 C.F.R. § 3.27.

²²⁶ *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), cert. denied, ___ S. Ct. ___, No. 02-1289, 2003 WL 1191395 (U.S. May 27, 2003). For a critique of the majority opinion of the Third Circuit, see Julie Hilden, *A "Complete Information Blackout," Part One: A Federal Court of Appeals Denies Media Access to All Immigration Proceedings Relating to 9/11 Witnesses*, Findlaw.com (Oct. 15, 2002), available at <http://writ.news.findlaw.com/hilden/20021015.html>.

²²⁷ See, *All Things Considered*, *National Public Radio*, April 18, 2002.

²²⁸ *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 941 (E.D. Mich., 2002).

decision to close the proceedings came from her supervisors and that she lacked the power to reverse the decision.²²⁹ Judge Hacker denied bail and ordered Haddad detained. Subsequent hearings in Haddad's case held on January 2 and 10 were also closed to the press and public.²³⁰ In response to the closure, Haddad and newspaper plaintiffs filed complaints against the government seeking a declaration that closed procedures violated their First Amendment right of access and an injunction to prevent future closure in the procedure.

Until March of 2002, Haddad was held in solitary confinement at the Metropolitan Correctional Center in Chicago.²³¹ He remained in custody there until the week of June 10, 2002, when he was transferred to an INS detention center in Monroe, Michigan.²³² He was denied immigration bond. As of April 2003 he remained in detention.

Haddad's conditions of detention have varied in the more than 15 months of his detention, sometimes as a reflection of the changing political circumstances outside of his detention facility. In February 2003 the Monroe County Jail began to refuse Haddad's wife and family visitation rights, citing heightened national security in anticipation of the U.S. strikes against Iraq.²³³

On Oct. 19, 2002, the U.S. Treasury Department designated Global Relief as a group that supports terrorism.²³⁴ However, Haddad has not been charged with terrorist activity as of April 2003. Haddad is currently seeking asylum, believing that his return to Lebanon would endanger both himself and his family due to the publicity regarding his case.²³⁵

A similar suit was filed by reporters in federal district court in New Jersey.²³⁶ A newspaper reported that, "[b]etween November and February, reporters from the *Law Journal* and the *Herald News* of West Paterson were prevented from attending court sessions for several of the hundreds of Muslims charged with immigration violations."²³⁷

One of the hearings that were closed to reporters was that of Malek Zeidan. Zeidan is a Syrian who arrived in the United States 14 years ago, and overstayed his tourist visa. According to press reports, he had worked in Paterson, New Jersey as an ice cream truck driver and doughnut shop employee.²³⁸ INS agents found Zeidan in February of 2002, when they came to his apartment looking for a former roommate in a marriage fraud case. The agents asked him to appear at the INS office the next day, at which time he was taken into custody and held in New Jersey's Hudson County Jail for approximately forty days.²³⁹

According to his attorney, Regis Fernandez, at Zeidan's subsequent hearings, the judge cleared the court of everyone except Zeidan and the lawyers, after the prosecutor notified the judge that Zeidan was the subject of an investigation related to September 11.²⁴⁰ In response, Zeidan filed suit against the Attorney General alleging a violation of his due process rights.²⁴¹ Following this action, Zeidan was released from custody on a bail of \$10,000.²⁴² The government subsequently removed his case from the "special interest" designation and moved to dismiss Zeidan's action as moot.²⁴³ On April 2, 2002, Bennet Zurofsky, also Zeidan's attorney, confirmed that he would not oppose the government's

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Danny Hakim, "A Nation Challenged: The Detainees, Transcripts Offer First Look at Secret Federal Hearings," *New York Times*, April 22, 2002.

²³² Mike Robinson, "Islamic Charity Chairman Returned to Michigan Detention Center," *Associated Press*, June 18, 2002.

²³³ Erin Saylor, "Terror alert halts visitation rights for Haddad's family," *Michigan Daily*, Feb. 11, 2003.

²³⁴ Niraj Warikoo, "Judge Rules Man Must Stay Behind Bars," *Detroit Free Press*, Oct. 25, 2002.

²³⁵ David Shepanski, "Muslim Activist to Ask for Asylum," *Detroit News*, Oct. 23, 2002.

²³⁶ *North Jersey Media Group v. Ashcroft*, 2002 U.S. Dist. LEXIS 10136 (2002).

²³⁷ Jim Edwards, "Federal Judge Mulls Constitutionality of Closed-Door Immigration Hearings," *New Jersey Law Journal* (May 20, 2002).

²³⁸ See, e.g., Matthew Purdy, "Our Towns; Their Right? To Remain Silenced," *New York Times*, May 1, 2002; Wayne Pary, "Syrian Detainee who Sued Government Released on Bail," *AP Worldstream*, March 13, 2002.

²³⁹ See, e.g., Purdy, *supra* note 238; Jim Edwards, "No More Secrecy?" *Bronx Daily Business Review*, March 7, 2002.

²⁴⁰ Purdy, *supra* note 238.

²⁴¹ *Zeidan v. Ashcroft*, Civil 02-843 (JWB) (Cited in *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002)).

²⁴² Pary, *supra* note 238.

²⁴³ Cited in *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

motion and accordingly, the Zeidan case was dismissed on April 16, 2002.²⁴⁴ As of April 2003, Zeidan still faces deportation.²⁴⁵

District courts in both of the cases brought by the press granted injunctions against closing the hearings, finding on First Amendment grounds that the closure was unconstitutional.²⁴⁶ In Detroit, in Haddad's case, federal district judge Nancy G. Edmunds rejected the government's argument that it should be allowed to determine which hearings must be closed without presenting arguments and evidence to immigration judges.

Judge Edmunds stated, "[i]t is important for the public, particularly individuals who feel that they are being targeted by the Government as a result of the terrorists attacks of September 11, to know that even during these sensitive times the Government is adhering to immigration procedures and respecting individuals' rights."²⁴⁷

Edmunds also indicated that an immigration judge's decision to detain Haddad since December 2001 may have been affected by a "climate of fear" and "unsupported allegations."²⁴⁸ Underlying her opinion was the notion that the government should at least make public the process through which cases designated as "special interest," and that process should include individualized, case-by-case review and factual findings by an Immigration Judge in order to assure accountability and transparency. Judge Edmunds stated, "An open detention and removal hearing will assure the public that the government itself is honoring the very democratic principles that the terrorists who committed the atrocities of 9/11 sought to destroy."²⁴⁹

On April 18, 2002, the Sixth Circuit denied the government's request for a stay of the district court order requiring it to produce transcripts of Haddad's hearing.²⁵⁰ On April 19, 2002, the Justice Department agreed to release the immigration court documents in

Haddad's case. However, the department stated that it planned to withhold the information pertaining to other detainees.²⁵¹

On Aug. 26, 2002, the Sixth Circuit, in a unanimous three-judge panel, affirmed the district court's order to grant a preliminary injunction on closed hearings, holding that the government had unlawfully held secret deportation hearings solely on the basis of the government's assertion of potential links between the individuals subject to such closed hearings and terrorism. The Circuit Court panel, comprised of Judges Damon J. Keith, Martha Craig Daughtrey and James G. Carr, ruled in fewer than three weeks after hearing oral arguments and recognized that the government had presented "compelling interests to justify closure." However, recognizing that deportation hearings "are exceedingly formal and adversarial," the Court held that the Creppy Directive violated the Constitution, since the government's interest in preventing terrorism must be argued before an immigration judge in each particular case. The opinion of the court questioned the government's commitment to an open democracy in strong terms, stating "Democracies die behind closed doors."²⁵²

On Sept. 25, 2002, the Justice Department announced that it would comply with the federal court order to grant an open detention hearing to Haddad. Haddad remained in federal custody after a second hearing to determine if he should be released on bond, pending immigration proceedings²⁵³ and received a new bond hearing before Immigration Judge Robert Newberry. Haddad had argued that Judge Hacker had been "tainted" because of the secrecy of the immigration hearings before her. October 24, Immigration Judge Newberry ruled that Haddad must remain in detention, although Newberry said he could not be certain whether Haddad supports terrorism.²⁵⁴ Parts of Newberry's ruling were sealed, but the unsealed portion indicated that the

²⁴⁴ *Id.*

²⁴⁵ Purdy, *supra* note 238.

²⁴⁶ *North Jersey Media Group v. Ashcroft*, 205 F. Supp. 2d 288 (D.N.J. 2002).

²⁴⁷ *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 944 (E.D. Mich. 2002).

²⁴⁸ Dan Eggen, "Judge Orders Release or Open Hearing for Detainee," *Washington Post*, Sept. 18, 2002.

²⁴⁹ *Id.*

²⁵⁰ *Order Denying Stay, Detroit Free Press v. Ashcroft*, 2002 U.S. App. LEXIS 10855, (6th Cir., 2002).

²⁵¹ Dan Eggen, "Court Papers on Detainee Released; Justice Dept. Says It Will Still Withhold Information About Others," *Washington Post*, April 20, 2002.

²⁵² *Detroit Free Press v. John Ashcroft*, 303 F. 3d 681 (6th Cir. 2002); *see also* Adam Liptak, "Court Backs Open Deportation Hearings in Terror Cases," *New York Times*, Aug. 27, 2002.

²⁵³ David Shephardson, "Muslim Activist to Ask for Asylum," *Detroit News*, Oct. 23, 2002.

²⁵⁴ Niraj Warikoo, "Judge Rules Man Must Stay Behind Bars," *Detroit Free Press*, Oct. 25, 2002.

recent Treasury Department decision designating Global Relief as a group that supports terrorism contributed to his decision regarding Haddad.²¹⁵

In the New Jersey press suit that was partly based on Zeidan's case, the District Court's reasoning was similar to that of the Sixth Circuit. Judge John W. Bissell ordered that all deportation hearings be opened nationwide and closed only on a case-by-case basis if the government could show justification. Judge Bissell noted that "since 1964, federal regulations have expressly provided a presumption of openness for deportation proceedings."²¹⁶ Judge Bissell asserted that in order to close hearings, a compelling government interest must be shown, and the closure of hearings must be narrowly tailored to achieve the government interest. In addition, the Judge noted that the Creppy Directive is overbroad as "it does not permit the individual to elect [the protective treatment, secrecy, intended to protect detainees against stigmatization]."²¹⁷

Judge Bissell denied the government's request for a stay, pending appeal, of the district court's order enjoining the enforcement of the Creppy Directive mandate, and on June 17, 2002, the Third Circuit also denied the government's request for a stay.²¹⁸ The government then appealed the Third Circuit's denial to the Supreme Court.²¹⁹ On June 28, 2002, the Supreme Court decided to grant the government's request for a stay, allowing Zeidan's hearings to remain closed.²²⁰

Subsequently, on the government's appeal—notwithstanding the compelling nature of the Due Process and First Amendment claims in Zeidan's case—two of the panel of three Third Circuit judges held that the government may close hearings for national security reasons.²²¹ The opinion of the Third Circuit majority written by Chief Judge Edward Becker gave greater weight to the government's national security claims, dismissing the Sixth Circuit decision regarding Haddad and another Third Circuit decision granting access to a town Planning Commission meeting.²²² Judge Becker noted that Congress has never explicitly guaranteed public access to deportation proceedings and asserted that the rebuttable presumption of openness created by INS regulation does not establish a First Amendment right of access to such proceedings.

Judge Becker's opinion has been criticized for accepting the government's position that "information that might appear innocuous in isolation...can be fitted into a bigger picture by terrorist groups."²²³ The opinion also concedes that the government has not presented evidence of concrete risk from presumptively open hearings, leaving open the argument that less intrusive measures, such as a case-by-case determination may be adequate to serve the government's objectives.²²⁴

²¹⁵ *Id.*

²¹⁶ Henry Weinstein, "No Closed Hearings, Judge Says," *Los Angeles Times*, May 5, 2002.

²¹⁷ *Id.*

²¹⁸ David Caruso, Federal Appeals Panel Rules Immigration Hearings Related to Terror Probe Must be Public," *Associated Press*, June 18, 2002.

²¹⁹ Susan Sachs, "Ashcroft Petitions Justices for Secrecy in Deportations," *New York Times*, June 22, 2002.

²²⁰ Associated Press, "Supreme Court blocks opening detention hearings for alleged terrorists," CNN at www.cnn.com, July 28, 2002.

²²¹ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); see also David B. Caruso, "Deportation Hearings Can Be Closed," *Associated Free Press Online*, Oct. 8, 2002.

²²² See *Whiteland Woods L.P. v. Township of West Whiteland*, 193 F.3d 177 (3d Cir. 1999). Although dismissed by the majority opinion of the Third Circuit, a town Planning Commission meeting is not a trial and, arguably, bears far less resemblance to a trial than a deportation hearing.

²²³ *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); see Julie Hilden, *A "Complete Information Blackout," Part One: A Federal Court of Appeals Denies Media Access to All Immigration Proceedings Relating to 9/11 Witnesses*, Findlaw.com (Oct. 15, 2002), available at <http://writ.news.findlaw.com/hilden/20021015.html>.

²²⁴ The Supreme Court's denial of Certiorari in the Third Circuit case leaves the division among the Courts of Appeals outstanding.

B. Secret Detentions

Secret arrests are a concept odious to a democratic society and profoundly antithetical to the bedrock values that characterize a free and open society such as ours.

— Judge Gladys Kessler
*Center for National Security Studies v. U.S.
Department of Justice*, 215 F.Supp.2d 94,
(D.D.C. 2002)

After September 11, the Department of Justice arrested and detained over 1,200 people, some in secret, and subsequently subjected many of those detainees to closed hearings.²⁰¹ This section of the report will analyze the harms this policy of secret detention causes to individual detainees, their families, communities and the wider public.

1. Harms to individuals

(a) Disappearance

The net effect of a policy of secret arrests followed by secret detentions is the “disappearance” of individuals. Government secrecy is a particularly terrifying prospect when detainees are denied access to counsel, are held incommunicado from their families and, in some cases, where the only witnesses to their arrest are also

detained.²⁰² Families and communities are left facing the long and difficult task of piecing together what little information is released in an effort to find their missing relatives.²⁰³

The government’s policy of secrecy in this area is undeniable. The initial sweep of arrests conducted after September 11 was largely covert, often with no information provided to family members about the location of the detainees. Since that point, the information that has been made public has been partial, selective and, at times, conflicting. At no time has information been publicly released providing the names or whereabouts of all those who have been detained.²⁰⁴

In fact, there has been a determined effort by the government to hide the identity, number and whereabouts of these detainees. After the release in November 2001 of a tally of detained individuals—1,182²⁰⁵—the Department of Justice reversed its position on making even this rough statistical information available to the public, and has not released a subsequent figure for additional numbers detained.²⁰⁶ During the period following November 2001, new programs for the arrest and detention of noncitizens were introduced,²⁰⁷ under which potentially hundreds of additional individuals have been detained.

²⁰¹ Of the more than 1,200 people originally detained, more than half were charged with immigration-related offenses; others with federal crimes; and still others held as material witnesses. Many of those charged with immigration offenses were designated “special interest” cases and deportation proceedings against them were conducted in secret.

²⁰² See Declaration on the Protection of all Persons from Enforced Disappearance, Dec. 18, 1992, General Assembly Resolution 47/133, A/RES/47/133 (18 Dec. 1992). In many instances, the only witnesses to the arrests of individuals as part of the initial September 11 sweep of arrests were themselves members of the targeted immigrants household or workplace who were themselves also picked up during the sweeps. See, e.g., “Local investigations following the September 11 attacks,” *Associated Press*, Aug. 19, 2002 (noting that on September 17 agents raided a home in Detroit in search of the man whose name was on the mailbox, failed to find him, but proceeded to detain the three other men then present in the house); and Foster Klug, “INS: Detained immigrant no longer subject of terror probe,” *Associated Press*, Oct. 1, 2002 (citing the case of six men, all of whom were detained at the same apartment by officials who were investigating one of the six but arrested all who were present). For examples of reports on the widespread sweep arrests, see Tamar Lewin, “As Authorities Keep Up Immigration Arrests, Detainees Ask Why They Are Targets,” *New York Times*, Feb. 3, 2002; Rachel Elbaum, “Caught in the Dragnet,” *MSNBC.com*, May 23, 2002 (<http://msnbc.com/news/751723.asp>); David Firestone, “Wide-Ranging Federal Sweep Changes Attitudes of Immigrants About U.S.,” *New York Times*, Dec. 5, 2001; and Ron Howell, “Fateful Knock from INS: Crackdown Hits NY’s Pakistanis,” *Nesuday*, Sept. 29, 2002. Effectively, such incidents of mass arrests would result in patterns of detention whereby family members and lawyers not only had difficulty determining whether a particular individual had been detained, and if so where they were being held, but also were unable to find witnesses to the arrest since such witnesses were also often in detention in undisclosed locations.

²⁰³ For descriptions of families unable to locate detained or deported relatives, see Matthew Brzezinski, “Hadi Hasan Omar’s Detention,” *New York Times Magazine*, Oct. 27, 2002 (recounting the efforts of a U.S. citizen woman to determine the whereabouts of her husband as he was moved from detention facility to detention facility); Greg Krikorian, “Family receives word from deported man,” *Los Angeles Times*, Sept. 24, 2002 (citing the case of a Pakistani detainee whose relatives in the U.S. were unable to find him after he consented to voluntary departure to Pakistan, where he was apparently detained by Pakistani authorities to whom he was turned over by INS officials); and Kim Honey, “Concern grows for deported Canadian,” *Globe and Mail*, Oct. 14, 2002 (noting difficulties of relatives trying to locate detained Canadian arrested by the JNS).

²⁰⁴ See *Center for National Security Studies v. U.S. Department of Justice*, 215 F.Supp.2d 94, 96-97 (D.D.C. 2002).

²⁰⁵ *Id.* at 99, note 7.

²⁰⁶ Amy Goldstein and Dan Eggen, “US to stop issuing detention tallies,” *Washington Post*, Nov. 9, 2001.

²⁰⁷ For a more detailed discussion of these programs, see Part II of this Chapter (*Government Initiatives Based on National Origin*), Part B (*The Alexander Apprehension Initiative*), at pp.3-4.

In a July 2002 letter from the Department of Justice to Senator Carl Levin, the information provided about the numbers of detainees held over the course of the investigation and the number of individuals still in detention conflicted with earlier statements.²⁷² Further, the letter clearly stated that the Department of Justice does "not maintain records [of]...the total number of individuals who have been detained without being charged."²⁷³

In addition to the secrecy surrounding the identities of the detainees, the climate of disappearance is reinforced by the scarcity of information made available about the basis of the detentions, including whether they resulted from alleged criminal or civil (immigration) violations. Only months after the first wave of detentions was the government forced, by the courts and public pressure, to reveal limited information on the charges against the detainees.

When the government did release partial information, the Justice Department conceded that fewer than ten percent of the detainees were facing criminal charges—and none of those picked up after September 11 had been charged with terrorism-related crimes—leaving over a thousand individuals presumably in immigration detention.²⁷⁴ That the majority of detainees faced nothing more than minor immigration charges only exacerbated the widespread view among immigrant communities, and the public at large, that their detentions were arbitrary and the result of scapegoating rather than careful criminal investigation.

(b) Due Process Violations

Realistically, the procedural rights contained in the Fifth and Sixth Amendments are far more likely to be abridged when detentions are secret. The reasons for this are many. First, the detainee faces major obstacles in communicating with the outside world, and vice versa. Access to phones, family visits, and consultations with counsel are extremely limited.²⁷⁵ Second, the refusal to disclose the identities of the detainees makes it diffi-

cult, if not impossible, for detainees to benefit from public scrutiny of the conditions of their detention, the timeliness of the filing of charges and the fairness of the hearings. Third, the detainees' Sixth Amendment right to a public and speedy trial is compromised when their detention is made secret and the ability of the defendant or the public to demand a speedy trial is impaired.

The violations of the procedural rights of post-September 11 immigration detainees include: (a) the government's failure to bring timely charges against detainees, (b) the government's failure to inform detainees of any charges they may face, and (c) the government's failure to inform the detainees of their rights, including right to counsel and right to contact their consulates.

It is therefore not surprising that, on Aug. 13, 2002, the American Bar Association condemned the government's secret detention of immigrants since September 11, largely based on procedural concerns. In particular, the ABA noted that its "greatest concern is the erosion of traditional due process safeguards and growing reliance on detention in the immigration context."²⁷⁶

(c) Access to Counsel

Individuals caught up in the wide net cast in the September 11 criminal investigation have a particularly acute need for legal representation. One consequence of the secrecy surrounding their detentions is that their ability to secure the effective assistance of counsel is almost entirely compromised.

Individuals held under administrative detention for immigration violations are not entitled to counsel as a matter of right, but they do have the privilege of obtaining legal representation.²⁷⁷ In the criminal context, the Sixth Amendment recognizes that defendants in all criminal prosecutions are entitled to the assistance of court-appointed counsel. Further, case law also recognizes the right to counsel for people who are interrogated while in custody about criminal matters.²⁷⁸

²⁷² See Letter from Daniel Bryant, Assistant Attorney General, Office of Legislative Affairs, Department of Justice to Senator Carl Levin, U.S. Senate Subcommittee on Investigations, on July 3, 2002 [hereinafter Bryant letter] (stating that 752 individuals have been detained on immigration violations since September 11 in connection with the investigation of the attacks, of whom 81 remained in detention, and of which 611 had been subjected to closed immigration hearings).

²⁷³ *Id.*, p. 2.

²⁷⁴ Bryant letter, *supra* note 272, (noting that only 120 of those detained since September 11 have been charged with criminal violations).

²⁷⁵ See 2003 OIG Report, *supra* note 113.

²⁷⁶ Recommendation in "Report to the House of Delegates," American Bar Association, Coordinating Committee on Immigration Law, Aug. 13, 2002 (hereinafter, "ABA Immigration Report 2002").

²⁷⁷ See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (protections that apply in the criminal context do not apply to civil deportation hearings).

²⁷⁸ See *Miranda v. Arizona*, 384 U.S. 436 (1966) (person taken into custody must be informed of their rights, including the right to consult with a lawyer and have the lawyer present during interrogation prior to an interrogation on a criminal matter).

While the Sixth Amendment is limited in its application to the criminal context, important parallels can be drawn between immigration detainees and criminal detainees. Immigration detainees have extremely important interests at stake when they go before an immigration court—aside from their liberty interest in being released from detention, the decision to deport them to their country of origin may endanger their lives.

Further, as many immigration detainees are at a disadvantage in terms of their knowledge and understanding of the American legal system, and even their ability to understand the language in which the proceedings take place, the importance for them of finding legal representation for their immigration proceedings is heightened. Moreover, legal representation is of crucial importance for detainees to protect their procedural rights by ensuring that they are charged promptly or released, brought before a judge to determine the legality of the detention, and not subjected to cruel and unusual treatment while in detention.

The nature of the secret detentions and other facets of the Justice Department's treatment of the September 11 detainees, however, have severely impeded the detainees' ability to exercise their right to seek counsel. For instance, Human Rights Watch has documented that:

Detainees have not been informed of their right to counsel or were urged to waive their right; policies and practices of the facilities holding them have impeded their ability to find counsel; and the INS has failed to inform attorneys where their clients are or when their hearings are scheduled.... In some cases, the INS frustrated attorneys' efforts to reach their clients, whether deliberately or because of bureaucratic chaos and confusion. Attorneys have said that it was hard for them to retrieve information about their clients, including the time and date of hearings.²⁷⁹

Despite all of the impediments the government used to limit their access to counsel, many of the September 11 detainees did eventually succeed in finding lawyers to represent them. The battle was not won with obtaining

counsel, however, since a fresh set of obstacles was then put in place to restrict the detainees' ability to consult with their lawyers. A committee of the American Bar Association, in detailing the violation of the procedural rights of the detainees, noted the following pattern:

Even if they succeed in hiring an attorney or obtaining pro bono representation, [post-September 11 detainees] often cannot access vital information and experience numerous difficulties preparing their cases and communicating with counsel. INS detention practices exacerbate this situation. Although there is nearly universal agreement that criminal and non-criminal detainees should not be commingled, the INS relies heavily on penal facilities for asylum seekers and other administrative detainees. The lack of access to phones, family, counsel and legal information in these places is well documented.

The INS frequently transfers detainees to distant locations, often without notifying the person's lawyer of record and without regard for the need to prepare for a hearing or to be close to one's family and support system.... There are no effective procedural safeguards in place to ensure that detention is non-punitive in nature, and judicial review is severely limited if available at all.... Taken together, these provisions can result in long-term and sometimes indefinite detention of administrative detainees and significantly impacts their ability to secure and maintain working relationships with counsel.²⁸⁰

One instance in which the courts have directly confronted the issue of denial of access to counsel in the post-September 11 legal environment is in the case of U.S. citizens being detained by the government as enemy combatants. While the legal designation of enemy combatants is beyond the scope of this report, the treatment of these detainees' right to counsel illustrates another way in which the government is circumventing constitutional protections that would normally be granted to both citizens and noncitizens alike in the criminal context.

²⁷⁹ Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees* (Aug. 2002), p. 42. See also 2003 OIG Report, *supra* note 113, at 130-141.

²⁸⁰ ABA Immigration Report 2002, *supra* note 276, at 4.

Yaser Hamdi, a U.S. citizen captured in Afghanistan and brought to the United States to be held as an enemy combatant in solitary confinement, was subjected to extensive custodial interrogation without access to counsel. Judge Robert Doumar of the federal District Court for the Eastern District of Virginia (Norfolk Division) recognized the gravity of depriving a detainee of access to counsel.²⁸¹ Judge Doumar noted in his order that the case "appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer."²⁸² The judge went on to deny the government's request to dismiss the writ of habeas corpus filed on behalf of Hamdi, demanding instead that the government substantiate its designation of Hamdi as an "enemy combatant."

On appeal, Judge Doumar's decision was reversed. The Court of Appeals for the Fourth Circuit remanded the case to the District Court for dismissal of Hamdi's petition of habeas corpus. In so holding, the Court drew a sharp line between a defendant indicted on criminal charges, on the one hand, and Hamdi's case, involving the executive branch's assertion of war powers of Article II of the Constitution, on the other.²⁸³ The Court stated that "[a]s an American citizen, Hamdi would be entitled to the due process protections normally found in the criminal justice system, including the right to meet with counsel, if he had been charged with a crime. But as we have previously pointed out, Hamdi has not been charged with any crime."²⁸⁴

The Court found that the government's two-page declaration²⁸⁵ was sufficient to demonstrate that its detention of Hamdi was a lawful one.²⁸⁶ The crucial dis-

inction, according to the Court, was that the executive was not exercising its law enforcement powers, but rather, its asserted war powers. However, this analysis fails to recognize the underlying and important parallels between detainees in the criminal context and suspects detained pursuant to the war powers of Article II. It is therefore hoped that the Fourth Circuit's position will not be the final word in such cases of access to counsel.

An opinion by Judge Michael B. Mukasey of the Federal District Court for the Southern District of New York involving Jose Padilla, a U.S. citizen held as an enemy combatant, deferred to the government's designation of "enemy combatant." However, at the same time, the court found security interests asserted by the government insufficient to deny Padilla access to counsel in connection with his challenge of his detention by means of *habeas corpus* petition.²⁸⁷ The court noted that such right to counsel stems from the detainee's right to present facts, which is an inherent component of a habeas corpus petition²⁸⁸ and held that although the Sixth Amendment does not control such a case, which does not involve criminal proceedings, the case law supports the exercise of judicial discretion granting a petitioner access to counsel.²⁸⁹

The court dismissed the government's argument that access to counsel should be denied on the basis that Padilla might use such access to convey messages to others as overbroad and speculative, since conditions of such access could be strictly controlled. It went on to note that Padilla's "statutorily granted right to present facts to the court in connection with this petition will be destroyed utterly if he is not allowed to consult with counsel."²⁹⁰ Despite the court's opinion to the contrary, U.S. Attorney James Comey wrote a letter to Judge Mukasey stating that the government will not allow Mr.

²⁸¹ *Hamdi v. Rumsfeld*, No. 2:02cv439, 2002 (E.D. Va. Aug. 16, 2002), p. 1.

²⁸² *Hamdi v. Rumsfeld*, No. 2:02cv439, 2002 (E.D. VA. Aug. 16, 2002), p. 1.

²⁸³ *Hamdi v. Rumsfeld*, 316 F. 3rd 450 (Fourth Cir. 2003). The Fourth Circuit specifically limited its ruling to situations involving the undisputed detention of a U.S. citizen "during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces." *Id.* at 25.

²⁸⁴ *Id.* at 475.

²⁸⁵ The declaration was made by Michael Mubbs, Special Advisor to the Under Secretary of Defense for Policy.

²⁸⁶ See *Hamdi v. Rumsfeld*, 316 F. 3rd (Fourth Cir. 2003).

²⁸⁷ *Padilla v. Bush*, 23 F. supp. 2d 564 (S.D.N.Y. Dec. 4, 2002).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* The government subsequently argued that such access to counsel could compromise interrogation of Padilla in a motion that Judge Mukasey reconsider his ruling. See Benjamin Weiser, "Judge is Angered by U.S. Stance in Case of 'Dirty Bomb' Suspect," *New York Times*, Jan. 16, 2003.

Padilla access to counsel and views the issue as significant enough to seek the immediate appeal of the court's Dec. 4, 2002, order.²⁹¹

Deprivation of basic constitutional rights such as access to counsel is even more troubling in the context of noncitizens who are detained on immigration charges alone. Most of the September 11 detainees who have been held in administrative immigration detention were arrested as part of the government's investigation of the September 11 attacks and thus subjected to custodial interrogation on criminal matters before being served with immigration charges. Based on considerable evidence that has emerged regarding the failure of FBI and INS officials to advise the September 11 detainees of their right to counsel or enable them to obtain counsel prior to interrogation, there is reason to conclude that the Fifth Amendment rights of the September 11 detainees to consult with a lawyer during such interrogations were systematically violated.

(d) Denial of Access to Family

One of the greatest hardships that detention represents for most immigrants in INS custody is the restriction on their ability to contact their families. While this problem is shared by all individuals held in administrative immigration detention, the problem has been greatly exacerbated for the post-September 11 detainees. With the Justice Department's refusal to disclose the names and locations of those who are being held in immigration detention, families have faced significant difficulty in even locating their missing relatives.²⁹² Further, even after a family is able to learn that a relative is in detention, access to detention facilities and visitation rights have frequently been denied by officials managing the detention facilities.²⁹³

Detainees held in solitary confinement and incommunicado face the most extreme restrictions on access to communication with the outside, including their families. However, even those detainees who were held under ordinary administrative immigration detention were often not given the access to telephones upon their arrest, or in certain instances even days or weeks into their detention. The secrecy of the detentions made it impossible for families to gain independent information about the whereabouts of their relatives, or even whether they had been detained or had suffered some other fate to account for their absence. For those detainees whose families lived outside of the United States, the lack of communication with their families was almost absolute. Many of the detention facilities in which detainees were held did not provide any telephone facilities for international collect calling, leaving detainees with no means of informing their families of their detention.²⁹⁴ The confusion and fear suffered both by the detainees and their families as a result of the detentions were magnified several fold by the difficulty of communication and the absence of reliable information about the nature, duration, and basis for the detentions.

The right to family integrity is a constituent part of the right to privacy that, by virtue of the Fourteenth Amendment, extends to all categories of noncitizens that are present in the territorial United States. As stated in *Bridges v. Wixon*, "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment."²⁹⁵

²⁹¹ See Benjamin Weiser, "U.S. to Appeal Order Giving Lawyers Access to Detainee," *New York Times*, March 26, 2003.

²⁹² See, e.g., Detainee Profile Number 188 (Hady Hassan Omar). See also Matthew Brzezinski, "Hady Hassan Omar's Detention," *New York Times Magazine*, Oct. 27, 2002 (noting that Omar's wife's efforts to locate her husband encountered severe difficulties even though she was present when he was first detained on Sept. 12, 2001, at their home in Arkansas. He was moved several times and when he was finally allowed to call his wife from one prison in New Orleans, he was moved again before she was able to arrive in New Orleans. Once at the prison she says "I begged the administrator," Candy recalls. "I said, 'He is my husband—I need to find him!' But the woman just said, 'I think national security is more important right now.") Omar was held on charges of immigration violations though he had an adjustment of status application pending, a green card interview scheduled, and was married to an American citizen with whom he had a daughter at the time of his detention.

²⁹³ During interviews conducted in preparation of this report, we learned from cooperating attorneys with organizations such as the American Civil Liberties Union (ACLU), the American Friends Service Committee (AFSC), and others who sought access to detention facilities to assist detainees in finding representation that they were frequently denied access to detention facilities between November 2001 and March 2002.

²⁹⁴ Again, cooperating attorneys working with such organizations as the ACLU, the AFSC and the Lawyers Committee for Human Rights, mentioned in several interviews that they encountered examples of detainees who had been denied access to a telephone for lengthy periods during their detention, thereby crippling their efforts to obtain counsel. Additionally, several detainees reported that when they were provided, by the Bureau of Prisons, information in order to seek legal representation, the information was outdated, included nonworking numbers or numbers for organizations that do not provide legal representation. Accordingly, the limited phone access available to detainees was often wasted on calls that did not enable them to obtain counsel. Interview with Anwen Hughes (LCHR), Nov. 7, 2002.

²⁹⁵ 326 U.S. 135, 161 (1945)

The principle that the right to family integrity is a component part of the privacy rights extended to noncitizens was recently articulated in the *Beharry* case, where the Federal District Court for the Eastern District of New York noted that “courts have recognized that a right to privacy is related to equal protection and due process...[which] include[s] the right to live with one’s family and control one’s children without unnecessary government interference.”³⁹⁸ The court was ruling on an alien’s right to remain in the United States with his family, despite immigration violations. The court held, in particular, that “forcible separation of a noncitizen legal resident of this country from his citizen child or spouse implicates the right to family integrity.”³⁹⁹

The entitlement of noncitizens to the equal protection of the laws, including for the protection of their privacy rights, under the Fourteenth Amendment, suggests strongly that detainees who have been deprived of access to their families may have grounds to challenge the practice of secret detentions based on the violation of their right to family integrity.

2. Harm to Immigrant Communities Targeted by the Government

In addition to the extensive harms to individual detainees, secret detentions cause considerable consequential harms to the communities to which the detainees belong.

(a) Consular Rights and Protections

The United States is a signatory of the Vienna Convention on Consular Relations, which imposes two obligations whenever a foreign national is detained by the U.S. government. First, all detainees must be informed of their right to contact their consulate and seek consular assistance.⁴⁰⁰ Second, the government must

notify the consulate that one of its nationals has been detained, and provide consular officers with access to the relevant detention facility, and the right to obtain legal representation for the detainee.⁴⁰¹ The U.S. obligations under the Vienna Convention are also codified as part of the regulations governing the INS.⁴⁰²

Concerns over U.S. compliance with its Vienna Convention obligations long predated September 11.⁴⁰³ Indeed, the government of Mexico recently filed a case with the International Court of Justice requesting provisional measures against the United States based on its failure to comply with the Vienna Convention in connection with 54 Mexican nationals who have been sentenced to death.⁴⁰⁴

Those longstanding concerns have only been reinforced by since September 11. Despite official government claims to have abided by the requirements of the Vienna Convention, violations of the requirements of the Convention have been documented both through interviews with detainees and through the formal complaints of consulates in the United States.⁴⁰⁵ In January 2002, the *New York Times* reported that “[o]fficials of several consulates said they were still unsure how many of their citizens were in detention or what they could do for those who were.”⁴⁰⁶ At best, the government has been in partial compliance with its obligations under the Vienna Convention, providing incomplete information on a selective basis to certain consulates, and continuing its policy of secrecy with respect to the detentions in other cases.

Foreign nationals living in the United States rely heavily on consular officials to protect their rights under international law in contexts where they may enjoy a lesser degree of constitutional protections under U.S. law than American citizens. In the case of the September 11 detainees, they have been deprived both

³⁹⁸ *Beharry v. Reno*, 183 F.Supp.2d 584, 588 (E.D.N.Y. 2002), *Revid on other grounds*, 329 F.3d 51 (2nd Cir. 2003).

³⁹⁹ *Beharry*, 183 F.Supp.2d at 588 citing *In Re Sherwin Nicholson, et al.*, CV 00-2229, slip op. at 8-9 (E.D.N.Y. Jan. 3, 2002).

⁴⁰⁰ Vienna Convention on Consular Relations, 24 April 1964, 596 U.N.T.S. 262 (providing in Article 36(1)(b) that the right of the detainee to contact the consulate and the duty of the government to report the detention to the consulate apply whenever a foreign national is detained, regardless of whether the detention is criminal, administrative or of another nature).

⁴⁰¹ See Article 36(1)(c) of the Vienna Convention.

⁴⁰² 8 C.F.R. § 236.1(a) (providing that the INS must notify detainees of their right to contact their consulate).

⁴⁰³ See, e.g., Julian J. Paust, *Breach and Treaty-Based Rights Under the Consular Convention*, 92 Am. J. Int'l L. 691 (1998); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 Am. J. Int'l L. 679 (1998).

⁴⁰⁴ See Application Instituting Proceedings Submitted by the Government of Mexico, *Avena and Other Mexican Nationals (Mexico v. United States)* (filed Jan. 9, 2003), available at http://www.icj-cj.org/cjwww/servlet/insua/insuaorder/insua_application_20030109.PDF.

⁴⁰⁵ For an example of a consulate’s inability to obtain information regarding the detention of one of its nationals, see *Current U.S. Policies and Practices Related to Detention of Noncitizens: Hearings Before the Senate Comm. On the Judiciary*, (Dec. 6, 2001) (testimony of Michael Boyle, American Immigration Lawyers Association), at p. 4 (noting that the Egyptian consulate was denied access to information regarding the detention of a national for two months).

⁴⁰⁶ “A Frustrated ACLU Tries to Guide Consulates Through a Thicket,” Jan. 2, 2002.

of minimal constitutional protections to which they are properly entitled, and to the international protections that the U.S. government has agreed to provide under its treaty obligations.

(b) Fear of Interaction with Authorities

The basic services of the local, state and federal government are provided to all residents of the United States without regard for their citizenship status. Immigrants resident in this country contribute to the productivity of the American economy and pay taxes to the government on the same basis as citizens. The post-September 11 treatment of immigrant communities, and particularly those of Middle Eastern, South Asian or Muslim origin, has left these groups especially vulnerable.

The rise of racial profiling against individuals who appear to be Middle Eastern or South Asian, the sharp increase in hate crimes against their communities, and the general climate of suspicion that they have faced in the wake of the September 11 attacks leave these communities much more dependent on the police and other services.

However, the secret detentions, more than any other aspect of the government's response to the September 11 attacks, have compromised these communities ability to rely on the public services to which they are entitled as residents in this country. Fearful that any interaction with the police may lead to suspicion, arrest and detention, these communities are loathe to turn to the police or others for basic community services or to report ordinary crimes.

3. Harm to the Public

The general public's right to transparency in government, accountability of government agencies for their actions, and scrutiny of public records have all been violated by the government's policy of secret detentions.

The two sets of public rights that are most clearly implicated by the secret detention policy are the public's First Amendment right to access information about government actions, and the public's right to access government records under the Freedom of Information Act.

(a) First Amendment Right of Access

The First Amendment establishes a system of free expression that both confers rights on the public to transparency in government and imposes limits on the ability of Government to withhold certain types of information from the public.³⁰⁵ Earlier in this section, in the context of closed immigration hearings, we described two recent federal court decisions evaluating whether the government's policy of blanket closure transcended the limits imposed by the Constitution.³⁰⁶ While both of these cases focused on the constitutionality of secret hearings as opposed to secret detentions, the constitutional reasoning applied by the courts applies with equal force in the context of secret detentions.

In both cases, the courts subjected the government's policy to strict scrutiny analysis, requiring that the policy in question be narrowly tailored to meet a compelling government interest. In deciding whether the public right to access encompassed the closed hearings, the courts employed a two-pronged test. First, they looked for a pre-existing tradition of access that is being restricted by the proposed government action. Second, they looked at whether public access would play a positive role in according legitimacy to the action or process in question. With respect to both of these issues, there is a long line of precedent cited with approval by the courts.³⁰⁷

If we apply this two-pronged analysis, we find that there is indeed a long-standing tradition of providing public information regarding the identities of individuals subjected to administrative immigration detention.³⁰⁸

³⁰⁵ Tribe, *American Constitutional Law* § 12-20 (2d ed.).

³⁰⁶ *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir. 2002); *Ashcroft v. North Jersey Media Group*, 308 F. 3d 198 (3rd Cir. 2002).

³⁰⁷ See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

³⁰⁸ 8 CFR 3.27 specifies that immigration proceedings are presumptively open. Logically, if the hearings regarding the basis for immigration detention are open, the identities of detained individuals must also be subject to public access. There is a tradition of treating information regarding immigration detainees as public. For instance, the New Jersey chapter of the ACLU was able to successfully bring a challenge to secret detentions in New Jersey (a state with four of the six detention facilities that have been most commonly used to hold the post-9/11 detainees) based on a New Jersey law requiring the state to publish the names of all individuals being held in detention facilities in the state, including immigration detainees. See N.J. Stat. Ann. § 30:8-16. On ACLU-NJ's lawsuit, *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, No. HUD-L-413-02 (N.J. Super. Ct. Law Div. filed Jan. 22, 2002); *News Organizations, Rights Group Sue to Open Immigration Court Proceedings; Second Suit Seeks Names of INS Detainees*, 79 Interpreter Releases 231, 232 (Feb. 11, 2002). Despite the successful litigation, however, the names of detainees in New Jersey were not ultimately released because the Department of Justice took the position that an INS directive not to disclose that information preempts state law. *Controversial INS Interim Rule Forbids Non-Federal Facilities From Releasing Info on INS Detainees*, 79 Interpreter Releases 593, 593 (April 22, 2002).

Applying the second prong, there is a strong argument to be made that releasing public information regarding the identity of the detainees, and compiling basic data about the charges on which they are being held, the conditions of their detention, and the duration of the detentions would produce a significant positive effect. The secret detentions have led to widespread public suspicion as to the motives and activities of the government in holding a large class of individuals largely incommunicado. Dispelling the alarm, suspicion and hostility that the practice of secret detentions have engendered, both in the targeted communities and amongst the more general public, would go a long way to restoring a public perception of legitimacy to the government's post-September 11 policies.

Further, to the extent that the government believes that the immigrant communities it has targeted may have valuable information that would assist the government's efforts, providing greater public information about the identities of the detainees and their circumstances might dispel the fears in those communities that inhibit their willingness to interact or collaborate with officials responsible for the investigations.

(b) FOIA Rights: Government Accountability and the Public Right to Open Records

The Freedom of Information Act ("FOIA"), enacted in 1966, was designed to give content to a citizen's general right to be informed about the workings of government by ensuring access to the records of federal agencies. It also entitles individuals to access government information that relates specifically to them. In particular, FOIA is intended to provide citizens with access to the records and proceedings of government agencies and to enable them to form judgments about whether the government is respecting the statutory or constitutional limits of its authority.

In interpreting the purpose of FOIA, the Supreme Court noted that the statute was enacted "to implement 'a general philosophy of full agency disclosure.'" The philosophy of full disclosure resulting in the provision of public access to government records under FOIA clearly extends to the kinds of records and proceedings involving the detention of individuals by the INS and others as part of the September 11 investigation. For these reasons, FOIA has proved to be an effective tool with which to challenge the secret detentions.

On the rare occasions since the initial sweep of arrests that information has been released regarding these detainees, it has often been as a response to the threat or outcome of FOIA litigation. Soon after September 11, human rights organizations and legislators undertook considerable efforts to obtain information from the Department of Justice regarding the identities and locations of individuals detained.¹⁰⁰ The government declined to release the information sought by these parties in response to an initial request under FOIA, and the parties opted to file a lawsuit in federal district court to pursue their request.

In response to the lawsuit that was filed (*Center for National Security Studies v. Ashcroft*), the government released a partial list of names of detainees, charges against them and their lawyers, but the list gave information for only 108 of the 1200 the government had admitted to detaining as of November. The list was limited to detainees who had been released by the Department of Justice, excluding the most egregious cases of those still being subjected to prolonged detention, being held without charge or who were deprived of access to counsel.¹⁰¹

Finally, on July 3, 2002, the Department of Justice released selected information concerning 752 of the detainees. The information released showed that of the nearly 1200 individuals they acknowledged detaining, only 129 detainees had been criminally indicted (of

¹⁰⁰ *U.S. Department of Justice v. Reporters Committee*, 489 U.S. 749, 754 (quoting S. Rep. No. 813, 83rd Cong., 1st Sess., 3 (1965)), 795-6 (1989).

¹⁰¹ On Oct. 31, 2001, responding to considerable public pressure, seven members of Congress—including Senator Patrick Leahy, chair of the Judiciary Committee, as well as Senators Ted Kennedy and Russ Feingold—wrote a letter to Attorney General John Ashcroft asking that he release information concerning the identities of the detainees and the charges against them. The Attorney General declined to release the requested information. On Dec. 3, 2001, as a result of the failure to obtain information concerning the detainees, the Center for National Security Studies, joined by twenty-two other community and human rights organizations, filed a Freedom of Information Act (FOIA) lawsuit against the Department of Justice demanding the disclosure of government records on the identities and charges against the September 11 detainees. See *Center for National Security Studies v. Ashcroft*, 217 F.Supp.2d 58 (D.D.C. 2002).

¹⁰² The Department of Justice provided the information on detainees who had been released as part of the agency's Jan. 11, 2002, motion for summary judgment in the FOIA lawsuit filed by the Center for National Security Studies (CNSS). The list can be found on a website created by the CNSS to provide public access to filings in the case. See Information on detainees released by the Department of Justice in connection with its filing, Jan. 11, 2002, at <http://www.cnsa.gov/ashu/~cnss/cnss0201.htm>.

whom only 76 remained in custody following hearings), and of those only one—Zacarias Moussaoui, who had been detained *prior* to September 11—was charged with a crime related to the attacks of September 11.¹¹² The government also conceded that of these 752 individuals, 611 had been subjected to closed immigration hearings, the majority of which presumably ended with deportation, as the government alleged that only 81 of the 752 referenced in the letter remained in U.S. custody.¹¹³

The partial and nonspecific nature of the information released by the Justice Department did not satisfy the demands of the parties that brought the December FOIA lawsuit, and they continued to pursue their civil suit in federal district court.

The decision was delivered on Aug. 2, 2002, when Judge Gladys Kessler of the District Court for the District of Columbia found that the government's rationale for withholding information about the detainees did not outweigh the public interest in obtaining information regarding the identities and locations of the detainees. Specifically, Judge Kessler noted that "the public's interest in learning the identities of those arrested and detained is essential to verifying whether the government is operating within the bounds of the law."¹¹⁴

Further, Judge Kessler found that the fact that none of the INS detainees were charged with links to terrorism undermined the government's argument that irreparable harm to its terrorism investigation might occur should the names of the detainees and their locations be revealed. Judge Kessler gave the government fifteen days to release the names (though not the locations) of the detainees, including material witnesses, and their attorneys, ruling that a blanket policy of secrecy was in violation of the public's constitutional right to subject government action to scrutiny.

The government immediately appealed. Judge Kessler granted the government's motion for a stay on the disclosure of the names of the detainees on Aug. 15,

2002. Since the stay will remain in effect until a federal appeals court has ruled on the government's appeal, it might take months or longer for the stay to be lifted.¹¹⁵

4. International Law Considerations

The *New York Times* reported on Aug. 11, 2002, that "the use of detention within the United States may be the most problematic tool in the Bush administration's arsenal in the global war on terrorism."¹¹⁶ The article noted that this tactic of using secret detentions has turned initial sympathy for the United States into a new wave of anti-Americanism, while at the same time allowing other governments to label their own human rights abuses as "antiterrorism" efforts.

On Sept. 26, 2002, the Inter-American Commission on Human Rights¹¹⁷ invoked an emergency procedure ordering the United States to take immediate steps to protect the rights of individuals arrested in the post-September 11 sweep of immigrant communities.¹¹⁸ The case against the United States was filed by the Washington-based International Human Rights Law Group ("IHLRG") on behalf of the class of these detainees.

In a letter addressed to the IHLRG, the Commission stated that it "considers that a situation of potential irreparable harm has been demonstrated so as to warrant precautionary measures."¹¹⁹ After noting their preliminary findings that there is neither a domestic nor international legal basis for the continued detention of the post-September 11 detainees, that there is evidence of abuse during detention and that the detainees have been subjected to prolonged, arbitrary detention without legal recourse, the Commission decided to adopt the referenced precautionary measures. Those measures demand that the United States government,

take the urgent measures necessary to protect the fundamental rights of the 9/11 detainees ordered deported or granted voluntary departure, including their right to personal liberty and security, their right to humane treatment, and their right to resort

¹¹² Bryant letter, *supra* note 272, p.2.

¹¹³ *Id.*, at p.1.

¹¹⁴ *Center for National Security Studies v. U.S. Department of Justice*, 215 F.Supp.2d 94, 106 (D.D.C. 2002)

¹¹⁵ Christopher Newtson, "Judge: Government Can Withhold 9/11 Names," *Associated Press*, Aug. 15, 2002 (noting that federal law clerk Shira Majumdar estimated that it "could take months" for a federal appeals court to hear the government's appeal and decide whether to lift the stay).

¹¹⁶ Barbara Crasette, "In the Secret-Detentions Club," *New York Times*, Aug. 11, 2002.

¹¹⁷ The Inter-American Commission on Human Rights is a seven-member panel of the Organization of American States, of which the U.S. is a member, that monitors human rights abuses in the Americas. The United States is bound by the Commission's actions.

¹¹⁸ *Human Rights Body Rules Against United States for Its Detention Tactics With Post-9/11 Detainees*, *Associated Press*, Sept. 27, 2002.

¹¹⁹ Inter-American Commission on Human Rights, Letter to Ms. Gay McDougall (IHLRG), "Post-September 11 INS Detainees, Request for Precautionary Measures," Sept. 26, 2002.

to the courts for the protection of their legal rights, by allowing independent courts to determine whether the detainees have been lawfully detained and whether they are in need of protection.¹²⁰

In response to the Commission's demand, the United States has requested an extension until June 6 to file a response.

C. Interim Rule on Protective Orders

The Interim Rule "Protective Orders in Immigration Administrative Proceedings,"¹²¹ published in the Federal Register on May 28, 2002, authorizes immigration judges to issue protective orders and seal records relating to law enforcement or national security information. According to the information published in the Federal Register, the Interim Rule, effective as of May 21, 2002, is intended to protect sensitive law enforcement or national security information that the INS may introduce in immigration proceedings and was designed to work in conjunction with the Sept. 21, 2001, directive by Chief Immigration Judge Creppy to close to the public certain "special interest" cases designated by the Attorney General. Under the Interim Rule, upon a showing by the INS of a "substantial likelihood" that certain information will harm U.S. national security or law enforcement interests, an immigration judge may issue a protective order barring such information from being disclosed outside the proceedings, including ordering those who are the subject of the hearings—the respondents—in immigration cases, along with their attorneys, to keep all such information confidential.

According to the supplemental information published with the Interim Rule in the Federal Register, the Department of Justice "recognizes that the issuance of a protective order raises First Amendment free speech issues," but insists that the rights of the respondent in an immigration proceeding are not limited any more than necessary to protect the government interest in achieving national security and law enforcement objectives to protect the public.

Despite the Department of Justice's position, an examination of the language of the Interim Rule reveals that the Rule fails to provide clear standards for immigration judges by virtue of its reliance on overbroad and vague language. Moreover, the Rule's language also provides for extremely harsh punitive measures as to respondents who are deemed to have violated the protective order, even when it is the respondent's attorney who was deemed to have violated the order. In such cases, respondents are denied discretionary relief from removal they might have otherwise been given. Such measures are unnecessary in light of existing regulations governing the treatment of confidential information in government proceedings.¹²² In addition, the restrictions on an individual's ability to disclose information are overbroad in violation of the First Amendment protections of free speech.

The language of the Interim Rule is overbroad.¹²³ "[A]ny information derived therefrom" does not account for the source of the information and can be understood to include any information the respondent may have possessed prior to being made aware of the protective order or that may be independently obtained from public information.

The breadth of this language threatens protected speech such as a lawyer's or respondent's refutation of false news reports. The vagueness of this language creates the additional risk that respondents and their lawyers will be unable to reasonably determine which information is included in the protective order, which is likely to have a chilling effect on constitutionally protected speech. The vagueness of the provision also creates a risk of arbitrary enforcement by immigration judges.

In addition, the parameters of who may be included in the protective order is unclear. It is unclear, for example, whether a protective order would apply to a guardian of a minor respondent, whether a translator could be used for information that may be covered by a protective order or whether a lawyer could cross-examine a witness on information covered by the protective order.

¹²⁰ *Id.* at 2.

¹²¹ EOIR 133, AG Order No. 2585-2002, RIN 1125-AA38 (67 Fed. Reg. 36799 (May 28, 2002)).

¹²² The analysis of this Interim Rule is based largely on the Comments to Interim Rule "Protective Orders in Immigration Administrative Proceedings," EOIR 133, AG Order No. 2585-2002, RIN 1125-AA38 (67 Fed. Reg. 36799 (May 28, 2002)) by American Immigration Lawyers Association to Charles Atkins-Blanch, General Counsel, Executive Office for Immigration Review (July 29, 2002).

¹²³ The Interim Rule states that:

"The protective order may require that the respondent, and his or her attorney or accredited representative, if any:

(i) Not divulge any of the information submitted under the protective order, or any information derived therefrom, to any person or entity, other than authorized personnel of the Executive Office for Immigration Review, the Service, or such other persons approved by the Service or the Immigration Judge." 8 CFR § 3.46(f)(92)(i) (emphasis added).

The Interim Rule also allows the immigration judge to add to the protective order “[s]uch other requirements as the Immigration Judge finds necessary to protect the information from disclosure.”³²⁴ This provision is dangerously vague, potentially allowing a judge to limit disclosure in a manner that might conflict with the statutory right to counsel (for example, preventing an attorney from consulting with another attorney) or the constitutional right to free speech (for example, restricting all statements to the press regarding the proceeding).

Three existing regulations provide for the treatment of confidential information in immigration proceedings and allow an immigration judge to evaluate classified information and provide an unclassified summary of such information to the extent consistent with national security.³²⁵ Because such regulations provide that information will only be disclosed in immigration hearings to the extent possible consistent with national security concerns, the protective order is unnecessary. The existence of the two sets of rules adds further confusion to the interpretation of the Interim Rule. It remains unclear whether the INS or the immigration judge has the authority to determine which regime will be implemented.

When a respondent’s attorney violates his obligation under a protective order, the Interim Rule provides that the respondent “shall” be denied all forms of discretionary relief, as well. Thus, the Interim Rule provides for sanctions against a respondent in the event of misconduct by his attorney, even though respondents in immigration proceedings are in no position to control the actions of their attorneys.

V. Delegation of Immigration Law Enforcement Authority

We believe the Department of Justice’s efforts to enlist state and local law enforcement agencies into enforcing federal immigration law risks making our cities and towns more dangerous, while hurting the effort to fight

terrorism. Such action undercuts the trust that local law enforcement agencies have built with immigrant communities, leaving immigrants less likely to report crimes, come forward as witnesses, or provide intelligence information, out of fear that they or their families risk detention or deportation.

The wall that has long separated law enforcement agents—federal, state and local—from federal immigration enforcement has been significantly breached. Not only has the DOJ asked state and local officials to assist with immigration enforcement in novel ways, it has also recently authorized FBI special agents to exercise the functions of immigration officers.³²⁶

The Supreme Court has stated on numerous occasions that “[t]he power to regulate immigration is unquestionably exclusively a federal power.”³²⁷ In practice, the federal monopoly on immigration enforcement has traditionally been near total. The extent of federal power in this area, and the detail with which federal immigration law treats the subjects of admission, detention, and removal of noncitizens, have led authorities to conclude that Congress has preempted the field of immigration enforcement, except as specifically authorized by statute.

The DOJ under Attorney General Ashcroft, however, has overturned its traditional view and taken the novel position that state and local officials have “inherent” authority to enforce federal immigration laws. It has sought to place broad categories of immigration data on the FBI’s chief database, the National Crime Information Center (NCIC). State and local law enforcement officers, who routinely check the NCIC database, have been requested to arrest and detain persons for federal immigration violations. Such state and local involvement in immigration enforcement, unless carried out under express federal grants of authority, breaches core federalism principles and the established understanding of federal preemption in the immigration field.

³²⁴ 8 CFR §3.46(f)(2)(iv).

³²⁵ See 8 CFR §§ 103.2(a)(16)(iv), 240.11(c)(3)(iv) and 240.49(a).

³²⁶ Attorney General Ashcroft recently widened the rules on detention, allowing FBI agents and U.S. marshals to detain foreign nationals for alleged immigration violations in cases where there is not enough evidence to hold them on criminal charges. The functions of law enforcement agents and immigration officers have been kept separate in part to encourage immigrants to report crimes without fear of detention or deportation. See Dan Eggen, “Rules on Detention Widened; FBI, Marshals Can Hold Foreigners,” *Washington Post*, March 20, 2003.

³²⁷ *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). See also *Toll v. Moreno*, 458 U.S. 1, 10-14 (1982); *id.* at 26-27 (Rehnquist, J., dissenting).

A. The Pre-September 11 Understanding of State and Local Authority to Perform Immigration Enforcement Tasks

The Immigration and Nationality Act (INA) expressly authorizes state enforcement of certain of its criminal provisions.³²⁸ This authorization, however, is limited: there is no similar express general grant of authority to make arrests for civil violations, and some criminal provisions do not specifically authorize state or local enforcement. Where there is no explicit authorization, Congress established statutory procedures to enable possible state and local participation in enforcement of those immigration provisions. This confirms that, except as authorized by statute, Congress intended to preempt all state and local enforcement.

One such statutory procedure, Section 103(a)(8) of the INA, allows the Attorney General to involve state and local agencies in responding to emergencies caused by "an actual or imminent mass influx" of noncitizens.³²⁹ In the 50 years that a variant of this provision has been in effect, it was used once, in 1994, when over 30,000 Cuban and Haitian refugees fled to Florida's shores.

The 1996 amendments to the INA created additional avenues for state and local participation in immigration enforcement. In particular, INA § 287(g) allows the Attorney General to enter into "a written agreement" with state or local police agencies to enforce immigration laws.³³⁰ Subsections (2) and (3), however, reinforce the understanding that states lack inherent

authority to "perform a function of an immigration officer" without some federal supervision and training in immigration law.³³¹ Before Sept. 11, 2001, no such agreement was executed, either because of lack of interest by local agencies, or because of political opposition generated when local agencies began negotiating agreements with DOJ. For example, an agreement being negotiated between the Salt Lake City, Utah, police department and the Immigration and Naturalization Service was rejected when the Salt Lake City Council voted against it in 1998.³³²

In any event, the handful of 1996 amendments did not adopt anything like the broad authorization of unsupervised state and local enforcement in immigration matters that DOJ announced last spring. Indeed, as recently as January 2002, Deputy Attorney General Larry Thompson noted that even in the context of criminal arrests, state and local officers' "legal authority is less clear" than that of federal law enforcement agencies such as the FBI.³³³

The scheme of limited statutory authorization under the INA suggests that Congress intended to allow state officials to enforce the complex scheme of federal immigration laws only under circumstances specifically delineated in the INA. Considering both the uniquely federal nature of immigration regulation and the exhaustive scope of regulation in the INA, DOJ has historically understood that states lack the power to enforce the civil provisions of the immigration laws, and Congress has been careful to specify in statutory text the few

³²⁸ Section 274 of the INA, which establishes a number of criminal immigration offenses, states: "No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws." 8 U.S.C. § 1324(c) (emphasis added). See also 8 U.S.C. § 1252c(a) (authorizing state and local arrests for the federal immigration crime of illegal re-entry by previously deported felons).

³²⁹ INA § 103(a)(8) states that: "In the event that the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States or near a land border presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges or duties conferred or imposed by this Act or regulations issued thereunder upon officers or employees of the service."

³³⁰ INA § 287(g) authorizes the Attorney General to "enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law." See 8 U.S.C. § 1357(g)(1). Along with enacting § 287(g), the IIRIRA amended § 103(c) of the INA, 8 U.S.C. § 1103(c), to permit the INS Commissioner to "enter into cooperative agreements with the State and local law enforcement agencies for the purpose of assisting in the enforcement of immigration laws," and amended 32 U.S.C. § 112 to permit the National Guard to "assist the [INS] in the transportation of aliens who have violated a Federal or State law prohibiting or regulating the possession, use, or distribution of a controlled substance."

³³¹ 8 U.S.C. § 1357(g). Section 287(g)(2) requires that state officers must "have knowledge of and adhere to" federal law governing immigration officers. Section 287(g)(3) establishes that "[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General."

³³² "The FY 1998 Annual Report of the Community Relations Service," U.S. Department of Justice.

³³³ Larry Thompson, Deputy Attorney General, Guidance for Absconder Apprehension Initiative § C(1) (Jan. 25, 2002) ("Deputy Attorney General Memo").

criminal immigration provisions that may be enforced directly by state or local police. In 1978, for example, DOJ stated: "Local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens."³²⁴ The position was confirmed in 1996, when a formal DOJ opinion concluded: "State police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings, as opposed to criminal prosecution."³²⁵

B. The Post-September 11 Move to Enhance State and Local Involvement in Immigration Enforcement

Since September 11, the federal government has taken several measures to involve states in immigration enforcement using preexisting legal vehicles. First, relying on the authorization of 1996's INA § 287(g), DOJ signed a "Memorandum of Understanding" (MOU) with the State of Florida, launching a pilot project deputizing 35 state and local law enforcement officers to perform immigration enforcement tasks under the direction and supervision of the INS.³²⁶

Second, DOJ has finalized a rule, relying on long-standing authorization under INA § 103(a)(8), that formalizes a process by which state and local governments can agree to place authorized law enforcement officers under the direction of the INS in exercising Federal immigration enforcement authority whenever the Attorney General determines that such assistance is necessary during a declared mass influx of aliens.³²⁷

However, the federal government's move to enhance state and local involvement in immigration enforcement did not stop at making full use of INA §§ 287(g) and 103(a)(8), the major provisions in the INA that authorize immigration enforcement by state and local officers under specific and limited circumstances. In an apparent

reversal of its long-standing position, DOJ has concluded that state and local officers have "inherent authority" to enforce civil immigration laws. DOJ has also significantly expanded the categories of non-criminal data entered into the FBI's NCIC database.

1. Claiming "Inherent" State Authority for Civil Immigration Enforcement

Not long after the September 11 attacks, the federal government started to argue that state officials have broad "inherent authority" to enforce federal immigration law. In private communications with MPI, however, the White House Counsel stated that state and local officials' "inherent authority" only extends to those individuals whose identifying information has been entered into the NCIC:

The Attorney General recently announced that the Justice Department's Office of Legal Counsel has concluded that state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws *and whose names have been placed in the National Crime Information Center (NCIC)*... Only high-risk aliens who fit a terrorist profile will be placed in the NCIC.³²⁸

The Attorney General elaborated the area of "inherent authority" as "arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC."³²⁹ In a reply to MPI's request for clarification on precisely "which individuals will be entered into the NCIC, such that they are subject to arrest by state or local police," the White House Counsel, in a second letter, "affirmed the Administration's position that only aliens who pose special security risks will have their names placed in

³²⁴ Local Police Involvement in the Enforcement of Immigration Law, 1 Tex. Hsp. J.L. & Pol'y 9, 36 (1994) (quoting Attorney Gen. Bell, Department of Justice Press Release, June 23, 1978).

³²⁵ Theresa Wynn Rousborough, Deputy Assistant Attorney General, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens (memorandum for U.S. Atty. for the S.D. Cal.) (Feb. 5, 1996) (the "O.L.C. Opinion").

³²⁶ INS press release, "Department of Justice and State of Florida Sign Agreement to Strengthen National Security," July 19, 2002. Among other requirements, the officers must complete mandatory training in the enforcement of federal immigration laws and policies, and pass examinations equivalent to those given to INS officers.

³²⁷ 67 FR 48354, 7/24/02. The INS received a total of 18 comments to the proposed rule. The majority of commentators opposed the rule. Of the four sets of comments supporting the rule, all came from government and law enforcement organizations in Florida. All pointed out that Florida has experienced a number of immigration-related crises over the years and favored closer federal and state coordination. Florida is also the first state to sign the MOU with DOJ that deputizes state and local law enforcement officers for immigration enforcement tasks.

³²⁸ Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (June 24, 2002) (emphasis in original).

³²⁹ See <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> for the Attorney General's speech. See also Letter from John Ashcroft, Attorney General, to Angela Kelley, National Immigration Forum (March 11, 2003).

NCIC.³³⁰ Neither letter cites any legal authority for the Attorney General's conclusion that state and local officials possess this "inherent authority."

In April, a coalition of immigrant advocacy groups sued the DOJ under FOIA to obtain a copy of the secret new policy on state and local enforcement of immigration laws. The suit is pending in U.S. District Court for the Southern District of New York.

2. Expanding Categories of Data Entered into the NCIC

The NCIC database contains millions of identification and criminal records, as well as records on lost or stolen property, that are entered by the FBI and accessible to federal, state and local authorities. Consistent with congressional intent, it has traditionally been used for national dissemination of criminal records.

According to DOJ, the "inherent authority" for state and local immigration law enforcement is limited to the arrest of persons whose immigration data has been entered into the NCIC.³⁴¹ Since September 11, DOJ has declared a policy of entering—without explicit statutory authorization—at least two broad new categories of immigration data into the NCIC, thereby effectively broadening the scope of potential state and local involvement, if their "inherent authority" is in fact found to exist.

First, in December 2001, INS Commissioner James Ziglar announced an effort to locate some 314,000 immigrants under a final order of deportation or removal who remain in the United States.³⁴² DOJ terms such persons "absconders," and estimates that there are now approximately 355,000 such persons in the country.³⁴³ The initiative calls for the entry of information regarding all absconders into the NCIC database.³⁴⁴

Second, DOJ has announced that information regarding any person determined by the agency to be subject to NSEERS³⁴⁵ but not in compliance with NSEERS requirements will be entered into the NCIC.³⁴⁶ DOJ has not indicated on what basis or pursuant to what criteria it will determine who is not in compliance with NSEERS requirements.

Together, these actions represent a sharp lowering of the threshold for entering a person's name into the NCIC database. Entry into the NCIC database of civil immigration information, such as deportation orders and alleged NSEERS non-compliance, is likely over time to entrench even reluctant state and local police into significant immigration enforcement. By ensuring that in the course of their ordinary duties police will routinely review an expanding set of civil immigration information, these policies are likely to deter immigrants and their families from communicating with local police, thereby frustrating effective law enforcement and undermining public safety generally.

C. Analysis of Limitations on State and Local Immigration Enforcement Authority

1. Limitations on the Use of the NCIC for Immigration Enforcement Purposes

It is evident that Congress did not intend the NCIC to be a vehicle for disseminating civil immigration data to state and local officials. The DOJ's unilateral determination to enter various categories of civil and administrative immigration data into the NCIC exceeds the authority delegated by Congress and is unlawful.

Under 28 U.S.C. §534(a)(1), the Attorney General is authorized to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records." "Criminal identification" and "crime" records clearly preclude the inclusion of civil immigration data. Federal regulations define an FBI identification record

³³⁰ Letter from Alberto R. Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute (Oct. 24, 2002).

³³¹ See <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm> for the Attorney General's speech. See also <http://www.immigrationpolicy.org/files/whitehouse.pdf> for a letter from White House Counsel, Alberto R. Gonzales. See also Letter from John Ashcroft, Attorney General, to Angela Kelley, National Immigration Forum (March 11, 2003).

³³² "INS Commissioner Ziglar Announces Data Sharing Arrangement with FBI, Other Security Measures," *Wall Street Journal*, Dec. 6, 2001. See also section II B of this report, "The Absconder Apprehension Initiative."

³³³ See Barry Newman, "Immigration Authorities Get Tough on Those Deportees Who Abscond," *Wall Street Journal*, April 25, 2003.

³³⁴ See Chris Adams, "INS to Put in Federal Criminal Databases The Names of People Ordered Deported," *Wall Street Journal*, Dec. 6, 2001 (according to Commissioner and agency spokesperson, INS will start data entry "immediately," but task will take 6-12 months).

³³⁵ The National Security Entry-Exit Registration System, which imposes fingerprinting and registration rules on a targeted class of nonimmigrants visiting the United States. See also section II D of this report, "The National Security Entry-Exit Registration System (NSEERS)."

³³⁶ Attorney General John Ashcroft, Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (transcript available at <http://www.usdoj.gov/ag/speeches/2002/060502agpreparedremarks.htm>).

as a "rap sheet" listing "certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, includes information taken from fingerprints submitted in connection with federal employment, naturalization, or military service."¹⁴⁷ The term "identification records" does not contemplate full civil immigration data. Nor can the DOJ justify the inclusion of civil immigration data as "other records," for that term must be read to mean other records of a like kind. In addition, the statute's legislative history strongly suggests that "other records" refers to records that are criminal in nature.¹⁴⁸

Moreover, in 1994, Section 534 was modified by the addition of subsection (e), which allows state and local officials to enter certain civil orders of protection into the NCIC.¹⁴⁹ The addition created a relatively narrow authorization to collect and disseminate civil domestic violence-related information through the NCIC.¹⁵⁰ Civil protection orders, like final orders of deportation or removal, are non-criminal determinations, the violation of which can create criminal liability. The specific inclusion of subsection (e) in the statute, together with detailed limitation and specification, demonstrates Congressional intent to strictly limit the inclusion of non-criminal records in the database.

8 U.S.C. §1252c is another case in point. The statute, enacted as an amendment to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), authorizes the arrest of noncitizens who have violated Section 276 of the INA, 8 U.S.C. § 1326, which provides criminal penalties for illegal re-entry into the country by a person previously convicted of a felony and ordered deported.¹⁵¹ The AEDPA amendment also contains a subsection on cooperation: "The Attorney General shall cooperate with the States to assure that information in the control of the Attorney General, including information in the National Crime Information Center, that would assist State and local

law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials."¹⁵² The statute was adopted at the urging of Representative Doolittle of California, to overcome what he viewed as the existing prohibition on such arrests by state and local officers.¹⁵³ Rep. Doolittle's concern suggests that when Congress sees a need for the DOJ to share immigration data with state and local officials through the NCIC, it will specifically authorize such sharing of information.

2. Absence of "Inherent Authority"

The federal government's recent assertion of an "inherent authority" on the part of state and local police to make immigration arrests claims for states potentially unlimited power to enforce immigration laws. Not only do these statements directly contradict DOJ's long-held interpretation of states' immigration enforcement authority, but no statute passed since September 11 appears to authorize a change in the DOJ position. In contrast, the Florida MOU and the new "mass influx" rule, both enacted in July 2002, reflect Congress' own careful choices about the circumstances and manner in which state and local authorities should participate in immigration enforcement.

As noted above, 1996 amendments to the INA increased the permissible scope of state and local enforcement activity, but only under narrowly and carefully defined circumstances, with state and local officers always operating under the direction of or pursuant to an explicit agreement with DOJ or pursuant to authority to enforce particular immigration provisions, as in INA § 274(c) and 8 U.S.C. § 1252c. The well-established canon of statutory interpretation, *expressio unius*, suggests that the states do not have the authority to make immigration arrests under other circumstances.¹⁵⁴ By taking care to spell out precise requirements for state and local authorities to make immigration arrests,

¹⁴⁷ 28 C.F.R. § 16.31.

¹⁴⁸ See *Manuel v. Sandoz*, 498 F.2d 1017 (D.C. Cir. 1974) (reviewing legislative history of NCIC statute and, in light of congressional intent that authorized categories of NCIC information be narrowly construed, concluding that even certain arrest records, undeniably "criminal," were not properly entered into database).

¹⁴⁹ Violent Crime Control and Law Enforcement Act of 1994, § 40601(a), 108 Stat. 1950.

¹⁵⁰ 28 U.S.C. §534(e).

¹⁵¹ 8 U.S.C. §1252c (a).

¹⁵² 8 U.S.C. §1252c(b).

¹⁵³ 142 Cong. Rec. 4619 (comments of Rep. Doolittle) (offering amend. no. 7 to H.R. 2703); (Congressman Doolittle "was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from arresting and detaining criminal aliens whom they encountered through their routine duties... [T]his amendment would give those with the responsibility of protecting our public safety the ability to take a known criminal alien off our streets and put him behind bars").

¹⁵⁴ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

Congress implied that it did not understand state and local officials to have inherent or preexisting authority to make such arrests otherwise. If state and local authorities did have such authority, the new INA provisions would be superfluous.³⁰⁷

Finally, the 1996 amendments were adopted only months after the February 1996 DOJ Opinion ("State police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings, as opposed to criminal prosecution").³⁰⁸ If Congress had intended to alter the Executive's interpretation of the INA, it would likely have granted the states broad civil enforcement authority expressly, which it did not.

3. State Law Considerations

Congress legislates against a longstanding background assumption that the federal government is principally, if not solely, responsible for immigration enforcement. That legislative context, and its constitutional underpinnings, strengthen the idea that the states are not intended to exercise enforcement authority outside the express grants of such authority in the INA.

Even if states had general federal authority to arrest noncitizens for suspected immigration violations, the officer making the arrest would require an affirmative grant of authority under state law to do so. Put another way, while Congress may *allow* the states to enforce immigration laws, it cannot *require* them to do so by commandeering state officers.³⁰⁹ Such federal action would encroach upon the sovereignty retained by states under the Constitution,³¹⁰ while also violating the Executive's prerogatives and duties under Article II.³¹¹

It thus appears to be established that if an officer lacks state-law authority to make an arrest, the INA cannot be read to give him such authority.³¹²

The scope of law enforcement officers' authority to make arrests varies among the states and is defined by the nature of the offense for which the *arrest* is made. It is not that states have explicit "carve-outs" that exclude immigration violations from the general power to arrest; rather, immigration violations fall into a general class of infractions for which state and local officers (in some states, at least) cannot make arrests.³¹³ California, for example, adheres to the common law rule that officers may not make arrests for misdemeanors not occurring in the officers' presence.³¹⁴ That state's Attorney General concluded that California law enforcement officers may not arrest or detain noncitizens solely for the purposes of civil deportation proceedings.³¹⁵ A recent opinion of the New York Attorney General is to similar effect: officers may arrest without a warrant individuals they have probable cause to believe have committed a criminal violation of the INA, but may not make arrests based on civil violations.³¹⁶

Existing restrictions on arrest authority are fundamental to state criminal procedure and stem from English common law. Further, leaders of local law enforcement agencies may conclude that, along with the resources that would be consumed in making such arrests and processing detainees, potential litigation over officers' authority would cost time and money that the agencies cannot afford. The *Castro v. Chandler* case demonstrates the likelihood that local police, even when working in cooperation with border patrol agents, may be liable for targeting classes or groups of residents and citizens for inspection.³¹⁷ States may also be reluctant to

³⁰⁷ See *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997).

³⁰⁸ See *OLC Opinion*, *supra* note 335.

³⁰⁹ See *Printz v. United States*, 521 U.S. 898, 922 (1997).

³¹⁰ *Id.* at 928.

³¹¹ *Id.* at 922.

³¹² See Deputy Attorney General Mazo, § C(1). (acknowledging that "some states and municipalities place certain restrictions on the extent to which their officers can be involved in the enforcement of immigration laws").

³¹³ This analysis pertains to arrests made because of suspected immigration violations. It does not examine the power of state officers who have made a valid arrest for a violation of state criminal law to inform federal authorities that an individual in state custody may be subject to removal under the INA.

³¹⁴ 75 Op. Attorney General Cal. 270 (1996).

³¹⁵ *Id.*

³¹⁶ 2000 N.Y. AG LEXIS 2 (2000). The Texas and Oklahoma Attorneys General have taken the same position under the laws of their states. 1977 Tex. AG LEXIS 92 (1977); 11 Okla. Opp. Attorney General 345 (1997). As for other states, the considerable variability in the circumstances in which officers may make warrantless misdemeanor arrests make generalization difficult. See 5 Am. Jur. 2d Arrest § 4 50-55 (Supp. 2002).

³¹⁷ *Gerard Castro et al. v. City of Chandler*, No. 97-1736 (D. Ariz. filed Aug. 18, 1997).

incur expense enforcing federal law without any federal reimbursement.³⁶⁶

D. Conclusions

The interplay between state and federal law in immigration enforcement has not been tested often in the past. DOJ's reversal of position, if acted upon by the states, could lead to extensive and expensive litigation and the possible voiding of arrests, suppression of evidence, and even awarding of damages in civil rights actions. For instance, in the recent case of *Carrasca v. Pomeroy*, the purported enforcement of federal immigration law by two New Jersey park rangers was successfully challenged on grounds of discriminatory racial profiling.³⁶⁷

There has been a broad spectrum of the public opinions opposing the DOJ policy shift, including statements from the community leaders and various police departments and police associations alike.³⁶⁸ Among the concerns voiced are the potential damage to police-community relations; cost to public safety as immigrants, even legal ones, might be deterred from reporting real crimes and suspicious activities or coming forward as witnesses; the diversion of resources from crime prevention and enforcement; the potential for conscious or unconscious racial profiling; and the distraction of attention from security-related reforms of the INS at a time when that agency is facing radical restructuring.

Finally, it is evident that Congress did not intend the NCIC to be a vehicle for disseminating civil immigration data to state and local officials. DOJ's unilateral determination to enter various categories of civil and administrative immigration data into the NCIC exceeds the authority delegated by Congress and is unlawful.

³⁶⁶ States' concern for the fiscal effects of federal immigration policy has erupted into litigation before. See *Texas v. United States*, 106 F.3d 661, 664 (5th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095 (9th Cir.1997); *California v. United States*, 104 F.3d 1086 (9th Cir.1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir.1996); *Palawan v. United States*, 82 F.3d 23 (2d Cir.1996); *Chiles v. United States*, 69 F.3d 1094 (11th Cir.1995). The Florida MOU, for instance, provides that participating state and local officers carry out designated functions at state or local expenses. The INS will provide only training personnel, training materials and supervision.

³⁶⁷ 313 F.3d 828 (3d Cir. 2002). Judge Sloviter did not rule on the legitimacy of local enforcement of federal immigration laws, stating that "[t]here is too much uncertainty on this record of the state of the law with respect to state rangers' authority to detain immigrants in this pre-September 11 period." *Id.* at 837.

³⁶⁸ See, e.g., "Law Enforcement, State and Local Officials, Community Leaders, Editorial Boards, and Opinion Writers Voice Opposition to Local Enforcement of Immigration Laws," compiled by Washington-based National Immigration Forum, consisting of over 60 accounts published in national and local newspapers during the two-month period following the news of DOJ policy shift in April 2002.

Chapter Three: The Effect of Post-September 11 Domestic Security Actions on National Unity

This chapter has three sections. In the first section we examine the impact of September 11 on America's Arab, Middle Eastern and Muslim communities, and people perceived to be members of these communities. We look at how these communities have responded, and at how September 11 has changed relations between Arabs and Muslims and the broader American society. The section is based in part on a series of interviews conducted with leaders of these communities across the nation.

In the second section we provide objective measures and examples of the impact of September 11 on minority groups, focusing on three areas: hate crimes, employment discrimination, and airline discrimination.

In the third section we review how immigrant communities have been targeted during periods of national security crisis throughout American history, and examine the resulting impact on national unity.

I. Impact of September 11 on Arabs and Muslims in America¹

The attacks of September 11 were a poignant reminder of the diversity of our country. The victims included people of all faiths and many nationalities. Americans of every stripe died, and we all grieved. Like their fellow Americans, Arab- and Muslim-Americans feel anger, heartbreak and the loss of the way life used to be.

But some Arabs and Muslims in America also feel isolated and stigmatized. They feel they have been victimized twice: once by the terrorists and once by the reaction to terrorism. As an Arab-American physician put it, "unlike other Americans, we, American Muslims, were simply not allowed to grieve."²

"We are feeling it both ways," said Rouhy Shalabi, president of the Arab-American Bar Association. "We, as Americans, were attacked. And at the same time, our fellow Americans are blaming us for something we didn't do."³

This lament emerged repeatedly in a series of interviews that MPI conducted to gauge the impact of the crisis on Arab- and Muslim-Americans. Conversations were held with leaders of these communities in New York, New Jersey, Chicago, Los Angeles, Washington, Artesia, Calif., Fremont, Calif., and Dearborn, Mich. There was remarkable agreement in the responses of those we interviewed.

Many Muslims in the United States today feel that they are under a microscope. On the one hand they have been the objects of suspicion by the government and hate by ordinary citizens; on the other hand they feel they must defend and serve as ambassadors of Islam.

Indeed, Arab- and Muslim-Americans feel under siege. They believe there is an aura of fear and suspicion about Islam and Muslims. A poll conducted by Zogby

¹ In this report we have used terms like Arab-Americans, Muslim-Americans, American Muslims, Middle Easterners, Arabs or Muslims to characterize the people and communities we are referring to. There is no consistent usage in popular or academic writing; the terms tend to be used interchangeably. We have used various terms depending on the context. It should be noted that some of the individuals we are referring to are recent immigrants or noncitizens, and thus not Americans; in other places, we refer to people and communities with strong roots in this country.

Arab-Americans constitute a diverse community with origins in over twenty countries of the Middle East. The majority of Arab-Americans are Christian; only 23 percent are Muslim. (See website of Arab-American Institute, www.aaiusa.org)

Muslims in the United States are an even more diverse community. Thirty-six percent are born in the United States. The 64 percent who are foreign-born hail from 80 different countries. (It has been suggested that the only example of a more diverse Muslim population in any country is during the annual Hajj in Mecca, which is attended by Muslims from more than a hundred countries.) Sixty-four percent of those born abroad arrived in the United States in the last two decades. African-Americans constitute about 20 percent of the total Muslim population. South Asians constitute over 32 percent and Arabs over 26 percent. (Survey conducted by Project MAPS (Muslims in American Public Square), Center for Muslim-Christian Understanding, Georgetown University, Spring 2002.)

² MPI interview with Dr. Hammal Adnan, director of Mental Health Clinic, Arab Community Center for Economic and Social Justice (ACCESS), Dearborn, Mich., Oct. 3, 2002.

³ MPI interview with Rouhy Shalabi, President, Arab-American Bar Association, Chicago, May 12, 2003.

International found that 57 percent of Muslim-Americans believe Americans have an unfavorable opinion of Muslims and Arabs.⁴ And 37 percent of those polled by the *Los Angeles Times* in September 2002 said they have negative impressions of Islam.⁵

Evidence of anti-Muslim attitudes among some Americans comes in several forms. In September 2002, the *Los Angeles Times* reported that "more than 20 books on the 'Islamic menace' have been published," noting that two of these, *American Jihad: the Terrorists Among Us* by Steven Emerson, and *Militant Islam Reaches America* by Daniel Pipes, have become best sellers.⁶ Some evangelical Christian leaders like Pat Robertson, Franklin Graham and Jerry Vines have publicly denounced Islam or Muslims.⁷ The antipathy for Islam expressed by some of these ministers is gaining new currency among evangelical Christians across the country; more than a dozen books criticizing Islam are now available in evangelical Christian bookstores.⁸

The sense of siege was reflected in graphic statements by two of the leaders we interviewed. Dr. Maher Hathout, founder of one of the oldest Islamic centers in the country, put it this way: "There are two models that express the fear that the larger society feels toward Muslims today: In one all Muslims are put in a box with a big 'danger' sign written all over it; in the other model, Muslims are seen as a box of chocolate and people are warned that some of the chocolates are poisonous, thus the entire box is shunned."⁹

A veteran school administrator in Dearborn summarized it in more concrete terms: "We are afraid about what is the neighbor's reaction, what is the boss's reaction, what is the teacher's reaction, what is the mayor's reaction, what is the policeman's reaction."¹⁰

Yet the experience of Arabs and Muslims in America post-September 11 is more than a story of fear and victimization. It is, in many ways, an impressive story of

a community that at first felt intimidated, but has since started to assert its rightful place in the American body politic.

A. The Government's Actions and the Community's Reactions

Immediately after September 11 Muslims and Arabs in the United States became victims of hate crimes and harassment. Two murders in quick succession (one of a South Asian Sikh, presumably taken for a Muslim), acts of arson at mosques or Islamic centers, and widespread harassment in ordinary encounters of daily life put the community on edge. "It was life that was painted with anxiety and uncertainty of what is coming the next day," said the Dearborn school administrator.¹¹

Then suddenly, in one singular act on the part of President Bush, the community found a major source of hope. The president visited a mosque in Washington—an important symbolic assurance for an insecure community. President Bush followed with a statement asking Americans not to equate Islam with terrorism and Muslims with terrorists. "The face of terror is not the true faith of Islam...Islam is peace," the president said. "Those who feel like they can intimidate fellow citizens to take out their anger don't represent the best of America, they represent the worst of humankind; they should be ashamed of that kind of behavior."¹²

This statement of tolerance and inclusion had a "huge positive impact on the community," said Harris Ahmad, director of the Michigan Chapter of the Council on American Islamic Relations.¹³ The Secretary-General of the Islamic Society of North America had this to say after the president's statement: "The number of support calls and visits to Islamic centers to show solidarity by far outnumber the nasty phone calls and attacks. This is what makes us proud to be Americans."¹⁴

⁴ Susan Sachs, "For Many American Muslims, Complaints of Quiet but Persistent Bias," *New York Times*, April 25, 2002.

⁵ Teresa Watanabe, "Frustrated U.S. Muslims Feel Marginalized Again," *Los Angeles Times*, Sept. 27, 2002.

⁶ *Id.*

⁷ *Id.* See also Mona Eltahawy, "Many Faces of Islam," *Washington Post*, March 9, 2002.

⁸ Laurie Goodstein, "Seeing Islam as 'Evil' Faith, Evangelicals Seek Converts," *New York Times*, May 27, 2003.

⁹ MPI interview with Dr. Maher Hathout, Founder, Islamic Center of Southern California, Los Angeles, July 17, 2002.

¹⁰ MPI interview with Wagi Saad, Executive Director, Student Services, Dearborn Public School District, Dearborn, Mich., May 5, 2003.

¹¹ *Id.*

¹² Dana Milbank and Emily Wax, "Bush Visits Mosque to Forestall Hate Crimes," *Washington Post*, Sept. 18, 2001.

¹³ MPI interview with Harris Ahmad, Director, Michigan Chapter, Council on American Islamic Relations, Dearborn, Mich., Oct. 2, 2002.

¹⁴ Milbank and Wax, *supra* note 12.

The reassurance that the community found in the President's message was, however, short-lived. Just when Arab- and Muslim-Americans were beginning to believe that they would not be the targets of government suspicion, the Justice Department announced a series of measures that convinced them otherwise.

The detention of over 1,200 mostly-recent immigrant Arab and Muslim men, often for long periods, has affected communities in many part of the country (Dearborn was a significant exception where very few detentions occurred.) Community activists believe that in five county jails of New Jersey the number of detainees once reached 1,040, though the government refuses to release this information.¹¹ The sympathy for these detainees is strong, since almost none of them have been associated with the events of September 11 (or with terrorism in general), since many of them have been deported, and since many of them were hardworking heads of households leaving behind their families and businesses without any support. And, sadly, it seems that a large number of detainees were picked up on tips from friends, relatives, neighbors and business competitors.¹²

The Justice Department's decision to conduct closed immigration proceedings for many of the detainees only increased suspicion that Arab- and Muslim-Americans were being treated under a different standard of due process. "The automatic association with terrorism is present in all these proceedings," said Michigan lawyer Noel Saleh.¹³

The "voluntary interview" program followed next. The program's focus was 8,000 adult men in the United States who are nationals of countries where al Qaeda is thought to be active—all of which have a Muslim majority. In some parts of the country our respondents reported that, as Mr. Ahmad put it, the program was "far from voluntary—FBI officials knocked on people's door at midnight."¹⁴

Even in Dearborn—where a cooperative arrangement between law enforcement officials and advocates for conducting these interviews has won high praise—no fans of the program could be found. "We may have negotiated a successful arrangement in Michigan, but it has still left the community victimized," Mr. Ahmad said.¹⁵ According to another leader, "the program was offensive, we objected to it, but made the best of it."¹⁶ And as Mr. Saleh put it, "respondents felt offended, but cooperated because they did not want any attention on them."¹⁷

According to a report issued by the General Accounting Office (GAO) in April of 2003, while participation in the interviews was not coerced, "those interviewed did not perceive the interviews to be truly voluntary because they worried about repercussions, such as future INS denials for visa extensions or permanent residency, if they refused."¹⁸ The GAO also reported that "more than half the law enforcement officers we spoke with expressed concerns about the quality of the questions asked and the value of the responses obtained in the interview project"¹⁹

The absconder initiative (arresting those who failed to comply with final orders of deportation) was next in the series of Justice Department actions that drew criticism from Arab- and Muslim-Americans. Though endorsing the government's authority to apprehend lawbreakers, the community once again felt that it had been singled out for attention. "Most of the absconders in this country are not Middle Eastern, yet they are the ones who are being arrested," said Ghazi Khankan, president of the New York chapter of the Council on American Islamic Relations.²⁰

In September 2002, the Justice Department started implementing the National Security Entry-Exit Registration System (NSEERS), requiring nationals of five Middle Eastern countries to be fingerprinted,

¹¹ MPI interview with Magfi Mahmoud, President, New Jersey Chapter, Council on American Islamic Relations, formerly President, Human Rights, Education and Law Project (HELP), May 13, 2003.

¹² MPI interview with Amy Gottlieb, Director, Immigrant Rights Program, American Friends' Service Committee (AFSC), Newark, N.J., April 24, 2003. See also Anwar Iqbal, "Muslim Youths Turned in By Their Own," *Washington Times*, Aug. 6, 2002.

¹³ MPI interview with Noel Saleh, immigration lawyer, Detroit, Oct. 3, 2002.

¹⁴ Ahmad interview, *supra* note 13.

¹⁵ *Id.*

¹⁶ MPI interview with Nasser Bedun, Director, Arab-American Chamber of Commerce, Dearborn, Mich., Oct. 2, 2002.

¹⁷ Saleh interview, *supra* note 17.

¹⁸ United States General Accounting Office, "Homeland Security: Justice Department's Project to Interview Aliens After September 11, 2001," GAO-03-459 (Washington: April, 2003).

¹⁹ *Id.*

²⁰ Ghazi Khankan, President, New York Chapter, Council on American Islamic Relations, at a meeting of New York metropolitan area community leaders conducted in the offices of Cleary, Gottlieb, Steen, and Hamilton, July 10, 2002 (hereinafter "Community Leaders Meeting").

photographed and interviewed at points of entry to the United States and to be re-interviewed at yearly intervals during their stays in this country. In November 2002, the new "Special Call-In Registration" program of NSEERS extended these requirements to nonimmigrants already present in the United States. With the exception of North Korea, only nationals of predominantly Muslim countries were subject to these requirements.

"To these communities, fingerprinting became that proverbial last straw," said Mr. Saleh. For the Muslim community, he added, the cumulative effect of all these measures has been "isolating instead of integrating. The feeling of siege is stronger today than it was immediately after President Bush's initial speech."²³

The President's initial statement was repeatedly invoked in the comments of our respondents. "On the one hand the president says don't blame Arab-Americans, but on the other hand they are saying we are going to round up these five and these six thousand—it certainly sends a real mixed message," said Jean AbiNader, spokesperson of the Arab-American Institute.²⁴

In addition to pointing out the contradictions between the president's initial statement and the Justice Department's actions, the Arab-American, Muslim, and South Asian community is critical of what it perceives to be the government's hypocrisy. There is a strong belief that these measures are ineffective in responding to threats of terrorism, but are being undertaken for political expediency or public relations at a huge price for the communities. "This is political smoke to make people feel good," said Mr. AbiNader.²⁵

Many current and former law enforcement officials share this assessment. A senior field officer of the Immigration and Naturalization Service (INS) expressed it this way: "Most of the Attorney General's initiative is a lot of make-work with few returns, but it

gets good press. It hasn't helped our community relations. It hurts the agency because the FBI and the other agencies are making arrests using INS statutes."²⁶

Many community leaders also expressed strong resentment at the government's closing down of many charities associated with Arab and Muslim causes. They find these summary closings offensive and violative of due process. "By not distinguishing one charity from the other, the government has created an environment where people are reluctant to make charitable contributions," said Khaled Saffuri, executive director of the Islamic Institute.²⁷

Since charitable giving is a religious obligation in Islam, Muslims believe that closing these charities violates their freedom of religion. It certainly seems to have had a chilling effect on donations. "People are afraid [that] if they give something, it will be used to track them down," said a spokesman for the Islamic Society of North America. "If you cannot donate to your parochial school, what is going to happen?"²⁸

It was particularly sad to hear from respondents who said that the post-September 11 actions of our government increasingly remind them of dictatorships in their countries of origin. "The country is beginning to have trappings of a police state," said Dr. Hathout. "It reminds me of Egypt."²⁹

Most importantly, Arab-Americans are generally skeptical of the government. "The dictator in the Middle East makes the law. Thus, mistrust of the government fits the Middle East mindset," said Osama Siblani, who is publisher of *Arab-American News* and also spokesman of the Arab-American Political Action Committee. "Before September 11, there had been an evolving change in this mindset—they were gradually beginning to recognize that the [U.S.] government is here to respect their rights. All that was shattered by the events of September 11. Their rights are being violated by the government."³⁰

²³ Saleh interview, *supra* note 17.

²⁴ MPI interview with Jean AbiNader, Managing Director, Arab-American Institute, Washington, May 15, 2003.

²⁵ *Id.*

²⁶ MPI interview with an INS field officer.

²⁷ MPI interview with Khaled Saffuri, Executive Director, Islamic Institute, Washington, May 22, 2003. See also Hathout interview, *supra* note 9.

²⁸ Rachel Zoll, "US Muslims Struggle to Guard Rights, Dispel Suspicion in Wake of September 11," *St. Louis Post-Dispatch*, Sept. 1, 2002; Shalabi interview, *supra* note 3.

²⁹ Hathout interview, *supra* note 9.

³⁰ MPI interview with Osama Siblani, Publisher, Arab-American News and Spokesman, Arab-American Political Action Committee, Dearborn, Mich., Oct. 2, 2002.

B. Private Actions

The acts of the U.S. government that have targeted Arab- and Muslim-Americans, most of our respondents believe, have provided a license to private individuals to engage in hate crimes, bias, discrimination, and harassment. "September 11 has created an atmosphere which suggests that it is okay to be biased against Arab-Americans and Muslims," said a prominent advocate in Dearborn.³³

Half of Muslims surveyed knew of individuals who were victims of anti-Muslim discrimination, harassment or assault following September 11, according to an August 2002 poll conducted by Hamilton College.³⁴ Similarly, a survey of Arab-Americans commissioned by the Arab-American Institute Foundation in May 2002 found that 40 percent of those surveyed knew someone who had experienced more discrimination since the terrorist attacks.³⁵ (See Section II of this chapter for specific examples).

The community leaders we interviewed have a strong sense that the absence of appropriate political leadership has contributed to the rise in these incidents. They point out that right after the President's initial speech separating Islam from terrorism, hate crimes decreased.³⁶ They believe that such statements, issued on a consistent basis by the President or his senior cabinet members, are key to keeping attacks against their communities down.³⁷

These community leaders are troubled by the president's decision not to condemn the offensive statements about Islam made by several leaders of the Christian Evangelical community.³⁸ They suspect that the president is keeping a measured distance from the leaders of the Muslim community on the advice of the conserva-

tive wing of his party.³⁹ And they are troubled by the fact that many senior members of the administration have declined invitations to attend conferences and meetings of Muslim-American organizations.⁴⁰

For them, all these omissions represent a failure of leadership to discourage hate crimes. This belief is reflected in polls. In a May 2002 survey commissioned by the Arab-American Institute Foundation, only 54 percent of Arab-Americans said they felt reassured by President Bush's comments and actions since the September 11 attacks—down sharply from 90 percent in an October 2001 survey.⁴¹

There is a basis for their concern. As discussed later in this chapter, an FBI report shows that reported hate crimes in the United States against Muslims jumped by a dramatic 1,600 percent from 2000 to 2001.⁴² Similarly, a Los Angeles Human Relations Committee report shows that hate crimes in Southern California against Muslims and those of Middle Eastern descent have gone up 1,300 percent since September 11.⁴³ Within a year of the September 11 attacks, the FBI had opened 380 investigations (with 11 federal prosecutions) of post-September 11 discriminatory backlash.⁴⁴

Discrimination in the workplace, especially towards more recent immigrants and Muslims, is another major source of concern. As discussed later in this chapter, so overwhelming was the number of complaints it received that the Equal Employment Opportunity Commission (EEOC) has created a new category to track acts of discrimination against Middle Eastern, Muslim and South Asian workers after September 11.⁴⁵ The EEOC reports that in the 12 months after Sept. 11, 2001, it received

³³ MPI interview with Imad Hamad, Regional Director, Midwest Regional Office, American-Arab Anti-Discrimination Committee (ADC), Dearborn, Mich., Dec. 3, 2002.

³⁴ Kaye Rouse, "Muslims Feeling Increasingly Vulnerable," *Denver Post*, Aug. 30, 2002.

³⁵ *Profiling and Pride: Arab-American Attitudes and Behavior Since September 11*, Arab-American Institute Foundation, July 2002.

³⁶ Statement, Muslim Public Affairs Council (MPAC), Washington, Sept. 10, 2002.

³⁷ Ahmad interview, *supra* note 13.

³⁸ Watanabe, *supra* note 5. See generally Laurie Goodstein, "Seeing Islam as 'Evil' Faith, Evangelicals Seek Converts," *New York Times*, May 27, 2003.

³⁹ Ahmad interview, *supra* note 13.

⁴⁰ Watanabe *supra* note 5.

⁴¹ *Profiling and Pride*, *supra* note 35.

⁴² Tanya Schewitz, "FBI Sees Leap in Anti-Muslim Hate Crimes," *San Francisco Chronicle*, Nov. 26, 2002.

⁴³ MPAC Statement, *supra* note 36.

⁴⁴ Julie Lieblich, "Lack of Trust Tears at Muslims," *Chicago Tribune*, Sept. 13, 2002.

⁴⁵ Mary Beth Sheridan, "Backlash Changes Form, Not Function," *Washington Post*, March 4, 2002.

654 such complaints.⁴⁶ And to add insult to injury, some of those who have been detained after September 11 have been fired by their employers as a result.⁴⁷

"September 11 has created a hostile work environment for Arab-Americans, Muslims and South Asians," said Imad Hamad, regional director of the American-Arab Anti-Discrimination Committee's Midwest Regional Office. "Many employees are shunned and isolated. Their personal lockers were searched, their cars were searched, some were subjected to extensive interrogations, and some were fired for praying at work."⁴⁸

Advocates are also concerned about discrimination by landlords, although such discrimination is not well-documented. An article in a realtors' association magazine in Southern California, which described Islam as a "religion of violence and hatred," has stirred considerable public debate.⁴⁹ Some fear that the guidelines that various police departments (including those in Los Angeles and New York) have issued to landlords for reporting terrorists has created a new license for racial profiling.⁵⁰

Dress codes have made certain groups special targets. Sikh advocates believe that they have been singled out for intrusive questioning at airports because of their turbans.⁵¹ A group of Sikh men have filed anti-discrimination complaints asserting that they were forced to remove their turbans at airports—something deeply offensive to their religion.⁵² Some Muslim women wearing hijab (head scarves) have been similarly forced to remove them, in violation of their religious beliefs.⁵³

Members of concerned communities have felt most harassed at airports. Anxiety over air travel pervades the community. "The notion that Arab-Americans have become a fifth column, politically disloyal, potentially dangerous—particularly when it comes to air travel—is quite widespread," said Hussein Ibish, communications director of the American-Arab Anti-Discrimination Committee.⁵⁴

⁴⁶ Equal Employment Opportunity Commission, *Muslim/Arab Employment Discrimination Charges since 9/11*, Dec. 02, 2002.

⁴⁷ Community Leaders Meeting, *supra* note 24.

⁴⁸ Hamad interview, *supra* note 33.

⁴⁹ Jocelyn Y. Stewart, "Groups Fight Increase in Bias Against Arabs," *Los Angeles Times*, July 8, 2003.

⁵⁰ *Id.*; see also Jacob H. Fries, "City Landlords get a Primer for Spotting Terrorist Tenants," *New York Times*, June 4, 2002.

⁵¹ Laurie Goodstein, "American Sikhs Contend They Have Become a Focus of Profiling at Airports," *New York Times*, Nov. 10, 2001.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ MPI interview with Hussein Ibish, Communications Director, American-Arab Anti-Discrimination Committee, May 6, 2003.

⁵⁵ Sherifas, *supra* note 45.

⁵⁶ Debra Barfield Berry, "FBI Was at the Door: Muslims in Paterson, NJ, Feel Besieged and Betrayed," *Newswatch*, Sept. 19, 2002. See also Michael Powell, "An Exodus Grows in Brooklyn; 9/11 Still Rippling Through Pakistani Neighborhood," *Washington Post*, May 29, 2003.

⁵⁷ Bedin interview, *supra* note 20.

Finally, September 11 has taken an economic toll on Arab- and Muslim-American businesses. Pakistani-born merchants, especially gas-station and sub-shop owners, saw their sales decline after September 11 as clients shunned them.⁵⁵ Once-popular restaurants in Paterson, New Jersey became "eerily quiet" after September 11.⁵⁶

Government monitoring of financial transactions has also had an impact on Arab-owned businesses. "Civil liberties have a special importance to businesses," pointed out the head of the Arab-American Chamber of Commerce in Dearborn. "The ability to make cash deposits, to transfer money from abroad, is important to business, especially to businesses whose owners have roots in other countries. But intrusive monitoring of bank accounts since September 11 has impacted these businesses, and bank credits to them have suffered."⁵⁷

C. Impediments to an Effective Initial Response

Any community, however well-established, would have found it daunting to confront the variety of challenges Arab- and Muslim-Americans have faced since September 11. What made it especially hard is a set of handicaps that many other communities have not had to contend with. That is perhaps why, in words used by several of our respondents, the community felt "paralyzed" in the immediate aftermath of September 11.

First, al Qaeda—beholden to no state, government, or organized religious order—was at complete liberty to misappropriate the faith practiced by Muslims in the United States. That immediately put American Muslims on the defensive. They not only had to explain the mysterious al Qaeda, but also had to convince an anxious (and generally ill-informed) country that they were different from al Qaeda. History did not help here. Before September 11, very few Arab or Muslim organizations in the United States had condemned al Qaeda

or its hosts, the Taliban.²⁸ Catching up in the charged atmosphere of war and revenge was, at best, rocky.

Second, many major Arab- and Muslim-American organizations are new and under-resourced. It is extraordinary how much they have been able to accomplish with so little. Most of the major national organizations of these communities are less than 25 years old. The Arab-American Anti-Discrimination Committee was founded in 1980; the Arab-American Institute was established in 1985; the Council on American Islamic Relations in 1994; the Arab American Action Network of Chicago in 1995; and the South Asian Network of Los Angeles in 1990. (ACCESS, the oldest Arab-American organization that provides social services to the community, was established in 1971.)

Immigrant service providers in the United States have traditionally been religious-based: Quaker, Catholic, Lutheran, and Jewish. HELP, the New York/New Jersey area organization that provided the most extensive and immediate assistance to Muslim and Arab detainees, was formed after September 11. And it is perhaps the only organization of its kind in the country. As a respected legal service provider in New Jersey pointedly asked, "When one of these detainees looks at a list of service providers, they will be asking, where is the Muslim or South Asian organization?"²⁹

Some leaders of these organizations strongly believe that the "politics of exclusion" played a significant role in impeding their development and growth before September 11. "We were not immediately accepted," said James Zogby, president of the Arab-American Institute. "Many organizations and politically-influential individuals maintained a strategic distance from us for fear of paying a political price."³⁰

Whatever the reasons for their lack of growth, most of the national Arab and Muslim organizations working in the areas of civil rights and legal services had a professional staff of fewer than ten prior to September 11.³¹ ADC established its first office in New York (the only one on the East Coast) after September 11. HELP is a completely-volunteer organization, with one part-time

employee, no office, an answering service and a "shoe string budget of \$35,000 to \$40,000," said the organization's former president.³²

Third, some Arab- and Muslim-American organizations (especially those that cater to recent immigrants) have historically been driven by an agenda that is dominated by the politics and political imperatives of the sending countries of these immigrants. Thus the skills, the talent, the knowledge base and the networks an organization needs to respond to a domestic crisis like September 11 were simply absent. The focus on the politics of the "home countries" may also help explain the absence of earlier condemnations of al Qaeda or the Taliban.

Fourth, and perhaps most important, is the element of fear prevalent in these communities, especially among recent immigrants. Many have left countries that are governed by dictatorships, where the rule of law and the accountability of government are scarce commodities. "They come from a tradition of being afraid," said a lawyer who has represented a number of post-September 11 detainees. "You cannot understand that unless you're from a culture of fear."³³ In the words of a senior Muslim leader, their previous experience created a "mindset of fear that leaves people emotionally intimidated."³⁴ It is a mindset used to tales of disappearances and to government secrecy. It is a mindset that encourages people to lie low, not to assert their civil rights. It is a mindset that doesn't trust the government to respond fairly to a complaint; it expects that complaints will only produce retaliation. And this vulnerability has an objective basis when people's own immigration status (or that of their loved ones) is dubious.

Many community leaders believe that this fear factor contributes to under-reporting of cases of bias and harassment, as well as to a reluctance to assert basic rights. "In the immediate aftermath of September 11, people didn't want to be stigmatized as anti-government or anti-patriotic," said a New York community activist, who noted that "three local New York community-based organizations did not want to take part in a peace rally

²⁸ Hathout interview, *supra* note 9.

²⁹ Gottlieb interview, *supra* note 16.

³⁰ MPI interview with James Zogby, President, Arab-American Institute, May 10, 2003.

³¹ Mehdi Bozorgmehr and Anny Bakalian, *Addressing Private and Public Backlash: The Role of Middle Eastern and South Asian American Advocacy and Service Organizations after September 11*, Middle East and Middle Eastern American Center, City University of New York (MEMEAC), Unpublished Manuscript.

³² Mahmoud interview, *supra* note 15.

³³ Hina Askari, quoted in Paul Lomartine and Louis J. Salome, "Lawyers Give Voice to Detainees at Krome," *Palm Beach Post*, Jan. 27, 2002.

³⁴ Hathout interview, *supra* note 9.

after September 11...and if they did participate, it was only when large numbers of them were present."⁶³ Some people backed away from posting bail for friends when they realized that it meant disclosing their own names.⁶⁴ Many have endured constant insults at work, but haven't spoken out for fear of retaliation by their employers.⁶⁵ "In housing or in employment discrimination," said a Los Angeles community leader, "people don't talk, nobody wants to appear on the radar."⁶⁶

D. Reaction to the Aftermath

1. Communities Trying to Cope

The reaction of Arab and Muslim individuals in the aftermath of September 11 has been a subject of great interest and speculation. Will they want to be more integrated with U.S. society? Will they more strongly assert their own ethnic identity? Or will they simply want to return to their countries of origin?

Interviews with community leaders and press reports suggest that while generalizations are not possible, some patterns are evident.

There has been no major emigration to the countries of origin, though many concede that they have entertained the possibility for the first time since their arrival in the United States.⁶⁷ (There has, however, been a substantial emigration to Canada among some groups, including Pakistanis, fearing deportation under the Special Call-In Registration program.) Indeed, some leaders have strong feelings on the decision to stay on, despite the response to September 11. A senior Muslim leader in Los Angeles was emphatic on this: "Home is not where your grandfather is buried, home is where your grandchild will live."⁶⁸

Some Arab- and Muslim-American have decided to be "extra-assimilationist," while others have chosen to cling to their identities. There is ample evidence of both

phenomena—as was the case in similar chapters of U.S. history.⁶⁹ A May 2002 survey by the Arab-American Institute Foundation found that two in five Arab-Americans feel that the events of September 11 have influenced the public display of their heritage, while nearly three quarters say that their pride in being Arab-American remains unchanged.⁷⁰

There is evidence that many Muslims and Arabs are less likely to express their feelings and opinions publicly since September 11. "Free speech has given way to self-censorship," reported the *Los Angeles Times*.⁷¹ A religious leader in New York told us, "People feel constrained (against expressing) their opinion; it is becoming like an Arab country."⁷² The head of the Muslim Public Affairs Council noted that some people have become afraid to speak out on behalf of unpopular causes.⁷³ A grocer in Anaheim, California, suggested that the climate since September 11 reminds him of his native Syria: "In Syria when you talk politics, you make sure you know everybody in the room, and you whisper."⁷⁴

Some people are changing their names to try to avoid bias and harassment.⁷⁵ Others do it to be accepted. What seems remarkable here is that Muslims born in the United States seem more inclined to be comfortable with their identity than their foreign-born parents. Dearborn school administrator Wagi Saad, citing his worry that his American-born son Mohammed would pay a price for having a Muslim name, was impressed that his son rejected the idea of being called Moe:

No one is going to deny their identity for the sake of being accepted. I am not as strong in my identity as my children are...It is the same with other families...While the children believe they are Americans, they have learned that America provides this freedom for them that allows them to be themselves and to assert their identity...They learn to be

⁶³ Robina Niaz, social worker and activist, Community Leaders Meeting, *supra* note 24.

⁶⁴ James Sterngold, "Muslims in San Diego Waver on Bail Pledge," *New York Times*, Dec. 9, 2001.

⁶⁵ Sheridan, *supra* note 45.

⁶⁶ Hamid Khan, Executive Director, South Asian Network based in Artesia, Calif., quoted in Stewart, *supra* note 49.

⁶⁷ MPI interview with Imam Abu Namouz, Chief Imam, Islamic Cultural Center of New York, Nov. 5, 2002. See also Powell, *supra* note 56.

⁶⁸ Hathout interview, *supra* note 9.

⁶⁹ Hanna Rosin, "In Search of Identity, Weighing Arab and American," *Washington Post*, Nov. 9, 2002.

⁷⁰ Profiling and Pride, *supra* note 35.

⁷¹ Henry Weinstein, Daren Briscoe and Mitchell Landsberg, "Civil Liberties Take Back Seat to Safety," *Los Angeles Times*, March 10, 2002.

⁷² Namouz interview, *supra* note 69.

⁷³ Salam Al-Maryati, quoted in Weinstein *et al.* *supra* note 73.

⁷⁴ Weinstein *et al.* *supra* note 73.

⁷⁵ Wayne Parry, "Some Arabs in US Change Names," *Associated Press*, March 20, 2002.

free from Day One...Many like me came from the Middle East. We learned to live with oppression. We learned to accept the ruler whether or not they do the right things. Our children do not accept treatment with bias.⁷⁹

2. Relations with Law Enforcement

In a striking consensus, many leaders of the community have developed a positive reaction to law enforcement agencies since September 11, especially to local police.

"The local police are our friends," said Imam Abu Namouz, Chief Imam of the Islamic Cultural Center of New York, citing their constant presence to protect his mosque.⁸⁰ Community representatives in Washington, Dearborn, and Los Angeles all positively cited the responsiveness of the police in protecting local mosques, schools, community centers, and the offices of Muslim organizations. "The aggressive treatment of hate crimes by the FBI and local police early on was very effective," said Mr. Ibiash, the American-Arab Anti-Discrimination Committee's spokesperson. "By the middle of September 2001 everyone knew that if they committed a hate crime they would be arrested...There are very few incidents in which the police turned the other way."⁸¹

Threats to harm Arab-American Institute president James Zogby, threats to the offices of the American-Arab Anti-Discrimination Committee, and threats to the Islamic Center in Los Angeles were all met with quick and effective responses by law enforcement officials, according to the leaders of these groups.⁸²

The FBI gets a more mixed review than local police. While many leaders have praised the FBI for its conduct post-September 11,⁸³ there has also been sharp criticism of the agency for targeting groups because of their ethnicity or religion. For example, it appears that residents of Paterson, New Jersey (a major enclave of Arab-Americans), initially responsive to the FBI, felt alienated after what they perceived as the agency's harassment in questioning and detaining a large number

of residents.⁸⁴ However, it appears that the FBI has increased its outreach to Arab and Muslim communities. The FBI's Washington field office has established an Arab-American Advisory Committee to address community concerns, and the FBI in New York City has recruited Muslim imams to present its agents with "a clear picture" of Islam to "avoid stereotypes."⁸⁵

From our interviews, it appears that two factors affect the relationship between the impacted communities and law enforcement agencies. First, the attitude and behavior of local police differs depending on the demographics of a neighborhood. In areas where there is a high concentration of Arab- and Muslim-Americans, police have better ties with the community, and tend to be protective of it and intolerant of harassment of community members. In mixed neighborhoods, the police tend to be less sensitive to and perhaps less protective of minority communities.

For example, in Michigan, local police in the western and southern parts of the state are reportedly less sensitive to the concerns of the minority communities than those in eastern Michigan, where many Arab- and Muslim-Americans live.⁸⁶ "Unfortunately there is still a tremendous amount of ignorance among the police officers about Arabs, Arab-Americans, and Muslims," said a local civil right activist in New York. "But in areas where there are large numbers of Arabs and Muslims, we found the police more sensitive to the needs and concerns of the community."⁸⁷

The second factor is that personalities do matter. In our series of conversations in Michigan, we were continually reminded that the local leadership of the FBI and the U.S. Attorney in Dearborn had taken special measures to reassure the community. The relative success of the voluntary interview program in Michigan can be attributed to the cooperative arrangement that the FBI, the U.S. Attorney's office, and a coalition of local organizations in Dearborn had reached.⁸⁸

⁷⁹ Saad interview, *supra* note 10.

⁸⁰ Namouz interview, *supra* note 69.

⁸¹ Ibiash interview, *supra* note 54.

⁸² AbiNader interview, *supra* note 26; Ibiash interview, *supra* note 54; Hathout interview, *supra* note 9.

⁸³ AbiNader interview, *supra* note 26; Ibiash interview, *supra* note 54; Hathout interview, *supra* note 9; Namouz interview, *supra* note 69; Hamad interview, *supra* note 13.

⁸⁴ Berry, *supra* note 56.

⁸⁵ Greg B. Smith, "Imam Briefs Agents Here," *New York Daily News*, March 11, 2003; Arab American Institute, press release, March 28, 2003.

⁸⁶ Ahmad interview, *supra* note 13.

⁸⁷ MPI interview with Monica Tarazi, New York Director, American-Arab Anti-Discrimination Committee, May 12, 2003.

⁸⁸ Ahmad interview, *supra* note 13; Saleh interview, *supra* note 17.

3. The Muslim Moment

Despite the many hardships that Muslim communities have endured, some of their leaders argue that positive developments that have long eluded them have been made possible by the events of September 11.

Many have come to see September 11 as having ushered in the "Muslim Moment" in America. While Muslims have felt vilified and misunderstood, they are also beginning to receive a share of positive attention. Mainstream America knows more about this population today than it knew before September 11. It has come to appreciate its large size and its amazing diversity. It understands that Muslims have settled in all parts of our country and that their origins lie in all parts of the world. It understands that it is far from a monolithic community and that there are significant distinctions among various sects within it. It understands that Muslims have joined all sectors of our economy and they cut across the economic strata. In essence, it understands the Muslim population as part of the American phenomenon.

"The moves to emphasize tolerance, to seek what is Islam, is this real Islam, what is Arab culture, is September 11 an authentic representation of Muslim religiosity, or who are the Arabs—these are all reasonable questions," said Mr. Ibish, the American-Arab Anti-Discrimination Committee's spokesperson. "This is excellent because it gives us an opportunity to correct the misapprehensions that may have existed."⁶⁴

A local community leader in New York pointed to new neighborhoods coalitions being formed between Muslims and non-Muslims. "They are introducing themselves to each other, often for the first time, and saying: I am a professional, not a terrorist," he said.⁶⁵ Other leaders have drawn similar conclusions: "After 9/11 there is a very big chance for the Muslims to

present themselves and their religion in a more correct fashion. Muslims and Islam in general have been the most misunderstood in the public eye," said one.⁶⁶ Added another, "Instead of judging us on the two-bit knowledge, they are asking us questions about our life, about the beliefs of Islam."⁶⁷

Leaders in the community suggest that there is a "tidal wave of desire"⁶⁸ among non-Muslims to learn about Islam. Muslim leaders have been deluged with invitations to speak at synagogues, churches, universities, and civic organizations.⁶⁹

The American Muslim community, on its part, is experiencing a significant internal dialogue. The notion of a distinct "American Muslim" identity has gained a new currency. It is an identity that not only seeks to assert its independence from forces abroad; it is an identity that has slowly evolved since Muslim immigrants started settling in the United States. It is an identity that combines the essential elements of Islam and the core values of American constitutional democracy.⁷⁰ The strong tension since September 11 surrounding the civil rights of Muslims in the United States has, for many Muslims, only crystallized the fundamental relevance of this identity. The assertion of this identity has brought together Muslims and Muslim organizations in a way that seemed improbable before the terrorist attacks.⁷¹

There is also perceptible self-criticism under way in the community. A New York Muslim leader pointed out to us that, "Muslims are wiser since September 11; they have become much more anti-extremist."⁷² A senior Muslim leader in Los Angeles remarked, "Muslims today are more mainstreamed."⁷³

For a community that is afraid of being self-critical, the push for change comes especially from the younger generation. One Los Angeles leader noted, "The younger generation is challenging the older generation on three issues: on foreign policy issues, on domestic

⁶⁴ Ibish interview, *supra* note 54.

⁶⁵ Dr. Mansour Khan, spokesperson, Help and Hope, a local community organization established after September 11, at Community Leaders Meeting, *supra* note 24.

⁶⁶ Mahmoud interview, *supra* note 15.

⁶⁷ Liebllich, *supra* note 44.

⁶⁸ Namoux interview, *supra* note 69.

⁶⁹ Rouse, *supra* note 34; Watanabe, *supra* note 5; Namoux interview, *supra* note 69.

⁷⁰ MPI interview with Imam Feisal Rauf, Imam of the Masjid Al-Farah, New York, and Founder of ASMA Society, Jan. 21, 2003.

⁷¹ Peter Skerry, "America's Muslims Never Had to Unite," *Washington Post*, Jan. 5, 2003; Saffuri interview, *supra* note 29. Similarly, coordinated work among various South Asian communities has been much more effective since September 11: MPI interview with Hamid Khan, Executive Director, South Asian Network, Artesia, Calif., Dec. 17, 2002.

⁷² Namoux interview, *supra* note 69.

⁷³ Hathout interview, *supra* note 9.

issues, and on theological issues. They are arguing with the older generation and asking them that if Islam is so good, how do they explain Jihad or the treatment of non-Muslims in other countries? They are rediscovering Islam without the imposing Islamic authority. They are attracted to true Islam more than their parents are, because they have to want to be Muslims."⁹⁸ A young Muslim leader added, "For the youth, the mosque is no longer a passive experience. They are no longer neutral about its activities... They are moving away from the orthodoxy, and are more open to self-criticism."⁹⁹

There is also a growing shift in the agendas of Muslim organizations. The focus on political issues abroad is fast giving way to domestic policy issues. They are paying more attention to civil rights, social services and economic development. "These communities are much more strategic, and focusing more on domestic policy," said Karen Rignel, national coordinator of ACCESS, a major Arab-American organization.¹⁰⁰ Here again, the younger generation is making a difference. "I know these Pakistani second-generation kids who say that they go to Pakistani political action committees and all they hear about is Kashmir and Musharaff. They don't like working there," the leader of a national Muslim organization told us.¹⁰¹ The shift in the agenda of these organizations was reflected this year in the patterns of charitable giving. Organizations that focus on domestic policy issues were the big beneficiaries, at the expense of charitable organizations that support causes abroad.¹⁰²

(a) Building Bridges and Alliances

In one of the most positive developments, the September 11 terrorist attacks have provided Arab- and Muslim-American organizations with a significant opportunity to strengthen their organizational structures, build new alliances, and increase their profiles as advocates. Leaders of these organizations are keen to point out the new relationships that have been created

since September 11, including alliances and dialogues with other faith or inter-faith groups.¹⁰³

"September 11 has increased the opportunities for us to multiply and magnify the work we usually do," said Mr. AbiNader, spokesperson of the Arab-American Institute. "With that you get more access... People know who you are—the government, the media, the American public."¹⁰⁴ The head of the local chapter of a national organization noted, "September 11 necessitated the rapid expansion of our capacity to serve the Arab-American community, but also afforded us the opportunity to forge alliances with communities that we had not worked with as closely in the past."¹⁰⁵

These new opportunities have made Arab-American organizations important players in various coalitions of civil and human rights organizations. They have also established new relationships with mainstream legal defense organizations, and have engaged in a different level of dialogue with government agencies. A leader of a national organization pointed out that since September 11, "In a strong turn of events, elected officials and political candidates have approached us to discuss the concerns of our community."¹⁰⁶ The building blocks "for greater understanding are in place, and they are not going to be changed," said Mr. AbiNader. "Relationships with the government, with other organizations—we can build on that."¹⁰⁷

Their expanded role has also led to structural developments in these organizations. National organizations like the Council on American Islamic Relations and the Arab-American Anti-Discrimination Committee have opened new offices since September 11. To help improve the coordination of advocacy and services, ACCESS has hired a full time national coordinator, and organized the first-ever national meeting of Arab-American organizations in November 2002.¹⁰⁸

The increased exposure has led to attention from an important source: foundations. "Many foundations, particularly the progressive ones, were keen to establish

⁹⁸ *Id.*

⁹⁹ Ahmad interview, *supra* note 13; MPI interview with Karen Rignel, national coordinator, ACCESS, Dearborn, Mich., Oct. 3, 2002.

¹⁰⁰ Saffari interview, *supra* note 29.

¹⁰¹ Alan Cooperman, "In US, Muslims Alter Their Giving; Those Observing Islamic Tenet Want to Aid Poor but Fear Persecution," *Washington Post*, Dec. 7, 2002.

¹⁰² Hathout interview, *supra* note 9; Rauf interview, *supra* note 94.

¹⁰³ AbiNader interview, *supra* note 26.

¹⁰⁴ Tarazi interview, *supra* note 86.

¹⁰⁵ Zogby interview, *supra* note 61. See also Arab-American Institute Press Release, "Arab-American Town Hall Meeting," Sept. 21, 2002, regarding a town hall meeting held by the Arab-American community of New Jersey.

¹⁰⁶ AbiNader interview, *supra* note 26.

¹⁰⁷ Rignel interview, *supra* note 100; Tarazi interview, *supra* note 86; Ahmad interview, *supra* note 13.

a relationship with these communities about whom we knew very little...and the funders realized that there was a wide range of organizations in these communities—from the well-established ones to the fledgling new organizations established as a direct result of September 11—but the common denominator among them is that they were under resourced,” said Kathleen W. Lee, a former program officer at the Tides Foundation, which established two separate funds “to respond to the immigrants’ rights and civil liberties concerns of the Arab, Muslim, South Asian and Sikh communities.”¹⁰⁸ This has allowed many of these organizations to initiate programs—from school outreach to town hall meetings to legal clinics—they could not have undertaken before September 11.¹¹⁰

(b) Sensitivity Training

A number of programs designed to increase sensitivity toward Muslims and Arabs have been initiated since September 11. National organizations like the Arab-American Institute (AAI) have launched anti-hate public information announcements and video and poster campaigns. “We had these materials for a year, but no one ever asked for them,” said AAI’s Mr. AbiNader.¹¹¹ Every new graduate of the police academy in the Chicago Police Department now receives “sensitivity training” on how to treat Arab-Americans.¹¹² In Los Angeles, the South Asian Network has undertaken an outreach program to local schools about issues of identity, peaceful coexistence and social justice. “Our outreach in a structured, organized way has happened only since 9/11,” the head of the Network told us.¹¹³

Corporate America has also responded, showing special sensitivity to Arab-Americans. Various community leaders in Dearborn think of corporations like Ford, General Motors, and Detroit Edison as model employers, who dealt aggressively with complaints of bias and hate speech and escalated their sensitivity-building programs.¹¹⁴ Ford has announced a “zero tolerance” policy on harassment of Arab-American employees, and has helped establish a Middle East group at its headquarters.¹¹⁵

(c) Politics

It is almost impossible to conclude a conversation with an Arab-American or Muslim group without some reference to President Bush and the 2000 election. News reports have suggested that President Bush received strong support among recent immigrant Arab and Muslim-American communities in the 2000 election.¹¹⁶ The American Muslim Political Coordinating Council Political Action Committee, comprising four major national American-Muslim organizations and the Dearborn-based Arab-American Political Action Committee, endorsed President Bush in the 2000 election.¹¹⁷

Many attribute this support to a single statement that candidate George W. Bush made in his presidential election campaign: a statement opposing the government’s use of secret evidence in deportation proceedings against Arab-Americans.¹¹⁸ For a community used to being ignored, that single statement was sufficient to earn its support.

Thus, the widespread practice of secrecy by the Bush administration since September 11 strikes a raw nerve in this community. And its leaders (even the

¹⁰⁸ MPI interview with Kathleen W. Lee, former program officer, the Tides Foundation, April 28, 2003.

¹⁰⁹ Khan interview, *supra* note 95; Mahmoud interview, *supra* note 15.

¹¹⁰ AbiNader interview, *supra* note 26.

¹¹¹ Shalabi interview, *supra* note 3.

¹¹² Khan interview, *supra* note 95.

¹¹³ Hamad interview, *supra* note 33.

¹¹⁴ Bedun interview, *supra* note 20.

¹¹⁵ See Delinda C. Hanley, “Historic Muslim—and Arab-American Bloc Vote a Coveted Political Prize,” *Washington Report on Middle East Affairs*, December 2000; Ralph Z. Hallow, “Muslim Turnout for Bush Fuels Hope,” *Washington Times*, Jan. 24, 2001. See also Steve Sailer, “Analysis: Muslim Voters Offer Tricky Opportunity for GOP,” *United Press International*, Nov. 18, 2000. The same article cites data provided by the Arab American Institute indicating a similar voting pattern for Arab-Americans, who overlap partially with American Muslims. It notes that in the heavily Arab-American districts of Dearborn, Mich., President Bush defeated Vice President Gore by a ratio of 2-to-1. The *Detroit Free Press* similarly reported that President Bush was heavily supported by Arab-Americans in Dearborn: See Nisaj Warikoo, “Arab-Americans Flex Their Voting Muscle,” *Detroit Free Press*, Nov. 15, 2000. See also Kerri Houston, “Into the Mosque; The GOP Should Forge Friendship With U.S. Muslims,” *Investor’s Business Daily*, Feb. 13, 2001.

¹¹⁶ Hanley, *supra* note 116; Warikoo, *supra* note 116; press release, American Muslim Alliance (AMA), “American Muslim PAC Endorses George W. Bush for President,” Oct. 23, 2000, available at www.amaweb.org/election2000/ampcc_endoreses.htm; Saffuri interview, *supra* note 29.

¹¹⁷ AMA press release, *supra* note 117.

Republicans among them) mince no words. Comments like "President Bush fooled us, he took his mask off after the election," and "It [supporting Bush] was the biggest mistake the community has ever made"¹¹⁹ are familiar refrains in the Arab-American community today. A poll conducted by Zogby International indicated that the Republican Party may have paid a price in the 2002 congressional elections.¹²⁰

This perceived turnabout and the impact of the government's response to September 11 have made the Arab- and Muslim-American communities much more politically conscious and politically active. "In the past some Muslims thought that participating in U.S. political life was un-Islamic," said a Muslim cleric in New York.¹²¹ Today, say community leaders, "those dissatisfied in the past are more engaged in political activity"¹²² and are "entering the political process at various levels."¹²³

An increased interest in political activity is responsible for the rise in voter registration in Arab- and Muslim-American communities, helped in part by drives sponsored by national Muslim organizations.¹²⁴ Meanwhile, applications for naturalization from immigrants across the country increased by 61 percent in October and November of 2001, compared to the same months in the prior year.¹²⁵ "People have discovered the need for citizenship. People who had never thought of acquiring U.S. citizenship are applying. It makes people feel secure," said a Dearborn civil rights leader.¹²⁶

The increase in citizenship applications is consistent with the behavior of other immigrant groups who have felt under attack in the past (for example, during World War II, and in the mid-1990s when Congress enacted legislation limiting the rights of immigrants). Times of national crisis seem to sharpen the distinction between

immigrants and citizens. And many immigrants, who may have been ambivalent about their new home, take the final step and decide to belong.

Thus, in a familiar American image, newly minted Americans of Arab descent and Muslim faith are waving U.S. flags at naturalization ceremonies. It is not the image bin Laden had in mind when he ordered the attacks of September 11.

II. Objective Measures of the Impact of September 11 on Minority Groups: Hate Crimes, Employment Discrimination, and Airline Discrimination

A. Hate Crimes

1. Dramatic Increases in the Immediate Aftermath of the Attacks

Hate crimes against Muslims soared after September 11, according to a November 2002 FBI report.¹²⁷ The report noted a dramatic increase of "more than 1,600 percent in reported hate crimes against Muslims—a jump from 28 hate incidents in 2000 to 481 last year."¹²⁸ Anti-Muslim incidents were previously the second-least reported type of religious hate crime, but in 2001, "presumably as a result of the heinous incidents that occurred on September 11," they became the second-highest among religious-bias incidents, according to the report.¹²⁹

Intimidation was the most common hate crime reported against Muslims in 2001, with 296 incidents reported in the annual statistical report.¹³⁰ Twenty-seven incidents of aggravated assault and 66 incidents of simple assault against Muslims were also reported.¹³¹

¹¹⁹ Bedin interview, *supra* note 20; Sibani interview, *supra* note 32.

¹²⁰ According to a Nov. 4, 2002, press release of the American Arab Institute, a poll conducted by Zogby International in the last week of October 2002 indicated that in the 2002 congressional elections, 40 percent of Arab-Americans were expected to support the Democratic Party, compared to 30 percent support for the Republican Party.

¹²¹ Namouz interview, *supra* note 69.

¹²² MEMEAC, unpublished manuscript, *supra* note 61.

¹²³ Rignel interview, *supra* note 100.

¹²⁴ Zoll, *supra* note 30.

¹²⁵ Kris Axtman, "A Boom in Citizenship Requests," *Christian Science Monitor*, Feb. 11, 2002.

¹²⁶ Hamad interview, *supra* note 33.

¹²⁷ Tanya Schovitz, "FBI Sees Leap in Anti-Muslim Hate Crimes," *San Francisco Chronicle*, Nov. 26, 2002.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

Some Muslim leaders believe the number of hate crime incidents is actually higher than indicated in the FBI report because many Muslims do not report such crimes to authorities.¹²⁷

The FBI report corroborates other reports of an increase in hate crimes in the United States against Muslims, Arabs, and South Asians since September 11. Human Rights Watch reports that 51 hate crimes against Arabs and Muslims were reported in Chicago in just the three months following September 11, compared with four in all of 2000.¹²⁸ According to the Justice Department's Civil Rights Division (CRD), such hate crimes include "telephone, internet, mail and face-to-face threats; minor assaults, assaults with dangerous weapons, and assaults resulting in serious injury and death; and vandalism, shootings and bombings directed at homes, businesses and places of worship."¹²⁹ The CRD also reported that "[a]pproximately 70 state and local criminal prosecutions have been initiated against approximately 80 defendants."¹³⁰

The Council on American-Islamic Relations reported 1,717 hate crime incidents in the first five months after Sept. 11, 2001.¹³¹ Of these incidents, 289 involved physical assault and/or property damage, 11 resulted in deaths, 166 were related to workplace discrimination, 191 involved airport profiling, 224 were reports of FBI, INS, or police intimidation, 74 were reports of discrimination in schools, 315 involved hate mail, 56 were death threats, 16 were bomb threats, and 372 were public harassment, which included such behavior as verbal harassment and running someone off the road.¹³²

2. Examples of Hate Crimes

The following are examples of hate crimes that were committed across the U.S. since September 11 against

Arab- and Muslim-Americans, or those perceived to be from these communities:

- *September 2001 – Mesa, Ariz.:* Balbir Singh Sodhi, a Sikh gas station and convenience store owner, was killed four days after September 11 by Frank S. Roque, who shot Sodhi as he drove by Sodhi's gas station. Roque then fired shots at a Lebanese-American clerk at another gas station 20 minutes later. Also that night, a gunman fired shots at the home of an Afghan-American family. Arizona police arrested and charged Roque for Sodhi's murder.¹³³
- *September 2001 – Dallas:* Mark Anthony Stroman, "a white supremacist, walked into a succession of Dallas-area convenience stores and killed a Pakistani clerk and an Indian clerk, and partially blinded a third clerk from Bangladesh."¹³⁴ Stroman has been sentenced to death. Voicing no remorse, he has recalled telling each of his victims, "God bless America."¹³⁵
- *September 2001 – New York (Richmond Hill area):* In Richmond Hill, an area in Queens, New York that has a large number of Sikh families, rubber bullets were fired at a gurdwara (Sikh temple) from a car at Sikh passersby. Also in Richmond Hill, an elderly Sikh man was attacked by youths armed with baseball bats. After hearing of such incidents, it was recommended that people not wear clothing that could be easily identified or mistaken as Muslim or Middle Eastern. For example, the Indian Consul in New York advised Indian women to wear a bindi¹³⁶ on their foreheads so they could appear to be non-Muslims.¹³⁷

¹²⁷ *Id.* (citing Maha ElGensaidi, executive director of the Islamic Network Group in San Jose, Calif.).

¹²⁸ United States: "We Are Not the Enemy": Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11, 26 Human Rights Watch 18 (Nov. 2002), available at <http://www.hrw.org/reports/2002/usahate/>, at 14-16 (hereinafter "Human Rights Watch").

¹²⁹ See Civil Rights Division, U.S. Department of Justice, *Enforcement and Outreach Following the September 11 Attacks* (hereinafter "Activity Sheet"), available at <http://www.usdoj.gov/crt/legalinfo/discrimupdate.htm> (last updated July 30, 2002). See also American-Arab Anti-Discrimination Committee (ADC), *The Condition of Arab Americans Post-9/11* (March 27, 2002), available at [http://www.adc.org/index.php?id=2828&no_cache=1&csword_list\[\]=9%2F11](http://www.adc.org/index.php?id=2828&no_cache=1&csword_list[]=9%2F11) (citing its report summarizing over 600 violent incidents against Arab-Americans or those perceived to be Arab-Americans, and other incidents which range from employment discrimination to airline racism to law enforcement profiling).

¹³⁰ See Activity Sheet, *supra* note 129.

¹³¹ See Council on American-Islamic Relations, *Number of Reported [Hate Crime] Incidents by Category*, available at <http://www.cair-net.org/html/bycategory.htm> (stating that a total of 1,717 number of incidents were reported against Arab-Americans or those perceived to be such as of Feb. 8, 2002).

¹³² *Id.*

¹³³ "Gunman kills immigrant, shoots at Lebanese clerk," *Chicago Tribune*, Sept. 17, 2001.

¹³⁴ Richard A. Serrano, "Crimes Driven by 9/11 Reach Prosecution," *Los Angeles Times*, July 8, 2002.

¹³⁵ *Id.*

¹³⁶ A bindi is a decorative mark worn on the forehead and is distinctive of the Hindu religion.

¹³⁷ Amitava Kumar, "In NY, You Can Die Now If You Have a Beard," *Times of India*, Sept. 17, 2001.

- *September 2001 – Chicago:* A mob of 300 chanting “USA! USA!” was turned away from a mosque by police, who feared they might have destroyed the mosque or harmed its worshippers. Also in Chicago, a Molotov cocktail was tossed at the Arab-American Community Center.¹⁴³
- *September 2001 – Reedley, Calif.:* Abdo Ali Ahmed, a Yemeni immigrant, was shot and killed while working at his East Reedley convenience store. Cash in two registers and the open safe were left untouched. Two days before his murder, Ahmed and his wife had found an intimidating note on his car windshield that contained anti-Arab sentiments and a death threat. Instead of contacting the police, he had thrown the note away.¹⁴⁴
- *September 2001 – San Gabriel, Calif.:* Adel Karas, an Arab and Coptic Christian, was shot and killed at his convenience store. His wife believes he was murdered because he was mistaken for a Muslim, noting that no money was taken from the store’s cash register or from the “thick wad of bills in his pocket.”¹⁴⁵ Local police said that without witnesses, no anti-Arab or anti-Muslim bias could be established.¹⁴⁶
- *September 2001 – Seattle:* Issa Qandeel, a Palestinian Muslim, was leaving the Idriss Mosque when he smelled gas near his jeep and saw a man, subsequently identified as Patrick Cunningham, emerge from behind the jeep. Cunningham was carrying a can of gasoline and a gun. When Qandeel asked Cunningham what he was doing, Cunningham began to walk away. When Qandeel tried to stop him, Cunningham shot at Qandeel three times, but the gun did not discharge any bullets. Cunningham shot at Qandeel once more when Qandeel began to chase after him. At that point, a bullet discharged, though it missed Qandeel.¹⁴⁷ Police later

discovered that Cunningham planned to burn cars in the mosque driveway.¹⁴⁸ Cunningham was prosecuted for attacking Qandeel and attempting to deface a house of worship. He later expressed remorse over his acts. In December 2002 he pleaded guilty to obstructing the free exercise of religious beliefs and to using a firearm in the commission of a crime. He was sentenced to six and a half years for the assault.¹⁴⁹

- *September 2001 – SeaTac, Wash.:* Raymond Isais Jr. allegedly assaulted Kulwinder Singh, a turbaned Sikh taxi worker. When he got into the back of Singh’s taxi, Isais allegedly told him, “You have no right to attack our country!” and began choking Singh. After both men got out of the taxi, Isais allegedly started punching Singh, pulled out tufts of his beard, knocked off his turban, and called him a terrorist during the assault. Isais was charged with a hate crime by local county prosecutors.¹⁵⁰
- *September 2001 – San Diego:* Swaran Kaur Bhullar, a Sikh woman, was stabbed in the head twice as she waited in her car at a traffic light. The two men who attacked her shouted, “This is what you get for what you’ve done to us!” and “I’m going to slash your throat,” prior to stabbing Bhullar. Bhullar felt she would have been killed had another car not approached the traffic light at the time. Her assailants were never identified or found.¹⁵¹
- *September 2001 – Huntington, N.Y.:* Fariza Ejaz, a Pakistani woman, was standing outside a mall when Adam Lang, a 76-year-old man, allegedly started driving toward her. She jumped out of the way and ran into the mall. Lang then jumped out of his car and screamed that he was “doing this for my country” and “was going to kill her.” Mall agents seized him before he was able to do anything more. Lang was charged with first degree reckless endangerment.¹⁵²

¹⁴³ *Id.*

¹⁴⁴ Karen De Sa, “Merchant’s Death May Be Backlash; Yemenis Anxious in Wake of Killing,” *San Jose Mercury News*, Oct. 2, 2001.

¹⁴⁵ Human Rights Watch, *supra* note 133.

¹⁴⁶ *Id.*

¹⁴⁷ The failure of the gun to fire bullets in the first three instances was later explained by prosecutors as a result of the gun misfiring. See Ray Rivera, “Man gets 6-1/2 years for attack on mosque,” *Seattle Times*, Dec. 18, 2002.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Human Rights Watch, *supra* note 133.

¹⁵¹ *Id.*

¹⁵² *Id.*

- *October 2001 – Minneapolis:* Ali W. Ali, a 66-year-old Somali man, died nine days after being punched in the head while standing at a bus stop. The only known witness to the attack saw the assailant walk up to Ali, punch him, stand over him, and then walked away. Ali's son and Somali community members attributed the attack against Ali to anger created against Somalis by a front page local newspaper article that appeared two days before the assault. The article stated that Somalis in Minneapolis had given money to a Somali terrorist group with links to Osama bin Laden.¹⁵³
- *October 2001 – Prince William County, Va.:* A mother and her son allegedly led a mob attack on two Afghan-American teenagers, brothers aged 16 and 17, "in what police said was a hate-related melee."¹⁵⁴ April Scruggs, 42, and Jarvis Berkley Wilhoit, 19, hit and kicked the teenagers after more than a month of verbal assaults. Wilhoit and a group of friends approached the two youths and began taunting and hitting them. Scruggs then joined the fight and hit the 17-year-old in the head with a wrench. The brothers escaped into a neighbor's house. Neither was seriously injured. Wilhoit was charged with two counts of assault and battery. These counts were elevated to felonies because they were allegedly hate-related. Scruggs was charged with one count of misdemeanor assault and battery.¹⁵⁵
- *November 2001 – Prince William County, Va.:* Two concrete layers allegedly beat a Pakistani taxicab driver severely. The two men had apparently been drinking prior to the incident, which police and prosecutors are calling a hate crime. They proceeded to berate their driver because of his Middle Eastern descent. Upon arrival at their destination, the two refused to pay their driver and instead "attacked him, throwing him to the ground and kicking him repeatedly in the head."¹⁵⁶ The driver suffered a concussion and several

superficial wounds. Upon questioning by the police, the two men acted belligerently and didn't appear to think they had done anything wrong. According to the interviewing detective on the case, "they made jokes and laughed, with one of them speaking in his version of a Middle Eastern language."¹⁵⁷

- *November 2001 – Oswego, N.Y.:* Cassie Hudson was one of four people arrested for a fire that destroyed the Gobind Sadan USA Temple in Palermo. According to authorities, the suspects thought the temple was named "Go Bin Laden" and burned it because they thought temple worshippers supported Osama bin Laden. Hudson was accused of throwing beer bottles at the building, and plead guilty to fourth-degree criminal mischief as a hate crime.¹⁵⁸
- *December 2001 – Columbus, Ohio:* Vandals broke into the Islamic Center of Columbus through a side door, drilled holes in the floors and pulled water pipes from walls, saturating floors and ceilings of the three-story building. They also shredded copies of the Quran and threw the detritus into the parking lot. The building must undergo extensive renovation because of the damage.¹⁵⁹
- *February 2002 – Brooklyn, N.Y.:* Two students, one an immigrant from Pakistan and the other from Egypt, were attacked by a group of youths outside Brooklyn's Lafayette High School. One victim suffered contusions to the head and knee. One parent leader at the school, Sajjad Khan, cited the assault as an example of a hate crime, stating, "They're targeting these Arab kids. They're targeting Muslim students. They're picking off our students one by one."¹⁶⁰ One of the assailants filmed the incident with a camcorder, leading school sources to speculate that the attack may have been related to a gang initiation ritual.¹⁶¹
- *March 2002 – San Francisco:* The phrase "Kill Arabs" was spray-painted above the entrance of

¹⁵³ *Id.*

¹⁵⁴ Josh White, "Beating of Pakistani Cab Driver Called a Hate Crime; Two Passengers Charged With Assault," *Washington Post*, Nov. 4, 2001.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Associated Press*, "Last Temple Fire Suspect Admits Role," May 28, 2002.

¹⁵⁹ Emily Swartzlander, "Islamic Center Vandalized; Muslims Call it Hate Crime," *Associated Press*, Dec. 31, 2001.

¹⁶⁰ Carl Campanile, "Bias Eyed in Beating of Muslim HS Kids," *New York Post*, Feb. 8, 2002.

¹⁶¹ *Id.*

the activist group Community United Against Violence. Other anti-Arab words were spray-painted on pro-Palestinian posters that were on a light pole nearby, in San Francisco's Mission District. "Kill Arabs" and other offensive graffiti were also painted over a peace-themed mural at the nearby Women's Building, home to several non-profit groups that had recently increased outreach to women in South Asian and Arab communities.¹⁶²

- *June 2002 – Houston, TX:* FK, an American Muslim woman who wears a hijab (head scarf) was allegedly assaulted in a drug store by a woman who told her before the assault "that she had learned about 'you people' over the last ten months and didn't trust 'a single damn one of you.'"¹⁶³ She then slammed FK to the floor and began pulling at her hijab, choking her. FK was forced to pull off the hijab because she could not breathe. The woman then dragged FK by her hair to the front of the store. The assailant was holding FK by her ponytail on the sidewalk in front of the store when police arrived, and told police that she was making a citizen's arrest.¹⁶⁴
- *August 2002 – St. Petersburg, Fla.:* Dr. Robert J. Goldstein, a podiatrist, was arrested after police found guns and explosive devices in his home. Deputies searching his home "found up to 40 weapons, 30 explosive devices, a list of about 50 Islamic worship centers in Florida, and detailed plans to bomb an Islamic education center."¹⁶⁵ Documents submitted to the court detailed plans to destroy the education center and dozens of mosques.¹⁶⁶ In April 2003, Goldstein plead guilty to plotting a bomb attack on a St. Petersburg mosque.¹⁶⁷
- *August 2002 – Selden, N.Y.:* A Pakistani family was attacked as they left their Tandoori Cottage

Restaurant in Selden. "Mehmooda Malik, 37, and her son Gibbran, 15, were allegedly beaten in the stomach and head, and taunted by teenagers who yelled, 'You blew up the Twin Towers' and 'Are you terrorists?'" The Maliks claimed they were not seriously injured by the attacks, but that they remained concerned for their personal safety. The son continues to suffer severe headaches. Two suspects were charged with second-degree aggravated harassment, a misdemeanor, and were released on \$100 bail.¹⁶⁸

- *September 2002 – Nassau County, N.Y.:* A window in a Nassau County mosque was smashed by a brick. Although no suspects were identified, the mosque had been vandalized in a bias crime the year before, immediately following the September 11 attacks.¹⁶⁹
- *September 2002 – Kent, Ohio:* The main entrance door to the Kent Mosque was rammed with a piece of wood, leaving "a sizeable hole in the glass door" and shards of broken glass covering the front entrance.¹⁷⁰ The vandalism marked the second time in less than a week that a mosque in the area had been a target of vandalism. Ihsan Ul Haque, president of the Islamic Society of Akron and Kent, said he believed that an individual or a group was deliberately targeting the Islamic community in the Akron area. Five days earlier, bullets were fired at the regional Islamic Community Center in Cuyahoga Falls, Ohio. The bullet holes were discovered in the window of the prayer hall.¹⁷¹
- *November 2002 – Easton, Mass.:* Three friends were on their way home after a night of drinking when they stopped at a 7-Eleven, where they began to smash goods and act unruly. When Mohd Amir Thakur, the store clerk who was of Pakistani origin, asked them to stop, the three berated him, allegedly saying, "[Expletive] you.

¹⁶² Jim Hutton Zamora, "Hate Crime Investigation in S.F. of 2 Graffiti Attacks in Mission," *San Francisco Chronicle*, March 28, 2002.

¹⁶³ Human Rights Watch, *supra* note 133.

¹⁶⁴ *Id.*

¹⁶⁵ Rachel La Corte, "Doctor Accused of Targeting Mosques," *Associated Press*, Aug. 23, 2002, available at <http://apnews.excite.com/article/20020824/1771J12FU00.html>.

¹⁶⁶ *Id.* See also Ansalan Iftikhar, "Doctor Arrested in Florida is a 'Terrorist' Too," *Houston Chronicle*, Aug. 29, 2002, available at <http://www.commodreams.org/views02/0829-07.htm>.

¹⁶⁷ Graham Brink, "Man Pleads Guilty to Bomb Plot," *St. Petersburg Times*, April 4, 2003.

¹⁶⁸ Erin Teixeira, "Pakistanis Voice Concerns on Hate Crimes," *Newsday*, Sept. 4, 2002.

¹⁶⁹ *Id.*

¹⁷⁰ Carl Chancellor and Andrea Misko, "Vandal Hits Door of Kent Mosque; Muslim Community Concerned Act Was Hate Crime," *Bowen Journal* (Akron, Ohio), Sept. 21, 2002.

¹⁷¹ *Id.*

You are from Afghanistan. You are Osama bin Laden's brother. You are a [expletive] terrorist." The three began throwing the goods at him before one of them punched him. When he fell to the ground, he was repeatedly kicked. According to reports, "Thakur sustained cuts and bruises and his thumb was injured from being bent back by one of the assailants."¹⁷²

B. Employment Discrimination

Employment discrimination against Muslim-Americans, Arab-Americans, and South Asians has increased dramatically since September 11. The federal Equal Employment Opportunity Commission (EEOC) is responsible for enforcing Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex, or national origin.¹⁷³ The EEOC developed a new code specifically to track employment discrimination complaints related to September 11. Code Z is for charges related to the events of Sept. 11, 2001, made by an individual who is, or is perceived to be, Muslim, Arab, Afghani, Middle Eastern or South Asian, or by any individuals alleging retaliation related to the events of September 11.

The EEOC has reported that in the 15 months between Sept. 11, 2001, and Dec. 11, 2002, it received 705 complaints concerning September 11-related employment discrimination.¹⁷⁴ In 428 cases, people alleged that they were unlawfully fired. Another 294 people alleged that they were unlawfully harassed. Seventy-two individuals aggrieved by September 11-related employment discrimination have received \$956,000 in monetary benefits through the efforts of EEOC.¹⁷⁵

While there is no baseline figure from the previous year to compare these employment discrimination statistics to, the EEOC does have information on complaints filed because of negative treatment based on religion.¹⁷⁶ From Sept. 11, 2000, to Feb. 20, 2001, 109

complaints of negative treatment due to the Muslim religion were filed, while from Sept. 11, 2001, to Feb. 20, 2002, that number more than tripled to 329.¹⁷⁷

The EEOC has acted on many September 11-related discrimination complaints. For example:

- On Sept. 30, 2002, the EEOC's New York District Office filed a lawsuit against the Worcester Art Museum, alleging that the museum unlawfully fired an Afghan-American Muslim man on the basis of his national origin and religion.¹⁷⁸ According to the lawsuit, Zia Ayub, the only Museum employee of either Muslim or Afghan origin, was ostracized by his co-workers after September 11. One of Ayub's co-workers falsely reported him to the authorities as a suspected terrorist. On Jan. 4, 2002, the museum fired Ayub without notice, "allegedly for taking excessive time to complete security rounds on three separate occasions." Ayub was replaced by "a non-Muslim who was not of Afghan or Middle Eastern origin." The suit alleges that the reasons given for Ayub's termination were discriminatory, as the museum had failed to investigate four other similarly slow guards who were not of Middle Eastern origin.¹⁷⁹

The Worcester Art Museum said in a statement that it "denies the allegations" and "strongly disagrees with the action being taken by the EEOC." It also said that "[t]he museum is committed to fostering a diverse work place and is an equal opportunity employer."¹⁸⁰

- The EEOC's Phoenix District Office filed a lawsuit against Alamo Car Rental alleging discrimination against Bilan Nur, a customer service representative.¹⁸¹ According to the suit, Nur, who had worked for Alamo since 1999, was allowed to wear a hijab in observance of Ramadan in 1999 and 2000, but was told not to do so in December 2001. Instead, Alamo told Nur that the company

¹⁷² Dave Wulge, "Trio arraigned in hearing of Pakistani store clerk," *Boston Herald*, Nov. 20, 2002.

¹⁷³ 42 U.S.C. § 2000e-2.

¹⁷⁴ Equal Employment Opportunity Commission (EEOC), Fact Sheet, *Muslim/Arab Employment Discrimination Charges since September 11* Dec. 11, 2002.

¹⁷⁵ *Id.*

¹⁷⁶ Telephone interview with EEOC staff, Washington, March 11, 2002.

¹⁷⁷ *Id.*

¹⁷⁸ EEOC, press release, "EEOC Files Post-9/11 Religion and National Origin Termination Lawsuit Against Worcester Art Museum," Sept. 30, 2002.

¹⁷⁹ *Id.*

¹⁸⁰ Denise Lavoie, Associated Press, "Discrimination claim filed against Worcester museum," *Standard-Times* (New Bedford, Mass.), Oct. 1, 2002.

¹⁸¹ EEOC, press release, "EEOC Sues Alamo Car Rental for Religious Bias," Sept. 30, 2002.

dress code prohibited wearing a headscarf. Alamo disciplined, suspended, and eventually terminated Nur for failing to remove her headscarf, though the company had no such policy.¹⁴⁷ The alleged discrimination occurred immediately after September 11, and Nur believes it was in reaction to her being Muslim. Nur even offered to wear an Alamo company scarf, but her offer was refused. A spokesperson for Alamo Car Rental's parent corporation declined to comment on the accusations because of pending litigation.¹⁴⁸

- On Sept. 30, 2002, the EEOC's Miami District Office filed a lawsuit against Chromalloy Castings Tampa Corp.¹⁴⁹ The EEOC's suit alleges that a U.S. citizen of Palestinian descent was "singled out and discharged within days of the 9/11 attacks for no other reason than his national origin."¹⁵⁰ In late May 2003, the case was in the discovery phase, an EEOC official said.
- A Chromalloy official denied the allegations. "Chromalloy Castings does not see any basis for the EEOC's allegations regarding (the) case, and we intend to vigorously defend against it," Chromalloy General Manager Chong Yi told MPI on June 2, 2003.

Kareem Shora, Legal Advisor at the American-Arab Anti-Discrimination Committee (ADC), estimates that only 5 to 10 percent of employment discrimination cases are reported.¹⁵¹ Shora indicated that while there has been a significant increase post-September 11 in the number of individuals calling the ADC to seek information and to describe incidents of discrimination,¹⁵²

callers are often too frightened to provide their names or places of employment.¹⁵³ Apprehension about having their information placed in a national database adds to this reluctance.¹⁵⁴

Concerns about immigration status may also lead to underreporting. While federal employment law makes it illegal to discriminate against any worker in the United States, regardless of immigration status,¹⁵⁵ many members of the affected communities have been deterred from reporting discrimination because of increased immigration enforcement by the federal government against Arabs and Muslims.

In addition, according to a representative of the National Association of Muslim Lawyers, "hundreds and possibly thousands"¹⁵⁶ of cases of discrimination against Muslims in the U.S. have gone unreported "due to the diminished faith in our legal system by those who have been the targets of discrimination."¹⁵⁷ Further, the general pattern that job applicants are less likely to bring employment discrimination claims than those who experience discrimination while already employed means that there is a particular lack of documentation of the discrimination faced by members of Arab- and Muslim-American community groups in receiving job offers, recruitment contacts, or even job interviews.¹⁵⁸ The Vice Chair of the EEOC, Paul Igarashi, has voiced these and other concerns:

Immigrants are often reluctant to make legal complaints. There are sometimes language or cultural barriers, and often people do not have information about their rights. A legal system that is intimidating to most is all the more so to someone who is

¹⁴⁷ *Id.*

¹⁴⁸ "Alamo Target of Religious Bias Suit," *Auto Rental News*, Oct. 8, 2002.

¹⁴⁹ EEOC, Press Release, "EEOC Files Post-9/11 National Origin Discrimination Suit Against Chromalloy Castings Tampa Corporation," Sept. 30, 2002.

¹⁵⁰ *Id.*

¹⁵¹ Telephone interview with Kareem Shora, Legal Advisor, American-Arab Anti-Discrimination Committee, May 17, 2002.

¹⁵² The ADC received five times as many complaints during the period of September 2001 to February 2002 as it averaged during the period of Jan. 2001 to August 2001. American-Arab Anti-Discrimination Committee, *Report on Hate Crimes & Discrimination Against Arab Americans: the Post-September 11 Backlash, September 11, 2002 to October 11, 2002*, (ADC Research Institute, 2003), p. 7. As of March 27, 2002, the ADC had confirmed several hundred cases of employment discrimination against Arab-Americans or those perceived to be Arabs since September 11, including hostile work environments and numerous terminations.

¹⁵³ Shora, *supra* note 186.

¹⁵⁴ *Id.*

¹⁵⁵ EEOC, press release, "EEOC Reaffirms Commitment to Protecting Undocumented Workers from Discrimination," June 28, 2002, available at <http://www.eeoc.gov/press/6-28-02.html>.

¹⁵⁶ Arshad Majid, National Association of Muslim Lawyers, Remarks at the Meeting of the U.S. Equal Employment Opportunity Commission, Employment Discrimination in the Aftermath of September 11 (Dec. 11, 2001) (hereinafter "EEOC 2001 Commissioners Meeting") (transcript available at <http://www.eeoc.gov/meetings/12-11-01-transcript.html>), at p. 18 of transcript.

¹⁵⁷ *Id.*

¹⁵⁸ Paul Igarashi, EEOC Vice Chair, Remarks at the EEOC 2001 Commissioners Meeting, *supra* note 191.

less familiar with it and perhaps less confident that they will be treated fairly. For many, their distrust of government is heightened substantially when they feel racial profiling or compromises of their legal rights.¹⁹⁴

The following are other examples of employment discrimination committed across the U.S. against Arab- and Muslim-Americans, or those perceived to be from these communities:

- *September 2001 – Island Park, N.Y.:* A Jordanian-American employee of Island Park Laundromat was fired from her part-time job. She alleged that her boss told her that “[t]he customers they are scared you want to put a bomb in my store.” Her boss later alleged that customers had threatened to boycott the store as a result of comments made by the employee.¹⁹⁵
- *September 2001 – Miami, Fla.:* Mohammad Rahat, a medical technician with the University of Miami, claimed that he was discriminated against for his Iranian background when he was fired for making certain comments. Rahat, whose birthday happened to be September 11, said aloud, “Some birthday gift from Osama bin Laden.” He claims that the statement, along with his criticisms of U.S. foreign policy, got him fired. The University of Miami said that Rahat was fired not due to his Iranian ethnicity, but because his comments “were inappropriate and unbecoming for someone working in a research laboratory.”¹⁹⁶
- *September 2001 – Ashburn, Va.:* Ossama Elkoshairi, an Egyptian-born U.S. citizen, was fired from his job as a Wal-Mart greeter in Fairfax, Virginia. He said that he was harassed by two employees who at one point had pointed at him and said, “He did it,” and one held up a picture of Osama bin Laden. Wanting to ensure employees that he also condemned bin Laden, Elkoshairi replied that if bin Laden were responsible, he himself would slaugh-

ter him. Several days later, he was called into the manager’s office and questioned for two hours by Wal-Mart officials and an F.B.I. agent about his behavior and views on the American bombing of Afghanistan. He was then fired and told not to enter any Wal-Mart or Sam’s Club store again. A Wal-Mart spokesman explained the termination was a result of “inappropriate conduct.”¹⁹⁷

- *Spring 2002 – New York, N.Y.:* Farrah Spencer, an Arab-American Muslim working as an office manager in a New York City venture capital firm, says that immediately after the terrorist attacks, her boss and co-workers started asking her questions such as “Why do you guys hate America?” Then, a few days after receiving a letter from a friend in Saudi Arabia, she lost her job. The company claims that the position was eliminated due to budget cuts, not due to her religion.¹⁹⁸

In some instances, job loss has occurred as a result of governmental investigation or enforcement activity. In Orlando, a Sikh man was questioned by the FBI after being seen reading books about architecture. He lost his job when his employers discovered that he had been questioned by the FBI.¹⁹⁹ The ADC has heard of cases where the FBI or law enforcement agents visited individuals’ workplaces and asked their supervisors to produce their records, with such visits leading to the individuals being fired.²⁰⁰ In another instance, a documented immigrant who had lived in the U.S. for 17 years was detained for several months on alleged suspicion of terrorism links. He was eventually released because the suspicion could not be substantiated. But he was left without a job when his employers refused to recall him.²⁰¹

C. Airline Discrimination (“Flying While Brown”)

1. Statistical Evidence of Airline Discrimination

Widespread fear after the September 11 terrorist attacks has led to the removal of brown-skinned people

¹⁹⁴ *Id.*

¹⁹⁵ Pam Belluck, “A Nation Challenged — Arab-Americans: After Sept. 11, Complaints of Job Bias Mount,” *New York Times*, Nov. 25, 2001.

¹⁹⁶ Any Martinez, “Watching for Bias in the Workplace So Far, Complaints from Muslims Are Limited,” *Palm Beach Post*, Jan. 13, 2002. Gail Epstein Nieves, “UM employee fired over Sept. 11 remarks,” *Miami Herald*, Nov. 16, 2001.

¹⁹⁷ Belluck, *supra* note 195.

¹⁹⁸ Deborah Kong, “Post-Sept. 11 Backlash Violence Replaced by More Subtle Forms of Discrimination, Advocates Say,” *Associated Press*, Sept. 7, 2002.

¹⁹⁹ Harpreet Singh, Director of Community Relations of the Sikh Coalition, at meeting of New York metropolitan area community leaders, conducted at offices of Cleary, Gottlieb, Steen, and Hamilton, July 10, 2002 (hereinafter “Community Leaders Meeting”).

²⁰⁰ Morica Tarazi, New York Director of American-Arab Anti-Discrimination Committee, at Community Leaders Meeting, *supra* note 199.

²⁰¹ Robina Nizz, social worker and activist, at Community Leaders Meeting, *supra* note 199.

perceived to be of Middle Eastern or South Asian descent from airplanes. Victims of this new form of ethnic profiling sometimes ruefully call it "flying while brown."²⁰² Statistical evidence from the U.S. Department of Transportation (DOT) demonstrates that discrimination against brown-skinned airline passengers after September 11 continues.

Between January and March 2002, the first period for which these numbers were available, the DOT documented 84 complaints of discrimination by air carriers.²⁰³ However, according to the monthly Air Travel Consumer Report issued by the DOT, complaints about discrimination in air transportation dropped by 50 percent between April and May 2002. Consumers registered five complaints in November 2002 alleging discrimination by airlines due to factors other than disability, such as race, religion, national origin or sex.²⁰⁴ While the number of such incidents may have declined after the initial increase in profiling after the terrorist attacks, discrimination continues to occur and innocent brown-skinned passengers are being singled out and face discrimination.

2. Examples of Airline Discrimination

The following are examples of airline discrimination perpetrated against Arabs and Muslims, or those perceived to be Arab or Muslim:

- *September 2001 – Seattle, Wash.:* Vahid Tony Zohrehvandi, an Iranian-American engineer and part-time consultant for American Airlines, was ejected from a flight operated by his employer on September 21. He was removed from the plane after he was told that the pilot was uncomfortable with him as a passenger. He was allowed to fly on a subsequent flight only after the pilot was consulted and agreed to fly with a "Middle Eastern" man on board.²⁰⁵ Zohrehvandi is one of dozens of passengers who says he was unfairly taken off an airplane after September 11 because of their

names or appearance. Zohrehvandi said, "It was humiliating." He later remarked, "In this country when I became a citizen, they said, 'You're an American.' On that day, I realize I will never be an American in this country as long as I look like this." American Airlines declined to comment about the incident.²⁰⁶

- *September 2001 – San Antonio, TX.:* On Sept. 17, 2001, at the San Antonio airport, Ashraf Khan boarded a Delta Air Lines flight to Dallas, en route to Pakistan to attend his brother's wedding. Khan, a lawful permanent resident for 11 years, was approached by the pilot moments after taking his first class seat. The pilot asked to speak to him in the gate area, told him that he and his crew did not feel safe flying with Khan on board and "even questioned how a 32-year-old businessman could afford a first-class ticket."²⁰⁷ The plane left without him. Delta's president later called Khan to apologize and offered to fly him to Pakistan on the next available flight, which would have arrived well after his brother's wedding ceremony.²⁰⁸ Delta issued a statement soon after the incident reminding employees not to single out passengers.²⁰⁹
- *September 2001 – Minneapolis, MN.:* Kareem Alasady, a U.S. citizen, and two companions were turned away from a Northwest Airlines flight from Minneapolis to Salt Lake City on September 20. "I feel that it's not the America I knew," said Alasady. "It's a different America." Northwest said in a statement that it "regrets any misunderstanding" involving the three men and is investigating the incident.²¹⁰
- *September 2001 – Tampa, Fla.:* "In Tampa, Mohamed el-Sayed, a U.S. citizen of Egyptian origin, was denied boarding on a United Airlines flight to Washington on September 21. An airport manager told him apologetically that the pilot refused to fly with him on board, explaining,

²⁰² See, e.g., Kareem Shmea, "Guilty of Flying While Brown," *Air and Space Lawyer* 17 (2002) available at <http://www.adc.org/index.php?id=456>.

²⁰³ ACLU, Press Release, "ACLU, ADC and Reiman Law Firm Sue Four Major Airlines Over Discrimination Against Passengers," June 4, 2002, available at <http://archive.aclu.org/news/2002/n060402a.html>.

²⁰⁴ Department of Transportation, Press Release, "Fewer Discrimination Complaints Filed by Airlines Passengers in May, According to DOT Report" (July 1, 2002), available at <http://www.dot.gov/affairs/dot06402.htm>.

²⁰⁵ Sasha Polakow-Suransky, "Flying While Brown," *American Prospect*, Nov. 19, 2001, available at <http://www.prospect.org/print/v12/i20/polakow-suransky-a.html>.

²⁰⁶ Sharon Cohen, "Arab Americans Complain of Profiling," *Associated Press*, Sept. 25, 2001.

²⁰⁷ Polakow-Suransky, *supra* note 205.

²⁰⁸ *Id.*

²⁰⁹ Cohen, *supra* note 206.

²¹⁰ *Id.*

'We've reviewed your profile; your name is Mohamed.'²¹¹ A United Airlines spokeswoman declined to comment on specific cases and said it treats all customers equally.²¹²

- *September 2001 – Orlando, Fla.:* Two Pakistani businessmen, Akbar Ali and Muhammad Naeem Butt, had traveled to Orlando, Fla., at the invitation of the U.S. Department of Commerce to attend an exhibition. "After boarding their US Airways flight to Baltimore on September 17, the two men were questioned extensively; they showed their passports, visas, a letter of invitation from the U.S. consul, and a brochure from the convention containing their photographs. Still, Ali and Butt were asked to leave the plane."²¹³ A US Airways spokesperson declined to comment on the incident but noted that the company's chairman had sent a special bulletin to employees on September 14 reminding them to treat Muslim, Arab and Middle Eastern co-workers and customers with respect.²¹⁴
- *October 2001 – San Francisco, Calif.:* Bina Ahmed was forced to wait at the check-in counter at the San Francisco airport. When she finally asked, "Is this delay because of my skin color and last name?" the counter agent replied, "Yes." Ahmed then asked, "Is racial profiling just your company's policy, or do all airlines do it?" The agent responded, "It's a government thing." After her bags were searched, Ahmed was told that FBI agents wished to speak with her. One agent proceeded to ask her a long series of questions, including her family's national origin, where her family lived, and what organizations she belonged to.²¹⁵
- *November 2001 – Chicago, IL.:* Samar Kaukab, a 22-year-old Muslim woman, passed through a metal detector without raising an alarm, but was asked to remove her hijab (head scarf) anyway. She explained to security that she could not remove it

in public for religious reasons. After consulting with a National Guardsman, the security official repeated the demand. Finally, Kaukab agreed to a compromise of removing her hijab in a back room in front of only female security officers. However, the search went much further than expected, involving the guard unzipping her pants, and patting her down inside her pants, on her lower abdomen and between her legs. Kaukab reported that even before she passed through the security checkpoint, the National Guardsman had glared at her.²¹⁶ She believes this was a clear case of racial profiling. The ACLU, on behalf of Kaukab, filed a lawsuit against members of the National Guard involved in the incident as well as three security personnel.

- *December 2001 – Baltimore, Md.:* In December 2001, a Secret Service agent assigned to protect President Bush was prevented from reboarding a flight to the president's ranch. The agent, an Arab-American, said he felt mistreated because of his ethnicity.²¹⁷ An American Airlines spokesperson said that the agent was refused passage not because of his ethnicity but because the captain was unable to confirm that the agent was who he said he was.²¹⁸
- *January 2002 – New York, N.Y.:* A 50-year-old British Asian woman flew to JFK to visit her sister, a cancer patient. When immigration officials at the airport learned that she had overstayed a previous visa while attending to her sister and awaiting an extension for which she had applied, they told her she would have to return to Britain. She accepted their decision and asked to speak to the British consul. Her request was refused, but told that she was free to call the Pakistani consulate. When she explained that she was British, not Pakistani, as her passport showed, they began to interrogate her about languages that she spoke and the length of

²¹¹ Polakow-Suzansky, *supra* note 205.

²¹² Cohen, *supra* note 206.

²¹³ Polakow-Suzansky, *supra* note 205.

²¹⁴ Linda Gilson, "Uneasy pilots refuse Arab-named travelers," *St. Petersburg Times*, Sept. 22, 2001.

²¹⁵ Bina Ahmed, "People of Color Bearing the Brunt of Post-Sept. 11 Climate," *San Diego Union-Tribune*, June 23, 2002.

²¹⁶ Daryn Kagan & Nancy Pender, "Woman Sues Argenbright, National Guard over Racial Profiling," (*CNN Live Today 10:00*), Transcript #011705CN.V75, Jan. 17, 2002. "American Muslim woman files suit over search at O'Hare," *CNN.com*, Jan. 17, 2002.

²¹⁷ Katherine Shaver & Mike Allen, "Federal Agent Accuses Pilot of Discrimination," *Washington Post*, Dec. 28, 2001; "4 Sue American Airlines Over Search," *Associated Press*, Aug. 2, 2002, available at http://news.findlaw.com/ap_stories/1310/R-2-2002/2002080294502_35.html.

²¹⁸ Jim Morris, "American defends removal of agent from flight," *Dallas Morning News*, Dec. 28, 2001.

her residency in Britain. She was ultimately fingerprinted, handcuffed, and marched through the departure lounge in front of other passengers.²¹¹

- *August 2002 – Atlanta, Ga.*: Dr. Bob Rajcoomar, a U.S. citizen of Indian descent and a former military physician from Florida, was on a Delta Airlines flight in first class from Atlanta to Philadelphia when a coach passenger began behaving erratically. The passenger, Steven Feuer, had nothing to do with Dr. Rajcoomar. U.S. air marshals moved and handcuffed Feuer into a seat next to Dr. Rajcoomar, who then asked to be moved to another seat, and the flight attendant reseated him.

Frightening the passengers and responding overzealously, one of the marshals wielded a gun, and told passengers they could not stand for any reason, extend their arms or legs into the aisles, or visit the restroom. Senior Judge James A. Lineberger of the Philadelphia Court of Common Pleas and a 20-year military veteran, who was a passenger on the flight, said, "I was afraid there was going to be a gun battle in that pressurized cabin....I was afraid that I was going to die from the gunfire in a shootout."

When the plane landed, Feuer was taken into custody, and so was Dr. Rajcoomar. The air marshals handcuffed him and reportedly took him to a filthy airport cell. He remained in custody for three hours before being released without charge. A Transportation Security Administration spokesman claimed Dr. Rajcoomar was detained because he had watched the unfolding incident with Feuer "too closely." Dr. Rajcoomar believes he was taken into custody due to his appearance and is suing the federal government for unlawful detention.²¹²

In June 2002, the ACLU sued American Airlines, Continental Airlines, Northwest Airlines, and United Air Lines, accusing the companies of discrimination

against five men. The suit alleges that the men were ejected from flights based on the prejudices of airline employees and passengers and for reasons wholly unrelated to security. The suits were filed in Los Angeles, Maryland, New Jersey, and San Francisco on behalf of the five men and the American-Arab Anti-Discrimination Committee.²¹³

ACLU clients Michael Dasrath, a U.S. citizen born in Guyana, and Edgardo Cureg, a permanent legal resident of Filipino descent, were removed on Dec. 31, 2001, from a Tampa-bound flight after a woman told the captain that "those brown-skinned men are behaving suspiciously."²¹⁴ Dasrath said, "I was working in Manhattan on September 11 and I will never forget the horror of that day. But ejecting me from a flight to make a passenger feel better isn't going to make anyone any safer."²¹⁵

The other cases were filed on behalf of Assem Bayaa of California, who was removed from a flight on Dec. 23, 2001; Arshad Chowdhury of Pittsburgh, who was taken off a plane on Oct. 23, 2001; and Hassan Sader of Virginia, who was removed from an Oct. 31, 2001 flight.²¹⁴ All five men were removed from the planes due to feelings of crew or passenger discomfort. They were offered seats on later flights without any further security checks.²¹⁵

In another case, four U.S. citizen men of Palestinian descent—Eyhab Matari, Ehab Abdelaziz, Osama Zeidan, and Waesam Hamdan—are suing American Airlines, claiming they were wrongly removed from an airplane and subjected to an invasive public search because of their Arabic names. On a flight to Florida from New Jersey in March 2002, the four men were asked by airline officials to leave the plane before take-off. They were allegedly searched in full view of the other passengers for 30 minutes and forced to lift up their shirts and lower their pants. The captain eventually apologized and allowed them back on the plane.²¹⁶

²¹¹ George Monbiot, "War on the Third World: A New US Racism Is Branding Those of Asian and Middle Eastern Origin as Terrorists," *The Guardian* (London), March 5, 2002.

²¹² Bob Herbert, "High Altitude Rambos," *New York Times*, Sept. 23, 2002. See also Thomas Ginsberg, "A Doctor on Delta Flight 441 Was Detained by U.S. Marshals," *Philadelphia Inquirer*, Sept. 19, 2002.

²¹³ ACLU, *supra* note 203.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ Shora, *supra* note 202.

²¹⁸ Associated Press, *supra* note 217.

3. Government Response to Airline Discrimination

Shortly after September 11, the federal government openly discouraged airline discrimination. Federal aviation law is unambiguous on this point: "An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry."²²⁷ U.S. Secretary of Transportation Norman Mineta publicly affirmed his department's commitment to nondiscrimination, declaring that "all of us will face heightened security in the aftermath of September 11, but the security and scrutiny must never become pretexts for unlawful discrimination."²²⁸

As early as Sept. 21, 2001, the DOT sent e-mails to several major airlines cautioning them not to discriminate against passengers based on race, color, or national or ethnic origin. The DOT repeated this warning in October, saying, "It is important to reemphasize that in performing our critical duties, we may not rely on generalized stereotypes or attitudes or beliefs about the propensity of members of any racial, ethnic, religious or national origin group to engage in unlawful activity."²²⁹

The DOT went further by adopting a recommendation by the American-Arab Anti-Discrimination Committee (ADC) to track illegal airline discrimination. The ADC made the recommendation during a February 2002 meeting between ADC and DOT representatives. The DOT initiated a new category of complaints specifically addressing alleged discrimination incidents reported by individual passengers against airline personnel. This new category of discrimination was, for the first time, included in the quarterly Air Travel Consumer Report issued by the Office of Aviation Enforcement and Proceedings at the DOT.²³⁰

On April 25, 2003, the DOT filed a complaint against American Airlines alleging that "the carrier discriminated against passengers who were or were

perceived to be of Arab, Middle Eastern or Southeast Asian descent and/or Muslim."²³¹ The complaint concerned 10 individuals, "mostly American citizens, who were either removed from or denied boarding on their scheduled American Airlines flights, even though they were properly ticketed and had successfully passed all security checks," the DOT said. "In some cases the complainants were immediately rebooked on American or another airline and not subjected to any additional screening, even though they had been removed from their original American flight as an alleged security risk."²³²

The DOT said it filed the complaint after unsuccessful settlement negotiations. "Under the complaint, American could be held liable for civil penalties of \$65,000 for violations described in the complaint, plus additional penalties for other violations that may be discovered during the proceeding," the DOT said. "The Aviation Enforcement Office is also seeking a judgment ordering American to cease and desist from engaging in discriminatory conduct in the future. The case will be heard by a DOT administrative law judge in a trial-type hearing proceeding."²³³

American Airlines issued a statement denying the allegations. "Our crew members are integral to our efforts to ensure the safety of our passengers and crews, and they must, understandably, act with caution anytime they perceive a potential security issue," the statement said.²³⁴

Despite the responsiveness of the DOT, however, the government has not been as vocal on this issue as it might have been, and the passage of new federal legislation in 2001 might exacerbate the religious and ethnic profiling incidents. The Aviation and Transport Security Act (ATSA),²³⁵ passed on Nov. 19, 2001, to address weaknesses in transportation security and establish the Transportation Security Administration, does little to discourage ethnic profiling of those who appear to be Arab or Muslim.

²²⁷ Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), Pub. L. No. 106-181, § 706, 114 Stat. 61 (2000).

²²⁸ Polakow-Suransky, *supra* note 205.

²²⁹ ACLU, press release, *supra* note 203.

²³⁰ ADC, press release, "DOT Adopts ADC Recommendation to Track Airline Discrimination," May 16, 2002, available at: [http://www.adc.org/index.php?id=322&no_cache=1&sword_list\[\]=DOT](http://www.adc.org/index.php?id=322&no_cache=1&sword_list[]=DOT).

²³¹ Department of Transportation, Press Release, "DOT Office Charges American Airlines With Discrimination Against Passengers," April 25, 2003. Details of the complaint are available at <http://dms.dot.gov>, docket OST-2003-15046.

²³² *Id.*

²³³ *Id.*

²³⁴ Bryon Okada and Darren Barbee, "Muslim details bias complaint," *Star-Telegram* (Ft. Worth, Texas), May 08, 2003.

²³⁵ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

The ATSA failed to mandate sensitivity training that would mitigate the prejudices of some flight crews towards Arab-American and Muslim passengers. Furthermore, the broad definition of what constitutes a threat under the ATSA potentially leaves room for illegal discrimination by crew members, while the lack of a penalty for improper threat assessments leaves open the possibility that illegal discrimination will not be addressed.

The ATSA provides immunity from legal liability for airline employees who negligently report passengers as a threat. The law gives airline employees an imprecise and broad authority to contact law enforcement officials concerning Arab-American passengers for any reason that an airline employee thinks may be relevant. The standard for an airline employee to lose immunity from legal liability is extremely high: the employee would have to be shown to have acted with reckless disregard for the truth or actual knowledge. Under this standard, employees could ensure immunity by supplying an excuse for the improper threat assessment, however meager.²¹⁶ Given the surge in discrimination, this legislation may send the wrong message by exacerbating a climate that already provides fertile ground for discrimination in air travel.

III. Historical Overview of the Targeting of Immigrant Communities During Periods of Domestic Security Crisis

A. Overview

Nativism, and the fear of alien influence on American values and security, have been part of U.S. culture almost from its inception. In times of crisis, when the perceived threat of such dangers has been strongest, the law has often been used, and misused, to target noncitizens and citizens of foreign extraction selectively based on their nationality or ethnicity. In historical hindsight, these techniques have never been judged to be effective at detecting or discouraging national security threats. Rather, these enforcement techniques have consistently been judged to be unnecessary and counterproductive infringements on the civil rights of their targets.

This section summarizes seven examples of efforts to target immigrants and other perceived national security threats during times of crisis: 1) anti-Catholicism and the Know-Nothing movement in the mid-1800s; 2) the early 20th century, including the treatment of German-Americans during World War I, the Red Scare of 1919, the Palmer Raids, and immigration quotas in the 1920s; 3) Japanese internments and other anti-immigrant measures during World War II; 4) McCarthyism in the 1950s; 5) FBI counterintelligence programs directed against perceived domestic threats in the 1960s and 1970s; 6) registration requirements for Iranian students in the late 1970s and early 1980s; and 7) a 15-year effort to deport eight Palestinians in Los Angeles.

B. Beginnings: Anti-Catholicism and the Know-Nothings

The early American colonists who departed England for Massachusetts and Virginia brought more to the New World than their meager personal belongings and their dreams of economic opportunity and religious autonomy. They also carried with them the passions and prejudices of their native land, including a profound hostility toward Catholicism. Enmity toward Rome and those nations and peoples loyal to Catholicism became a major thread in the socio-cultural and political fabric of America throughout the 18th and 19th centuries.²¹⁷

While anti-Catholic animus in America stemmed partly from similar widespread sentiment in the colonists' native Britain, this fear and hostility toward Catholicism also reflected very real political and military considerations confirmed by historical experience. Ray Allen Billington explains:

The settlers themselves had been cradled in an England more bitter against Catholicism than at any other time. They had seen the constant plot and counterplot of the reigns of Elizabeth and James I when Catholic forces threatened to engulf their land: the Irish uprising at Kerry, the projected attack of the Spanish armies under the Duke of Kent through Scotland, the intrigue of the Jesuits, Campion and Parsons, the efforts to restore Mary Queen of Scots to the throne, the threat of the Armada, and the Gunpowder Plot. This intrigue

²¹⁶ *Stora, supra* note 202.

²¹⁷ For a more detailed treatment of the continued prevalence of anti-Catholic sentiment in America, see Andrew M. Greeley, *An Ugly Little Secret: Anti-Catholicism in North America* (1977).

had fastened the conviction in the minds of all loyal subjects that Catholicism was a dangerous and constantly threatening force.¹¹²

In the New World, the military threat posed by Catholic France and Spain was ever-present; Spanish forces policed the colonies' southern border in Florida, while French troops controlled the colonies' northern border in Canada. Among American colonists, this fear of invasion from the North or South generated fear and suspicion of Catholic settlers, who were thought capable of siding with either the French or Spanish against the English colonists.¹¹³ A series of wars with these powers in the early 18th century further exacerbated such tensions.

Moreover, many colonists viewed Roman Catholicism as an inherently authoritarian religion that could endanger the political stability of their settlements. This fear that Catholic authoritarianism posed a special threat to democracy finds expression in the writings of many Founding Fathers, including John Adams, Paul Revere, Thomas Jefferson, and Alexander Hamilton, who as a young man warned fellow colonists that "we may see an Inquisition erected in Canada, and priestly tyranny hereafter find as propitious a soil in America as it ever has in Spain or Portugal."¹¹⁴

In response to this perceived threat, colonies subjected Catholics to higher taxes, forbade them to settle in large groups, deprived them of many religious and civil rights, denied them the right to bear arms, and prohibited Catholic churches from holding real estate.¹¹⁵ Maryland, in particular, forbade any "popish priest or bishop" to exercise his duties in the colony, levied special taxes on Irish immigrants "to prevent the entrance of papists," and provided that children of a Catholic mother and a Protestant father should, upon the father's death, be removed from the mother's custody.¹¹⁶

1. Early Post-Colonial Discrimination

Although this pervasive anti-Catholic animus played no significant role in the federal Constitutional Convention of 1789, the new Constitution did not put an end to anti-Catholic legislation. On the federal level, the infamous Alien and Sedition Acts of 1798 raised citizenship requirements, authorized the President to expel or arrest dangerous aliens, and specified prison terms for citizens or aliens hindering government operations. These laws were employed largely as a weapon against Irish Catholics.¹¹⁷ More important, federal religious freedom protections did not prevent state constitutions from discriminating against Catholic citizens. The New Jersey constitution of 1776 extended religious freedom guarantees only to Protestants and, like seven other states, closed the legislature and other state offices to Catholics. New York required immigrants to forswear any allegiance to foreign powers—civil or ecclesiastical—and New Hampshire passed a series of laws from 1779 to 1784 that singled out Catholics for disfavored treatment.¹¹⁸

Although the threat of an invasion by Catholic nations lessened as the United States entered the 19th century, the rhetoric of anti-Catholicism did not disappear—it merely changed focus. Apprehension shifted to the less visible perceived threat to American liberty posed by Catholic beliefs and values. Politicians, newspapers, and religious leaders described a struggle for the hearts and minds of the American people—a decisive battle between Catholic authoritarianism and American liberty.¹¹⁹ By the 1840s, this rhetoric had cooled substantially, although controversies continued to flare over Catholic efforts to establish their own parochial schools and maintain them with public funds.¹²⁰

¹¹² Roy Allen Billington, *The Origins of Nativism in the United States, 1800-1844* (1974), pp. 2-3.

¹¹³ Les Wallace, *The Rhetoric of Anti-Catholicism* (1990), p. 16; Brian Fry, *Responding to Immigration: Perceptions of Promise and Threat* (2001), p. 63. Fry notes that Catholics were not the only group singled out as potential saboteurs: Jews, French, Huguenots, Protestant Irish, and Germans were also frequently the objects of persecution. Protestant French Huguenots, for instance, were attacked by mobs in Rhode Island and unjustly imprisoned in Pennsylvania during the Anglo-French wars in 1689. *Id.* at 65.

¹¹⁴ Ira M. Leonard and Robert D. Farmer, *American Nativism, 1830-1860* (1971), pp. 17-18; see also Billington, *supra* note 238, p. 46.

¹¹⁵ Fry, *supra* note 239, p. 63; Billington, *supra* note 238, pp. 26-27.

¹¹⁶ Billington, *supra* note 238, pp. 27-28.

¹¹⁷ *Id.*, p. 45.

¹¹⁸ *Id.*, pp. 36-39.

¹¹⁹ See Thomas J. Curran, *Xenophobia and Immigration, 1820-1830* (1975), pp. 24-25.

¹²⁰ *Id.*, p. 41.

2. Responses to Large-Scale Catholic Immigration in the Mid- and Late 19th Century: "Know-Nothings"

Anti-Catholicism reentered the national spotlight, however, in the wake of the failed European revolutions of 1848. Viewing these revolutions from afar, nativists in America feared that refugees would infect America with either anarchy or authoritarianism.²⁴⁷ In addition, exponential leaps in immigration had greatly exacerbated tensions between long-time Protestant residents and expanding immigrant communities that had suddenly become major political forces and competitors in the marketplace. Irish Catholics became a central focus of public ire due to perceptions of their clannish clustering in urban areas and their alien religious allegiance.

The 1850s witnessed the creation of numerous fraternal organizations dedicated to preserving the political and socioeconomic status quo by halting the growing political power of immigrant communities and seeking to suppress Catholicism's expanding power in American society. Chief among these organizations was a secret society known as the Order of the Star Spangled Banner. The society spread rapidly throughout the states, gaining influential adherents in virtually every major urban center, and becoming a powerful, independent political party known to outsiders as the "Know-Nothings."

By 1854, the Know-Nothings had become a crucial minority swing vote for both the Democratic and the Republican parties, dictating the outcome of many federal, state, and local elections by secret consensus.²⁴⁸ As Leonard and Parmet observe, the Know-Nothings succeeded in building an extraordinarily powerful political machine by concentrating on a single issue: fear of an "authoritarian, Rome-dominated church, represented in the United States by poor, ignorant, and faithful adherents."²⁴⁹ Anti-Catholic riots swept Boston, New York, Philadelphia, Baltimore, Providence, Hartford, New Orleans, St. Louis, Cincinnati, Louisville, and San Francisco, as well as many smaller townships.²⁵⁰ In Connecticut, the Know-Nothing administration passed laws effectively vesting all Catholic property in the hands of incorporated congregations rather than ecclesiastical leaders and, if no such local body existed, the state itself held these properties in trust. The state

legislature also passed a special constitutional amendment conditioning voting rights on literacy tests in an effort to exclude naturalized citizens.

By 1855, Know-Nothings controlled all but one New England state, along with Maryland, Delaware, Kentucky, New Jersey, Pennsylvania, and California, and held numerous seats in Congress. The party appeared poised to make further gains nationally, including the White House.²⁵¹

Its prospects ultimately dwindled, however, as the party's legislative agenda stalled and the slavery question subordinated national nativist sentiments to more pressing regional loyalties. The Civil War eased much of the antagonism between Protestant and Catholic America as these communities fought and died alongside one another.

Nevertheless, anti-Catholicism was hardly extinguished. In the North, groups similar to the Know-Nothings such as the American Protective Association would reappear as immigration climbed in the 1890s. In the South, these fraternal organizations would later evolve into other secret societies such as the Ku Klux Klan.

In sum, the history of anti-Catholicism in 18th and 19th century America demonstrates that fears of military aggression and subversion may have a profound and long-lasting impact upon the perception and treatment of religious and ethnic groups. Viewed as potential dangers to national security, Catholics were routinely subjected to deprivations of civil and religious rights in colonial America and the early United States. Even after the perception of military threat waned, many Americans continued to view Catholic communities as foreign belligerents in an ideological war for the future of American liberty. Such rhetoric laid the foundation for repressive legislation and intercommunity hostility and violence.

C. Early 20th Century: World War I Treatment of German-Americans, the Red Scare of 1919, the Palmer Raids, and 1920s Immigration Quotas

The beginning of the 20th century saw the rise of anti-foreigner sentiment following the assassination of President McKinley in 1901 by Leon Czolgosz, a

²⁴⁷ Dale T. Knobel, *America for the Americans: The Nativist Movement in the United States* (1996), p. 126.

²⁴⁸ Ray Allen Billington, *The Protestant Crusade, 1800-1860* (1938), p. 417.

²⁴⁹ Leonard and Parmet, *supra* note 240, p. 107.

²⁵⁰ Carlton Beals, *Bless-Knowle Crusade: The Great Know-Nothing Conspiracy, 1820-1860* (1960), p. 9.

²⁵¹ *Id.*, pp. 24-25.

native-born anarchist “evidently of foreign extraction.”²⁵² By 1903, Congress passed an anti-immigrant bill, which expanded the criteria for excluding and deporting aliens—indeed, for the first time since the Aliens Act of 1798, immigrants were penalized for their political beliefs.²⁵³ The Immigration Act of 1907 further authorized the President to deny admission to immigrants that he deemed harmful to the U.S. labor market. Primarily aimed at Japanese laborers, the Immigration Act was soon followed by the Gentlemen’s Agreement of 1907–1908, which, in practice, sharply curtailed Japanese immigration.²⁵⁴

1. German-American Experience During World War I

America entered World War I on April 6, 1917. Almost immediately, the war focused attention on a perceived internal threat: German-Americans. The preoccupation with German-Americans was due largely to four factors: 1) the German-American Alliance’s support for Germany, 2) the largely pro-German stance of the German-American press, 3) a few blundered sabotage attempts by a group of Germans, and 4) the intense climate of “100 percent Americanism” that engulfed the United States following the nation’s entry into the war.²⁵⁵

The government’s legal assault on German-Americans was swift:

- After April 6, federal agents employed the anti-immigrant Aliens Act of 1798 as justification to arrest 6,300 German-Americans—or “enemy aliens,” as they were termed.
- President Wilson issued regulations prohibiting all German males over the age of 14 from owning guns, radios, or explosives and from living within a half mile of munitions factories, aircraft stations, forts, arsenals, or naval vessels.²⁵⁶

- Later regulations required 250,000 male enemy aliens to register at U.S. post offices and made it illegal for such aliens to be found without their cards. Washington, D.C., became off limits to enemy aliens.²⁵⁷
- Congress enacted the 1917 Espionage Act and the 1918 Sedition Act to prosecute U.S. citizens of German origin who “criticized the war effort or obstructed the draft.”²⁵⁸
- Ultimately, 2,048 Germans out of the approximately 250,000 registered aliens were incarcerated for the remainder of the war in enemy camps without the filing of criminal charges.²⁵⁹
- In 1919, Attorney General A. Mitchell Palmer created the General Intelligence Division, which targeted not only Germans, but “foreign radicals” in general, and particularly Russian workers.²⁶⁰

Such legal activity focusing on German nationals and German-Americans was enabled by a larger political and social culture that was equally hostile toward German-Americans. As historian Don Heinrich Tolzman documents:

The U.S. declaration of war on Germany in April 1917 resulted in a tragic display of hysteria directed against everything and anything German. Although carried on by nativist extremists, the majority silently approved, or at least did not speak out against the nativist hysteria.²⁶¹

Volunteer U.S. citizen groups like the American Protective League spied on and generally harassed German-American groups and individuals.²⁶² German-Americans reported being made to kiss the American flag, memorize the Gettysburg Address, or recite a list of American presidents.²⁶³ Employers fired foreign workers with suspicious accents, and at least one accused spy was lynched by a mob.²⁶⁴

²⁵² Benson J. Lossing, *Our Country: A History of the United States from the Discovery of America to the Present Time*, 7 (1905): 2006.

²⁵³ Fry, *supra* note 239, p. 73.

²⁵⁴ *Id.*

²⁵⁵ *Id.*, p. 74.

²⁵⁶ Arnold Krammer, *Undue Process: The Untold Story of America’s German Alien Internees* (1997), p. 13.

²⁵⁷ *Id.*, p. 14.

²⁵⁸ Fry, *supra* note 239, p. 74.

²⁵⁹ Krammer, *supra* note 256, pp. 14–15; Stephen Fox, *America’s Invisible Gulag: A Biography of German American Internment & Exclusion in World War II* (2000), p. 4.

²⁶⁰ Fry, *supra* note 239, p. 74.

²⁶¹ Don Heinrich Tolzman, *The Cincinnati Germans* (1987), pp. 14–15, cited in Timothy J. Hollan, *The German-Americans and World War II: An Ethnic Experience* (1996), p. 13.

²⁶² Fry, *supra* note 239, p. 74.

²⁶³ Krammer, *supra* note 256, p. 14.

²⁶⁴ *Id.*

Such measures had a significant impact on German culture in the United States. Many German-Americans did away with their “hyphenated” identity and rejected signs of their German heritage, to show their loyalty to their adopted homeland and avoid anti-German prejudice.²⁶⁵ But by the end of World War I, despite high levels of naturalization and cultural assimilation, many German-Americans and foreigners felt “a new foreboding that they were not as safe or welcome as they had come to believe.”²⁶⁶

The treatment of German-Americans during World War I arguably laid the foundation for the American public’s acceptance and even support of anti-immigrant activities between the wars, and even more extreme measures during World War II. In Arnold Krammer’s analysis, the experience of World War I “created a legal precedent for a later government to restrict the movement of any minority, especially Germans, in any future war. The evacuation of 120,000 Japanese-Americans during World War II could not have occurred without the precedents established against Germans in World War I.”²⁶⁷

2. The Red Scare

Even after the end of World War I, the wartime Espionage and Sedition Acts were not repealed but continued to be used by the federal government. Fear that foreigners would harm the United States from within, by espionage, sabotage or by stirring up labor unrest, was already palpable before World War I. After the arbitrary persecution of German-Americans during World War I, the government simply extended these practices to immigrants perceived to present a leftist threat.

On May 1, 1919, the *New York Times* announced a “nationwide bomb conspiracy,” which the police authorities said had every earmark of “left-wing radical origin.”²⁶⁸ On or around May 1 (May Day), 36 small bombs had been mailed to prominent U.S. citizens from Georgia to San Francisco.²⁶⁹ News of the apparent conspiracy launched a nationwide assault on left-wing groups that would later be titled the “Red Scare.”

The May bombings exploded onto an already volatile scene in the United States. With the end of World War I in November of 1918, discharged soldiers began pouring back into the country.²⁷⁰ Wartime price controls were canceled by the government, leading to rapid inflation.²⁷¹

Most notably, labor unions, which had stood quiet during the war, began to reassert themselves. In January 1919, New York harbor workers and dressmakers went on strike. In February, a general strike was called in Seattle and a national packinghouse strike was only barely averted. In March, New Jersey rail workers struck.²⁷² In the following months, New York cigar workers, Boston policemen, national railroad and subway workers, and most notably, the United Mine Workers would all go on strike.²⁷³

All of this was compounded by a new threat of left-wing revolution. The Bolsheviks had seized power in Russia in 1917, apparently demonstrating the dangerous revolutionary power of a handful (about 11,000) of Communists. This “radical” danger, first demonstrated by President McKinley’s assassination by anarchist Leon Czolgosz in 1901, took on new relevance amid the violent events of 1919.

On Jan. 15, 1919, authorities announced that 46 members of the International Workers of the World (the I.W.W. or “Wobblies”), a radical labor

²⁶⁵ “The National German-American Alliance faltered in April 1918...and membership in German cultural and political organizations plummeted. Many German-Americans stopped speaking German, even in the privacy of their homes. German aliens rushed to become U.S. citizens, and hundreds of citizens of German descent changed their names.” Anne Galich, *The German Americans* (1989), p. 84, cited in Hollan, *supra* note 261, p. 14.

²⁶⁶ Krammer, *supra* note 256, p. 15. The years following World War I saw the publication and circulation of Henry Ford’s *Dearborn Independent*, alleging the world control and conspiracy of “International Jews.” Grant’s *The Passing of the Great Race* was republished in the late 1920s. The Ku Klux Klan, which acquired between 2 and 3 million recruits by 1924, shored up its racist measures against Catholics, Jews, and foreigners in addition to African-Americans. Fry, *supra* note 239, p. 7.

²⁶⁷ Krammer, *supra* note 256, p. 15.

²⁶⁸ Edwin P. Hoyt, *The Palmer Raids, 1919-1920: An Attempt To Suppress Dissent* (1969), p. 6.

²⁶⁹ *Id.*

²⁷⁰ *Id.*, p. 8.

²⁷¹ *Id.*, p. 10.

²⁷² *Id.*, pp. 10-11.

²⁷³ *Id.*, p. 41. See also Charles H. McCormick, *Swing Reds: Federal Surveillance of Radicals in the Pittsburgh Mill District, 1917-1921* (1997), p. 5.

organization, had been involved in the bombing of the home of the governor of California.²⁷¹ On February 12, the Secret Service arrested Pietro Pierre, "identified as the leader of an anarchist plot to assassinate President Wilson."²⁷² Even before the May bomb scare, government leaders and officials were reporting "that I.W.W.'s, anarchists, radical socialists, and Bolshevists in the United States were trying to overthrow the government in 'bloody revolution,' and calling for a halt to all immigration to the United States."²⁷³

In the American public eye, immigrants and labor unrest became completely intertwined with left-wing revolution and terrorism. Labor Secretary Wilson said the rash of strikes were the work of Bolsheviks seeking to spur revolution.²⁷⁴ Cleveland's mayor proposed deporting all foreigners who failed to become citizens as soon as they possibly could. The *New York Times* ran an article under the headline: "Russian Reds are Busy Here: Workers Union has 500 Agents Spreading Bolshevism in the United States."²⁷⁵ On June 13, New York State authorities raided the New York office of the Russian Bolshevik Mission to the United States.²⁷⁶ And as President Wilson toured the country to advocate membership in the League of Nations, he warned audiences of "the dangers of revolution in the United States."²⁷⁷

3. The Palmer Raids

Responsibility for quashing the "radical" threat was thrust upon and seized by Attorney General A. Mitchell Palmer.²⁷⁸

Because a large percentage of the "radicals" in the United States were foreign-born and often not naturalized, immigration laws became a potent weapon in Palmer's arsenal. Under the Alien Control Act of 1918,

any alien who was a member of or affiliated with any organization that taught or advocated the violent overthrow of the U.S. government was excluded from entering the country.²⁷⁹ Palmer—in conjunction with the Department of Labor, which had responsibility for immigration and naturalization at the time—used the 1918 Act to arrest suspected radicals and have them deported from the United States.

On Dec. 21, 1919, after a series of raids beginning on November 7 and targeting the Union of Russian Workers and various similar organizations across the country, 249 arrested "radicals" were loaded onto the Buford and shipped out of the country.²⁸⁰ The 249 represented only a fraction of the number of supposed radicals being held across the country and an even smaller fraction of those picked up in the initial dragnets. Starting on Jan. 2, 1920, Palmer launched a second set of raids, this time aimed at the Communist and Communist Labor Parties.²⁸¹ Thousands of active and passive party members were arrested before national interest in the Red Scare began to wane.²⁸²

(a) Legal Measures Adopted and Used

Because of the parallels between Palmer's actions against immigrants during the Red Scare and Justice Department moves in response to Sept. 11, 2001, the legal measures used by Palmer invite examination.

(i) Deportation

The main tool in the hands of the government was the Alien Control Act of 1918. According to Section 1 of the Act,

aliens who are members of or affiliated with any organization that entertains a belief in, teaches, or advocates the overthrow by force or violence of the

²⁷¹ Hoyt, *supra* note 268, p. 15.

²⁷² *Id.*

²⁷³ *Id.*, pp. 15-16.

²⁷⁴ *Id.*, p. 39.

²⁷⁵ *Id.*, p. 35-36.

²⁷⁶ *Id.*, p. 37.

²⁷⁷ *Id.*, p. 42.

²⁷⁸ In October 1919, the U.S. Senate voted unanimously in favor of a resolution calling on Palmer to inform the Senate what actions he was taking against the radicals. *Id.*, p. 48. Others have noted, however, that Palmer was also a frontrunner for the Democratic Presidential nomination and may have seen such action as a political opportunity. See McCormick, *supra* note 273, p. 146.

²⁷⁹ See Hoyt, *supra* note 268, p. 43.

²⁸⁰ See McCormick, *supra* note 273, pp. 150-51.

²⁸¹ See *id.*, p. 167.

²⁸² John Higham places the number merely held for deportation at about 3,000, "almost all of them eastern Europeans." John Higham, *Strangers in the Land: Patterns of American Nativism, 1860-1925*, (1994), p. 231.

government of the United States shall be excluded from admission into the United States.²⁶⁵

Section 2 "provide[d] for the deportation of such aliens, irrespective of the time of their entry."²⁶⁶ It was under the general authority of this law that the "Palmer raids" took place and under which the 249 immigrants aboard the *Buford* were eventually deported.²⁶⁷ Palmer and local law enforcement specifically targeted noncitizens for arrest. Among the instructions delivered to Justice Department agents in connection with raids in Massachusetts and New Hampshire in January 1920 was the following:

"Only aliens should be arrested; if American citizens are taken by mistake, their cases should be immediately referred to the local authorities."²⁶⁸

In *Colyer v. Skeffington*,²⁶⁹ 20 aliens arrested in the January 1920 raids brought a *habeas corpus* petition to challenge their detention and deportation on the basis of their membership in Communist organizations. On Jan. 2, 1920, several hundred local, state, and federal police officers had raided a number of meeting places and homes of Communist organizations in the Boston-Worcester area and in New Hampshire, and detained at least 600 and possibly as many as 1,200 suspected Communists.²⁷⁰ The Federal District Court for the District of Massachusetts, in a lengthy opinion, reviewed the trial record and found that many of the detainees were held for several days without charge or warrant. The authorities typically sought out the suspects at home late at night and searched their homes without explanation and in many cases without a warrant. Women, including single mothers, and children were among the detainees. Many of the detainees were held for a few hours or days, in many cases incommunicado, then released because there was no evidence against them other than their attendance at the

meetings; many were in fact U.S. citizens.²⁷¹ About 440 aliens were ultimately detained for an extended period in the Boston city prison on Deer Island.²⁷²

After reviewing these facts, Judge Anderson opined that the raid was "carried out with... disregard of law and properly verified facts."²⁷³ He continued:

Pains were taken to give spectacular publicity to the raid, and to make it appear that there was great and imminent public danger, against which these activities of the Department of Justice were directed... I doubt whether a single warrant was obtained or applied for.²⁷⁴

The picture of a non-English-speaking Russian peasant arrested under circumstances such as described above, held for days in jail, then for weeks in the city prison at Deer Island, and then summoned for a "trial" before an inspector, assisted by the Department of Justice agent under stringent instructions emanating from the Department of Justice in Washington to make every possible effort to obtain evidence of the aliens' membership in one of the proscribed parties, is not a picture of a sober, dispassionate "due process of law" attempt to ascertain and report the true facts.²⁷⁵

Anderson ultimately found that most of the petitioners had been denied due process in the hearings and that the deportation orders against them were therefore invalid.

The First Circuit Court of Appeals reversed the District Court's decision and remanded the petitioners to the custody of the immigration authorities. The First Circuit found that the record did not include all the information that had been before the Secretary of Labor in making the deportation decisions and that the

²⁶⁵ *Colyer v. Skeffington*, 265 F. 17, 21 (D. Mass. 1920), *rev'd sub nom. Skeffington v. Katsieff*, 277 F. 129 (1st Cir. 1922) (citing Comp. St. Ann. Supp. 1919, § 4289 1/4b[1]). "The sole charge against these aliens is membership in the Communist Party or the Communist Labor Party. The proposition of the Department of Justice, adopted by the Commissioner General of Immigration, as hereafter set forth, is that membership in one of these parties is, alone, enough to bring the alien within the purview of this provision." *Id.* at 21.

²⁶⁶ *Id.* (citing Comp. St. Ann. Supp. 1919, § 4289 1/4b[2]).

²⁶⁷ *See Hoyt*, *supra* note 268, p. 51.

²⁶⁸ *Colyer*, 265 F. at 37 n.2.

²⁶⁹ 265 F. 17.

²⁷⁰ *Id.* at 39.

²⁷¹ *Id.* at 39-45.

²⁷² *Id.* at 45-46.

²⁷³ *Id.* at 43.

²⁷⁴ *Id.* at 44.

²⁷⁵ *Id.* at 47.

evidentiary and other procedural requirements in connection with immigration matters are lower than those required for criminal trials.²⁹⁷

(ii) *Bureau of Investigation Rules*

Palmer was further helped by the adoption of a Justice Department Bureau of Investigation rule that mere membership in various groups, such as the Union of Russian Workers, the Communist Party, and the Communist Labor Party, was enough to qualify a non-citizen for deportation under the Alien Control Act.²⁹⁸ In the instructions for the raids that resulted in the *Colyer* case, Commissioner General of Immigration Anthony J. Caminetti wrote to the Boston Commissioner of Immigration:

For your confidential information, the Bureau has to state that the Department holds the Communist Party of America to be an organization mere membership in which brings an alien within the purview of the Act of Oct. 16, 1918.²⁹⁹

Justice Department agents could thus look to group membership rolls to identify candidates for arrest and deportation. The instructions given to agents bear this out. "2. Upon taking person into custody try to obtain all documentary evidence possible to establish membership in the Communist Party, including membership cards, books, papers, correspondence, etc."³⁰⁰

(iii) *Access to Counsel*

Further, Palmer successfully amended the Immigration Bureau rule concerning when aliens would have access to counsel.³⁰¹ Before the first set of raids the rule read:

At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel.³⁰²

Thus after the first set of raids in November, many of those arrested secured counsel, refused to talk about their views, and had to be released for lack of evidence.³⁰³ However, before the second set of raids in January, the Bureau modified the rule to read:

Preferably at the beginning of the hearing under the warrant of arrest or *at any rate as soon as such hearing has proceeded sufficiently in the development of the facts to protect the Government's interests*, the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued and shall be apprised that thereafter he may be represented by counsel.³⁰⁴

As the Federal District Court for Massachusetts noted in *Colyer*:

[T]he practical result of this changed rule...was to cut the alien off from any representation by counsel, until the inspector...was of the opinion that the hearing had proceeded "sufficiently in the development of the facts to protect the government's interests." This left these aliens, many of them uneducated and seriously hampered by their inability to understand English...entirely unprotected from the zealous attempts of the Department of Justice agents to get from them some sort of apparent admission of membership in the Communist or Communist Labor Party...[M]any of these aliens were arrested in boarding houses or halls in which were found large quantities of literature and pamphlets, the origin and ownership of which were necessarily largely matters of guesswork. In cases of doubt, aliens, already frightened by the terroristic methods of their arrest and detention, were, in the absence of counsel, easily led into some kind of admission as to their ownership or knowledge of communistic or so-called seditious literature.³⁰⁵

²⁹⁷ *Shoffington v. Katsuff*, 277 F. at 130-32.

²⁹⁸ McCormick, *supra* note 273, p. 155.

²⁹⁹ *Colyer*, 265 F. at 33 (quoting a memorandum to the Boston Commissioner of Immigration).

³⁰⁰ *Id.* at 37 n. 2.

³⁰¹ McCormick, *supra* note 273, p. 158. McCormick also notes that "[c]onstruing deportation as an administrative procedure led logically to the BI's argument that the time, often months, that aliens spent in jail awaiting the outcome of Immigration Bureau proceedings was not 'imprisonment [or] deprivation of liberty without due process of the law' It was only 'detention' and jail was 'detention quarters.'" *Id.*, p. 156.

³⁰² *Colyer*, 265 F. at 46.

³⁰³ See McCormick, *supra* note 273, p. 149 (noting complaints that such counsel complicated the government's tasks).

³⁰⁴ Emphasis added. *Colyer*, 265 F. at 46.

³⁰⁵ *Id.* at 46-47.

(iv) Espionage and Sedition Acts

Federal and local law enforcement officials could also use the wartime Espionage Act of 1917 and the Sedition Act of 1918, which were still in effect during the Red Scare. The two acts criminalized any defamatory statements made against the government. Moreover, although “[b]efore the war, only New York and Tennessee had laws against sedition... after the war 35 states passed laws against sedition, criminal anarchy, and criminal syndicalism.”³⁰⁸

(b) Enforcement in Practice

(i) Misguided Targeting

It is very difficult to assess whether the Palmer Raids had any measurable impact on the threat of revolution or radical terrorism in the United States, or whether any such threat ever existed at all. Despite the evidence that the May bombings were the work of an Italian anarchist group, the Palmer Raids targeted mostly Russians and Eastern European organizations.³⁰⁹ Among the initial targets were the Union of Russian Workers, the Russian Mission in New York, and the Russian People’s House. Later raids included the Lithuanian Socialist Choir. Anecdotal evidence demonstrates that those undertaking the raids believed that they should specifically seek Russians.³¹⁰ This targeting played upon the general fear of Bolshevism and the association of Bolshevism with Russians. It also captured the widely held but nonetheless incorrect belief that recent Eastern European immigrants were behind the labor unrest.

Various local officials also took advantage of the situation and sought to use the raids as a means to break organized labor.³¹¹ Charles McCormick points to one Bureau of Investigations (BI) agent leading such raids in the mining regions of Pennsylvania who appears to have “belatedly... realized that mine owners had used the BI

to settle a score against an unruly community of foreigners.”³¹² Further, McCormick notes at least one memo that “shows that government officials understood deportation primarily as a device to tame rebellious industrial workers—native and immigrant—not an emergency measure to save the country from revolution.”³¹³

The decision to treat all Union of Russian Workers (UORW), Communist Party, and Communist Labor Party members as radicals seems to have been similarly misguided and overbroad. Edwin Hoyt notes that many of the people on the membership rolls did not even realize that they were on them. After the Bolshevik Revolution many smaller groups of different stripes had affiliated with the Communist Party; the Communist Party immediately transferred those groups’ membership rolls to their own.³¹⁴ And McCormick notes that although the Union of Russian Workers did have a radical anarchist platform, the organization’s “people’s houses,” “[m]ore than revolutionary centers... were social gathering places for Russian immigrant male laborers excluded from American life by barriers of language, culture, prejudice, and indifference and cut off from family and friends in Russia by war and revolution.”³¹⁵

(ii) Massive Infringement of Civil Rights, Yet Few Revolutionaries Captured

Thousands of people were rounded up during the various raids; very few appear to have been radicals.³¹⁶ The presiding judge in *Colyer*, Judge Anderson, noted that:

[f]or instance, in a hall in Lynn 39 people were holding a meeting to discuss the formation of a co-operative bakery. About half of them were citizens. But the Lynn police, acting under the instructions of the Department of Justice, raided this hall and arrested the entire 39, held them over night in cells at the police station, and then had them all docketed as ‘suspects’ and 38 of them discharged.³¹⁷

³⁰⁸ Hoyt, *supra* note 268, p. 88.

³⁰⁹ McCormick notes, for example, that the majority of those deported aboard the *Bufoad* were alleged members of the Union of Russian Workers. Moreover, “[w]hat was new about the proposed UORW deportations was the focus on a single organization and a single nationality.” McCormick, *supra* note 273, p. 148.

³¹⁰ See *id.*, pp. 150-54.

³¹¹ See Kevin R. Johnson, “The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws,” *St. Mary’s Law Journal* 28 (1997): 833, 835.

³¹² McCormick, *supra* note 273, p. 144.

³¹³ *Id.*, pp. 151-52.

³¹⁴ Hoyt, *supra* note 268, pp. 90-91.

³¹⁵ McCormick, *supra* note 273, p. 146. McCormick notes that deportees collectively noted three reasons for joining the UORW: “1) to underwrite a school where they could learn to read; 2) to organize against the U.S. government’s ‘blockade’ of the Soviet Union so that they could return home; and 3) to socialize with other Russians in this lonely land.” *Id.*, p. 160.

³¹⁶ See William C. Banks and M.E. Bowman, “Executive Authority for National Security Surveillance,” *American University Law Review* 50 (2000): 1, 24 (“Thousands of individuals were arrested without probable cause.”).

³¹⁷ *Colyer*, 265 F. at 43.

Assistant Secretary of Labor Louis Post told Congress that only three revolvers had been found over the course of 5,000 arrests.¹¹⁶ Post also discovered that only 40 of the thousands arrested had actually admitted favoring the overthrow of the U.S. government.¹¹⁷ Upon review in the spring of 1920, Post eventually canceled the arrest warrants of 1,141 of 1,600 "suspects" and ordered the release of hundreds more who had been arrested without a warrant.¹¹⁸ By July, 2,202 potential deportees were set free.¹¹⁹

Summing up what he saw in Boston, Judge Anderson wrote:

I refrain from any extended comment on the lawlessness of these proceedings by our supposedly law-enforcing officials. The documents and acts speak for themselves. It may, however, fitly be observed that a mob is a mob, whether made up of government officials acting under instructions from the Department of Justice, or of criminals, loafers, and the vicious classes.¹²⁰

(iii) *Evaluation of Actual Threat and Criticism of Measures Taken*

The Justice Department predicted that the radicals would undertake massive operations on May 1, 1920, to spark a full-scale insurrection against the U.S. government. May 1 came and went without event. The failure of the Department's warnings, combined with the testimony of Assistant Secretary Post and the publication of a 67-page report by the National Popular Government League on the Palmer Raids, began to change the mood of the country. Fear of radical revolution waned.¹²¹ The National Popular Government League Report, signed by Roscoe Pound, Felix Frankfurter, and Zechariah Chafee, Jr. of Harvard University Law School, Tyrell Williams, dean of Washington University Law School,

and Francis Cane, who had resigned from the Justice Department in protest over the Palmer raids, concluded:

American institutions have not in fact been protected by the Attorney General's ruthless suppression. On the contrary, those institutions have been seriously undermined and revolutionary unrest vastly intensified. No organization of radicals acting through propaganda over the last six months could have created as much revolutionary sentiment in America as has been created by the Department of Justice itself.¹²²

4. Immigration Quotas of the 1920s

By mid-1920, the paranoia of the Red Scare was receding and a serious critique of the civil rights violations of the Palmer Raids began to emerge. Nonetheless, the general fear of Bolshevism and radicalism and their association with Southeastern and Eastern European immigrants did not disappear.¹²³ Moreover, as anti-"red" and anti-German arguments dissipated with the end of the Red Scare and World War I, they were quickly replaced with other more general arguments against immigrants and a strengthening nativist attitude that took its most obvious form in the debates over immigration quotas.¹²⁴

(a) *Shift in Immigration Sources Leads to Friction*

The immigration debate of the 1920s had its roots in the country-of-origin shift that began in the 1880s.¹²⁵ Before that period, most immigrants in the United States came from Northwestern Europe—Great Britain, Germany, and Scandinavia. By 1890, however, "those immigrants were outnumbered by those from southeastern Europe."¹²⁶ "These new immigrants from Italy, Poland, and the Austro-Hungarian Empire brought with them cultural patterns and traits which gave rise to

¹¹⁶ *Id.* at 105, 113.

¹¹⁷ *Id.* at 105.

¹¹⁸ *Id.* 105-06. See also McCormick, *supra* note 273, p. 176.

¹¹⁹ Higham, *supra* note 285, p. 231.

¹²⁰ *Caher*, 265 F. at 43.

¹²¹ See McCormick, *supra* note 273, pp. 176-77.

¹²² Hoyt, *supra* note 268, pp. 116-117.

¹²³ See Robert A. Divine, *American Immigration Policy, 1924-1952* (1972), p. 8. See also Higham, *supra* note 285, pp. 265-66.

¹²⁴ See, e.g., Kitty Calavita, *U.S. Immigration Law and the Control of Labor: 1820-1924* (1984), p. 117 ("The Red Scare, the culmination of decades of anti-immigrant xenophobia and the more specific racial ideologies that rationalized discontent as an individual defect, was accompanied by a series of immigration laws that, while still selective, suggested a gradual closing of the gate.")

¹²⁵ See Divine, *supra* note 323, p. 3 ("Out of this complex there developed a movement to restrict immigration which continued with varying degrees of success until it achieved total victory in 1924.")

¹²⁶ *Id.*, pp. 2-3.

an increasing degree of friction between native Americans and recent arrivals.³²²

Nativism, largely in the form "of hatreds-towards Catholics, Jews, and southeastern Europeans"-had been present well before World War I, but the particular circumstances of the post-war years created a fertile ground for its resurgence.³²³ Out of the wartime anti-German spy-hunting and the postwar anti-Bolshevik "red"-hunting came a sense that the "trouble must come...from the tenacity and secret cunning of alien influences, together with a lack of solidarity on the part of true Americans in resisting them."³²⁴

Together with the labor unrest of 1919, a brief depression in 1920, and a resurgence in immigration following the end of the war, these trends came to convince many Americans that they were in the process of being flooded with unassimilable Eastern European immigrants who came to the United States not to become Americans, but to take advantage of American prosperity and spread the chaos of Europe to American shores.³²⁵

(b) Legislative Reactions

The clamor for new immigration restrictions was deafening. In 1920, the House of Representatives voted to suspend immigration altogether.³²⁶ In 1921, Congress passed the first of a series of immigration restrictions that would define U.S. policy for the next two decades. The bill instituted a quota system-immigration would be limited to three percent of the total foreign born of each nationality residing in the country in 1910.³²⁷ This quota would have the result of restricting European immigration to about 350,000 and assign most of that total (55 percent) to northwestern Europe.³²⁸ The bill passed the House without a recorded vote and the Senate by a vote of 78 to 1.³²⁹

³²² *Id.*, p. 3.

³²³ Higham, *supra* note 285, p. 266.

³²⁴ *Id.*, p. 270.

³²⁵ See Divine, *supra* note 323, pp. 6-8 (noting fear of "alien flood" and "alien indigestion").

³²⁶ *Id.*, p. 6. See Higham, *supra* note 285, p. 306 ("[T]he House Committee on Immigration reported a suspension bill to Congress early in 1919 with the argument that revolutionists and Bolsheviks could be kept out of the country only by keeping everybody out.")

³²⁷ Higham, *supra* note 285, p. 311; Divine, *supra* note 323, p. 5.

³²⁸ Divine, *supra* note 323, p. 5.

³²⁹ Higham, *supra* note 285, p. 311.

³³⁰ Divine, *supra* note 323, p. 17.

³³¹ *Id.*

³³² *Id.*, p. 23.

³³³ See, e.g., Higham, *supra* note 285, p. 308 ("The declining Red Scare left an afterglow of vague suspicion that the immigrants harbored subversive designs.")

³³⁴ See *supra* note 312 and accompanying text.

The new restrictions only spurred the debate in Congress further. Building on the then-popular eugenics theories, Congressional restrictionists argued that the 1921 restriction still allowed in too many Eastern and Southeastern European immigrants. Instead, they argued, the calculation date should be pushed back from 1910 to 1890, resulting in 70 percent of the quotas going to northwestern Europe. In 1924 the new restrictions passed by sweeping majorities, 323 to 71 in the House and 62 to 6 in the Senate.³³¹ Under the new bill, immigration was restricted to 150,000 Europeans annually, with the total allocated at two percent of the foreign born of each nationality residing in the country in 1890.³³² The 1924 bill also excluded Japanese immigrants altogether.³³³

5. Impact on Immigrant Communities and American Society

Although the burst of paranoia associated with the Palmer Raids and the Red Scare waned over the course of 1920, it cast a dark shadow over American society for many years to come. The official association of immigrants, particularly those from Eastern and Southeastern Europe, with radicalism and Bolshevism, left many Americans suspicious of immigrants, both from Eastern Europe and elsewhere.³³⁴

The targeting of immigrants in the Palmer Raids also helped cement a vision of American society in which the "old stock" could and should be distinguished from the new immigrants and immigration restrictions could be a panacea for all that ailed the country at the time, whether economic instability, labor unrest, or vague threats of insurrection.³³⁵ Eliminate immigrants and Americans would eliminate their problems.

These lingering views came at a considerable cost to immigrant groups, ethnic minorities and American society as a whole. The ethnic distinctions drawn during the Palmer Raids encouraged all sorts of nativist and

racist ideologies. The eugenics movement capitalized on the distinction drawn between Nordics, whom eugenicists declared true Americans, and other European groups, including Mediterraneans, Slavs and Jews, whom they deemed unfit and undeserving to take part in and contribute to the American dream. The Ku Klux Klan regained prominence as it embraced the nativist attitudes of the Red Scare and fused them with its own racist ideology. Anti-Japanese activists on the West Coast were able to capitalize on the general anti-immigrant fervor to convince Congress to abrogate the "Gentlemen's Agreement" and exclude all Japanese immigrants in the 1924 immigration law.¹⁴⁰ The outburst of anti-Semitism in the 1920s must similarly be viewed as an outgrowth of the official immigrant-targeting of the Red Scare. Jews in particular fought hard to dispel unfounded associations between themselves and radicalism.

Most notably, the Red Scare helped instigate a radical transformation in American self-perception that took legislative form in immigration quotas: the 1921 quota law put an end to the ideal of America as the asylum for Europe's oppressed.¹⁴¹

As the drowned-out opponents to restrictionism exclaimed, before the 1920s the United States had been seen and had seen itself as a "home of the oppressed."¹⁴² With the passage of the immigration laws of 1921, 1924 and 1927, the United States embarked on the opposite course. Immigration restriction would serve to protect the United States from the oppressed of Europe. Europe did not want them; neither did the United States. A land of opportunity was reconceived as a land of limited opportunity where immigrants could only serve to dilute, and even destroy, American prosperity. Further, as Adolph Sabath, leader of the House opposition to restrictions, argued, "it [was] the first instance in our modern legislation for writing into our laws the hateful doctrine of inequality between the various component parts of our population."¹⁴³

¹⁴⁰ See Divine, *supra* note 323, pp. 18-25.

¹⁴¹ *Id.*, p. 6.

¹⁴² See Higham, *supra* note 285, p. 304.

¹⁴³ See Divine, *supra* note 323, p. 16.

¹⁴⁴ *Id.*, p. 77. 8 U.S.C. § 1302(a) provided that it "shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 1201(b) of this title or section 30 or 31 of the Alien Registration Act, 1940, and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days." Although sections 30 and 31 of the Alien Registration Act were formally repealed with the enactment of the Immigration and Nationality Act in 1952, the substantive requirements of registration and fingerprinting remain as U.S. federal law. See Immigration and Nationality Act § 262, 8 U.S.C. § 1302. Registration is discussed in more detail in Chapter 2 of this report. The Alien Registration Act describes its own purpose as follows: "To prohibit certain subversive activities; to amend certain provisions of law with respect to the admission and deportation of aliens, to require the fingerprinting and registration of aliens and for other purposes."

¹⁴⁵ Kramer, *supra* note 256, p. 23.

The practical effect this ideological transformation was stark. Not only did the new restrictions separate families, but, when combined with the onset of the Depression, they also effectively excluded those fleeing Hitler's reign, both Jewish and non-Jewish, from escaping to the United States. Although the immigration debates of the 1930s focused on economics rather than racism, the effect of the racially-motivated restrictions of the 1920s was to exclude those ethnic groups at the time they most needed a haven. A vision of "America" as a haven for oppressed peoples beginning with the Pilgrims would be forever scarred by the image of World War II refugees turned away, only to meet death in Europe.

D. World War II: Japanese Internments and Other Anti-Immigrant Measures

In the late 1930s, the United States began to emerge from the Depression and economic motivations for discrimination against immigrants lessened. But Germany and Japan's aggressive actions in Europe and Asia, which also threatened the United States, fueled new waves of anti-immigrant hysteria even before the United States entered World War II.

In a move foreshadowing Justice Department actions in 2002, Congress in 1940 passed the Alien Registration Act (also known as the Smith Act), which required all resident aliens 14 and older to be fingerprinted and to register annually.¹⁴⁴ Public support for the measures was high: According to a Gallup Poll in June 1940, 95 percent of those surveyed agreed that all people who were not U.S. citizens should be required to register with the government.¹⁴⁵

The bombing of Pearl Harbor on Dec. 7, 1941, reinforced America's restrictive immigration policy and its fear of foreigners. Immediately after Pearl Harbor, Roosevelt directed the FBI and other security agencies to arrest all Japanese, Italian and German aliens whom they regarded as national security threats, largely based on lists compiled before the outbreak of hostilities

between the United States and European nations.³⁰⁶ In addition to detaining potential spies and saboteurs, the threat of internment was also used to divide and intimidate immigrant communities.³⁰⁷

By Feb. 4, 1942—two months after Pearl Harbor—261 Italians and 1,361 Germans had been arrested; by Oct. 5, 1943, the numbers had increased to 503 Italians and 5,977 Germans.³⁰⁸ Of those arrested, none were convicted of sabotage, and relatively little evidence of wrongdoing and few actual threats to national security were uncovered.³⁰⁹ Legal basis for such action was provided by Proclamation 2535, signed by President Roosevelt immediately after Pearl Harbor pursuant to the Enemy Alien Act and giving the government full authority to detain enemy aliens and confiscate enemy alien property.³¹⁰

The harshest measures were reserved for the Japanese. On Feb. 19, 1942, Roosevelt issued Executive Order 9066 authorizing the army to “prescribe military spaces” and exclude “any or all persons” as military necessity required.³¹¹ Such persons included “enemy aliens” or non-U.S. citizens that came from countries at war with the United States, as well as people of “enemy ancestry,” including U.S. citizens.³¹² In addition to internment, Executive Order 9066 provided for enemy alien hearings without full due process of law.³¹³

In the weeks that followed this proclamation, nearly all Japanese-Americans responded to orders to gather at “assembly centers” in the exclusion areas where they lived (in western Washington and Oregon, all of California and southern Arizona) and were shortly thereafter sent to one of ten internment camps, known as “relocation centers.”

Ultimately, about 120,000 Japanese-Americans were interned, of whom about two-thirds were U.S. citizens. Although the evacuation and internment were justified on the grounds of military necessity, no facts have ever

demonstrated that necessity. Rather, racism and the long history of resentment toward and mistreatment of Japanese-Americans was the primary reason for the evacuation and internment.

The Supreme Court approved the exclusion and detention in several cases, but the Court ultimately rejected the government’s contention that it could continue to detain citizens that it conceded were loyal. Nevertheless, the exclusion order lasted until late 1944, well after any possible threat by Japan to the West Coast had vanished, and the last camp did not close until 1947.

The costs to Japanese-Americans were enormous, from millions of dollars in lost earnings and property to trauma that caused decades of psychological difficulties. The internment of Japanese-Americans provides contemporary policy makers with a sobering reminder of the power of ethnic prejudice to distort policymaking in the name of national security, particularly in times of crisis.

1. Cultural/Discrimination Background and Japanese-American Responses to Pearl Harbor

American attitudes toward Japanese-Americans had made their assimilation difficult. Many Americans believed that assimilation by Japanese was impossible, that Japanese (and other immigrants from outside Western Europe) had “natural” dispositions that could never adapt to American cultural norms and values.³¹⁴ As a result of nativist prejudices, Japanese-Americans experienced discrimination and mistreatment in personal and commercial dealings and in legal measures and official interactions.

The 1913 Alien Land Law in California prohibited all “aliens ineligible to citizenship,” which included all Asian Americans, from owning land.³¹⁵ Both the Federal

³⁰⁶ Holian, *supra* note 261, p. 134.

³⁰⁷ Kramer, *supra* note 256.

³⁰⁸ Fry, *supra* note 239, p. 77.

³⁰⁹ *Id.*; Holian, *supra* note 261, p. 90.

³¹⁰ Holian, *supra* note 261, p. 134. See also Fox, *supra* note 259, p. 3. Fox summarizes other legal precedents effecting the measures taken during World War II. For example, during the War of 1812, courts upheld presidential exclusion of British subjects from the United States. During the Civil War, President Lincoln suspended *habeas corpus*—a measure that would later be affirmed by Congress and declared unconstitutional by the Supreme Court.

³¹¹ Fry, *supra* note 239, p. 78.

³¹² Holian, *supra* note 261, p. 135.

³¹³ Holian, *supra* note 261, p. 135.

³¹⁴ See D. Ogawa, *The Jap Image*, in Stanley Sue and Nathaniel N. Wagner (eds.), *Asian Americans: Psychological Perspectives* (1979), cited in Frank S. Zelko, *Generation, Culture and Prejudice: The Japanese American Decision to Cooperate with Evacuation and Internment During World War II* (1992), pp. 9–10.

³¹⁵ Under an 1870 statute, only immigrants of “white persons and persons of African descent” could be naturalized. See Robert Daniels, *Asian America: Chinese and Japanese in the U.S. since 1850* (1988), p. 139.

restriction on naturalization of citizens other than those of European and African descent, and therefore the state bans on their purchase and ownership of land, were upheld by the Supreme Court in 1922 in *Ozawa v. United States*.³⁵⁶ Local discrimination occurred frequently as well, with Japanese-Americans prohibited from using public accommodations such as swimming pools.³⁵⁷

Japanese-Americans experienced hostility and discrimination in private dealings as well, including in renting housing,³⁵⁸ but most of all in employment. Many qualified Japanese-American graduates found that employers would choose less accomplished white graduates over them, and as a result they had to work at fruit stands, drive trucks and do menial agricultural labor.

Most Japanese-Americans in the late 1930s were the first generation of immigrants, who had arrived as young men and women from about 1907 through 1924 (known as the "Issei," or first generation), and their U.S.-born children mostly born after 1915 (known as the "Nisei," or second generation).³⁵⁹

The discrimination they experienced resulted in isolation and tight-knit communities of Issei and their Nisei children in the 1920s and 1930s, and the creation of their own institutions performing social, commercial, cultural, security, educational, and financial functions.³⁶⁰ In these communities, traditional Japanese cultural norms were largely preserved by the Issei, including sacrifice to fulfill obligations of loyalty and devotion (*on*), need for acceptance by the dominant community (*amae*), and respect for and self-effacement before authority figures and other "superiors" (*enryo*). In the United States, because the status as social inferiors was frequently reinforced, Japanese immigrants translated *enryo* in part into deference to whites, and particularly

white authority figures.³⁶¹ Relatively unquestioning respect for officials may also have contributed to most Japanese-Americans' lack of involvement in politics.³⁶²

But the Nisei children, wanting to assimilate, resisted learning the Japanese language and took a critical attitude toward their teachers' and parents' celebrations of Japanese culture.³⁶³ To express their rejection of Japan, its emperor and its culture, and their loyalty to the United States, a group of Nisei formed the Japanese Americans Citizens League. The JACL aimed to ease assimilation of Japanese-Americans by promoting American values among them and sought to act as a political voice for Japanese-Americans in U.S. politics. As its name suggested, the JACL only admitted as members Japanese-Americans who were U.S. citizens, effectively barring the foreign-born Issei.

As relations between the United States and Japan deteriorated from 1939 through 1941, the JACL became increasingly vocal in advocating that all Japanese-Americans clearly express their loyalty to the United States. Its leaders feared that war would deepen anti-Japanese prejudice, and argued that any such prejudice should not dim Japanese-Americans' love for their adopted country.³⁶⁴ Immediately after Pearl Harbor was bombed, JACL leaders continued their vocal expressions of patriotism, and mixed them with statements of faith that they would be treated fairly. Despite some resentment toward the suspicion and attention they received from other Americans, Nisei generally seemed to feel primarily the shock and horror at the attack and the wartime patriotism typical of most Americans at the time.³⁶⁵

2. U.S. Government Measures

The U.S. government, however, wasted no time in targeting the Japanese-American community. On the day Pearl Harbor was bombed, the FBI arrested 1,300

³⁵⁶ *Ozawa v. United States*, 260 U.S. 178 (1922).

³⁵⁷ See Zelko, *supra* note 354, p. 36, quoting Commercial Artist, in Dorothy S. Thomas, Charles Kikuchi and James Sakoda, *Japanese American Evacuation and Resettlement: The Salvage* (1952), p. 510.

³⁵⁸ See Monica Sone, *Nisei Daughter* (1979), p. 114.

³⁵⁹ See Zelko, *supra* note 354, p. 13-14 (citing Dorothy S. Thomas and Richard S. Nishimoto, *Japanese-American Evacuation and Resettlement During World War II: The Spoilage* (1946), p. 31).

³⁶⁰ See Zelko, *supra* note 354, pp. 24-25.

³⁶¹ See *id.*, pp. 14-18, 22.

³⁶² See *id.*, pp. 23-24.

³⁶³ See *id.*, pp. 31-35, 43, quoting Reginald Bell, *Public School Education of Second-Generation Japanese in California* (1935), p. 17; *id.*, quoting Katsumi Kunitzugu, No. 39, at 6, in Arthur A. Hansen and Betty E. Mitson (eds.), *Voices Long Silent: An Oral Inquiry Into the Japanese-American Evacuation* (1974); *id.*, quoting Agricultural Student, Restaurant Keeper and Clerk, in Thomas, Kikuchi and Sakoda, *supra* note 357, pp. 184, 323 and 235; *id.*, pp. 31-35, quoting Testimony of Michio Kunitani, U.S. Congress, House Select Committee Investigating National Defence Migration, National Defence Migration Hearings, 77th Cong., 2nd Sess. (1942) at 11223 ("Tolan Committee Hearings"); Sone, *supra* note 358, p. 4.

³⁶⁴ See *id.*, p. 44.

³⁶⁵ See Zelko, *supra* note 354, pp. 48-51; Alice Yang Murray, *Introduction*, in Alice Yang Murray (ed.), *What Did the Internment of Japanese Americans Mean?* (2000), p. 3.

noncitizen Issei, and over 700 more in the following few weeks, including civic, business, professional, and religious leaders, based on lists the FBI had previously prepared.³⁶⁸ Most were elderly men who had engaged in such "subversive" activities as donating money to Japanese organizations and possessing literature sympathetic to the Japanese government.³⁶⁹ The FBI did not have enough agents to conduct the arrests, and deputized local law enforcement officers to arrest many on the list. These deputies were not well prepared and some conducted the arrests in a cruel and violent manner,³⁷⁰ unsurprisingly given the prejudice against Japanese-Americans in their local communities. By mid-February 1942, before the evacuation order had been given for all Japanese-Americans, Justice Department camps held over 2,100 Japanese-American noncitizens as "enemy aliens" who had been given only summary hearings.³⁷¹

The U.S. government turned to the JACL as the representative of all Japanese-Americans after Pearl Harbor, even though the JACL did not admit noncitizens. The U.S. government mostly saw the overwhelming majority of Nisei as loyal, including the JACL, primarily based on two reports. The first was by Lt. Cmdr. Kenneth D. Ringle, a naval intelligence specialist with a background in Japanese language and culture who had been assigned to investigate Japanese-Americans in Los Angeles in 1940. Ringle had concluded that the Nisei and "their chief organization," the JACL, could safely be relied upon to assist the United States in the war.³⁷² However, he believed that the Issei and the Kibei, American-born children of Issei who had been returned to Japan for education and possibly military service, and then returned to the United States, should be suspect.³⁷³

The second report, by Curtis B. Munson, a businessman who served as a special agent for an ad hoc White House intelligence operation, estimated that 90 to 98 percent of all Nisei were loyal and eager to serve the United States.³⁷⁴ However, Munson fueled calls for evacuation and internment by asserting "there are still Japanese in the United States who will tie dynamite around their waist and make a human bomb out of themselves," and pointing out the vulnerability of California's infrastructure, all without any evidence of an existing threat.³⁷⁵

Though these two reports painted a generally favorable picture of the Nisei, they were ambiguous enough about Japanese-Americans in general to cause many politicians and commentators (particularly in California) to favor removal of all Japanese-Americans from the entire West Coast.

The government itself was split. Naval Intelligence and the FBI dismissed the threat of sabotage, espionage or invasion and thought evacuation unnecessary and a diversion of resources from more urgent needs.³⁷⁶

But the U.S. military demanded—and received drastic action against Japanese-Americans from the other branches of the U.S. government. On Dec. 30, 1941, Attorney General Francis Biddle authorized search warrants for any house in which an "enemy alien" (i.e., all noncitizen Japanese-Americans) had lived on the representation of reasonable cause to believe that contraband was on the premises. Contraband included many "dual use" items, including anything that might be used as a weapon, radio transmitters and shortwave receivers, and most cameras. Thousands of searches of Japanese-American homes and businesses over the next few months turned up much "contraband," but the FBI later stipulated that none of it was sinister in nature or intended for subversive use.³⁷⁷

³⁶⁸ See Zelko, *supra* note 354, pp. 51-52; Yang Murray, *supra* note 365, p. 3.

³⁶⁹ See Zelko, *supra* note 354, pp. 51-52.

³⁷⁰ See *id.*, p. 52, citing A.H. Leighton, *The Governing of Men: General Principles and Recommendations Based on Experience at a Japanese Relocation Camp* (1946), p. 19.

³⁷¹ See Yang Murray, *supra* note 365, pp. 3-4.

³⁷² Kenneth D. Ringle, "The Japanese in America: The Problem and the Solution," *Harper's Magazine* 185 (1942): 491, quoted in Zelko, *supra* note 354, p. 53.

³⁷³ See *id.*, p. 492, cited in Zelko, *supra* note 354, p. 53. Ringle also prepared a longer, official report for Naval Intelligence that long remained classified but was ultimately discovered by attorneys seeking to reverse the convictions of Gordon Hirabayashi, Fred Koinatsu and Minoru Yasui. See Peter Irons, *Gordon Hirabayashi v. United States: A Jap's a Jap*, in Yang Murray, *supra* note 365, pp. 69, 73.

³⁷⁴ See Yang Murray, *supra* note 365, p. 7.

³⁷⁵ Curtis B. Munson, *Report on Japanese on the West Coast of the United States*, Joint Committee on the Investigation of the Pearl Harbor Attack, Hearings, 79th Cong., 1st Sess., quoted in Zelko, *supra* note 354, pp. 54-55.

³⁷⁶ See Yang Murray, *supra* note 365, pp. 6-7; Robert Daniels, *The Decision for Mass Evacuation*, in Yang Murray, *supra* note 365, pp. 33, 51, 58; Irons, *supra* note 371, p. 71.

³⁷⁷ See Daniels, *supra* note 374, p. 34.

After a Jan. 4, 1942, conference with General John L. DeWitt, the Commander of the Western Defense (who would ultimately press for and be responsible for carrying out the evacuation and internment), the Justice Department agreed to conduct further measures, including the registration of all "enemy aliens," large-scale "spot" raids by the FBI, and the establishment of restricted "Category A" zones around many military and defense installations on the West Coast that would require a pass for entry. In "Category B" zones, including all the rest of the coastal areas, enemy aliens and Japanese-American citizens would be allowed to live and work under rigid conditions.²⁷⁵

On January 29, the Justice Department announced that all enemy aliens would be excluded from 86 Category A zones and would be closely controlled in Category B zones, covering all the rest of the West Coast; a nighttime curfew was imposed affecting only Japanese-Americans. Seven thousand aliens, of whom nearly 3,000 were Japanese-Americans, would be excluded from the Category A areas by February 24.²⁷⁷

By February 1942, West Coast politicians such as Earl Warren, then Attorney General of California, Mayor Fletcher Bowron of Los Angeles, and Representative Leland Ford, a Santa Monica Republican, favored the complete removal of all Japanese-Americans from the West Coast.²⁷⁸ Warren identified the fact that Japanese-Americans owned most of the marginal land around rural military installations as a source of concern and evidence of a subversive plot. He suggested that the Nisei were more, not less, of a threat than the Issei, simply because of the Nisei's greater numbers.

In an astounding Catch-22, Warren, prominent columnist Walter Lippmann, and General DeWitt all asserted that the fact that no acts of sabotage by Japanese-Americans had occurred suggested most strongly that these were being meticulously planned and would be all the more damaging when they came.²⁷⁹

General DeWitt further declared that "the Japanese race is an enemy race" in a report recommending full removal. That report summarized the military's information about threats from Japanese-Americans but completely omitted significant exculpatory information, including the Ringle report.²⁸⁰ Numerous other top military officials pressed for the detention of all Japanese-Americans living on the West Coast throughout February.²⁸¹

Also in February 1942, the U.S. House of Representatives formed the House Select Committee Investigating National Defense Migration to consider measures to address potential threats to the United States from within. These hearings, known as the "Tolan Committee," were more a justification of evacuation than an examination of alternatives, with only a single Japanese-American witness speaking out against evacuation, whom the JACL then proceeded to undermine.²⁸²

On Feb. 19, 1942, President Roosevelt signed Executive Order 9066, leading directly to the internment. The order gave the Secretary of War and the Army the authority to designate "military areas" from which "any or all persons may be excluded" and provide for them "transportation, food, shelter, and other accommodations as may be necessary...until other arrangements are made."²⁸³

The initial plan was for Japanese-Americans to relocate on their own to states in the interior, leaving Military Zone 1, which included western Washington, western Oregon, the western half of California (the eastern half was designated Military Zone 2) and the southern third of Arizona. However, the governors of most Rocky Mountain states resisted, crying that their states would not become the West Coast's "dumping grounds" for Japanese-Americans. Of the few Japanese-Americans who did try to relocate there before the internment began, many were sent back to the West Coast immediately.²⁸⁴

²⁷⁵ See *id.*, pp. 36-37.

²⁷⁶ See *id.*, p. 39.

²⁷⁷ See Testimony of Earl Warren, Tolan Committee Hearings at 11014-17, quoted in Zelko, *supra* note 354, pp. 55-56; Daniels, *supra* note 374, p. 37.

²⁷⁸ See Testimony of Earl Warren, Tolan Committee Hearings at 11014-17, quoted in Zelko, *supra* note 354, pp. 55-56; Walter Lippman, [column], Los Angeles Times, Feb. 13, 1942, part II, p. 4, quoted in Zelko, *supra* note 354, pp. 56-57; Yang Murray, *supra* note 365, p. 7; Daniels, *supra* note 374, p. 39.

²⁷⁹ Quoted in Malsin Conrad and Richard Conrad, *Executive Order 9066: The Internment of 110,000 Japanese Americans* (1972), p. 44; see also *supra* note 371. Few media sources defended Japanese-Americans. In William Randolph Hearst's *San Francisco Examiner*, one columnist pressed the U.S. government to "herd 'em up, pack 'em off and give them the inside room of the ballgame. Let 'em be pitched, hurt, hungry and dead up against it." Quoted in *id.*, p. 52.

²⁸⁰ See Daniels, *supra* note 374, pp. 42-58.

²⁸¹ See Zelko, *supra* note 354, pp. 59-62.

²⁸² Quoted in Daniels, *supra* note 374, p. 58.

²⁸³ See Zelko, *supra* note 354, p. 69; Yang Murray, *supra* note 365, pp. 8-9; Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (1997), p. 2 (hereinafter "Personal Justice Denied").

"Voluntary evacuation" having failed, it was replaced at the end of March 1942 by the announcement of a "planned and systematic evacuation" of all Japanese-Americans, citizens and aliens, from Military Zones 1 and 2, notwithstanding the government's promise to the 3,000 Japanese-Americans who had voluntarily moved to Zone 2 that it would remain a "free zone."

Japanese-American families were informed that they were required to appear at an assembly center in the area where they lived, typically on less than a week's notice, and instructed to leave nearly all of their belongings behind. They were forced to sell businesses, homes and possessions at fire-sale prices. From there, they were brought to "relocation centers" (the internment camps).³⁸⁷ The trips were physically grueling, often lasting several days on crowded trains with no sleeping facilities or open windows, minimal food and water, and almost no stops or breaks.³⁸⁸

3. The Internment

Despite the euphemistic name, the relocation centers were surrounded by barbed wire, watchtowers and armed guards, reinforcing the Japanese-Americans' status as prisoners.³⁸⁹ The camps, run by the War Relocation Authority ("WRA"), were located on cheap land, often dusty and barren, and always far from existing homes and businesses, in Arizona, California, Utah, Idaho, Wyoming, Colorado, and Arkansas.

Each family received one room in barracks divided into four or six rooms. The rooms were divided from other rooms by partitions that did not reach to the ceiling and provided little privacy. Bathrooms were communal, without partitions between the showers, to the horror of the elderly Issei. The families received potbellied stoves and one canvas cot per person. Lines, for food and other necessities, were often long.³⁹⁰

Although jobs were provided in the camps, pay ranged from \$12 to \$19 per month, while comparable jobs earned ten times as much outside the camps (and for white WRA employees in the camps). Internees

were not permitted to leave the camps for the first year other than for emergencies, and then only with a non-Japanese escort.³⁹¹

One year after the signing of Executive Order 9066, the head of the WRA, Dillon S. Myer, censured the WRA's own camps as "unnatural" and "un-American" due to the disruptions to family life and concluded that they were "undesirable institutions and should be removed from the American scene as soon as possible."³⁹²

Beyond the deprivation of liberty and the physical discomforts, the camps caused severe psychological stress to the interned individuals, families and communities by fundamentally altering family dynamics, reducing the traditional authority of male heads of household, emphasizing peer group relationships over intergenerational family relationships, and isolating internees from the outside world.³⁹³

By late 1942, the tide had turned in the Pacific war. It was clear even to the most paranoid minds that a Japanese invasion of the United States was no longer feasible, and that the detention of the Japanese-Americans could therefore safely be relaxed.

But instead of releasing the detainees outright, the U.S. government instituted a "loyalty review" program in February 1943, trying to ensure that those released did not include the supposed disloyal few. Although the government thought the internees would be grateful for this program, it angered many internees to have their loyalty examined after they had been treated so poorly. One question asked the internees to "swear unqualified allegiance" to the United States, faithfully defend it and "forswear any form of allegiance or obedience to the Japanese emperor." The Issei, who had never been given the opportunity to become U.S. citizens, were angered to find that they were now being asked to give up allegiance to the one country in which they could claim citizenship.³⁹⁴

Senior military and War Department officials concluded privately in the spring of 1943 that there was no remaining military reason to detain Japanese-

³⁸⁷ See Yang Murray, *supra* note 365, p. 9.

³⁸⁸ Valerie J. Matsumoto, *Amadeo*, in Yang Murray, *supra* note 365, pp. 125, 126-27.

³⁸⁹ See Yang Murray, *supra* note 365, pp. 9-12; Personal Justice Denied, *supra* note 384, p. 2.

³⁹⁰ See Yang Murray, *supra* note 365, p. 12.

³⁹¹ See *id.*, pp. 12-13; Matsumoto, *supra* note 386, p. 130.

³⁹² Dillon S. Myer, *Uprooted Americans: The Japanese Americans and the War Relocation Authority during World War II* (1972), p. 158.

³⁹³ See Matsumoto, *supra* note 386, pp. 125, 132-36; Personal Justice Denied, *supra* note 384, p. 300. The disruption of existing family hierarchies did provide some Issei women in particular the opportunity to loosen tighter bonds with other women, take classes and generally assert greater authority and autonomy. See Matsumoto, *supra* note 386, p. 133.

³⁹⁴ See *id.*, pp. 138-39; Yang Murray, *supra* note 365, pp. 14-15.

Americans. Nevertheless, whether due to resistance from the Western Defense Command, political opposition on the West Coast, political considerations in the election year of 1944 or simple bureaucratic slowness, exclusion was not terminated until December 1944.

4. Court Challenges

Almost no Japanese-Americans actually defied the evacuation and internment order or earlier measures. Of the few that did, four resulted in landmark legal decisions, three of which largely upheld the government's actions. Minoru Yasui, a lawyer, deliberately violated the curfew to challenge the authority of the Army to impose the curfew. Gordon Hirabayashi, a Seattle Quaker, refused to comply with removal orders, turned himself in several days later and was also charged with violating the curfew. Probably the most famous resister, Fred Korematsu, was also the least political in the reasons for his failure to comply: He wished to remain in the San Francisco area with his Italian-American fiancée.

Of the cases to reach the Supreme Court as a result of these resisters, none succeeded in challenging the authority of the U.S. government to carry out these measures. In the case of Mitsuye Endo, however, the Supreme Court decided in 1944 that the camp administrators had no authority to subject U.S. citizen detainees who were concededly loyal to leave restrictions.³⁹⁵

Hirabayashi's trial was tainted by the racism of the presiding judge, Lloyd Black, who rejected Hirabayashi's assertion that the internment and other measures were unconstitutional because they discriminated on the basis of race. In the decision rejecting the motion to dismiss, Judge Black called the Japanese "unbelievably treacherous and wholly ruthless," and speculated without foundation that "suicide parachutists" would drop onto Seattle's aircraft factories and seek "human camouflage and with uncanny skill discover and take advantage of any disloyalty among their kind."³⁹⁶ Hirabayashi's attorney had argued to the jurors that his client had not violated valid laws of the United States, but before

sending the jurors to their deliberations Black instructed them to consider only whether Hirabayashi had violated the laws, which he told them were valid and enforceable. Then, extraordinarily, he told the jurors "you are instructed to find a verdict of guilty" on both counts.³⁹⁷

In the 1980s, attorney Peter Irons discovered that the U.S. government attorneys had considered disclosing the Ringle Naval Intelligence report indicating no substantial basis for suspicion of Japanese-Americans to the Supreme Court,³⁹⁸ but ultimately decided not to disclose it to create an impression of greater certainty as to the threat from Japanese-Americans. On the basis of this report, Irons convinced Hirabayashi, Korematsu, and Yasui to seek to have their cases reopened and to challenge their convictions using the *coram nobis* procedure,³⁹⁹ and all three men's convictions were overturned.⁴⁰⁰

5. Releases, Aftermath, and Costs

When the camps were finally closed (not until seven months after the war's end in the case of Tule Lake), many, particularly among the Issei, claimed that they were owed compensation for their losses at the time of evacuation and since. The elderly Issei especially feared the difficulties of returning "home" to the communities that had watched or cheered their expulsion and starting over from scratch. The government rejected these claims for redress and sent them home with \$25 each. Churches and charities helped in the resettlement effort, but many Issei had trouble finding new work.

Even among the more successful Nisei, the harsh conditions of internment and the deprivation of liberty left lasting psychological scars. Common behaviors in Japanese-Americans after release included denial of the experience; distrust or hatred of white America; internalization of anger as guilt and self-blame, much like rape victims; and identification with the aggressor through denial of Japanese culture and associations.⁴⁰¹

The Nisei faced difficult conditions despite the wartime and post-war economic boom. With prejudice against Japanese-Americans officially endorsed and

³⁹⁵ See *id.*, pp. 9-12.

³⁹⁶ Quoted in Irons, *supra* note 371, p. 72.

³⁹⁷ *Id.*

³⁹⁸ See *supra* note 258.

³⁹⁹ Under this rarely used procedure, available only to criminal defendants whose trials have been tainted by "fundamental error" or "manifest injustice," a court of appeals directs a trial court to reconsider a conviction in light of facts not in the trial record that might have resulted in a different verdict if known. See generally Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, 6 *Immigration Law and Procedure* § 74.08[8][f] (2003), p. 74-150.

⁴⁰⁰ See Irons, *supra* note 371, pp. 76-77.

⁴⁰¹ See Yang Murray, *supra* note 365, pp. 18-20; Personal Justice Denied, *supra* note 384, pp. 299-300.

their rights limited, many employers and educational institutions during and after the war discriminated against them and took advantage of their limited options for redress.

As a result, many educated Nisei continued to be forced into low-paying menial jobs such as in domestic service, even as the boom created new opportunities for African-Americans and Mexican-Americans who had occupied these positions.⁴⁰² As late as 1980, studies found that Japanese-Americans earned significantly less than white Americans after controlling for gender and education, although Japanese-Americans overall had higher income and education levels.⁴⁰³

The economic costs for Japanese-American internees were huge. Those who had not sold their homes and businesses in fire sales before internment found that, at best, they had lost customers, good will and, in the case of many professionals and skilled workers, important skills and training. Many were unable to meet tax, insurance, or mortgage payments or to protect their property from theft, looting, and vandalism, and then returned to homes and businesses almost without value.⁴⁰⁴

The federal government did create a mechanism for redress, the 1948 Japanese-American Evacuation Claims Act, which gave detainees the right to claim "damage to or loss of real or personal property [not compensated by insurance, which occurred as a] reasonable and natural consequence of the evacuation or exclusion."⁴⁰⁵ This legislation made no attempt to compensate for psychological impact, loss of earnings or profits, physical injury or death during detention, or losses from resettlement outside the camps, as its authors considered all of these costs too speculative to quantify. Claims totaling \$148 million were made under this legislation, and the government paid out a total of approximately \$37 million in compensation.

6. Treatment of German and Italian Noncitizens

The treatment of German and Italian aliens has received less attention than the mass internment of Japanese-Americans. While on the surface the fates of Germans and Italians were frightfully similar to that of the Japanese, in the end they were not interned en masse nor treated nearly as harshly as the Japanese. Approximately 2,200 Italians⁴⁰⁶ and 10,900 Germans⁴⁰⁷ were interned or otherwise taken into custody during World War II.

Historians attribute the different treatment to several reasons: 1) bureaucratic infighting between the War and Justice Departments; 2) greater prejudice against Asians than against Europeans; 3) the logistics of relocating and interning possibly millions of Germans and Italians; and 4) recognition that such an action would inevitably interrupt the war effort. As a result, while the Japanese were being transported en masse to internment camps in 1942, German and Italian aliens faced more mild limitations and restrictions, namely nighttime curfews, travel restrictions, and confiscation of their cameras, radios, and firearms.

(a) Post-War Impact

At the end of the war, President Truman issued Proclamation 2655, which authorized the government to deport enemy aliens "considered to pose danger to the public peace and safety of the nation."⁴⁰⁸ Nearly 1,000 German aliens were deported in the two years after the end of the war.⁴⁰⁹ German legal resident aliens challenged the deportation orders in federal court, but lost. Under U.S. pressure, Latin American nations were strongly encouraged to prevent these "enemy aliens" from settling in any country in the Americas.

For the several thousand German-Americans returning from internment after the war, the physical and mental adjustments to life and society were full of

⁴⁰² See Matsumoto, *supra* note 386, pp. 137, 141-47.

⁴⁰³ See U.S. Commission on Civil Rights, *Success of Asian Americans: Fact or Fiction?* (1980), cited in *Personal Justice Denied*, *supra* note 384, p. 296.

⁴⁰⁴ See *Personal Justice Denied*, *supra* note 384, p. 117.

⁴⁰⁵ 50 U.S.C. App. §1981(a).

⁴⁰⁶ U.S. Department of Justice, *Report to the Congress of the United States: A Review of the Restrictions on Persons of Italian Ancestry During World War II* (November 2001), Appendices C-D.

⁴⁰⁷ See Kramer, *supra* note 256, p. 34.

⁴⁰⁸ Holian, *supra* note 261, p. 145.

⁴⁰⁹ *Id.*, p. 146.

challenges and frustrations. Some of those interned "saw their businesses close or fall victim to competition; others lost homes and property to unpaid taxes and vandals."⁴⁰⁸ Others were denied employment after the war, and some children were orphaned while their parents were interned.⁴⁰⁹

In a hearing conducted on wartime relocation and internment during the early 1980s, federal authorities conceded that they "inflicted tremendous human cost," including homes and businesses sold or abandoned, injury to professional advancement, and the personal stigma that suspected disloyalty carried with it in American life.⁴¹⁰ German-Americans were particularly disturbed that the government repeatedly refused their requests to have their records cleared after the war even though no evidence of wrongdoing existed.⁴¹¹ German-Americans have never received any apology or compensation from the government for the detentions, despite government documentation arguably showing a basis for redress.⁴¹²

On Nov. 7, 2000, Congress signed the "Wartime Violation of Italian American Civil Liberties Act" into law. The Act recognized that the "freedom of more than 600,000 Italian-born immigrants in the United States and their families was restricted during World War II by Government measures that branded them 'enemy aliens' and included carrying identification cards, travel restrictions, and seizure of personal property."⁴¹³ The Act went on to recognize that while thousands of Italian-American immigrants were arrested and hundreds were interned, hundreds of thousands served valiantly in defense of the United States. Significantly, Congress acknowledged that the "impact of the wartime experience was devastating to Italian American communities in the United States, and its effects are still being felt."⁴¹⁴

Indeed, as Kramer concludes, "the internment program and mass evacuation left a dangerous legacy for America's future."⁴¹⁵ The secret, unauthorized, arbitrary, and often unconstitutional arrest of thousands of citizens and noncitizens "caused a crack in the Constitution that allowed McCarthyism and the communist witch hunts of the late 1940s and early 1950s."⁴¹⁶

As Fry states, the "kind of nativism which can erupt during wartime belongs to an enduring tradition of intolerance where national and ethnic populations came to be seen as potential subversives because their former homeland is at war with their 'new home.'"⁴¹⁷

7. Effectiveness of Enforcement Measures

It is difficult to measure the ultimate "effectiveness" of the evacuation and internment measures, because they responded to a threat that was not only exaggerated but almost entirely nonexistent.

No evidence has been uncovered of any fifth column, sabotage, or espionage activities by ethnic Japanese in America, citizens or otherwise. Both press reports in late 1941 of such activities contributing to Pearl Harbor, and comments by Secretary of the Navy Frank Knox on which some of the reports were based, were completely unfounded, and were not included in Knox's official report.⁴¹⁸ Similarly, though a Jan. 23, 1942, report by a committee of inquiry led by Supreme Court Justice Owen Roberts concluded that the Pearl Harbor attack had been abetted by Japanese spies, that conclusion was false, according to Daniels.⁴¹⁹ In the only two Japanese attacks on the Pacific Coast after Pearl Harbor, a Japanese submarine briefly shelled a Santa Barbara oil field and a Japanese seaplane dropped two incendiary bombs in an Oregon forest. These attacks caused minimal damage and no casualties, and no evidence has linked

⁴⁰⁸ Kramer, *supra* note 256, p. 172.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*, p. 153.

⁴¹² *Id.*; Kramer, *supra* note 256, p. 172.

⁴¹³ Wartime Violation of Italian American Civil Liberties Act, Pub. L. No. 106-451, § 2, 114 Stat. 1947 (2000).

⁴¹⁴ *Id.*

⁴¹⁵ Kramer, *supra* note 256, p. 173.

⁴¹⁶ *Id.*

⁴¹⁷ Fry, *supra* note 239, p. 95.

⁴¹⁸ See Yang Murray, *supra* note 365, p. 6; Robert Daniels, *Concentration Camps U.S.A.: Japanese Americans and World War II* (1971), p. 35.

⁴¹⁹ See Daniels, *supra* note 418, pp. 49-50.

them to Japanese-Americans. In any case, both occurred after the U.S. government had announced the evacuation order and so did not contribute to the decision.⁴⁰⁷

Overall, the internment engendered significant resistance and resentment among the camp populations. As shown by comparing the results of the Ringle report to the responses to the loyalty questionnaire, many more Japanese-Americans expressed doubts about their loyalty to the U.S. government and willingness to serve it during and after internment than beforehand. Nevertheless, thousands of Japanese-Americans did enlist in the armed forces or respond to the draft and served with distinction.

The threat posed by German immigrants seems similarly to have been overstated. According to Kramer, "the relatively small number of Nazi extremists cast a pall over the loyal immigrant residents and naturalized citizens who were not members or sympathizers of the Bund."⁴⁰⁸ It is difficult to cite any historical examples that suggest that the severity of wartime law enforcement measures and infringement upon civil liberties were proportional to the actual threat posed by German-Americans.

When in 1939 the Justice Department began gathering lists of residents it felt posed security risks to the United States, it added names based on a person's purported commitment to Germany, not on the documentable danger a given individual posed.⁴⁰⁹ Many average Germans found that a single incautious remark or a spiteful neighbor was sufficient to place them on an FBI list.⁴¹⁰ In fact, FBI files reveal that at the very beginning of FBI efforts to compile enemy lists to make arrests, J. Edgar Hoover himself was concerned that he did not have enough information on each suspect.⁴¹¹

Among those Germans sentenced to internment during World War II, "seldom were formal charges actually levied against them."⁴¹² While the growth of pro-Nazi German organizations in the 1930s and 1940s no doubt

contributed to the distrust of the German-American community as a whole,⁴¹³ even the most vocal pro-Nazi organization "broke no law by its existence or activities," and represented only a "tiny fraction of the entire German-American community."⁴¹⁴

Government actions were based on the premise that all aliens of enemy nationality were *potentially* dangerous; perception, rather than evidence, was the determining factor.⁴¹⁵ And indeed, even before the end of internment in 1948, "key federal authorities had begun to have misgivings on the necessity for internment, and doubts as to the way in which alien arrests and internments had been carried out."⁴¹⁶

8. The Legacy

By the end of World War II the practice of taking measures against large groups of Americans singled out because of their race, ethnicity, or ideology was well established. Following each of these episodes (and even, on a more limited basis, during each of them) vocal critics emerged and eventually public opinion came to view them as unnecessary abuses rather than necessary measures for protecting national security.

Nevertheless, the repeated use of such draconian measures, supposedly to protect U.S. national security, would simplify the use of such measures in subsequent "emergencies." In addition to entrenching these governmental practices, by targeting groups for enforcement measures on the basis of race, ethnicity, and ideology, the U.S. government effectively legitimized racial, ethnic and ideological discrimination and mistreatment by nongovernmental entities such as private citizens, businesses, educational institutions and civic groups.

E. McCarthyism

Few figures in American political history have enjoyed the meteoric rise or suffered the swift downfall of Senator Joseph McCarthy, America's grand inquisitor

⁴⁰⁷ See Yang Murray, *supra* note 365, p. 5.

⁴⁰⁸ Kramer, *supra* note 256, p. 6.

⁴⁰⁹ *Id.*, p. 11. Category "A" was made up of alien leaders in nonpolitical cultural organizations; category "B" were people who merely belonged to such organizations; and category "C" were people who donated money to radical pro-Nazi organizations. *Id.*

⁴¹⁰ *Id.*, p. 36.

⁴¹¹ *Id.*, p. 39.

⁴¹² Holian, *supra* note 261, p. 127. In one instance in 1942, German-born citizens who had all lived in the United States landed on U.S. shores armed with explosives and were lawfully tried before a military tribunal. See *Ex parte Quirin*, 317 U.S. 1 (1942).

⁴¹³ See Hollan, *supra* note 261, pp. 15-54.

⁴¹⁴ *Id.*, p. 171.

⁴¹⁵ *Id.*, p. 171.

⁴¹⁶ *Id.*, p. 164 (quoting figures such as Henry Stimson, Francis Biddle, William O. Douglas, and Chief Justice Earl Warren).

during the anticommunist purges of the late 1940s and early 1950s. The movement associated with McCarthy involved political and law enforcement efforts to root out and, in many cases, prosecute Communist sympathizers employed by the government. Beyond the personal cost to those accused and prosecuted by McCarthy-style investigative committees, McCarthy's bureaucratic inquisition also deepened Cold War prejudices and marginalized civil liberties and civil rights groups, labor unions, and immigrant communities.

1. Background

McCarthy's anticommunist rhetoric represented a familiar *leitmotif* in the political discourse of his time. As early as the 1930s, House Republicans had sought to attribute the influence of communist ideology to Roosevelt's domestic and international policies—particularly through the investigations of the House Committee on Un-American Activities.⁴⁰ Republican opponents sought to paint the New Deal as an unconstitutional attack on the separation of powers and a first step toward authoritarianism.

After World War II, critics accused Roosevelt and his followers of capitulating to Stalin at Yalta, Potsdam, and Tehran, by essentially ceding Eastern Europe and China to the Soviet Union.⁴¹ Moreover, as the 1940s drew to a close, a series of staggering setbacks on the international stage convinced many Americans that the politics of "appeasement" had shifted momentum in the communists favor. First, a coup ousted Czechoslovakia's non-communist government and replaced it with a Communist regime. Second, the Soviet Union invited Finland to participate in a mutual-defense treaty, prompting Secretary of State George Marshall to state that "The hour is far more fateful than it was one year ago [at the beginning of 1946]...Totalitarian control has been tightened in...[the] countries of Eastern Europe...Other European peoples face a similar threat of being drawn against their will into the communist orbit."⁴²

Fears concerning the expanding "orbit" of communist influence reached crisis levels with the Soviets' successful detonation of an atomic bomb in 1949 followed closely by China's official fall to Mao Zedong's forces. Public demands for a vigorous response made the United States' decision to commit forces to Korea all but inevitable when hostilities erupted six months later.

A rash of domestic scandals in the national security and intelligence communities further exacerbated public anxiety. First, in 1945, the FBI discovered a large cache of classified State Department documents in the offices of a small magazine, *Amerasia*, which specialized in Asian affairs. A year later, the Canadian government arrested members of a Soviet spy ring that had infiltrated its government, and reported that the network might extend to the U.S. government as well.⁴³ Even more damaging developments emerged between 1950 and 1951: the perjury conviction of Alger Hiss for denying that he had divulged secret documents in 1938; the indictment of Judith Coplon, a Justice Department employee, on charges that she had stolen FBI secrets for a spy; the conviction of Julius and Ethel Rosenberg on charges that they had provided the Soviet Union with the secrets necessary to develop the atomic bomb.⁴⁴

These scandals gave Republicans an opportunity to link the communist threat abroad directly to widespread subversion within the government itself, of which there was little evidence.⁴⁵ Republicans quickly recognized that Communism's advance throughout Eastern Europe and Asia would provide a dramatic, damning metaphor for the alleged Soviet infiltration of government agencies and the perceived insinuation of communist ideology into American civic organizations, labor unions, and classrooms. Failure to contain Soviet and Communist expansion in the years immediately following World War II eventually became conflated in the public mind with a perceived softness on Communists in the ranks of the U.S. government.⁴⁶

Faced with partisan rancor, Truman adopted anticommunist rhetoric and used this rhetoric to advance his own foreign and domestic policies, both by distinguishing his policies from the Progressive left and

⁴⁰ Athan Theoharis, *Seeds of Repression: Harry S. Truman and the Origins of McCarthyism* (1971), p. 7.

⁴¹ *Id.*, pp. 23-24.

⁴² Richard M. Freeland, *The Truman Doctrine and the Origins of McCarthyism: Foreign Policy, Domestic Politics, and Internal Security, 1946-1948* (3d Ed. 1985), p. 271.

⁴³ *Id.*, p. 120.

⁴⁴ Theoharis, *supra* note 430, p. 121.

⁴⁵ *Id.*, pp. 99-100.

⁴⁶ *Id.*, p. 19.

by identifying both Progressives and conservatives as threatening to U.S. foreign policy—Progressives for their willingness to bind the United States to international structures and conservatives for their isolationism.⁴⁰⁷ According to Truman and his McCarthyite critics alike, foreign Communist military aggression represented only part of the threat to America and other free nations; an equally serious threat came from domestic communist sympathizers who sought to undermine democratic institutions and surreptitiously spread communist ideology.

In addition, Truman emphasized the fragility of democratic institutions abroad relative to the danger of communist subversion, especially when combined with transnational communist networks capable of initiating and supporting major insurrections. Examples of communist agitation—from Czechoslovakia to China—appeared to confirm Truman's theory, as well as his call for an effective domestic and international response. For Truman, this reasoning necessitated a more expansive American role in supporting struggling governments abroad.⁴⁰⁸ Thus, in pressing for passage of the Greek-Turkish aid—the "Truman Doctrine"—Truman stressed the likelihood that the countries' economic misery would strengthen the guerilla movement "led" by communists.⁴⁰⁹ Truman also came to recognize, as one commentator notes, that:

continued decisive and conspicuous action against American communists and subversives could help the Administration solve what it considered the fundamental problem of internal security, which had nothing to do with federal employees but was related to the absence of strong public support for its international policies. ...In this setting, while planners in the State Department were developing the Marshall Plan and girding themselves for the political battle it would participate, officials elsewhere in the Truman administration were preparing to move forward with new and dramatic initiatives against American communists and subversives.⁴¹⁰

Capitalizing on the public's anxieties and turning up the heat on domestic communist sympathizers allowed

Truman to successfully marshal support for liberal foreign aid. However, by pressing anticommunist rhetoric and domestic enforcement into the service of his foreign policy agenda, Truman committed his administration to an escalating domestic campaign that quickly spun out of his control.

2. Truman's Response

One of the Truman Administration's first anticommunist measures was the establishment in 1946 of a commission to determine what the President should do to guarantee "employee loyalty" within the government bureaucracy. Upon the commission's prompting, Truman issued Executive Order 9835 on March 22, 1947, establishing official review boards to identify "disloyal" federal employees.⁴¹¹ Unfortunately, as one historian has noted, identifying "disloyal" employees proved to be no easy matter, and once suspicions arose, accused employees faced an uphill battle to demonstrate their loyalty:

The trouble was that Communists were universally acknowledged to be devilishly clever at hiding their identities; they did not belong to "subversive" organizations; they could be anyone, indistinguishable from the neighbor next door. It was therefore necessary to seek information about suspects from any source, however dubious, and lay the burden of proof on them: they had the right to prove their innocence. They could bring lawyers and appeal verdicts to higher boards, but they could not face their accusers or get access to the information used against them. They enjoyed none of the rights of a court proceeding and had to be satisfied with such limited due process as the executive order granted them.⁴¹²

To gather information for the loyalty cases, Truman directed the FBI "to wiretap 'subversive' and criminal persons, [even though] information so secured, owing to existent legislative and constitutional restrictions, was not admissible as evidence in court."⁴¹³ The confidentiality of the FBI's secret loyalty files on government employees triumphed even over efforts of Congress and the Department of the Interior to gain access.⁴¹⁴

⁴⁰⁷ *Id.*, pp. 153-57.

⁴⁰⁸ *Id.*, p. 50.

⁴⁰⁹ *Id.*, p. 48.

⁴¹⁰ *Fiseland*, *supra* note 432, at 206-07.

⁴¹¹ Reprinted in Albert Fried (ed.), *McCarthyism, The Great American Red Scare: A Documentary History* (1997), p. 24.

⁴¹² *Id.*, p. 24.

⁴¹³ Theobaris, *supra* note 430, p. 126.

⁴¹⁴ *Id.*, pp. 130-31.

In addition to due process concerns, some historians have questioned whether the Truman administration itself even expected the boards to bear fruit:

Was this innovation likely to improve national security? It is doubtful that this was expected... The report of the Temporary Commission [recommending review boards stated]: "Unless this entire problem is considered with proper emphasis on the counterespionage aspect of its solution, the Commission is convinced that the achievement of the basic objective may well fail."...[T]he Administration [took no] steps to study this question by other means. In brief, both what the Administration did do—its extension of the system of loyalty investigations—and what it did not do—its failure to study the problem of counterintelligence—strongly suggest that in promulgating the loyalty order it was only incidentally concerned with national security.⁴⁴⁷

Interestingly, the loyalty boards' periods of greatest activity were closely synchronized with the administration's major policy initiatives. Whatever may have been the motivation behind these domestic security measures, their effect was to remind the populace of the Communist threat and intensify Cold War tensions.

Soon after the establishment of Truman's loyalty boards, Congressional Republicans began their own effort to ferret out and discredit American Communists. In 1947, a new group of Republican congressman co-opted the largely moribund House Un-American Affairs Committee (HUAC) to investigate allegations that Hollywood actors, directors and screenwriters were conspiring to produce films containing Communist propaganda. Ultimately, this investigation led to the public martyrdom of the "Hollywood Ten," a collection of actors, writers and directors, accused of having been Communist party members. Choosing to assert their First Amendment freedom of association principles rather than their Fifth Amendment right to freedom from self-incrimination, all ten were charged with contempt of Congress.

HUAC later turned its attention to government functionaries, among them Alger Hiss, who was accused of delivering classified State Department documents to

Communists during the 1930s. Although Truman and others attacked HUAC for being excessively partisan, the Committee's purpose went largely unchallenged.

While Truman's loyalty boards and the HUAC scoured Washington and Hollywood for Communist sympathizers, the Justice Department launched its own response to the perceived Communist threat. At the President's request, Attorney General Tom Clark drafted a list of "subversive organizations." Without specific criteria for identifying so-called "subversive" groups or assuring due process to groups accused of treasonable activity, Clark was given *carte blanche* to add or remove dissident groups based upon purely political preferences. Since many federal employees had at one time or another belonged to some group on the Attorney General's list, "the administration had, quite without intention, declared an anti-radical field day on former Roosevelt and present Truman administration personnel."⁴⁴⁸

The Justice Department also targeted potential subversives through selective enforcement of existing immigration laws. The Alien Registration Act outlawed any advocacy, propaganda, or association for the purpose of "overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government."⁴⁴⁹ By February 1947, the Attorney General was able to report that "we have deported 124 persons on the grounds of communism."⁴⁵⁰ By the end of the year, the Department had three hundred active cases.

Immigration law proved to be a particularly well-targeted weapon to further Clark's national security agenda:

At the same time [that Clark began focusing upon immigration enforcement], he sponsored a study of the ethnic characteristics of American communists and discovered that over 91 percent were either immigrants or the children of immigrants or married to someone in one of those two categories. In short, almost all communists were vulnerable directly or indirectly to punishment through deportation proceedings....In its relationship to the debate on Cold War foreign policy, the deportation drive functioned in a manner similar to the Attorney General's list. In the most limited sense it provided

⁴⁴⁷ Freeland, *supra* note 432, pp. 126-27.

⁴⁴⁸ Theoharis, *supra* note 430, p. 107.

⁴⁴⁹ H.R. 6365, 76th Cong. (1st Sess. 1940).

⁴⁵⁰ Freeland, *supra* note 432, at 217.

a potent means of excising from the body politic a significant number of dissident voices.⁴⁹⁹

Immigration law was effectively wielded against the American Communist Party, striking such prominent leaders as Alexander Bittleman, Claudia Jones, Gerhart Eisler, and John R. Williamson. Notably, the Justice Department openly publicized these deportations and timed them at regular intervals for maximum theatrical effect. As public concern over the communist threat deepened, Clark also sought an additional statutory mandate to detain alien subversives indefinitely without bail until deportation arrangements could be completed.⁵⁰⁰ Although unsuccessful in securing these expansive powers, Clark's well-publicized deportation offensive succeeded in magnifying public perceptions of the communist threat.

3. McCarthy's Hour

When Joseph R. McCarthy, a little-known junior senator from Wisconsin, entered the national spotlight in 1950 by claiming to have the names of 205 State Department Communists, his undocumented accusations went virtually unchallenged. As evident from the foregoing discussion, McCarthy's virulent anticommunism had become standard fare in Cold War rhetoric of the late 1940s.

McCarthy nevertheless captured the public imagination and gained instant fame with his unique claim to have specifically identified communist sympathizers within the government. Moreover, his ability to weave complex issues into a single conspiracy theory appealed to the press and public precisely because it provided an outlet for popular anticommunist anxiety.

For the next four years, McCarthy championed his anticommunist agenda on the floor of the Senate and through his own investigative committee, the Investigative Subcommittee of the Committee on Government Operations. Although McCarthy's was only one of many such investigative committees throughout the country, McCarthy's extraordinary

claims and high popularity gave him continuing high profile, and both Truman and Eisenhower went out of their ways to appease the dangerous Senator.

As a symbol of the anticommunist movement, McCarthy proved extraordinarily influential. Among the bills produced by McCarthyites in Congress was the Internal Security Act, passed over Truman's veto, which gave the federal government unprecedented power to restrict civil liberties, including the power to deny political dissidents entry into the United States and to round up suspected communists and detain them indefinitely during a national emergency.⁵⁰¹ A passive Supreme Court failed to strike down such statutes despite their clear impact upon civil liberties.⁵⁰² Simultaneously, loyalty review boards sprung up at every level of federal and local government, with unfettered discretion "in how they gathered evidence and what they did with it and who decided on the procedures they would follow, the person whose fate lay in the balance having only such rights as they deigned to allow."⁵⁰³

In the end, McCarthy himself fell victim to his own excessive anticommunist ardor. Condemning Eisenhower for deciding to meet with Soviet leaders at Geneva in 1955, McCarthy alienated much of his public following and, for the first time, found himself facing an enemy more powerful than himself. A series of televised hearings engineered by the Eisenhower administration in 1954 showed McCarthy's cruelty and incivility to the whole nation, and McCarthy's popularity began to slide. Once public opinion turned against him, Congress was not far behind. On Dec. 2, 1954, the Senate censured Senator McCarthy for insulting members of its body, leaving him utterly broken and disgraced.

But despite his shockingly swift and complete political ruin, McCarthy's personal disgrace had only a relatively minor impact upon the government's anticommunist agenda. The same day that the Senate punished McCarthy for his unseemly conduct, it also passed a bill, "drawn up by liberal Democrats who denounced him and McCarthyism loudest, in effect outlaw[ing] the Communist Party by ordering its registration under the

⁴⁹⁹ *Id.*, pp. 217-18.

⁵⁰⁰ *Id.*, p. 298.

⁵⁰¹ H.R. 9490, 81st Cong. (2d Sess. 1950).

⁵⁰² See, e.g., *American Communications Association v. Douds*, 339 U.S. 401 (1950) (upholding the Taft-Hartley Act section, which denied NLRB protection to union unless their leaders signed an affidavit that they were not, nor had ever been, communists); *Dennis v. United States*, 341 U.S. 407 (1951) (upholding the prosecution of communists under the Alien Registration Act).

⁵⁰³ Fried, *supra* note 441, p. 116.

Internal Security Act. The move was a transparent attempt to assure the American people...that no one hated Communists more than liberal Democrats."⁶⁴ Despite McCarthy's fall from grace, the anticommunist ideology that McCarthy championed would continue to guide Cold War politics for years to come.

4. McCarthyism's Costs

The anticommunist purges of the 1940s and 1950s had a significant, long-term impact that transcended the personal cost to those who suffered unjust incarceration or deportation for their political convictions. Unsurprisingly, the American Communist Party suffered most during this period, as its top 12 members were prosecuted under the 1940 Alien Registration Act and innumerable others suffered official and unofficial sanctions.

The anticommunist inquisition extended well beyond avowed communist organizations, however. Loyalty reviews and lists of subversive organizations became weapons for marginalizing other political dissidents and crippling the nation's labor movement. Hundreds of political prisoners spent time behind bars or in Immigration and Naturalization Service (INS) detention centers during the 1940s and 1950s. Conservative estimates place the number of those who lost jobs in these anticommunist purges somewhere between ten and twelve thousand.⁶⁵ While such statistics convey some sense of the price paid by the McCarthyism's victims, anecdotal evidence is far more compelling. One historian describes the "extralegal sanctions" accompanying anticommunist investigations thus:

People who were identified as Communists were sometimes physically attacked by superpatriots who took the law into their own hands....Crank calls, hate mail, and other forms of harassment also tormented victims of McCarthyism, especially in those cities where local newspapers printed the names and addresses of subpoenaed witnesses....A New York City teacher remembered how terrified his children were by the telephoned death threats as well as by

the letter with a picture of 'gibbets and myself hanging from the scaffold.' A Southern college teacher active in the Wallace campaign had his home smeared with red paint; a blacklisted writer found a burning cross in his front yard. This kind of harassment was so widespread that almost everybody whose case became public experienced one such incident.⁶⁶

Anticommunist investigations not only subjected individuals to political or legal censure; rather, they turned whole communities against those accused.

Aside from consequences for those specifically targeted, McCarthyism also fostered a climate of fear and distrust in American society at large. Anxiety was particularly high within the academic community; in one 1955 survey of 2,451 college professors "nearly half the respondents admitted that they were scared, a figure that reached 75 percent for people who belonged to a controversial group or taught at a school that had experienced some trouble."⁶⁷

Similarly, McCarthyist purges intimidated many civil liberties groups to the point of near-silence; the American Civil Liberties Union, for instance, maintained a low profile during this period, refusing to represent Communists and other political dissidents, for fear that by aligning themselves with these groups, it, too, would be committing political suicide.

The African-American civil rights movement suffered as well, as its focus on international anti-imperialism became a target of McCarthyist reprisals: "The political repression that had narrowed debate in so many areas of American life vitiated the black community's internationalism and muzzled its main advocates."⁶⁸

Conversely, white supremacy groups benefited greatly from anticommunism, because it "hooked them into a national network of right-wing activists [and] reinforced their traditional contention that outside agitators were behind the move for civil rights. 'The attempt to abolish segregation in the South,' the Alabama Citizens Councils explained, 'is fostered and directed by the Communist Party.'⁶⁹

⁶⁴ *Id.*, pp. 180-81.

⁶⁵ Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (1998), p. 363.

⁶⁶ *Id.*, pp. 362-63.

⁶⁷ *Id.*, p. 366.

⁶⁸ *Id.*, p. 375.

⁶⁹ *Id.*, p. 391.

Immigrant communities were particularly vulnerable to the government's aggressive anticommunist campaign. Attorney General Clark's fateful decision to prosecute alleged subversives through immigration proceedings conveyed a clear message to immigrant communities:

As with the Attorney General's list [of subversive organizations], the major impact of these arrests... undoubtedly lay in their indirect psychological and political consequences rather than in their direct silencing of subversive voices. They were a clear warning to all unnaturalized aliens... that active opposition to Cold War foreign policy could subject them to severe penalties. They also suggested to native Americans that opposition to the Administration's policies was an alien concept, to be associated with deportable criminals.⁴⁰⁵

Employing publicized deportation for political prosecutions affixed a stigma of disloyalty to immigrant communities, keeping them in a constant state of fear and exacerbating their social and political alienation. In sum, anticommunist prosecutions affected not only those directly targeted, but also silenced a broad cross-section of American intellectuals, civil libertarians, ethnic minorities, and immigrants.

F. COINTELPRO

1. Perceived Threat in Post-War America

Following the end of World War II, the U.S. government had identified the spread of communism as the primary threat to national security. During this period, the FBI perceived the Communist Party, USA ("CPUSA"), an organization that embraced a concept of Stalinist Soviet Communism, as the most substantial domestic communist threat. The FBI believed this group, boasting a membership of roughly eighty thousand in 1945, to be providing Soviet espionage and intelligence.⁴⁰⁶ In the late 1940s and early 1950s,

the FBI's counterintelligence efforts severely weakened the CPUSA; between 1953 and 1956, 42 indictments were brought against the CPUSA. By 1956, membership had declined to 22,000.⁴⁰⁷

When the Supreme Court declared in 1957 that the 1940 Alien Registration Act did not forbid advocacy or teaching of forcible overthrow as an abstract principle,⁴⁰⁸ FBI head J. Edgar Hoover came to believe that the FBI's abilities to investigate communist subversion had been effectively undermined. As a result, he sought approval from President Eisenhower and members of the National Security Council to use counterintelligence techniques to further disrupt CPUSA activities.⁴⁰⁹ These included surreptitious entry, safecracking, mail interception, telephone surveillance, microphone plants, trash inspection, infiltration, and IRS investigations.⁴¹⁰ The ensuing expansion of FBI domestic intelligence became a program known under the codename COINTELPRO, an acronym for "counterintelligence program." During the height of COINTELPRO activity—between 1960 and 1974—the FBI conducted over 500,000 separate investigations of persons and groups categorized by the FBI as subversive.⁴¹¹

Besides targeting the CPUSA, COINTELPRO ran programs designed to counter four other perceived threats: the Socialist Workers Party program, the White Hate Group program, the Black Nationalist-Hate Group program, and the New Left program. Although the objectives of the CPUSA program were clear—to eliminate a perceived communist threat—but overstated, those of the other programs became more speculative.⁴¹²

Specific COINTELPRO programs were typically launched after significant national events. The program against the Ku Klux Klan commenced shortly after the widely-publicized disappearance in 1964 of three civil rights workers in Mississippi. The program against Black Nationalists began after the Newark and Detroit riots of 1967. The program against the "New Left"

⁴⁰⁵ Froeland, *supra* note 432, at 219.

⁴⁰⁶ See James Kirkpatrick Davis, *Assault on the Left: The FBI and the Sixties Antiracist Movement* (1997), p. 3.

⁴⁰⁷ See *id.*, pp. 3-4.

⁴⁰⁸ *Yates v. United States*, 354 U.S. 298 (1957).

⁴⁰⁹ By this time, the FBI recognized that the CPUSA no longer constituted a true threat for espionage, but rather a potential recruiting ground for spies. See *Intelligence Activities and the Rights of Americans*, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (1976) (hereinafter 2 Church Report), pp. 43, 66.

⁴¹⁰ See Davis, *supra* note 461, p. 5.

⁴¹¹ See 2 Church Report, *supra* note 464, p. 19.

⁴¹² In March 1960, COINTELPRO received directives to prevent communist infiltration in groups such as the NAACP and local scout troops. See *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities 17 (1976) (hereinafter 3 Church Report). Other directives were to target Black Nationalist groups that were not necessarily prone to violence, but whose membership was primarily African-American. See 2 Church Report, *supra* note 464, p. 213.

started soon after the student disruption on the campus of Columbia University in 1968.⁴⁶⁸ Though significant, these events do not constitute the sort of crisis normally required before a government exercises the full extent of its domestic intelligence activities, especially in the targeting of the "New Left," a program that was primarily ideologically based.⁴⁶⁹

By the latter stages of COINTELPRO, the overriding organizational goal was the prevention not of specific criminal acts but of possible violence by groups believed have a propensity or potential for violence.⁴⁷⁰ In the case of Martin Luther King, Jr., the FBI feared that King, as the most important African-American leader in the country, could turn into a potential "messiah" to electrify the Black Nationalist movement and might abandon his strategy of nonviolence.⁴⁷¹

The widespread impact of COINTELPRO investigations upon civil liberties of Americans was unprecedented. In 1974, only two percent of the 17,528 FBI investigations of individuals were based upon advance knowledge of any specific type of activity.⁴⁷² The mail-opening program instituted during the 1950's did not distinguish between messages of foreigners and Americans; the FBI shared information gained with both the CIA and NSA.⁴⁷³ Though the FBI did not maintain complete records in this regard, it is known that FBI did not limit its microphone surveillance to suspected communists or spies. The FBI also used microphone surveillance on both black separatist groups and white hate organizations, and on individuals such as a U.S. Congressman and Martin Luther King, Jr.⁴⁷⁴ Additionally, the FBI placed unauthorized wiretaps on people such as a reporter for the *New York Times* and an official of the Nation of Islam.⁴⁷⁵

2. Military Intelligence

Though a separation is typically maintained between the military and civilian spheres in this country, the Army was called upon during the late 1960s to engage in domestic surveillance of U.S. civilians. This activity climaxed between 1967 and 1970. There were four broad types of domestic military intelligence used with respect to U.S. civilians: (1) gathering of information on political activities of private citizens and organizations; (2) monitoring of radio transmissions; (3) investigating private organizations considered to be threats; and (4) assisting other intelligence-gathering organizations.

Following an outbreak of domestic violence associated with the civil rights and antiwar movements, the Army began to prepare for possible future disturbances and gathered information on activist groups and individuals. From 1967 to 1970, the Army maintained files on at least 100,000 Americans, including Martin Luther King, Jr., Whitney Young, Congressman Abner Mikva, and Senator Adlai Stevenson III.⁴⁷⁶ The Army also monitored organizations such as antimilitary dissident groups, peace groups, antiwar groups, and white racist groups.⁴⁷⁷ Military agents infiltrated private organizations by posing as members or newsmen. The Army also gathered intelligence by relying on civilian informants and police intelligence, and by monitoring private radio transmissions.⁴⁷⁸

G. Registration Measures Against Iranian Students, 1979-1980

The recent requirements that immigrants from Iran and other Muslim countries register with the INS, which led to the detention of many registrants, is not the first

⁴⁶⁸ 2 Church Report, *supra* note 464, p. 86.

⁴⁶⁹ A former White House official under the Johnson administration admitted that intelligence gained about anti-war protest did not necessarily facilitate control of possible violence, since the most valuable information concerned geography of major cities. *Id.*, p. 19.

⁴⁷⁰ See 3 Church Report, *supra* note 467, p. 6. Not all targeted groups were necessarily violent. COINTELPRO aimed at New Left activities based on moral grounds, for example, in opposition to such groups' free speech demonstrations defending use of four-letter words or opposing the war in Vietnam. See *id.*, p. 7; Davis, *supra* note 461, pp. 141-57.

⁴⁷¹ See 2 Church Report, *supra* note 464, pp. 12-13.

⁴⁷² See *id.*, p. 19.

⁴⁷³ See *id.*, p. 59.

⁴⁷⁴ See *id.*, pp. 60-61, 220.

⁴⁷⁵ See *id.*, pp. 62-64.

⁴⁷⁶ See 3 Church Report, *supra* note 467, p. 803.

⁴⁷⁷ See *id.*, pp. 815-18.

⁴⁷⁸ See *id.*, pp. 789-91, 823-24.

time Iranians have been required to register and threatened with deportation. After the Iranian revolution, during the Iran hostage crisis, both the federal government and several states enacted measures that specifically targeted Iranian aliens in the United States.

On Nov. 13, 1979—days after the overthrow of the Shah of Iran and the taking of hostages at the U.S. Embassy in Tehran—the Attorney General, at the direction of President Carter, required all nonimmigrant post-secondary students who were Iranian nationals to report to the INS for registration by December 14. Each alien was required to provide details of residence and immigration status and to present a passport and evidence of school enrollment, payment of fees, number of course hours enrolled, good standing, and current address.⁴⁰³ The regulation provided that failure to comply with the reporting requirement would be a violation of the conditions on the alien's stay in the United States and would be grounds for deportation under the Immigration and Nationality Act.⁴⁰⁴

In response, several Iranian students sued, seeking to have the regulations overturned.⁴⁰⁵ The government claimed that because of Congress's plenary power over immigration matters,⁴⁰⁶ immigration laws and regulations were not subject to judicial review, and therefore that the district court should not hear the case. The district court rejected this argument that the plenary power of Congress over matters related to immigration precluded judicial review of the regulation. The court

held that Congress had not explicitly conferred on the executive the power to discriminate among aliens on the basis of national origin.⁴⁰⁷

The plaintiffs asserted that the regulation violated the Fifth Amendment's equal protection provisions by singling out aliens who were Iranian nationals.⁴⁰⁸ Characterizing the measures as "a discriminatory thirty-day roundup that violates the fundamental principles of American fairness,"⁴⁰⁹ the district court agreed.

In the absence of specific Congressional authorization for the distinction between Iranians and all other aliens, the government had sought to justify the regulation by claiming that the regulation served several "overriding national interests," including protecting the lives of the U.S. hostages in Iran by protecting Iranians in the United States from violence, expressing to Iran the U.S. government's displeasure with the Iranian government's actions, and identifying Iranian students who could assist in developing a response to Iran on the hostage crisis.⁴¹⁰ The district court dismissed the last two of these concerns as hardly "overriding" and held that there was only a "dubious" relationship between the first objective and the challenged regulation.⁴¹¹ Ultimately, it found, there was "only a psychological purpose for the regulation, . . . one of assuaging the anger of the American people by demonstrating that something is being done in the face of the crisis."⁴¹²

On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed the lower court, finding that the Immigration and Nationality Act had conferred on the Attorney General sufficiently broad authority to enact

⁴⁰³ 8 C.F.R. § 214.5 (Nov. 13, 1979).

⁴⁰⁴ *Id.* Under the Immigration and Nationality Act, the Attorney General is authorized to order the deportation of any nonimmigrant alien who fails to maintain his status or to comply with any conditions of such status. 8 U.S.C. § 1251(a)(7) (1980) (now recodified at 8 U.S.C. § 1227(a)(1)(C)(i)).

⁴⁰⁵ *Narenji v. Civiletti*, 481 F. Supp. 1132 (D.D.C.), *rev'd*, 617 F.2d 745 (D.C. Cir. 1979).

⁴⁰⁶ The "plenary power" doctrine essentially states that immigration law and regulation is subject only to limited judicial review because immigration is a question of national sovereignty, relating to a nation's right to define its own borders. Judicial review should therefore be limited to examination for executive action's conformity with immigration laws duly passed by Congress and should subject immigration law and regulation to limited, if any, constitutional scrutiny. However, this doctrine has been applied inconsistently; when courts do defer to the "plenary power" of Congress in immigration matters, this power effectively justifies a heightened deference toward, and lower level of scrutiny of, Congressional and regulatory action. *See generally* Stephen H. Legomsky, "Ten More Years of Plenary Power: Immigration, Congress, and the Courts," *Hastings Constitutional Law Quarterly* 22 (1995): 923.

⁴⁰⁷ *Narenji*, 481 F. Supp. at 1141; *see also* Mary McGowan, "Narenji v. Civiletti: Equal Protection and the Iranian Crisis," *Catholic University Law Review* 31 (1981): 101, 103.

⁴⁰⁸ The plaintiffs also asserted that the regulation violated their First Amendment rights to free speech, association and assembly because it was enacted to punish Iranian aliens for their protests and other expressive and associative actions and to chill any such future actions; and violated their Fourth Amendment rights to be free from search and seizure, in that the registration requirements amounted to a "compelled interrogation" without individualized suspicion. *Narenji*, 481 F. Supp. at 1136.

⁴⁰⁹ *Id.*, p. 1142.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

measures distinguishing among aliens based on their nationality, and that "so long as such decisions are not wholly irrational they must be sustained."⁴⁸⁵ Declining to require that the regulation serve an "overriding national interest," the D.C. Circuit upheld the regulation on the ground that it needed only to have a rational basis. In particular, the appeals court found that it was "not the business of the courts" to judge measures such as this beyond a limited "rational basis" inquiry because the government had plausibly invoked foreign policy, traditionally the province of the executive, as the justification for its actions.⁴⁸⁶

The government may cite *Narenji* as support for the law enforcement measures currently being implemented against Arab, South Asian, Middle Eastern, and Muslim immigrants. However, the challenged regulation requiring Iranian student registration had a narrower focus and basis on national origin, rather than ethnicity, race, or religion, arguably distinguishing it from the broad measures undertaken since Sept. 11, 2001.⁴⁸⁷

Taking the broader reading of *Narenji*, commentators analyzing its applicability to current policy toward Arab and Muslim immigrants have expressed concern that the foreign policy justification for shielding executive actions on immigration from judicial scrutiny leaves open the possibility that

the Executive [Branch] will overvalue the government interest and undervalue the individual constitutional interest. In a severe crisis, the political and psychological pressures on the Executive are extreme. In this situation, executive measures may be motivated by frustration or desperation rather than by an assessment of their actual usefulness, or they may reflect little more than a desire to appear stern and decisive. Conversely, in times of crisis the individual interests of persons selected for special burdens may be grossly undervalued.⁴⁸⁸

H. Los Angeles Eight Case

In 1986, the Justice Department created the Alien Border Control Committee, a task force to address immigration and terrorism concerns.⁴⁸⁹ This committee was directed to develop ways to deport "PLO activists who violated their visa status" while protecting classified information.⁴⁹⁰ Soon after the committee's formation, the INS began deportation proceedings against a group of Palestinian students in Los Angeles. What began as a seemingly simple deportation procedure under the McCarthy-era McCarran-Walter Act has, after more than fifteen years, evolved into one of the most significant incidents involving the First Amendment rights of non-citizens.

After almost 20 years of investigation and court proceedings, the INS continues to seek the deportation of these individuals for reasons ranging from routine visa violations to alleged association with the Popular Front for the Liberation of Palestine ("PFLP").

1. History

In 1984, the FBI, concerned about possible terrorism at the Los Angeles Olympics, began investigating a group of politically active Palestinian students in Los Angeles.⁴⁹¹ Over the next three years, agents attended public demonstrations and meetings, seized literature and had it translated, and tracked the group's distribution of a Palestinian magazine.⁴⁹²

In 1986, agents attended a community dinner to celebrate Palestinian culture and politics. None of the agents could understand Arabic, but they reported that the "tone" of the speeches and "the music and entire mood" of the gathering indicated that it was a fundraising event for terrorists.⁴⁹³ During the function, one of the student activists, Khader Hamide, allegedly asked for contributions "for the combatants in Lebanon and on the West Bank."⁴⁹⁴ At the end of their investigation,

⁴⁸⁵ *Narenji*, 617 F.2d at 747. The D.C. Circuit also declined to apply strict scrutiny, *id.*, because national origin distinctions not defined in terms of race or "motivated by racial prejudice" are not subject to strict scrutiny under Equal Protection analysis. Gerald L. Neuman, "Terrorism, Selective Deportation and the First Amendment After *Reno v. AADC*," *Georgetown Immigration Law Journal* 14 (2000): 313, 340.

⁴⁸⁶ *Narenji*, 617 F.2d at 748.

⁴⁸⁷ Susan M. Akram and Kevin R. Johnson, "Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy," *New York University Annual Survey of American Law* 58 (2002): 295, 338.

⁴⁸⁸ Peter E. Quint, "The Separation of Powers Under Carter," *Texas Law Review* 62 (1984): 785, 856.

⁴⁸⁹ David Cole, "Terrorist Scare (Guarding Against PLO Terrorism and Activism)," *The Nation*, April 19, 1999.

⁴⁹⁰ *Id.*

⁴⁹¹ David Cole, "Misdirected Snooping Doesn't Stop Terror," *New York Times*, June 4, 2002.

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ David G. Savage, "The Great Alien Lockout: Can Congress Bar Courts from Hearing Deportation Challenges?" *ABA Journal* 84 (1998): 34.

FBI agents wrote a 1,400-page report urging the Immigration and Naturalization Service to deport several of the students to hamper their political activities.⁹⁹

In January 1987, federal officials in Los Angeles arrested eight foreign student activists—seven Palestinians and a Kenyan.¹⁰⁰ The eight students, who have come to be known as the “Los Angeles Eight,” were alleged to be associated with a group that advocated the “doctrines of world communism,” the PFLP.¹⁰¹ The FBI Director at the time, William Webster, testified to Congress that the three-year FBI investigation had found no evidence of criminal or terrorist activity, but that the individuals “were arrested because they are alleged to be members of a worldwide Communist organization which under the McCarran-Walter Act makes them eligible for deportation,” and that “if these individuals had been United States citizens, there would not have been a basis of their arrest.”¹⁰² The INS District Director who authorized the deportation proceedings confirmed that explanation, stating that the eight aliens “were singled out for deportation because of their alleged political affiliations with the [PFLP].”¹⁰³

The McCarran-Walter Act, or Internal Security Act of 1950, was the legislative centerpiece of the government’s anticommunism actions during the Cold War era.¹⁰⁴ The first part of the McCarran-Walter Act, known as the Subversive Activities Control Act, contained a lengthy statement of the threat to the United States posed by Communism and declared the Communist movement to present “a clear and present danger to the security of the United States and to the existence of free American institutions.”¹⁰⁵ In addition, the McCarran-Walter Act barred members of Communist parties from entry into the United States

and directed the Attorney General to deport aliens who engaged in activities considered to be “prejudicial to the public interest.”¹⁰⁶ Such activities included advocating or teaching opposition to all organized government and, mores specifically, advocating the overthrow of the government of the United States.¹⁰⁷

Two months after their arrests, the Los Angeles Eight, joined by several immigrants’ rights organizations, filed suit in federal court charging that the McCarran-Walter Act’s provisions for deporting members of Communist organizations were unconstitutional under the First Amendment.¹⁰⁸ However, before the initial hearing, the INS withdrew the original charges and reinstated new deportation proceedings against the group. Six members of the group, who were nonimmigrant aliens, were charged with routine visa violations. The two other members, who were permanent residents, were charged under a section of the McCarran-Walter Act that made it a deportable offense to be affiliated with a group that advocated destruction of property and attacks on government officials.¹⁰⁹ On Jan. 26, 1989, a district court ruled that these McCarran-Walter Act provisions were unconstitutional on the basis that aliens living in the United States have the same First Amendment rights as citizens.¹¹⁰

In 1990, Congress repealed the McCarran-Walter Act and enacted the Immigration Act of 1990, which made it a deportable offense to “engage in terrorist activity.”¹¹¹ Following this change, the INS initiated new charges against the permanent residents. They were not charged with actually engaging in terrorist acts, but were charged with providing financial support to the PFLP, a “terrorist organization.”¹¹² The INS argued that, under

⁹⁹ *Id.*

¹⁰⁰ David Cole, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security* (forthcoming 2003), p. 35.

¹⁰¹ David Cole, “Enemy Aliens,” *Stanford Law Review* 54 (2002): 887, 996.

¹⁰² *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d, 1045, 1053 (9th Cir. 1995) (quoting Hearings before the Senate Select Committee on Intelligence on the Nominations of William H. Webster to be Director of Central Intelligence, 100th Cong., 1st Sess. 94-95 (April 8, 9, 30, 1987; May 1, 1987)).

¹⁰³ *Reno v. American-Arab Anti-Discrimination Comm.*, No. 97-1252 (U.S.), Joint Appendix at 93 (Declaration of INS District Director Ernest Gustafson), cited in Cole, *supra* note 501, pp. 996-97.

¹⁰⁴ William M. Wiecek, “The Legal Foundations of Domestic Anticommunism: The Background of *Dennis v. United States*,” *Supreme Court Review*, 2001: 375, 425.

¹⁰⁵ Act of Sept. 23, 1950, ch. 1024, 64 Stat. 987, 989 (1990) repealed by Immigration Act of 1990, 104 Stat. 4978 (Nov. 29, 1990).

¹⁰⁶ *Id.* at 1008.

¹⁰⁷ *Id.* at 1006-07.

¹⁰⁸ Cole, *supra* note 500, pp. 41-42.

¹⁰⁹ See *American-Arab*, 70 F.3d at 1053.

¹¹⁰ *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060, 1064 (C.D. Cal. 1989).

¹¹¹ See Immigration Act of 1990, Pub. L. No. 101-649, § 358, 104 Stat. 4978 (codified at 8 U.S.C. § 1182(a)(3)(C)).

¹¹² Cole, *supra* note 500, p. 42.

the Immigration Act of 1990, such support was a deportable offense.³¹³

In January 1994, the group challenged the deportation proceedings in federal district court in California. The court enjoined the deportation proceedings, ruling that the group had been unlawfully targeted for deportation based on the free exercise of their First Amendment rights, because similarly situated members of other groups, also alleged to be supporting terrorist organizations, had not been deported. In November 1995, the U.S. Court of Appeals for the Ninth Circuit affirmed the decision, rejecting the government's argument that immigrants are not entitled to the same First Amendment protection as U.S. citizens.³¹⁴

In 1996 Congress attempted to limit federal court jurisdiction over a range of immigration matters, including claims of selective enforcement of immigration law.³¹⁵ As a result, the Supreme Court granted the Justice Department's request to review the case. The Court indicated that it would address only a jurisdictional question—whether the federal courts retained jurisdiction to hear the claim in the wake of the 1996 changes in immigration law.³¹⁶ The Supreme Court, however, went further than that in its ruling. The Court determined that federal courts had been stripped by Congress of nearly all power to hear challenges to selective enforcement of the immigration laws. Although jurisdiction may remain in cases of "outrageous" discrimination,³¹⁷ the Court ruled that as a general matter, "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation."³¹⁸

At present, all eight individuals continue to live in Los Angeles, working in accounting, engineering, contracting, and securities trading.³¹⁹ The INS continues to seek their deportation—six for routine visa violations,

and two for allegedly supporting a "terrorist organization." The government continues to assert that providing material support to a terrorist group is a legally sufficient basis for deportation.

2. Local and National Effects

The Supreme Court decision in *American-Arab* has had the affect of chilling political speech by aliens in the United States. Immigrants cannot engage in controversial political activity without fearing retaliatory deportation proceedings from the INS.³²⁰ These aliens, once pursued by the INS, can no longer object to the government's use of selective enforcement against them in deportation proceedings.³²¹

In addition, the government's use of "secret evidence" against the Los Angeles Eight has raised concerns with non-citizens and with civil rights groups. The INS contends that it faces an unavoidable dilemma when it has classified information indicating that a non-citizen poses a threat.³²² If the INS discloses the evidence, it will endanger national security by revealing its sources, but if it does not use the evidence and permits that person to remain at large, that may also endanger national security.³²³ The INS believes that the best way to resolve this dilemma is to present evidence in secret.

The use of secret evidence creates the enormously difficult task for defendants and their counsel of having to defend against the unknown. The defense cannot know how to discredit or counter government assertions. The defense has no opportunity to cross-examine secret witnesses or otherwise refute evidence presented in secret.

The use of evidence in this manner, particularly when it appears that the INS is targeting particular communities on the basis of race or religion, "breeds cynicism, paranoia, and distrust in those communities."³²⁴

³¹³ Under the Immigration Act of 1990, 8 U.S.C. § 1251(a)(3)(B) (now § 1182(a)(3)(B)(i)), it is a deportable offense to "engage in terrorist activity," which is defined in 8 U.S.C. § 1182(a)(3)(B)(iv) to include soliciting funds for a terrorist organization.

³¹⁴ See *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045 (9th Cir. 1995).

³¹⁵ But see *INS v. St. Cyr*, 533 U.S. 289 (2001) (holding 1996 laws do not eliminate *habeas corpus* jurisdiction to review deportation orders); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (reviewing indefinite detention provisions of 1996 laws and holding provisions violative of due process).

³¹⁶ Cole, *supra* note 500, p. 43.

³¹⁷ *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, (1999).

³¹⁸ *Id.* at 487.

³¹⁹ David Cole, *New Voices Silenced: Supreme Court Denies First Amendment Rights to Legal Aliens*, *Legal Times*, March 8, 1999, p. 19.

³²⁰ Cole, *supra* note 500, p. 44.

³²¹ Cole, *supra* note 519, p. 20.

³²² Cole, *supra* note 493.

³²³ *Id.*

³²⁴ David Cole, "Secrecy, Guilt by Association and The Terrorist Profile," *Journal of Law and Religion* 15 (2000-2001): 267, 288.

Members of those communities are not shown evidence of terrorist activity, so they worry that, in many cases, deportation proceedings are not based on credible evidence but on the basis of race or religious affiliation. As a result, these immigrant communities may distrust the FBI and INS rather than cooperate with them.

3. Efficacy of the Law Enforcement Measures

The efficacy of the law enforcement measures used in this instance cannot be determined from the public record. The INS and FBI continue to assert that the Los Angeles Eight should be deported on the grounds that they provided material support to the PFLP. If this charge is accurate and it can be shown that the Los Angeles Eight did provide financial support to the PFLP, then perhaps the deportation proceedings were an effective means of inhibiting a group that was "engaged in terrorist activity," which under the Immigration and Nationality Act includes soliciting funds for a "terrorist organization."¹⁴³

It is legitimate to deport individuals who are involved with terrorism, and *American-Arab* made it legally possible for the INS to selectively deport individuals for technical immigration violations on the basis of politics, race, religion, or ideology. *American-Arab's* legal sanction, however, does not answer the question of whether such a policy is advisable and effective. If it appears to the Arab communities that the FBI and INS only deport individuals involved with Arab "terrorist organizations," while overlooking individuals of other nationalities that are involved with similar groups, it may lead to distrust in these communities. The FBI and INS need the support of these communities to effectively monitor and control future terrorist activity.

In the case of the Los Angeles Eight, the FBI and INS have repeatedly stated that the Palestinian students did not commit any offense that would be the basis for the arrest of a U.S. citizen. These statements indicate that law enforcement resources have been expended to combat political activities that are not illegal and would otherwise be protected under the First Amendment. Thus, the deportation proceedings against the Los Angeles Eight appear to be government retaliation for their association with an organization that is politically unpopular.

¹⁴³ 8 U.S.C. § 1182(a)(3)(B)(iv).

Chapter Four: An Alternative Framework for Immigration Enforcement and Domestic Security

Liberty is the air that we Americans breathe. Our Government is based on the belief that a people can be both strong and free.

Franklin D. Roosevelt
Harvard University tercentenary, Sept. 18, 1936

America's challenge is to meet post-September 11 security demands while defending and strengthening the civil liberties and national unity that contribute to our great strength as a nation.

On immigration matters, the path the government has chosen is a patchwork of *ad hoc* initiatives that have seriously undercut individual liberties and national unity and have accomplished only marginal, if any, improvements in security.

There is an alternate path. It is one that incorporates immigration law and policy into comprehensive national and international strategies that confront the terrorist threat. These strategies also respect civil liberties and protect and uphold proper constitutional standards.

With counterterrorism redefining American security at home and abroad, the nation's full range of responses are being mobilized to achieve three broad goals: prevent future attacks, be prepared to respond if attacks should occur, and dismantle and isolate terrorist networks to starve them of the means to function. In each of these arenas, immigration powers and actions have roles to play that can contribute to effective counterterrorism strategies.

To be effective, those roles must reflect a clear grasp of what the immigration system can and cannot be expected to accomplish. In addition, times of national danger intensify the fundamental tension in democracy between law enforcement powers and civil liberties, a tension that is acute in the implementation of immigration policy. So, in the recalibration of our commitments to liberties and security that is underway, extra care must be exercised to uphold and affirm constitutional protections.

Finally, government actions in the face of today's threats are no longer matters of domestic policy alone. Singling out groups and nationalities for onerous

enforcement actions not only risks individual rights and divides Americans along nationality and religious lines but resonates internationally. These reverberations also feed the resentment against America that helps to fuel terrorism.

The broad framework that should guide the nexus between immigration policy and counterterrorism should be centered on four broad policy imperatives:

- Mobilizing intelligence and information capabilities;
- Protecting the security of air, land and sea borders and beyond;
- Supporting law enforcement and law enforcement cooperation; and
- Engaging Arab- and Muslim-American communities.

I. Mobilizing Intelligence and Information Capabilities

More than anything else, September 11 demonstrated the need to dramatically improve U.S. intelligence capabilities. The challenge is how information among government agencies should be linked, shared, and analyzed in a post-September 11 world. The nation's immigration system captures voluminous amounts of data that, if properly organized and accessible, can supply important elements of "connecting the dots" about individuals under investigation and patterns and trends that may constitute suspicious activity. Entry information about people visiting the United States, data describing criminal activity, and application information from those seeking immigration status changes all represent unique, useful categories of information.

But it is one thing to gather and store information; it is quite another to understand its meaning and make it available in a timely, operational way to those who need and can act on it. To harness the security potential of immigration information, the following should receive priority attention:

A. Integrated Immigration History Information

The former Immigration and Naturalization Service (INS) and the State Department's Bureau of Consular Affairs are the nation's sole repositories of data on visitors and non-citizens. The data are spread among stovepipe systems that are only partially linked. Fully linking these data systems¹ to establish complete immigration histories of visitors and residents—accessible to authorized persons for authorized purposes—is an urgent need for both security and civil liberties reasons.

For example, when consular officers abroad screen visa applicants, they should have at their fingertips a full summary of information that answers questions such as whether the applicants have applied for or been granted visas before. Have they returned from prior trips as required? Have they ever been deported? Do they have criminal records in the United States? Do they have any applications pending, for asylum or permanent residence, for example?

Data that answer these questions exist but are only partially available to visa officers and immigration officials. Thorough screening and informed case decisions are vital to strengthening security. Until complete immigration histories are readily available, front-line immigration and consular officials—the foot soldiers of prevention—cannot carry out their domestic security responsibilities properly.

At the same time, such information is vital to protecting individual rights. When visitors are arrested for failing to leave the country, immigration officers should be able to verify electronically whether they properly applied for an extension of stay, for example, in determining whether to detain, repatriate, or release them. Such decisions have profound effects on individual lives, but are routinely made without access to full information.

Moreover, the need for information integration is made more acute with INS functions now divided among various parts of the Department of Homeland Security (DHS) and with complex, costly new programs, such as the recently-announced United States Visitor and Immigrant Status Indicator Technology (U.S. VISIT)² program, being built.³ Integrated information systems must become the connective tissue for

interconnected missions that were formerly coordinated because they resided within INS as a single agency. With that organizational entity having been eliminated, integrated information is now the only antidote for serious right-hand, left-hand problems that can have potentially grave consequences for both security and liberties.

The reliability and accuracy of data are essential. Data quality problems and deficiencies have bedeviled the immigration field for decades. Government officials, Congress, and the public must insist on the highest standards and strict accountability governing the handling of information. As a safeguard, individuals should have access to information about them and be able to correct inaccurate information.

B. Watchlists and Information-Sharing

To be useful, information about those who may mean harm must be in the hands of officials able to act on it. They include visa, port-of-entry, investigative, and other consular, immigration, and customs officials who are key first-responders in preventing terrorism. In making literally millions of decisions daily that determine who enters or stays in the country, they must have explicit, timely information to be effective.

The USA PATRIOT Act removed legal barriers that have hampered robust information-sharing between intelligence and front-line agencies. The task now is to change organizational cultures and institutionalize practices that champion partnership, overcome rivalry, and uphold vital protections for sources and methods while sharing information.

Watchlists have been the principal vehicle for such sharing. They include the names—increasingly augmented with biometric information such as fingerprints—of known or suspected terrorists, criminals, and others ineligible to be admitted to the United States. Names and other available identity information about visa applicants and travelers coming through ports of entry are checked against watchlists. There is a vigorous debate underway in intelligence circles about the best technology concepts to develop for counterterrorism information-sharing needs. Whether watchlists as

¹ This does not mean or require creating a single massive database. Instead, a single query of a name or alien number should display basic biographic information and all the specific databases that contain information about the individual, so that decision makers can query further for details.

² U.S. VISIT is the name now being used to describe the government's combined entry-exit system, the Student and Exchange Visitor Information System (SEVIS), and the National Security Entry Exit Registration System (NSEERS). It is to be implemented incrementally with the goal of collecting information on the arrival and departures of most foreign nationals at air, sea, and land ports of entry. It will use fingerprint and photographic technology to verify identity. U.S. VISIT information is to be made available to consular officials, inspectors at ports of entry, immigration adjudicators, and authorized law enforcement personnel.

presently constituted persist or successor techniques emerge, systems that flag known or suspected wrongdoers so they can be identified for in-depth review and consideration of their eligibility to enter or remain in the country are essential tools for law enforcement.

At the same time, watchlists have in the past brought with them cases of serious violations of individual rights because of mistaken or incomplete information and a lack of transparency and rigor in procedures for listing and removing names. Clear procedures for who is placed on and taken off watchlists must be developed. The procedures should be subject to public comment and review and should: (a) establish explicit criteria for listing names; (b) provide for regular review of names listed; and (c) set out steps for assessing the quality of information that can result in listing or removing names. Such rules are as important to listing names as they are to removing them given the need, again, to optimize both security and the protection of liberties in an information age.

C. Intelligence Analysis

Intelligence as the primary tool to combat terrorism must draw on expertise from across the government and around the globe. This includes immigration skills and information. Immigration databases can amplify analysis of investigative leads and can supply important insights into questions regarding identity, travel patterns and history, biometric information, criminal activity, legal status, and family relationships

The new intelligence paradigm that must be constructed in a post-September 11 world envisions a dynamic two-way street between analysis and action. Using advanced technology, highly-skilled specialists must work together across government agency lines to evaluate information and derive its meaning. The human talent required to meet the demands of these tasks is in short supply and needs to be bolstered. In addition to being a key user of anti-terrorism data and intelligence, immigration officials represent a valuable source of expertise and experience to be incorporated in the model that must now be built.

II. Protecting Borders

With a solid edifice of intelligence about terrorist networks and plans here and abroad, linked databases that provide comprehensive immigration histories about individuals, solid analysis of potential threats, and strengthened information-sharing among intelligence and front-line agencies, preventing dangerous people

and goods from getting into the country is by far the best way to protect the nation. That means focusing resources, technology, and ingenuity at U.S. borders—air, land, and sea—and beyond.

In this era of globalization, efficiency in the transnational flows of people and goods is crucial for economic prosperity. Last year, more than 440 million border crossings were made through 300 ports of entry, 358 million of them at land borders with Canada and Mexico. Border procedures must facilitate the movement of vast numbers of legitimate entries, while identifying and stopping a very small, but potentially lethal, number of wrongdoers.

Handling this needle-in-a-haystack phenomenon calls for systems, infrastructure, and policies that are rooted in risk management principles of segmenting traveling populations and conveyances. The task is to design reliable ways—such as smart-cards and other secure ways to identify pre-screened people and traffic—to facilitate the vast majority of legitimate crossings. This allows enforcement officials to concentrate their attention, resources, and expertise on unknown and high-risk traffic that may constitute security threats.

The agenda must be one of establishing security in trade and travel networks around the world. Where movements of people are concerned, this includes:

- Pre-screening and certifying frequent, legitimate travelers for expedited movement at border entry and exit points;
- Installing biometric systems that validate the identity of individuals and their documents;
- Expanding the use of commuter crossing lanes and building the necessary networks of roads in border regions;
- Engaging Canada and Mexico in common projects for shared infrastructure and border development that reduce congestion through handling appropriate clearances at locations away from immediate border crossings; and
- Establishing strong working partnerships and shared responsibility among intelligence, border enforcement, municipality, travel industry, and other public and private-sector actors.

The payoff is that good facilitation of border crossings and effective enforcement are mutually reinforcing. Proper facilitation frees up precious resources, generally personnel, to heighten enforcement scrutiny that, in turn, strengthens security. Moreover, at and beyond national

borders, government officials have wide law enforcement latitude. Exercising it to prevent the entry of travelers ineligible for admission and not residents or citizens of the United States is far less likely to jeopardize civil liberties imperatives than is the case within borders. Sensitive issues, such as access to the political asylum system and other norms and responsibilities of international law, should continue to be addressed as they are now, through specialized procedures and training.

Two major current initiatives should be used to shape the direction of the border agenda. They are the statutory mandate for automated entry-exit procedures, the central element of U.S. VISIT, by the end of 2005, and "smart border" agreements the United States signed with Canada and Mexico after September 11.

The purpose of automated entry-exit controls is to know who comes to the United States for temporary stays and when, the purpose of the visit, and whether travelers have left the country as required. The technology for such controls has been installed at most airports and seaports, and plans are reportedly in place to complete air and seaport installations by the end of 2003.

But land border locations, where the large majority of crossings to and from the country occur, present quite another challenge. It is daunting to design and implement entry-exit controls at land borders, given the hundreds of millions of crossings and scanty infrastructures, traffic management, and current technologies in place to handle them. Because the congressional mandate for automated entry-exit controls also calls for trade and tourism not to be harmed, such controls provide the opportunity and catalyst for a new vision for organizing the movement of people across our land borders. Only then can we meet the demands of both our economic and security interests in the decades to come.

The cornerstone of a new long-term vision should be to broaden and deepen the smart border agreements we have with our two hemispheric neighbors. The agreements outline a wide range of cooperative initiatives that constitute greater integration and shared responsibility for border security and facilitation. At its core, the vision represents a transformation: a North American continent that is secure from external threats but where, internally, three nations share responsibility for regulating flows of goods and people among us.

III. Supporting Law Enforcement and Law Enforcement Cooperation

With smart borders, information-sharing, and strong intelligence, security can be improved without undermining civil liberties protections and alienating broad sectors of society. This is fundamental to conceptualizing how immigration enforcement is best handled within our borders.

Immigration enforcement to strengthen domestic security within the country raises troubling questions of what values and precepts should guide policy and what strategies, as a practical matter, are likely to be effective. These dilemmas are among the reasons immigration policy has become such a key battleground since September 11 for the struggle between law enforcement and civil liberties.

Immigration enforcement strategies within the country should take account of these realities:

- The FBI estimates that the number of terrorists in the country is likely to be in the low hundreds. This suggests that narrowly-drawn approaches will work best.
- Locating terrorists in our midst depends heavily upon community cooperation, especially from co-ethnic groups.
- Overall, immigration enforcement within the country has been chronically ineffective due to insufficient resources, a history of abruptly-shifting priorities, and political opposition from business, ethnic, and other strong interest groups.
- Internal enforcement carries greater potential for violating individual rights and deepening ethnic and racial divides among communities than any other element of immigration policy. That is because it inevitably affects long-established, contributing members of communities and households with lawful resident or U.S. citizen members, many of whom are children.
- Deficiencies in accessible data and chronic backlogs in processing applications for changes in immigration status deprive law enforcement of basic tools it needs.

This experience suggests what *not* to do.

Blanket policies, such as the widespread arrests of non-citizens and closed immigration hearings that followed September 11, predictably produced few, if any, anti-terrorism cases or charges, while imposing

substantial costs to liberties and national unity. Blanket measures are too blunt an instrument for circumstances where careful targeting, based on investigative leads, is required.

Similarly, blurring border and internal enforcement, as has been done with the "call-in" elements of the National Security Entry-Exit Registration System (NSEERS) program, is reckless. Entry-exit requirements and registration of nonimmigrants already in the country are entirely different matters. Each is a major initiative that deserves careful planning and skilful implementation. "Call-in" registration has resulted in serious misallocations of scarce resources and has severely stigmatized Arab- and Muslim-Americans by singling them out for exceptional, onerous treatment. It constitutes unacceptable law enforcement practices that are at odds with long-held core principles of immigration law.

The realities also point to what *should* be done:

- Immigration law enforcement has an important role in combating terrorism. Thus, in some cases immigration violations and charges may be a method for identifying or pursuing criminal or terrorism-related charges, just as tax evasion charges have been used against organized crime. But maximum safeguards must also be established and built into counterterrorism law enforcement so that immigration charges—typically for being in violation of immigration status requirements—against individuals who may be terror suspects do not result in avoiding due process requirements.
- Tools such as the use of classified information should be allowed only on a case-by-case basis and only with judicial authorization. Arrest and detention for immigration violations should be subject to time limits that may be extended, but only in exceptional instances, case-by-case, and with a showing before and authorization from an immigration judge. And individuals detained for immigration violations, who do not now enjoy the right to government-appointed counsel because immigration proceedings are considered civil matters, should be granted that right when immigration charges result in detention.
- Immigration expertise and staff should be broadly incorporated into FBI joint terrorism task forces, which have grown from 35 to 66 since September 11. They are among the best investigative and intelligence responses to terrorist conspiracies because they constitute a mechanism for sharing

knowledge and leveraging skills across law enforcement agency lines. On issues of identity and the validity of documents from around the world, for example, immigration officials have special expertise. Unique resources, such as the fraudulent documents laboratory of the former INS, should also be tapped to support task force efforts.

Crimes that can aid terrorism such as document fraud, identity theft, money laundering, misuse of the financial system, and immigration fraud are often linked. Building cases to thwart them requires coordinated, multi-agency approaches that the task forces are designed to do. Such law enforcement uses smart profiling, that is examination of specific behavior patterns, and rejects using nationality as the proxy for treating individuals with suspicion.

- Cooperation and joint efforts among law enforcement agencies should be broadened and actively cultivated. This is of particular importance at the international level among nations and between national law enforcement and intelligence services.

However, at the state and local level within the United States, immigration arrest authority exercised by other than immigration officers raises sensitive civil rights issues, especially for ethnic and immigrant communities, whose trust is important for effective local law enforcement. Local law enforcement authorities should not be authorized to exercise immigration arrest authority independently or to initiate immigration law enforcement actions or questioning about immigration status unless subject to cooperative agreements between the Department of Justice (or the new Department of Homeland Security) and state governments allowed under a 1996 law.

- As with watchlists, database procedures must be subject to careful rules and standards. The Administration's recent proposal to exempt the NCIC from Privacy Act protections, for example, is objectionable and should be vigorously opposed.
- Information systems, such as U.S. VISIT and the Student and Exchange Visitor Information System (SEVIS), the foreign student tracking system, should be completed on a priority basis. Their principal use should be to cultivate a culture of compliance with immigration requirements among visitors and others who travel to the

United States. To that end, these systems should generate notices that advise visitors of their stay and departure requirements. Compliance officers could make random spot checks, akin to tax audit practices, to promote compliance.

In addition, the systems can provide information that law enforcement needs in specific cases. They also constitute an important source of data for analysis of trends and patterns of possible criminal activity. But it is unrealistic and a misuse of resources to imagine such systems as the basis for systematically locating and deporting every individual who may overstay his or her visa.

Taken together, directing immigration law enforcement attention and resources toward these objectives is the most effective way to confront the needle-in-a-haystack character of terrorism. It is also the best strategy for striking a healthy balance between law enforcement and liberties, an imperative both for adapting rule-of-law values and institutions to new realities and for winning the long-term war for hearts and minds around the world.

IV. Engaging Arab- and Muslim-American Communities

Along with being a free nation, a precious asset the United States possesses to combat terrorism is our history and character as a nation of immigrants. Immigration makes us open and outward-looking to the rest of the world. It demonstrates that in a free society, people of many cultures, beliefs, and ethnic and religious origins can live together in the common embrace of freedom and democratic values, thereby making the nation stronger. Again and again, history and experience remind us that this is a powerful force that helps the United States achieve lofty goals.

Arab- and Muslim-Americans represent a critical, virtually unique resource at this time. The government, private, and non-governmental sectors should see and embrace these communities as bridges of understanding to societies and peoples around the world who are deeply alienated from the United States.

Engaging Arab- and Muslim-American communities is critical for law enforcement as it works to identify terrorism-related conspiracies, recruitment, and financial networks. This requires cultivating new relationships between law enforcement and communities and building trust and communication. But a far broader agenda is called for and should be imagined.

Arab- and Muslim-Americans constitute a resource of language skills and cultural literacy that should be mobilized to forge economic, civil society, cultural, educational, and social ties throughout the Arab and Muslim world. These are not new or novel ideas.

But political leaders must set the tone. Instead of embracing and broadly engaging communities and immigrant groups in a common project to defend the nation against terrorism, national policies and actions have sent deeply contradictory messages. Despite calls for tolerance and cooperation, a succession of special initiatives has stigmatized and profoundly offended Arab- and Muslim-Americans across a wide spectrum. The social fissures that have been opened and aggravated weaken us as a society. At a time when solidarity is needed as much or more than ever, the nation's immigration policies have created a climate that devalues some of our strongest attributes as a nation, attributes that could be pivotal in combating terrorism effectively.

In that connection, there is a deeper harm to consider. Ultimately, the answers to terrorism reside most fully in foreign, not domestic, policy. Issues of high politics, such as relations with key allies in the Middle East, military action, and the Israeli-Palestinian conflict, are fundamental turn-keys. Other key ingredients reside in the "soft power" elements of international relations: how America is seen in the world, the credibility of American leadership, and the power of America's values and democratic principles.

U.S. immigration policy has reverberations in foreign policy through the perceptions it conveys about America and the character of our society. This echo effect is apparent in actions the United States has taken over the years to promote human rights and humanitarianism through generous refugee protection and resettlement policies around the world, setting a standard for others to follow.

The echo effect can also be negative. Border policies and workplace practices toward undocumented workers define America in the eyes of the majority of Mexico's people and leaders. Today, however, the echo effect of policies that stigmatize Arab- and Muslim-Americans stands at an unprecedented order of magnitude in its potential to undercut critical U.S. foreign policy objectives and interests.

By targeting and alienating Arab- and Muslim-American communities, immigration actions have deepened the perception abroad that the United States is anti-Muslim and that our democratic values and

principles are hypocritical. This taps into and serves to validate deeply-held views throughout the Arab and Muslim worlds of persecution, humiliation, and powerlessness at the hands of the West, especially among the next generation of leaders. It strengthens the voices of radicals and other detractors in their drive to recruit followers and expand influence, at the expense of moderates and other actors more sympathetic to or intellectually aligned with Western philosophies and goals.

Thus, in the name of buttressing security, current immigration policy may be making us *more* vulnerable to terrorism. In the post-September 11 era, immigration policy must be part of a new security system in which the measures we take to protect ourselves also help us win the war for hearts and minds around the world.

Findings and Recommendations

They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

Benjamin Franklin

I. Findings

● To combat terrorism since September 11, the U.S. government has relied to an excessive degree on its broad power to regulate immigration.

Although parts of the immigration system have been tightened to good effect, even under the best immigration controls most of the September 11 terrorists would still be admitted to the United States today. That is because they had no criminal records, no known terrorist connections, and had not been identified by intelligence methods for special scrutiny. The innovation al Qaeda introduced is “clean operatives” who can pass through immigration controls.

Immigration measures are an important tool in the domestic war against terrorism, but they are not effective by themselves in identifying terrorists of this new type. The immigration system can only set up gateways and tracking systems that: (1) exclude terrorists about whom the United States already has information; and/or (2) enable authorities to find “clean” operatives already in the country if new information is provided by intelligence agencies. The immigration and intelligence systems must work together for either to be effective.

To that end, the lead domestic security responses to terrorism should be strengthened intelligence and analysis, compatible information systems and information-sharing, and vigorous law enforcement and investigations. Improved immigration controls and enforcement are needed and can support good anti-terrorism enforcement, but they are not enough by themselves.

● The government’s use of immigration law as a primary means of fighting terrorism has substantially diminished civil liberties and stigmatized Arab- and Muslim-American communities in this country. These

measures, which were primarily targeted at Muslims, have diminished the openness of U.S. society and eroded national unity.

● Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is now vital for Congress to assert its policy and oversight role.

● Despite the government’s refusal to provide information about the more than 1,200 noncitizens detained immediately after September 11, we were able to obtain information on 406 of them. We believe this to be the most comprehensive survey conducted of these detainees. The summaries, which are contained in the Appendix to this report, reveal the following:

- One-third of the detainees in our survey were from just two countries: Egypt and Pakistan. We found no rational basis for this disproportionate concentration.
- Of the detainees for which information about the total amount of time spent in the United States was available, over 46 percent had been in the United States at least six years. Of those for whom relevant information was available, almost half had spouses, children, or other family relationships in the United States. This suggests that the majority of noncitizens detained since September 11 had significant ties to the United States and roots in their communities, unlike the hijackers.
- We did not find any substantial evidence that government officials systematically used Middle Eastern appearance as the primary basis for apprehending these detainees. However, we found that many of the detainees were incarcerated because of profiling by ordinary citizens, who called government agencies about neighbors, coworkers and strangers based on their ethnicity or appearance. We also found that law enforcement agencies selectively followed up on such tips for persons of Arab or Muslim

extraction. These findings are based on our review of these 406 cases and on interviews with community leaders, lawyers, and advocates who had contact with the detainees.

- Large numbers of detainees were held for long periods of time. Over half of the detainees for whom such information was available were detained for more than five weeks. Almost 9 percent were detained more than nine months before being released or repatriated.
 - Even in an immigration system known for its systemic problems, the post-September 11 detainees have suffered exceptionally harsh treatment. Many of these detainees had severe problems notifying or communicating with their family members and lawyers or arranging for representation at all. Many were held for extensive periods of time before they were charged on immigration violations. Many had exceptionally high bonds posted against them or were not allowed to post bond. Of the detainees for whom such information was available, approximately 52 percent were believed to be subject to an FBI hold, preventing their repatriation for weeks or months even after they were ordered removed from the United States and did not appeal.
- Most importantly, from our research it appears that the government's major successes in apprehending terrorists have not come from post-September 11 detentions but from other efforts such as international intelligence initiatives, law enforcement cooperation, and information provided by arrests made abroad. A few noncitizens detained after September 11 have been characterized as terrorists, but the charges brought against them were actually for routine immigration violations or unrelated crimes.
- We found that established due process protections have been seriously compromised:
- Nearly 50 people have been held as material witnesses since September 11. The use of the material witness statute allowed the government to hold them for long periods without bringing charges against them. Many were held as high security inmates subjected to the harshest conditions of detention. The government's use of

the material witness statute effectively resulted in preventive detention, which is not constitutionally permissible.

- Over 600 immigration hearings were closed because the government designated the detainees to be of "special interest" to the government. Such hearings raise serious constitutional concerns and have been applied primarily to Muslim detainees.
 - Although detainees had the legal right to secure counsel at their own expense and to contact family members and consular representatives, the reality of the detentions frequently belied the government's assertions regarding these rights.
- The government has selectively enforced immigration laws based on nationality since September 11. Though claiming to include other factors, the record is one of de facto national origin-based enforcement. In addition to arrest and detention policies, examples of nationality-based enforcement include:
- *The voluntary interview program.*
This program greatly alarmed Arab- and Muslim-American communities. In some places, the FBI worked to establish good relations with the community and conducted the program in a non-threatening manner. Problems occurred, however, when poorly-trained police officials were tasked to implement the program. Moreover, the goals of the program (investigating the September 11 terrorist attacks, intimidating potential terrorists, recruiting informants, and enforcing immigration violations) were contradictory. The immigration enforcement focus and public fanfare that surrounded the program worked against its potential for intelligence gathering.
 - *The absconder initiative.*
As a general immigration enforcement measure, the absconder apprehension initiative is legitimate and important. However, after September 11 the government changed the character of the program to make it nationality-specific. This has marginal security benefits, while further equating national origin with dangerousness.

Although stepped-up absconder apprehension efforts are eventually to encompass all nationalities, this has not happened so far.

- *Special registration.*

The “call-in” special registration program (part of the National Security Entry-Exit Registration System (NSEERS)) has been poorly planned and has not achieved its objectives. Its goals have been contradictory: gathering information about non-immigrants present in the United States, and deporting those with immigration violations. Many nonimmigrants have rightly feared they will be detained or deported if they attempt to comply, so they have not registered. Moreover, any potential security benefits of registering people inside the United States will fade over time as new non-immigrants are required to register at the border.

- Another critical civil liberties concern is the administration’s assertion that local police officials have inherent authority to enforce federal immigration statutes and enter information about civil immigration violations into the National Crime Information Center (NCIC) database. We found no clear statutory authority to allow immigration information to be stored in NCIC. Such measures undercut the trust that local law enforcement agencies have built and need with immigrant communities to fight terrorism and other crimes.

- Arabs and Muslims in America feel under siege, isolated, and stigmatized. They believe they have been victimized twice: once by the terrorists and a second time by the reaction to that terrorism.

The President’s visit to a Washington, D.C. mosque shortly after September 11 had a profound positive impact on Arab- and Muslim-American communities. Community and religious leaders all emphasized the symbolic importance of such actions and a critical need for senior government officials to deliver sustained messages of inclusiveness, tolerance, and the value of diversity.

Hate crimes against Muslims soared after September 11, rising more than 1,500 percent. The number of violent hate crimes has since tapered off.

Employment discrimination against Muslim-Americans, Arab-Americans, and South Asians also increased dramatically. The federal Equal Employment

Opportunity Commission (EEOC) received over 700 complaints concerning September 11-related employment discrimination in the first 15 months after the attacks. Community leaders believe many hate crimes and acts of employment discrimination have gone unreported. Government officials have spoken out only occasionally against such incidents.

Paradoxically, the sense of siege has also resulted in some communities starting to assert their civil and political rights and engage in the political process in new, classically American ways. And Arab- and Muslim-American organizations have started to react to the crisis of the attacks as a significant opportunity to strengthen their organizational structures, build new alliances, and increase their profile as advocates.

We also reviewed the historical record. In times of similar crisis in the past, U.S. immigration law has often been misused to selectively target noncitizens based on their nationality and/or ethnicity under the pretext of protecting domestic security. In most of these cases, the government failed to prove the existence of the alleged threat from within these communities, and the U.S. public has come to regret our government’s actions. Targeting whole communities as disloyal or suspect has damaged the social fabric of our country as a nation of immigrants.

- Finally, we found an important international echo effect from domestic immigration policy. By targeting Muslim and Arab immigrants the U.S. government has deepened the perception abroad that the United States is anti-Muslim and that its democratic values and principles are hypocritical. This echo effect is undermining U.S. relationships with exactly the moderate, pro-Western nations and social groups whom we need in our fight against terrorism.

II. Recommendations

The issues examined in this report touch wide-ranging aspects of our national life. They span the distance from how we interact with one another individually to the policymaking role of Congress under the Constitution. They truly are “America’s Challenge.” To reflect this range, we have grouped our recommendations into six themes.

A. Congressional Oversight and Legislation

1. New executive branch powers, especially those provided by the USA PATRIOT Act, should be carefully monitored on an ongoing basis. Congress sensibly included sunset provisions in that legislation, recognizing that emergency measures passed to deal with the unprecedented threat presented by the rise of terrorism deserve ongoing evaluation, oversight, and reconsideration before becoming a permanent part of our legal tradition. This decision was particularly appropriate given the amorphous and open-ended character of the terrorist threat and the uncertainty of the long-run costs and benefits of these measures. These sunset provisions in the USA Patriot Act should be retained, and Congress should use the oversight opportunities that they invite. Any new anti-terrorism legislation should include similar sunset provisions to ensure that such measures receive the ongoing reassessment and reevaluation that they deserve before becoming a permanent part of our law.
2. Congress has accorded extraordinary deference to the executive branch. This may have been understandable immediately after September 11. But in our constitutional system, it is vital for Congress to assert its policy and oversight role. Among the issues for review should be the USA PATRIOT Act's amendments to the Foreign Intelligence Surveillance Act (FISA) that allow surveillance where foreign intelligence is a "significant purpose" rather than "the purpose," as originally enacted. This does not enhance collection of information on foreign terrorists and raises the possibility that FISA will be used to gather evidence of ordinary crimes, which we believe is unconstitutional. The original language should be restored and language added making it clear that the law permits gathering evidence to prosecute specified foreign intelligence crimes.
3. Congressional committees should also assert their oversight role in evaluating how immigration law provisions have been used since September 11. For example, the government asserts that closed immigration hearings in which the person's name is kept secret are useful to recruit informants. Congress should evaluate the validity of this assertion, especially in light of the Supreme Court's recent decision not to hear a case on this issue. Even if

determined to be useful, the practice is so counter to U.S. notions of justice that Congress should carefully consider whether it should be used at all. Congressional review should similarly include the government's practice of withholding information on the post-September 11 detainees, and the use of the material witness statute. Based on their assessment, the Intelligence committees should issue a report so that public debate is possible.

4. The Intelligence and Judiciary Committees should carefully examine the many issues raised by data-mining, a technique that officials hope will identify terrorist suspects and networks among general populations. Does it work? How should officials handle the many false-positives that are produced? Will people identified this way be subject to further investigation based on previously unknown forms of reasonable suspicion? Will data-miners range over private sector as well as government information? Will they examine IRS or other confidential government files?

B. Information-Sharing and Analysis

1. Unifying and automating government watch lists must be completed on an urgent basis. As the CIA has done, the FBI should provide all relevant information for inclusion in TIPOFF, the State Department's terrorist watch list. Centralizing this information in TIPOFF will avoid long visa processing delays, which damage U.S. political and economic relations abroad.
2. To protect against violations of individual rights caused by mistaken or incomplete information, clear procedures for who is placed on and taken off watch lists should be developed. These procedures should be subject to public comment and review and should:
 - Establish explicit criteria for listing names;
 - Provide for regular review of names listed; and
 - Set out steps for assessing the quality of information that can result in listing or removing names.
3. The State Department, CIA, and FBI should devise mechanisms for doing in-depth risk-assessments of particular visa applicants who are of plausible security concern. To be effective, these must be based on narrower intelligence criteria than mere citizenship

in a country where al Qaeda or other terrorist organizations have a presence.

C. Due Process and Immigration Procedure Issues

1. A disturbing trend exists in recent legislation to criminalize minor immigration violations. In addition, immigration violations are now being widely used as a basis for investigating more severe criminal violations. For these reasons, immigration detainees, who traditionally have not enjoyed the right to government-appointed counsel because immigration proceedings are considered civil matters, should be granted the right to such counsel.
2. Closed proceedings should be allowed only on a case-by-case basis. Arguments and evidence to close some or all of a hearing should be presented to a court for its approval. Similarly, classified information should be allowed only on a case-by-case basis.
3. Prolonged detentions without charge pose the strongest threat to civil liberties. A charge should be brought within two days of detention unless there are extraordinary circumstances that require an additional period of initial detention. The case for extraordinary circumstances should be presented to an immigration judge. Pre-charge detentions beyond two days and FBI holds should be subject to judicial review.
4. Detention is the most onerous power of the state, and should rarely be used as a preventive or investigative tool absent a charge. Bringing timely charges when evidence is available has no security cost. If the government requires additional time in extraordinary circumstances, an individual showing should be made to a judge.
5. Those detained should be released on bond unless there is a clear flight risk. Immigration authorities should not have automatic authority to overrule an immigration judge's bond determination. If the government disagrees with a bond decision, it can appeal and obtain a stay while the decision is pending. The Attorney General's recent decision challenging immigration judges' discretion to grant bonds lends special urgency to address this issue.
6. According to an "automatic stay" rule issued shortly after September 11, immigration authorities can automatically stay an immigration judge's decision to order a noncitizen's release from detention if the bond has been set at \$10,000 or higher. The rule should be rescinded. Immigration judges balance security, flight risk and right-to-release claims. If the government disagrees, the decision can be appealed.
7. Individuals should be promptly released or repatriated after a final determination of their cases. The government should only be able to detain an individual for security reasons after a final removal order if a court approves the continued detention. The detainee should have full due process rights in such a proceeding.
8. With the secrecy, erosion of rights, and fear surrounding immigration, it is more important than ever that immigration officials take special care to uphold the following policies:
 - Informed consent to waivers of the right to counsel should be guaranteed and should be in writing in the detainee's own language.
 - Those offering legal counseling or pastoral services should have access to detainees, as should consular officers for their nationals.
 - When detainees are transferred to locations away from their families or to places where access to counsel is limited, notice should be promptly provided.
 - INS detention standards should be upheld to prevent abusive conditions (solitary confinement, lack of appropriate and adequate food, 24-hour exposure to lights, physical abuse, the inability to engage in religious practices, and harassment), especially when the INS contracts with non-federal facilities. Investigations of alleged abuses should be prompt and thorough.
9. The material witness statute should not be used to circumvent established criminal procedures. Any individual detained as a material witness should be entitled to the full procedural protections of the Fifth and Sixth Amendments, including due process and the immediate right to counsel.

D. Law Enforcement Programs

1. Revised FBI guidelines allow field offices to approve terrorism investigations. That authority should be returned to FBI headquarters officials. New Attorney General guidelines for domestic and

foreign terrorist investigations have given the FBI broad authority to collect information on First Amendment activity to enhance domestic security. The breadth of these new powers calls for improved agency oversight to address legitimate civil liberties concerns.

2. Law enforcement officials at all levels must build ties with immigrant communities to obtain information on unforeseen threats. If special circumstances arise in the future that require interviews of immigrants, such interviews must be truly voluntary. As our research and a recent General Accounting Office report found, interviewees in the recently concluded voluntary interview program did not believe the program was truly voluntary. If special contingencies require voluntary interview programs again in the future, the model adopted by law enforcement officials in Dearborn, Michigan should be followed. Individuals should receive written requests informing them of the voluntary nature of the program and have the opportunity to have counsel present during the interview. Participants should be assured that no immigration consequences will flow from coming forward to be interviewed.
3. In pursuing absconders, immigration authorities should enforce final orders of removal based either on nationality-neutral criteria, such as dangerousness, criminal records, or ability to locate, or on intelligence-driven characteristics, which can include nationality but only in combination with these other characteristics.
4. Absconders who are apprehended should be able to reopen their final orders if they are eligible for immigration remedies or if they can establish that their in absentia orders were entered through no fault of their own.
5. Registration of nonimmigrants entering the country is part of entry-exit controls that have been mandated by Congress. It is a defensible and long-needed immigration control measure as long as it is not nationality-specific and is driven by intelligence criteria. But the "call-in" registration program, which has been mischaracterized as part of the entry-exit system, is nationality-specific and is being implemented with contradictory goals of compliance and immigration law enforcement. Since the government has not extended call-in registration to all countries, which was its original stated intent, follow-up reporting requirements for those who have already registered should be terminated.
6. Any future registration of nonimmigrants already in the country should only be carried out under the following circumstances:
 - Compliance should be the goal. This requires providing meaningful incentives for out-of-status individuals to register, including eventual regularization of their status.
 - To be meaningful, registration must be nationality-neutral and must include all non-immigrants in the country, including the large undocumented population.
 - Registrants with pending applications for adjustment of status, including under section 245(i) of the Immigration and Nationality Act, should not be put into immigration proceedings or detained.
 - Registrants who are unlawfully present in the United States should be allowed to apply for a waiver of the three- and ten-year bars that normally apply to them.
 - A registration program must be carefully planned, with sufficient lead-time and resources to handle literally millions of registrants, and be accompanied by a major outreach and public education program.
7. The government should reaffirm that state and local law enforcement agencies do not have inherent authority to enforce federal immigration law. Cooperative agreements between the Justice Department and the state governments (allowed under a 1996 law) that permit state and local officials to enforce immigration law should contain detailed plans regarding training such officials in immigration procedures. State and local law enforcement agencies should not affirmatively enforce federal immigration law.
8. Civil immigration information should not be entered into the NCIC, and the Justice Department's proposal to waive privacy standards for NCIC information should be abandoned.
9. To ensure effective oversight of civil rights issues in the work of the new Department of Homeland Security (DHS) and to aggressively investigate

complaints alleging civil rights abuses, the Secretary of Homeland Security should establish a new position of Deputy Inspector General for Civil Rights in the DHS Office of Inspector General. Only with a dedicated senior official able to dedicate full attention to this portfolio will there be the oversight and accountability these sensitive issues require.

E. National Unity

1. An independent national commission on integration, made up of a wide spectrum of distinguished civic leaders, should be created to address the specific challenges of national unity presented by post-September 11 events and actions. The commission's goals should be guided by the principle that long-term interests of the nation lie in policies that strengthen our social and political fabric by weaving into it, rather than pulling out of it, all immigrant and ethnic communities. In the post-September 11 world, this means paying special attention to the experiences of Arab and Muslim communities, as well as to South Asian communities who are sometimes mistaken to be Muslim or Arab. Examples of issues the commission might address include:
 - Policies that consciously and systematically prevent stigmatization of Muslim and Arab communities and actively turn them into social, political, and security assets.
 - Sensitivity by airport personnel and other private and public entities to dress codes and protocols of Muslims, Arabs, and South Asians.
 - The need for educational instruction about Islam and Muslims in schools and workplaces.
 - Encouragement for interfaith dialogue at national and local community levels that leads to common programs across faiths.
 - The role that charitable giving plays in the lives of Muslims and the implications on religious freedom of new bans on or monitoring of Muslim charities.
2. Public leadership and government policies and actions also have important roles to play:
 - To reassure the Muslim and Arab community in the United States, the President should use the moral authority of his office to deliver sustained messages of inclusiveness, tolerance, and the importance of diversity in our society.
 - Senior administration officials should consistently address conferences and other public events hosted by Arab and Muslim community groups. Similarly, issue-specific meetings should regularly be held with leaders of those communities.
 - There should be an increased and visible presence of Arab- and Muslim-Americans in key policymaking roles in the government. In particular, the FBI and other law enforcement agencies should expand efforts to hire Arab- and Muslim-American agents.
 - Widespread bans on Islamic charities should be re-examined. The U.S. government should issue guidelines to Muslim not-for-profit agencies regarding distribution of funds for charity purposes.
 - The government should aggressively pursue acts of private discrimination.
 - Relevant government agencies should use "testers" to track housing and employment discrimination against Muslims, Arabs, and South Asians to determine whether there has been a sustained increase in discrimination against such groups since September 11 and whether additional efforts to address it are needed.
3. Islam is misunderstood in America. This creates a special burden for Muslim-Americans and Muslim immigrants living in America who have to cope with prejudices about their communities and their religious beliefs, while also experiencing the more general post-September 11 security fears that they share with other Americans. But many of the leaders also recognize the extraordinary opportunity they are presented with. Community, business, and religious leaders in Arab and Muslim communities should take a more active role both in promoting democratic values overseas and in promoting their own rights and interests through the political process in the United States.

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4. A small number of extremists have misappropriated Islam to promote acts of terrorism and preach hatred. Muslims have a special obligation to denounce such acts. Similarly, leaders of other religions have a responsibility for fostering an understanding of Islam and to denounce hate speech within their own faiths.
 5. It is especially important that Islam's impressive history of tolerance and respect for pluralism be promoted and publicized. This is a huge challenge that can only partially be met through the efforts of the Muslim community in the United States. Like so many other ethnic and religious minorities, Muslim Americans cannot alone dispel the prejudices about their communities and religion. Rather, Americans generally, and the U.S. government in particular, must share the responsibility to learn about the different traditions and faiths that make up the true mosaic that is American society.
 6. The advocacy, representational, and service capacities of Arab- and Muslim-American organizations should be expanded and strengthened. The donor community has a special role to play here.

F. Foreign Policy

1. Immigration policy has always had foreign policy dimensions and implications. But rarely has it had the resonance in national security matters that it has today. In re-examining domestic policies to strengthen national security, policymakers should also weigh the impact U.S. immigration policies have on our nation's long-term foreign policy goals in combating terrorism.
2. Immigration policy should not rely on enforcement programs that give propaganda advantages to terrorist foes and contribute to their ability to influence and recruit alienated younger generations. Immigration policy should also not undermine the great comparative advantage we have as a nation, which is openness to the world and to people of all nationalities and cultures. Instead, immigration policy should be actively used to promote cultural exchange, education, and economic activities that serve America's national interests abroad.

Glossary of Key Terms and Programs

Absconder Apprehension Initiative

Announced on January 25, 2002, this program is designed to locate, apprehend, interview and deport over 300,000 aliens in the U.S. subject to final orders of removal. These individuals have "failed to surrender or otherwise comply with" orders to leave the U.S. The initiative includes the entry of all absconder names into the FBI's National Crime Information Center (NCIC) database. In addition, under the initiative, apprehension teams locate, apprehend and interview the individuals, and then determine whether to prosecute the individuals, hold them for further investigation or remove them from the U.S. The Bureau of Immigration and Customs Enforcement (BICE) is authorized to conduct this program under 8 U.S.C. § 1357, while local and federal agencies may arrest absconders upon "probable cause of the felony of failure to depart" under 8 U.S.C. § 1253. Priority is given to locating, apprehending, interviewing and deporting aliens from countries with a known al Qaeda presence. In practice, this has meant the prioritization of the case files of approximately 5,900 aliens from the Middle East and South Asia.

As of May 2003, the BICE has located over 1,100 absconders through this initiative.

Change of Address Requirement

On July 26, 2002, the Attorney General proposed measures to ensure compliance with the existing statutory requirement for non-citizens to report address changes to the BICE. Currently, 8 U.S.C. § 1305 requires all aliens to notify the Attorney General in writing of each change of address within 10 days from the date of such change. The proposed rule would require every noncitizen applying for immigration benefits to acknowledge: (1) having received notice that he or she is required to provide a valid current address to the BICE, including any change of address within 10 days of the change; (2) that the BICE will use the most recent address provided by the noncitizen for all purposes, including the service of a Notice to Appear if the BICE initiates removal proceedings; and (3) that if the noncitizen has changed

address and failed to provide the new address to the BICE, the noncitizen will be held responsible for any communication sent to the most recent address provided by the alien. Therefore, a noncitizen can be charged with having received the necessary notice and can be removed *in absentia* if he or she fails to appear at a scheduled meeting. The consequences of willful failure to register are imprisonment for up to six months and a fine of up to \$1,000. A fine up to \$200 and up to 30 days in jail may be used to punish unintended violations. In both cases, the noncitizen may be subject to removal. In the nine months after the publication of this proposed rule, over 800,000 change of address forms were filed.

Closed Immigration Proceedings

On September 21, 2001, Chief Immigration Judge Michael Creppy ordered immigration judges to close to the public certain immigration hearings designated by the Attorney General as "special interest." Although the "Creppy Directive" failed to require any particularized reasons for a "special interest designation," once a case is so designated, the proceedings are then closed to the individual's family, the media, and the general public. Immigration courts are forbidden even to confirm or deny whether a special interest case is on the docket. A number of media organizations challenged the directive, arguing that closing the proceedings violated their First Amendment rights to access. In cases brought in New Jersey and Michigan, federal district courts in both states granted injunctions against closed hearings, finding that blanket closures were unconstitutional on First Amendment grounds. In *North Jersey Media Group v. Ashcraft*, the Third Circuit subsequently ruled that immigration proceedings are sufficiently dissimilar to criminal proceedings to allow restrictions of the First Amendment right of access to the courts, given that deportation proceedings historically did not rely on openness and national security interests outweighed any argument otherwise. In *Detroit Free Press v. Ashcraft*, the Sixth Circuit affirmed the district court's injunction, holding that any closure would have to be based on

particular findings and not a blanket directive. At the end of May 2003, the Supreme Court refused to hear an appeal of the Third Circuit's decision, thus leaving open the conflict.

Department of Homeland Security

The Department of Homeland Security (DHS) was created by the Homeland Security Act of 2002 to consolidate and coordinate many of the investigative and enforcement agencies of the Executive Branch. Its main goals are to "prevent terrorist attacks within the United States; reduce America's vulnerability to terrorism; and minimize the damage and recover from attacks that do occur." To realize these goals, the DHS is incorporated in four main divisions, each consisting of one or more specialized bureaus. New bureaus with immigration-related responsibilities are highlighted below.

BICE

The Bureau of Immigration and Customs Enforcement (BICE) incorporates the investigative and interior law enforcement functions of the former Immigration and Naturalization Service (INS), U.S. Customs Service and the Federal Protective Services. The government intends that the unification of the investigative branches of these agencies will lead to a more effective and comprehensive interior enforcement strategy.

BCBP

The Bureau of Customs and Border Protection (BCBP) incorporates the inspection functions of the Agricultural Quarantine Inspections, the Border Patrol, the INS and U.S. Customs. The focus of the BCBP is consistent and thorough border enforcement and border-based inspection procedures.

BCIS

The Bureau of Citizenship and Immigration Services (BCIS) incorporates the service and benefit functions of the former INS. The Bureau focuses on the adjudication of visa, naturalization, asylum, and refugee petitions, as well as all other INS adjudications.

Domestic Security Guidelines

Under Director J. Edgar Hoover, the FBI enjoyed nearly unlimited authority to investigate domestic political

groups. After congressional criticism, in 1976 Attorney General Edward Levi promulgated guidelines to establish the standards, procedures, levels of review, and investigative techniques warranted for graduated levels of FBI domestic security investigations. Attorney General William French Smith changed the guidelines in 1983, combining them with guidelines for general and organized crime investigation and lowering the threshold for which a full investigation may be started. In 2002, in response to the September 11 terrorist attacks, Attorney General John Ashcroft further altered the guidelines, giving the FBI authority to collect publicly-available information on political and religious activity without any threshold of suspicion for counter-terrorism purposes and urging the Bureau, when appropriate, to use intrusive techniques more freely than in the past.

FBI Holds

FBI holds are a colloquial description of local police or law enforcement detention of individuals at the behest of the FBI. The FBI may request that an individual, held on unrelated charges or suspicions, be held to allow more extensive background investigations or further informational interviews. These holds may be effected even if the individual in question has been granted bond or seeks voluntary departure. The FBI hold prevents such individuals from departing the United States. FBI holds are not specifically authorized by legislation.

NCIC

The National Crime Information Center (NCIC) is a computerized index of criminal justice information established and maintained by the FBI in accordance with 28 U.S.C. § 534. It is available to federal, state and local law enforcement agencies, as well as other criminal justice agencies and certain foreign governments. Individuals listed on the system fall within distinctly mandated groups: wanted persons; individuals charged with "serious" or "significant" criminal offenses; missing persons; individuals designated by the Secret Service as posing a danger to the President; members of violent criminal gangs; members of terrorist organizations; and unidentified persons. Accused individuals on the system have all been convicted or stand accused of criminal, not civil, violations, except for those accused of immigration violations. The system also includes information about stolen property, wanted persons, and foreign fugitives. A

system update in 1999 has resulted in greatly increased database access by law enforcement officials. Originally established in 1967, the index processed 2 million transactions that year; in 1999, it averaged 2.1 million transactions per day.

NSEERS/Special Registration

In June 2002 the Attorney General proposed setting up a registration system to monitor certain nonimmigrants entering or already in the United States. The proposal was finalized in August 2002. Over time this program has come to be known informally as special registration and formally as the National Security Entry-Exit Registration System (NSEERS). It includes port of entry registration for nonimmigrants entering the United States; call-in registration for nonimmigrants already in the United States; and exit controls for nonimmigrants leaving the United States. The purpose of the registration system is to record when certain nonimmigrants enter and exit the country; verify where they live, study and/or are employed while in the country; and facilitate the arrest of overstayers or non-compliant registrants.

Special registration began on September 12, 2002, and currently applies to nationals of Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Iran, Iraq, Indonesia, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen. The process involves a background check of each individual based on fingerprints, photographing of the individual, review of identification documents and interviewing as well as, in some cases, credit card information. If a registrant is deemed to have an expired visa or to be in violation of his immigration status, he is generally referred to an immigration judge for removal proceedings. Some registrants who are deemed "out of status" have been detained pending such proceedings.

Failure to register is a deportable offense, resulting in the inclusion of the non-registering individuals' files in the NCIC database to facilitate their arrest, detention, and deportation.

As of May 2003, over 138,000 individuals from over 150 countries have registered at ports of entry or at immigration offices in the United States. In late April 2003, the DHS announced that it intends to fold

NSEERS into a new U.S. Visitor and Immigrant Status Indication Technology (U.S. VISIT) system, under which all nonimmigrants will be registered.

Security Clearance Measures

Numerous data-collection measures exist among various agencies. Here are some of them:

CCD

The State Department's Consulate Consolidated Database (CCD) contains the biographic data and photographs from all nonimmigrant visa issuances and denials for the previous five years. It is accessible at all consular posts and is updated every five minutes.

CLASS

The State Department's Consular Lookout and Support System (CLASS) is the primary consular office database listing information on visa violators, containing over 12.5 million names of prior visa refusals, immigration violations, and over 8.4 million FBI records from a variety of other databases added after September 11.

IBIS

The Interagency Border Inspection System (IBIS) includes combined databases from U.S. Customs, the BICE, State Department, and 21 other federal agencies, allowing access to over 650,000 federal, state and local officers. IBIS permits access to TIPOFF, CLASS, SEVIS, and other databases. A supplemental database, the BICE IDENT, contains fingerprints to identify individuals at U.S. borders.

NAILS

The National Automated Immigration Lookout System (NAILS) is the central mainframe computer used to verify the admissibility of individuals to the U.S.

TIPOFF

(Not an acronym)

The State Department's interagency watch list for terrorists comprising 48,000 names of known and suspected terrorists. The system is managed using deliberately broad standards so that any suspicions of terrorism or any suspicious activity can receive scrutiny under the

system at the time of the visa application regardless of a lack of specific information.

Visas Condor

The only security clearance program initiated after September 11 specifically designed to counter terrorism. All individuals applying for visas to visit the U.S. must now be cleared across over 20 U.S. security databases. If the applicant is applying from one of 26 nations the U.S. has identified as affiliated with al Qaeda, the visa application is flagged for further scrutiny at foreign consular posts, which may include fingerprinting along with other background checks. Criteria for applications to be subjected to this program are classified.

Visas Mantis

If a visa applicant is applying to study one of 16 fields of expertise exposing them to information or goods defined as sensitive—or “vulnerable to theft” from the U.S.—and identified on a federal “technology alert list,” they are subject to additional visa clearance proceedings. These include advanced science, computer and engineering degree programs.

Visas Vipers

The Visas Viper program is how the State Department keeps track of suspected terrorists who are not applying for visas.

SEVIS

The Student and Exchange Visitor Information Service (SEVIS) was developed in response to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) to better collect information from academic institutions regarding international students on F, J, and M nonimmigrant visas) and to supervise students doing their studies in the United States. SEVIS is an Internet-based system that enables schools and universities to directly enter information on students’ degree programs, fields of study, dates of entrance and departure, and other registration information, such as nationality. The database will be made available to all agencies involved in anti-terrorism and national security matters. Consulates worldwide must now crosscheck student visa applications against the SEVIS database.

TIPS

The Terrorism Information and Prevention System (TIPS) was proposed in January 2002. It was designed to create a reporting and data sharing system for “specific industry groups” to report “suspicious, publicly observable activity that could be related to terrorism.” As originally proposed, the industries included “American truckers, letter carriers, train conductors, ship captains, utility employees, and others.” Described as “a formal way to report suspicious terrorist activity,” TIPS was designed to offer these workers—selected because of their unusual access into private homes and ability to recognize unusual events on their routes—a means of reporting suspicious activity and providing the government with a method of forwarding the information on to relevant local, state, or federal entities. The Justice Department intended that workers at utility plants and water systems would report any suspicious activity to reduce the likelihood of terrorist attacks on these facilities. After criticism on both sides of the aisle, Congress declined to legislate the program.

Voluntary Interview Program

On November 9, 2001, the Attorney General issued a directive announcing a “voluntary” interview program. It initially entailed interviewing approximately 5,000 foreign-born men regarding a wide variety of topics, including any knowledge of terrorist activity, conducted according to guidelines issued by the Deputy Attorney General. Interviewees were almost exclusively males between the ages of 18 and 33 who entered the U.S. after January 1, 2000 on a nonimmigrant visa and who held passports from or resided in countries with an al Qaeda presence. During the implementation of the voluntary interview program, it became clear that it included nationals of most Arab countries. U.S. Attorneys, in conjunction with the FBI, conducted the interviews with broad discretion, resulting in wide variations in methodology throughout the U.S. The results of the interviews were entered into a database designed for the project. Since that date, the age span of potential interviewees was increased from 18–33 to 18–46 years of age, and aliens who entered the U.S. between October 2001 and February 2002 were included in a second round of interviews affecting an additional 3,000 men. The Justice Department started a new effort to monitor and interview Iraqi-Americans in November 2002. Formally announced as part of Operation Liberty Shield in

March 2003, the program involves tracking thousands of Iraqi-Americans and Iraqis in the U.S., and interviewing 11,000 individuals of Iraqi origin.

Ultimately, fewer than half of those initially identified for the first round of voluntary interviews were successfully interviewed under the program. Others, who were not interviewed because they could not be located, may have left the U.S. or moved from the last address listed in their immigration records. It is believed that fewer than 20 interviewees were arrested as a result of the interview program, most of whom were charged with immigration violations.

Withholding Names of Detainees ("Secret Detentions")

Within six weeks after September 11, 2001, the Justice Department announced that it had detained over 1,000 individuals in connection with the September 11 terrorism investigation, without allowing public access to the number of individuals arrested, their names, their locations, their attorney's names, or the reason for their detention. Despite congressional demands, the Justice Department refused to release this information, alleging that such revelation would compromise law enforcement investigations and the interests of national security. Under the so-called "mosaic theory," the Justice Department argued that revealing the methods and dates of prior apprehensions would enable terrorist organizations to piece together the government's investigative approach to evade future detection or apprehension. In response to Freedom of Information Act requests by civil liberties organizations, the Justice Department did release some numbers regarding a subset of detainees detained on immigration violations and on federal criminal charges, as well as limited amounts of information on each group.

Public interest groups challenged the secrecy of the detentions. A federal district court ordered disclosure of the names of the detainees and their attorneys, but declined to insist that the Justice Department reveal further information. This order has been stayed pending appeal.

"This report is a crucial appraisal of the challenge to America: how to ensure security for our country while remaining an open society that protects the rights of all its residents. It is both a courageous and practical report that requires serious attention by our legislators and policymakers."

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Former Senior Intelligence Official, Head of Counter-terrorism Operations and Analysis, Central Intelligence Agency (CIA)

"The 'America's Challenge' report provides vitally important information for some of the most significant policy debates that now confront the American public and policymakers. How we keep America both safe and free is one of the most important and yet vexing issues of our generation.

The Migration Policy Institute report provides definitive recommendations in the areas of immigration, national security, and inter-group relations. It will certainly be one of the most significant documents consulted by future historians as they assess how this generation of Americans has fared in assuring national security without sacrificing our cherished freedoms."

Anthony D. Romero

Executive Director, American Civil Liberties Union (ACLU)

"While concern for national security allowed some to initially justify many of the laws and programs implemented in the wake of September 11, 2001, the costs and consequences experienced by thousands of recent Arab and South Asian Muslim immigrants were devastatingly high.

The work of the Migration Policy Institute provides a sober and detailed assessment of the constitutional, human and political impact of these Department of Justice initiatives, complete with valuable recommendations that will enable us to correct our course."

James Zogby

President, Arab American Institute (AAI)

